IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, ARKANSAS UNITED, DORTHA DUNLAP, LEON KAPLAN, NELL MATTHEWS MOCK, JEFFREY RUST, and PATSY WATKINS,

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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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I. Introduction

Arkansas's General Assembly responded to a modest voter turnout increase in the state in the last election cycle in the midst of the COVID-19 pandemic—which *still* saw Arkansas with one of the worst voter-turnout rates in the country—by creating additional obstacles to every method of voting available to voters in the state. Specifically, the General Assembly quickly enacted four Acts that together impose an assortment of restrictions that will make voting more difficult for lawful voters (the "Challenged Provisions"), in many cases disenfranchising those unable to navigate these new hurdles. Even before the enactment of these suppressive provisions, Arkansas had some of the worst turnout rates in the country, especially among Black voters. For some, these new impediments to exercising their fundamental right to vote will be insurmountable—a direct result of the General Assembly's unjustifiable decision to make voting in Arkansas even *more* difficult, rather than seeking to reverse a decades-long trend of low turnout.

Plaintiffs are six Arkansas voters whom the Challenged Provisions will harm and two organizations whose work to promote civic engagement and voter turnout in the state will be undermined by the Challenged Provisions. In moving to dismiss Plaintiffs' claims, Defendants—the Secretary of State and the State Board of Election Commissioners (the "State Board")—swing and miss. First, they challenge Plaintiffs' standing by pinning their hopes on inapplicable federal standing doctrine, ignoring the much more lenient Arkansas standard and ignoring that Plaintiffs *would*, in any event, meet Article III standing requirements even if they were applicable. Second, they erroneously assert that Plaintiffs should have added officials from each and every one of Arkansas's 75 counties as a defendant in this case, ignoring their own ability to redress Plaintiffs' injuries as well as directly applicable Arkansas case law.

The remainder of Defendants' motion is predicated on their mistaken assertion that none

of the Challenged Provisions impacts any fundamental rights and are instead run-of-the-mill changes to "election mechanics." Defs.' Br. in Support of Mot. to Dismiss Am. Compl. ("Mot.") at 17. This argument disregards the legal standard at the pleading stage. This Court must treat all facts alleged in the Amended Complaint as true and view all facts in the light most favorable to Plaintiffs. *See Deitsch v. Tillery*, 309 Ark. 401, 405, 833 S.W.2d 760, 761 (1992). Instead, Defendants ask this Court both to disregard Plaintiffs' well-pled allegations about the Challenged Provisions' impact on Arkansans' fundamental rights and resolve factual disputes in *Defendants*' favor.

The Amended Complaint sufficiently alleges both the basis for Plaintiffs' standing and their claims. The motion to dismiss should be denied.

II. Background

In the 2020 general election, Arkansas's voter turnout ranked near the bottom of all U.S. states and the District of Columbia. Am. Compl. ¶¶ 28–30. This low ranking was despite voter turnout *increasing* last year as the state relaxed several suppressive voting restrictions in response to the ongoing COVID-19 pandemic. *Id.* ¶ 3. Even though voter turnout in Arkansas remained significantly depressed when compared nationwide, even this slight adjustment allowed for a small but substantial increase in the state's voter turnout. At the same time, Arkansas elections officials reported *no* instances of fraudulent election activity. *Id.* ¶¶ 9, 25, 41, 49–59. In fact, state and local elections officials, from the Secretary to County Clerks, offered high praise for how smooth, safe, and secure the election went. *See, e.g.*, *id.* ¶ 4 (Secretary of State declaring "we had one of the most successful elections in state history"). The only group of people unhappy with the way the election went appears to have been the Republican majority in the General Assembly. Instead of working to ensure that the state's voters have free and equal access to the franchise in the future,

they moved quickly to pass a slew of legislation that was intended to and will make voting harder, based on an entirely unsubstantiated specter of election fraud and imagined threats to the state's election integrity. The resulting provisions that are at issue in this litigation are as follows:

Absentee Application Signature-Match Requirement. Act 736 makes it substantially harder for lawful Arkansas voters to obtain an absentee ballot by making the signature-matching process even more unreliable and error-prone. *See id.* ¶¶ 61–79. Specifically, Act 736 now requires the rejection of absentee ballot applications if an untrained elections official determines that the voter's signature on the application does not match the signature on their original voter registration application—a document often signed by the voter years, if not decades, earlier. *Id.* ¶ 62. This subjects a voter's ability to obtain an absentee ballot to an arbitrary, error-prone process against a *single* comparator document—even if other, more recent documents are available. *Id.* ¶ 63. Signature matching experts universally find that, under conditions like these, erroneous rejection of applications by those doing the "matching" are inevitable. *Id.* ¶¶ 68–72. The General Assembly imposed this new, burdensome, and arbitrary requirement in absence of any evidence or hint that Arkansas's prior system for absentee ballot applications resulted in voter fraud. *Id.* ¶ 65.

Before Act 736, officials could match the voter's signature against registration "records," which encompassed multiple documents with the voter's signature like past absentee-ballot applications or absentee ballot materials themselves. *Id.* ¶ 64. While Arkansas law allows a voter to resubmit an application for an absentee ballot if it is initially rejected as a result of a signature mismatch, Ark. Code Ann. § 7-5-404(a)(2)(B)(ii), the resubmitted application will *again* be matched to the signature on the original voter registration application, creating a feedback loop of erroneous rejections. Am. Compl. ¶ 76. This undermines the ability to cure any perceived signature mismatch and removes precious time for the absentee voter to obtain and then return their absentee

ballot before the applicable deadline. *Id*. ¶¶ 78–79. And if the voter's signature has permanently changed from the earlier comparator, the "do-over" will cure nothing, because the problem lies in the comparator, not the voter's true, current signature. There is no rationale to support this narrowing of the comparator signature. Simply put, because of inevitable mistakes made by elections officials in "matching" signatures in a regime that the General Assembly has quite literally set up to lead to those mistakes, some voters will be denied absentee ballots to which they are properly entitled. *Id*. ¶ 66.

In-Person Ballot Receipt Deadline. While the General Assembly made it harder for voters to obtain absentee ballots in time to vote in Arkansas elections, it also made it more difficult for voters to return their absentee ballots in time for them to be counted. Arkansas has long allowed voters to hand deliver their absentee ballots in person up to and including the day before election day. In 2020, many voters were rightfully concerned about surrendering their ballots to the U.S. Postal Service (because doing so risked their ballots not arriving in time to be counted) chose to hand deliver their ballots instead. *Id*. ¶ 79. Yet, through the enactment of Act 973, the General Assembly has inexplicably moved up the deadline for voters who choose to drop off their absentee ballots, requiring their rejection if they are hand-delivered any time after the Friday *before* election day. Ark. Code Ann. § 7-5-411(a)(3). As a result, Arkansas now has the earliest absentee-ballot deadline in the entire United States, inflicting substantial burdens on voters who request or wait to vote their absentee ballots nearer election day—or are forced to because they must navigate the new signature-matching requirements to even obtain an absentee ballot. Am. Compl. ¶¶ 83, 87. Making matters worse, voters can lawfully apply for absentee ballots up to the Tuesday before election day. Ark. Code Ann. § 7-5-404(a)(3)(A)(ii). Those who apply on that deadline will have only three days or less to both receive by mail *and* return their ballots in person before election

day, a virtually impossible scenario. Am. Compl. ¶ 88. It is inevitable that lawful voters will be disenfranchised as a result. *See id*. ¶¶ 87–88. There is no reasonable justification for Arkansas' decision to shorten this timeframe for voters who hand deliver their voted ballots. *Id*. ¶¶ 85, 89. After all, absentee ballots sent by mail are considered timely and will be counted if they are received by 7:30 p.m. on election day. Ark. Code Ann. § 7-5-411(a)(1)(A). Treating voters who return their ballots by hand, as opposed to through the postal service, so substantially differently is, quite simply, irrational. And as explained below, it certainly cannot be justified under the heightened scrutiny that applies to laws burdening the fundamental right to vote.

Voter ID Affidavit Prohibition. The General Assembly's newly enacted voting restrictions do not just target absentee voters—they also make it harder to vote in-person. In particular, Act 249 takes aim at a critical option that had previously been available for in-person *and* absentee voters who lack or could not produce the required voter identification: the ability to affirm their identity under penalty of perjury in a written affidavit ("Affidavit Fail-Safe"). Am. Compl. ¶¶ 110–11. Under prior law, the ballots of voters who used the Affidavit Fail-Safe were treated as provisional, to be counted if the county board of election commissioners could subsequently confirm the voter was eligible. *Id*. ¶ 99. There have been no instances of fraud involving the Affidavit Fail-Safe, which ensured to protect lawful voters against disenfranchisement. *Id*. ¶¶ 163, 169. By eliminating this option, Act 249 imposes additional burdens on voters who fail to bring an acceptable form of identification, requiring them to return to elections officials a copy of a valid voter identification, or else have their ballot rejected. *Id*. ¶ 112. There is *no longer any exception* for voters who lack a form of acceptable identification. Those voters will simply be disenfranchised. In addition, voters whose personal circumstances make it difficult or even impossible for them to return in time to avoid the rejection of their ballots

will be similarly burdened. *Id*. ¶¶ 112, 162, 165.

Act 249 is the culmination of the General Assembly's long quest to impose strict voter identification requirements on Arkansas's voters. These legislative efforts first began in 2013 when the General Assembly attempted to enact strict voter identification, but was found to violate the Arkansas Constitution by imposing an additional qualification on voters. *See id*. ¶ 93; *see also Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844 (2014). In 2017, the General Assembly tried again with Act 633, which required voter identification but also included the Affidavit Fail-Safe that Act 249 has now removed. Am. Compl. ¶¶ 94–96. This time, the Arkansas Supreme Court upheld the voter identification law, which *included* the Affidavit Fail-Safe. *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509 (2018). As a result, the voter-identification scheme—with the Affidavit Fail-Safe providing an escape hatch for voters without identification—was in effect during the 2018 and 2020 elections. Am. Compl. *Id*. ¶ 97. Notably, no instances of voter fraud arose because of the Affidavit Fail-Safe (or for any other reason, for that matter). *Id*. ¶¶ 101, 115. However, the General Assembly has now removed this crucial fail-safe from Arkansas' identification law, serving no purpose other than burdening voting rights.

Voter Support Ban. In addition to each of the restrictions discussed above, the General Assembly has also taken aim at individuals and organizations who exercise their rights to help Arkansas voters exercise their most fundamental right. The General Assembly accomplishes this through Act 728, which *criminalizes* "enter[ing]" an area within 100 feet of a polling place unless entering or leaving a building where voting is taking place for "lawful purposes." Ark. Code Ann. § 7-1-103(a)(23); Am. Compl. ¶¶ 5, 127. Anyone who violates this provision commits a class A misdemeanor under Arkansas law, which can result in a fine of up to $2,500 and incarceration of up to one year. Ark. Code Ann. §§ 5-4-201(b)(1), 5-4-401(b)(1); *see also id.* § 7-1-103(b)(1).

The prohibition includes *no* exceptions for those who are simply supporting voters who encounter long lines, through innocuous activities like handing out water and snacks. Am. Compl. ¶ 121. As statements by the law's proponents have revealed, this is by design. *Id*. These types of voter-support activities have been offered by organizations like the League of Women Voters of Arkansas ("League") and Arkansas United, which have worked to support voters for whom Arkansas has made exceedingly difficult by refusing to address the problem of perpetually long voting lines, which occur with some regularity throughout Arkansas but especially in Pulaski County, which is home to a significant minority voting population. Am. Compl. ¶¶ 120–26. The Ban's vague language would even apply to exclude non-voting caretakers, friends, and family if those individuals choose not to actually enter the polling place with the voter. *Id*. ¶¶ 123–24. Although Defendants may claim that the Ban was intended to prohibit electioneering near polling places, that claim is refuted by the fact that Arkansas already separately prohibits that activity. *Id*. ¶ 122. Nothing in the Ban makes it specific to electioneering; to the contrary, its supporters in the General Assembly have admitted that its broad language was intended to reach voter support activities. *Id*. ¶¶ 122–23. There is no logical reason to prohibit these activities, except to burden voters, particularly in those minority-heavy areas of Arkansas that routinely experience long lines for voting. *Id*. ¶ 118.

III. Legal Standard

In considering a motion to dismiss under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, the Court must treat all alleged facts as true and view them in the light most favorable to Plaintiffs. *Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761. The Court may look only to the allegations in the operative complaint, and it may not consider facts asserted by Defendants. *See id*. "Pleadings are to be liberally construed and are sufficient if they advise a defendant of his

obligations and allege a breach of them." *Id.* In other words, the Court must deny the motion so long as the complaint contains "a statement in ordinary and concise language of facts showing that [they are] entitled to relief." Ark. R. Civ. P. 8(a)(1).

IV. Discussion

A. Plaintiffs have standing.

Plaintiffs allege all that is necessary to establish standing to challenge the Challenged Provisions in this Court: the laws are "unconstitutional as applied to that particular litigant" and Plaintiffs "have suffered injury or belong to a class that is prejudiced" by the laws. *Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, at 14–15, 991 S.W.2d 536, 539 (1999). Both the organizational plaintiffs and the individual plaintiffs easily satisfy this standard. Defendants offer three misguided reasons why they incorrectly believe that standing is lacking here, all of which focus on the organizational plaintiffs, ignoring that the individual plaintiffs have standing in their own right. For that reason alone, the Court should reject Defendants' standing challenge. But even if that were not the case, Defendants' arguments are without merit. Among other things, they ignore the requirements for standing that the Arkansas Supreme Court has long identified, and wrongfully seek application of the more restrictive standing requirements under Article III of the U.S. Constitution that, by constitutional design, strictly limit the jurisdiction of federal courts. But even if these standards were equivalent, the allegations in the Amended Compliant compel the conclusion that Plaintiffs have standing.

1. The allegations in the Amended Complaint establish that the Challenged Provisions will directly injure the organizational plaintiffs.

First, Defendants mistakenly ignore Arkansas's standing requirements for irrelevant case law interpreting the requirements of Article III of the U.S. Constitution. "[S]tanding in Arkansas courts is a question of state law, and federal cases based on Article III of the U.S. Constitution are

not controlling." *Chubb Lloyds Inc. Co. v. Miller Cnty. Cir. Ct., Third Div.*, 2010 Ark. 119, at *11, 361 S.W.3d 809, 815 (internal quotation marks omitted); *see also* Ark. Civil Prac. & Proc. § 7:3 (5th ed.) (same); *Jegley v. Picado*, 349 Ark. 600, 616, 80 S.W.3d 332, 339 (2002) (rejecting federal cases' discussion of standing because "neither case is binding on this court's determination of whether a justiciable controversy exists in the case now before us"); *Ark. Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 509, 256 S.W.3d 488, 496 (2007) (explaining "there is no need for Arkansas courts to resort to the requirements for standing under" federal statute when state law details standing).

In Arkansas courts, "a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant." *Ghegan*, 338 Ark. 9, at 15, 991 S.W.2d 536, 539. A plaintiff "must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law." *Id.* This is not an onerous requirement: Plaintiffs need only "show that the questioned act has a prejudicial impact on them." *Kohls*, 2014 Ark. 427, at *8, 444 S.W.3d 844, 849 (citations omitted). Contrary to Defendants' unsupported assertion, *see* Mot. at 8, there is no requirement that a litigant be a "person." Rather, courts must consider whether "a *litigant*" will suffer an injury or "belong[s] to a class that is prejudiced to have standing to challenge the validity of a law." *Ghegan*, 338 Ark. 9, at 14–15, 991 S.W.2d 536, 539 (emphasis added); *see also Moore*, 369 Ark. 498, at 504, 256 S.W.3d 488, 493 (recognizing association's standing); *First United Bank v. Phase II*, 347 Ark. 879, at 893, 69 S.W.3d 33, 43 (2002) (summarizing state law holding that "a person *or party* who has a pecuniary interest in the outcome of the action has standing to assert a claim on his or its behalf" (emphasis added)).

The Amended Complaint details how the Challenged Provisions will prejudice the organizational plaintiffs directly. In particular, as a result of the Challenged Provisions, the League

and Arkansas United must divert their already scarce resources to navigate these new restrictive policies that infringe upon Arkansas voters'—including hundreds of their members'—rights in violation of the Arkansas Constitution. Am. Compl. ¶¶ 13–15; *see Ghegan*, 338 Ark. 9, at 14–15, 991 S.W.2d 536, 539 (affirming company's standing to challenge law when it alleged violations of federal and state constitutions). The Challenged Provisions have a "prejudicial impact" on the League and Arkansas United precisely because of this diversion of resources. *Kohls*, 2014 Ark. 427, at *8, 444 S.W.3d 844, 849. The organizations must spend significant time and money to re-train members and volunteers, update training materials and literature for voters, educate voters about the new laws, including the new deadline to drop off absentee ballots, and work with voters to correct their perceived mismatched signatures on their absentee applications. Am. Compl. ¶¶ 13–16. They will also have to reformulate their programming. For instance, they will no longer be able to hand out food, water, and other resources to voters within 100 feet of a polling place because of Act 728, and they must train their volunteers not to do so to avoid criminal prosecution. *See, e.g.*, *id.* ¶ 15–16. For these reasons alone, the organizational plaintiffs have established standing under Arkansas's liberal standing requirements.

Even if Article III jurisprudence applied in Arkansas court, which it does not, the allegations in the Amended Complaint satisfy that standard as well. Defendants are simply incorrect that Plaintiffs' injuries are "speculative." Mot. at 9. The Amended Complaint identifies concrete harms that the Challenged Provisions will inflict on the League and Arkansas United in the next election. For Article III standing purposes, while a plaintiff must establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," it "does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted).

And when a law is challenged by a party who is an "object of the statute's prohibitions, 'there is ordinarily little question that the [statute] has caused him injury.'" *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997)). Here, once the Challenged Provisions went into effect, their requirements—and the associated burdens of compliance—became concrete. Am. Compl. ¶¶ 13–21. There is no uncertainty whether the League and Arkansas United will be harmed by the Challenged Provisions. Federal courts routinely adjudicate challenges to elections laws under analogous circumstances, rejecting exactly the types of standing arguments that Defendants make here. *See, e.g., Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (explaining that "imminent injury" for standing purposes "requires only that the anticipated injury occur within some fixed period of time in the future"); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, at 1268 (N.D. Ga. 2019) (explaining that plaintiffs in voting rights suit can "demonstrate a time period in which the injury will occur (*i.e.* prior to the next scheduled elections). There is no speculation that elections will occur; thus, this satisfies the 'imminent' requirement"). The cases cited by Defendants are inapposite or unhelpful to them—and notably do not involve similar challenges to election laws. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 150 (2014) (acknowledging pre-enforcement judicial review is appropriate when "credible threat" that law will be enforced against plaintiff exists); *Braitberg v. Charter Comms., Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (denying standing where plaintiff challenging company's retention of personal information could not identify *any* "material risk of harm").

2. The allegations in the Amended Complaint establish that the organizational plaintiffs also have associational standing.

In addition to direct standing, the League and Arkansas United have also alleged sufficient facts to establish that they have associational standing on behalf of their members and constituents,[1] and the Amended Complaint "make[s] specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *see* Am. Compl. ¶¶ 17, 19, 21 (identifying individual plaintiffs as League members). For both the League and Arkansas United: (1) their members would otherwise have standing to sue in their own right; (2) the interests they seek to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 869 (8th Cir. 2013) (discussing these requirements).

Defendants contest the first two factors. As to the first factor, Defendants' suggestion that "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," Mot. at 12, is irrelevant because, as discussed, this Court at this stage must take Plaintiffs' allegations as true. *Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761. Three individual plaintiffs—Dortha Dunlap, Nell Matthews Mock, and Patsy Watkins—are members of the League and have alleged in detail how the Challenged Provisions will infringe on their rights. Ms. Mock, for instance, alleges that the Absentee Application Signature-Match Requirement will impair her voting rights because arthritis and the two decades that have lapsed since she registered to vote have changed her signature, which will make obtaining

[1] Arkansas case law is silent on associational standing. This silence is likely the result of state law expressly providing for non-profit organizations to assert associational standing until it was repealed in 2012. *See* Ark. Code Ann. § 4-28-507 (repealed 2012). Virtually all states have embraced associational standing doctrine, as have federal courts. *See Int'l Union of Operating Eng'rs v. Illinois Dep't of Empl. Sec.*, 828 N.E.2d 1104, 1112 (Ill. 2005) (collecting cases); *see also Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342–43 (1977).

an absentee ballot more difficult, if not impossible. Am. Compl. ¶ 19; *see also id.* ¶ 17 (alleging Ms. Dunlap's voting rights will be impaired because of Challenged Provisions, including arthritis affecting her signature, her inability to stand in line, and age); ¶ 21 (alleging Ms. Watkins' voting rights will be impaired because of Challenged Provisions, including arthritis affecting her signature). Next, Defendants selectively argue that the League's and Arkansas United's interests are not germane to their interests because "[n]either purports to be an organization working to ensure Black voters are not disenfranchised." Mot. at 12. But this assertion ignores the allegations demonstrating that the central missions of both the League and Arkansas United are to ensure that *all* Arkansas voters' ballots are properly cast and counted. Am. Compl. ¶¶ 13, 15. It also ignores the clear allegation that the League brings its claims on behalf of its Black and Latino members, "many of whom will find it difficult, if not impossible, to cast their ballots . . . if the Challenged Provisions stand." *Id*. ¶ 14.

The League and Arkansas United have adequately alleged both standing based on injury to the organization and associational standing.

3. The allegations in the Amended Complaint establish that Challenged Provisions will injure the individual plaintiffs.

Defendants' cursory acknowledgment of the six individual plaintiffs ignore those individuals' strong, independent standing to challenge the Challenged Provisions. Each is an Arkansas voter who has standing here because they allege the Challenged Provisions are unconstitutional as applied to them; each will suffer injury during the next election; and they "belong to a class that is prejudiced." *Ghegan*, 338 Ark. 9, at 15, 991 S.W.2d 536, 539. Their standing is enough for this Court to reject Defendants' motion to dismiss for lack of standing. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (recognizing just "one plaintiff must have standing to seek each form of relief requested in the complaint.").

First, the Amended Complaint alleges specifically how the Challenged Provisions infringe on each of the individual plaintiffs' rights protected by the Arkansas Constitution. Am. Compl. ¶¶ 17–21. For example, Ms. Dunlap, Ms. Mock, Mr. Rust, and Ms. Watkins all allege that their signatures have changed since they registered to vote, which will infringe on their ability to successfully apply for an absentee ballot and have their votes counted. *Id*. ¶¶ 17, 18–21. Additionally, Mr. Kaplan depended on the Affidavit Fail-Safe in 2020, still lacks an eligible voter identification, faces significant hurdles in obtaining an Arkansas driver's license, and faces a material risk of disenfranchisement in the next election because of Act 249's elimination of the Affidavit Fail-Safe. Am. Compl. ¶ 19. And all of the individual plaintiffs will be burdened by the Voter Support Ban's onerous requirement allowing only those "entering or leaving a building where voting is taking place" to "enter" a space within 100 feet of a polling place. *Id*. ¶¶ 5, 17–21.

Second, each of the individual plaintiffs will suffer injuries in the next election by having their constitutional rights infringed. These injuries need not have already occurred for plaintiffs to obtain standing, as Defendants incorrectly assert. Mot. at 8. The Arkansas Supreme Court rejected this argument in *Martin v. Kohls*, where the plaintiffs were registered voters in Pulaski County and challenged a voter-identification law *before* the 2014 elections. 2014 Ark. 427, at *1–4, 444 S.W.3d 844, 846–47. The Court held that the voter plaintiffs only had to show they "were among the class of persons affected by the legislation." *Id*. at 849. And it specifically rejected the Secretary's arguments that the plaintiffs lacked standing because they did not offer proof "that they suffered an injury or harm." *Id*. at 849. Based only on "their status as registered voters in Arkansas," the plaintiffs had established standing. *Id*.

Here, the individual plaintiffs belong to a class that is prejudiced: voters "affected" by the challenged law. *Kohls*, 2014 Ark. 427, at *8, 444 S.W.3d 844, 849. They meet the requirement

established by the Supreme Court in *Kohls*, that voter plaintiffs "were only required to demonstrate that they were among the class of persons affected by the legislation." *Id.* (citing *Jegley*, 349 Ark. 600, 80 S.W.3d 322). Similarly, in *Haas*, the Supreme Court confirmed that a voter plaintiff had standing to challenge a separate voter-identification law because he was "a person affected" by the law in that he was "required to show compliant identification or sign the voter-verification affidavit" according to the challenged law's requirements. 2018 Ark. 283, at *8, 556 S.W.3d 509, 515. Here, likewise, each of the individual plaintiffs will be subject to the Challenged Provisions in upcoming elections and therefore have standing to challenge them under this binding Arkansas precedent.

4. Defendants can redress Plaintiffs' injuries.

Defendants' assertion that Plaintiffs lack standing because the Secretary and the State Board are somehow not "involve[d]" in the Challenged Provisions defies both the applicable legal standard and reality. Mot. at 13. Defendants assert that only "county boards and county election officials," not Defendants, are involved in the implementation of the Challenged Provisions. *Id.* This is simply wrong. Defendants have full authority to stop the Challenged Provisions' enforcement. The State Board and the Secretary, who chairs the State Board, are responsible for providing "statewide training for election officers and county election commissioners" on how to administer elections, and Arkansas law states that county officials "shall" perform their duties "consistent with the training and materials provided by the State Board." Ark. Code Ann. §§ 7-4-101(f)(2), (7); *id.* § 7-4-107(a)(2). The county officials have no power to ignore Defendants' directions. *See McGee v. State*, 262 Ark. 473, 474-75, 557 S.W.2d 885, 886 (1977) (statutory use of "shall" makes instruction "[c]learly" "mandatory"). Thus, if this Court concludes the

Challenged Provisions are unconstitutional, Defendants will instruct the county officials not to enforce those laws, and the county officials will be required to follow those instructions.[2]

This clear delineation of authority enables Arkansas courts to provide litigants relief from statewide election laws by ordering Defendants not to implement or enforce them. *See Kohls*, 2014 Ark. 427, at *3–4, 444 S.W.3d 844, 847, 853 (affirming preliminary injunction against Defendants in challenge to voter ID law). As far as Plaintiffs' counsel can tell, no Arkansas court has *ever* required a plaintiff to sue officials from each of the state's 75 counties when challenging a statewide election law. Indeed, in offering this impractical and unsupported theory, Defendants fail to cite a *single* case applying Arkansas law to require such a breathtaking result.[3]

The only authority Defendants cite on this issue is a pair of decisions interpreting Article III of the U.S. Constitution in a federal circuit in which Arkansas is not even located. *See* Mot. at 13–14 (citing *Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181 (11th Cir. Dec. 21, 2020), and *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020)). Once again, "standing in Arkansas courts is a question of state law, and federal cases based on Article III of the U.S. Constitution *are not controlling*." *Chubb Lloyds*, 2010 Ark. at *11 (internal quotation marks omitted) (emphasis added). Defendants' inability to identify *any* helpful controlling case law demonstrates just how far their argument departs from what Arkansas law actually requires.

[2] In asserting otherwise, Defendants resort to mischaracterizing Arkansas law. Defendants claim that Ark. Code Ann. § 7-4-107(a)(1) gives "county boards [] *sole* statutory authority to '[e]nsure compliance with all legal requirements relating to the conduct of elections.'" Mot. at 13 (emphasis added). In fact, Section 7-4-107 merely requires county boards to comply with all applicable legal requirements. Arkansas law *also* gives Defendants a wide range of responsibilities relating to ensuring elections are administered in accordance with state law. *See* Ark. Code Ann. § 7-4-101(f) (delineating the State Board's authorities).

[3] The suggestion that Plaintiffs must hail into this Court election officials from each of the 75 Arkansas counties is one that the Court ought to view with more than a little skepticism, especially in light of the absence of supporting authority.

In any event, the decisions cited by Defendants involved situations where the defendants did not "control[]" the local entities that ran elections, *Ga. Republican Party*, 2020 WL 7488181, at *2, and did not play "*any* role in" the implementation of the laws at issue, *Jacobson*, 974 F.3d at 1253-54 (emphasis added). Here, by contrast, Arkansas law not only gives Defendants a central role in implementing Arkansas's election laws (including the Challenged Provisions), it makes Defendants responsible for directly instructing county officials on how to do so. More importantly, those extremely recent Eleventh Circuit decisions represent a dramatic break from long-established precedent that continues nearly everywhere else in the country. Fifth Circuit case law, for example, is at complete odds with the Eleventh Circuit's new approach, explaining that the "facial invalidity of a [state] election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the chief election officer of the state." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (internal quotation marks omitted). The case law of other circuits instructs the same. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008) (concluding the Ohio Secretary of State and Governor were proper defendants due to their respective status as the chief election officer and chief executive officer); *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280-81 (9th Cir. 2003) (same, based on the Secretary's authority to promulgate rules).

Even if it were appropriate to use federal law as a guide for determining Plaintiffs' standing, Defendants' arguments cannot be sustained. Multiple federal courts in Arkansas have rejected the exact arguments Defendants offer here. Just last year, in a challenge to Arkansas's pre-Act 736 signature-matching regime, a federal court found that the League—a Plaintiff in this case—had standing to challenge that regime in a case in which they sued the Secretary and the State Board alone. *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2020 WL 6269598, at *3

(W.D. Ark. Oct. 26, 2020). Defendants argued—just as they do here—that they could not provide plaintiffs relief because "county boards have sole statutory authority to '[e]nsure compliance with all legal requirements relating to the conduct of elections,'" Ex. 1 at 21; *see* Mot. at 13 (asserting the same, verbatim), and Defendants had "no authority" to instruct counties on how they process absentee ballots and no "control" over the process. Ex. 1 at 22; *see* Mot. at 14 (same). Directly rejecting these arguments, the court explained that Ark. Code Ann. § 7-4-101 makes Defendants responsible for instructing counties in election-related duties, and, as a result, plaintiffs' injuries were fairly traceable to Defendants, and Defendants could redress plaintiffs' injuries by instructing counties not to implement the challenged election law. *League of Women Voters of Ark.*, 2020 WL 6269598, at *3.

Less than six months ago, a federal court similarly concluded that the other organizational plaintiff here, Arkansas United, had Article III standing to sue Defendants when challenging Arkansas laws governing voter assistance. *Arkansas United v. Thurston*, --- F. Supp. 3d. ---, 2021 WL 411141, at *11 (W.D. Ark. Feb. 5, 2021). Again, Defendants argued they could not be sued because they had "no authority" to implement those laws. Ex. 2 at 22. Again, the federal court rejected this argument, explaining that Arkansas United's injuries are fairly traceable to Defendants, who "train the county officials and monitor their compliance with state" law, and that those injuries could be redressed by an "injunction preventing further implementation" of the challenged laws, which would cause "Defendants to provide updated training to county election officials" not to implement them. *Ark. United*, 2021 WL 411141, at *11. Defendants offer no reason why this Court should depart from this consensus among federal courts in Arkansas interpreting and applying relevant Arkansas law.

Finally, the mere fact that county officials are *also* involved in implementing the Challenged Provisions such that Plaintiffs *could* name them as defendants, *see* Mot. at 13–14, does not mean Plaintiffs lack standing to sue only the Secretary and the State Board. "An injury may be 'fairly traceable' to a defendant for causation purposes even when the defendant's actions are not 'the very last step in the chain of causation.'" *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). Because Defendants can order the counties not to implement the Challenged Provisions, and the counties must to follow those instructions, Defendants can provide the relief that Plaintiffs seek.

In sum, because Defendants play a central and authoritative role in the Challenged Provisions' implementation, even if federal standing law applied (and it does not), their arguments should be rejected.

B. Neither Arkansas Rule of Civil Procedure 19 nor the Declaratory Judgment Act requires the Court to add officials from each of Arkansas' 75 counties to this suit.

Defendants' assertion that officials from each of Arkansas's 75 counties are necessary parties to this litigation, Mot. at 14–15, finds no basis in Arkansas law. In fact, the Arkansas Supreme Court rejected this very argument in *Kohls*, when it definitively held that, in light of Defendants' authority to instruct counties on how to administer elections under Ark. Code Ann. § 7-4-101(f)(2), county officials are not necessary parties to litigation challenging statewide election laws. 2014 Ark. 427, at 9, 444 S.W.2d 844, 849–50.

The Arkansas Supreme Court's direct rejection of Defendants' necessary-parties argument settles the matter, but it was also clearly correct: Defendants' argument to the contrary is simply wrong, finding no basis in either Arkansas Rule of Civil Procedure 19 or the Declaratory Judgment Act. Under Rule 19(a), a party is necessary in two scenarios. First, a party is necessary when, in its absence, "complete relief cannot be accorded among those already parties." Ark. R. Civ. P.

19(a)(1). As discussed, Plaintiffs can obtain complete relief from Defendants through an instruction by Defendants to counties not to enforce the Challenged Provisions. *Supra* Section IV.A.4; *see also Ark. United*, --- F. Supp. 3d ---, 2021 WL 411141, at *11 (concluding local entities were not necessary parties under identical Federal Rule of Civil Procedure 19 because State Board and Secretary could prevent enforcement of challenged election laws).

Second, a party is necessary if it "claims an interest relating to the subject of the action" and disposition of the action in its absence would "impair or impede his ability to protect that interest." Ark. R. Civ. P. 19(a)(2)(i).[4] Not only has no county official "claim[ed]" an interest in this litigation, they could not feasibly claim that its disposition would impair or impede their ability to protect their interest. If the Challenged Provisions are unconstitutional, the counties have no interest in enforcing them. *See* Ark. Code Ann. § 7-4-107(a)(1) (tasking county boards with ensuring compliance with the "*legal* requirements" imposed by law (emphasis added)). And because "Defendants are zealously advocating for the general constitutionality" of the Challenged Provisions, the counties' ability "to protect their interests is not impaired or impeded." *Ark. United*, --- F. Supp. 3d ---, 2021 WL 411141, at *12 (rejecting same argument).

The Arkansas Declaratory Judgment Act also provides Defendants no help. Neither of the provisions Defendants cite suggest that this Court cannot issue declaratory relief against Defendants. Ark. Code Ann. § 16-111-106 provides that a court "may refuse to render or enter a declaratory judgment" if it "would not terminate the uncertainty or controversy giving rise to the proceeding." Defendants do not offer any argument as to why this provision applies. *See* Mot. at 15. Nor could they: a determination by this Court that the Challenged Provisions are

[4] Rule 19(a)(2)(ii) also makes a party necessary if its absence creates "a substantial risk of incurring double, multiple or otherwise inconsistent obligations." This case involves only declaratory and injunctive relief; there can be no argument that the county officials' absence creates a risk of multiple damages or inconsistent obligations.

unconstitutional would terminate the controversy giving rise to this case. Moreover, Defendants cite Ark. Code Ann. § 16-111-111, which provides that parties "who have or claim any interest which would be affected by the declaration" must be made parties and that "no declaration shall prejudice the rights of persons not parties to the proceeding." As explained, the counties have no interest at stake in this litigation, let alone one that Defendants are not adequately protecting.

The cases Defendants cite have no relevance here. In *Davis v. McKinley*, a third party brought suit claiming that the plaintiff's deed was fraudulent. 104 Ark. App. 105, 107, 289 S.W.2d 479, 480 (2008). The plaintiff sought to evade judgment by filing a separate declaratory action, naming the party from whom he had obtained the deed as the only defendant. *Id.* Because the third party was not involved, no one in the plaintiff's suit argued the deed was fraudulent, and the court issued a declaratory judgment. But when the third party advised the court of the plaintiff's actions, the court vacated its judgment. *Id.* Condemning the plaintiff's maneuverings, the Supreme Court affirmed, explaining that the plaintiff's failure to name the third party prevented the trial court from settling the entire controversy over the validity of the plaintiff's deed. *Id.* This suit involves nothing of that sort. Defendants have not identified any issue that will not be brought to the Court's attention due the absence of county officials, and they certainly do not claim that Plaintiffs have brought this suit to evade the outcome of other litigation.

Nor is *Johnson v. Robbins* analogous, where the court concluded that a county board of education was a necessary party in a suit against a school district disputing the placement of a school. 223 Ark. 150, 152, 264 S.W.2d 640, 641-42 (1954). The court concluded that the board was necessary because the school district, which was an inferior body to the board, could not instruct the board to follow the court's order. *Id*. Here, by contrast, Defendants are *superior* to the

county election boards and can—indeed *must*—instruct county officials not to implement the Challenged Provisions should they be held unconstitutional.

Neither Rule 19 nor the Declaratory Judgment Act requires the Court to add officials from each of Arkansas's 75 counties as defendants in this case.

C. Plaintiffs have stated a claim for relief as to each of the Challenged Provisions.

Defendants' argument for dismissal under Arkansas Rule 12(b)(6) is based entirely on the mistaken assertion that *none* of the Challenged Provisions implicate, let alone infringe upon, any fundamental right. *See e.g.*, Mot. at 3 (claiming the Challenged Provisions "do not impair or impede the right to vote at all"); *id.* at 16 (asserting that none of the Challenged Provisions "infringe on 'the right to suffrage'"). Defendants claim that all four Challenged Provisions are matters of "election mechanics only," *see id.* at 3, and, therefore, rational basis review applies, *id.* at 16-18. This is incorrect.

First, and perhaps most fundamentally, Defendants' approach ignores the applicable legal standard for evaluating a motion to dismiss, which requires this Court to treat all facts alleged in the Amended Complaint as true, and to view those facts in the light most favorable to Plaintiffs. *See Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761; *supra* Section III. Defendants ask this Court instead *to disregard* Plaintiffs' well-pled factual allegations about the Challenged Provisions' impact on their fundamental rights, assume the laws will *not* impact such rights, and then, as a result, dismiss Plaintiffs' claims by applying rational basis review. But under the standard for a Rule 12(b)(6) motion, the Court cannot do this.

If (as Plaintiffs allege in detail) the Challenged Laws burden Plaintiffs' fundamental rights, strict scrutiny applies. *Jegley*, 349 Ark. 600, at 616, 80 S.W.3d 332, 339–40. Under Arkansas law, the question of what level of scrutiny applies is binary:"When a statute infringes upon a fundamental right," it is subject to strict scrutiny and "cannot survive unless 'a compelling state

interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350 (quoting *Thompson v. Arkansas Social Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)). Because Plaintiffs' allegations demonstrate that the Challenged Laws burden Arkansans' fundamental rights, strict scrutiny applies. Defendants' motion must fail on this basis alone. But that is also the case even if a less exacting level of scrutiny applied.

Second, in addition to their misunderstanding the appropriate level of scrutiny, Defendants repeatedly argue that the Challenged Provisions do not implicate fundamental rights because they "involve election mechanics only," *see* Mot. at 3; *see also id.* at 1, 11, 17, 19. But Defendants fail to cite a single case in support of their proposition that rational basis applies to any law involving election mechanics, regardless of its effect on fundamental rights.[5] Defendants' failure to offer any legal support for what appears to be their central argument shows that they cannot meet their burden to demonstrate that the Amended Complaint fails to state a claim. Ark. R. Civ. P. 12(b).

While each of the Challenged Provisions impose significant burdens standing alone, they do not exist in a vacuum. The burdens that the Challenged Provisions impose on the fundamental rights to vote, speak, and assemble must be considered *together*, in the context of all of Arkansas's election laws, with explicit regard for their cumulative harm. *See, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 733 (M.D. Tenn. 2019) (finding a law burdens the fundamental

[5] Federal courts have recognized that laws similar to the Challenged Provisions burden the fundamental right to vote. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (denying stay of preliminary injunction of signature-matching requirement that burdened "vote-by-mail and provisional voters' fundamental right to vote"); *Self Advocacy Solutions N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1055 (D.N.D. 2020) (enjoining laws rejecting ballots for perceived signature discrepancies because they deprive citizens of their "fundamental right to vote"); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (recognizing Georgia law requiring officials to reject absentee ballots for perceived signature mismatches "implicates the individual's fundamental right to vote"); *Fla. Democratic Party v. Detzner*, 4:16-cv-607, 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016) (enjoining signature-matching requirement for absentee ballots that infringed on "the precious and fundamental right to vote and to have one's vote counted.").

right to suffrage in considering the "Cumulative Burdens of the Act"); *see also Burdick v. Takushi*, 504 U.S. 428, 434–37 (1992) (considering the challenged laws in the context of all of Hawaii's ballot access laws in assessing the scope of the burden imposed); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (finding that, "[t]aken together," various provisions make ballot access and the ability to vote for a third party candidate "difficult, if not impossible").

Here, strict scrutiny is appropriate because, individually and cumulatively, the Challenged Provisions impede fundamental rights by making it harder for Arkansans to participate in our democracy. But even if strict scrutiny did not apply (which it does), Plaintiffs have adequately alleged facts sufficient to state a claim under any less exacting standard. At a minimum, issues of fact must be resolved to determine the proper level of scrutiny, and at this stage Plaintiffs have alleged more than adequate facts to demonstrate something more than rational basis applies. Defendants' motion does not even dispute this assertion: they *do not argue* that, in the event anything but rational basis applies, Plaintiffs' claims should be dismissed. As a result, their motion should be denied.

1. Strict scrutiny is the appropriate legal standard because the Challenged Provisions impair and abridge fundamental rights.

The Amended Complaint raises five distinct categories of legal claims, each of which centers on the *fundamental* rights to vote, speak, and/or assemble. Specifically, Plaintiffs allege: (1) all four of the Challenged Provisions violate the Free and Equal Elections Clause, Ark. Const. art. 2 § 3 and the Equal Protection Clause, Ark. Const. art. 2 § 3; (2) the Absentee Application Signature-Match Requirement and the In-Person Ballot Receipt Deadline, Acts 736 and 973 respectively, violate the Voter Qualifications Clause, Ark. Const. art. 2 § 1; and (3) the Voter Support Ban, Act 728, violates the rights to freedom of speech and assembly as enshrined in the Arkansas Constitution, Ark. Const. art. 2 § 4; Ark. Const. art. 2 § 6. *See* Am. Compl. ¶¶ 135-181.

The legal standard for each of these claims under the Arkansas Constitution and binding precedent is strict scrutiny. "When a statute impinges on a fundamental right, strict scrutiny applies, and [the challenged law] cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out the state interest.'" *McDaniel v. Spencer*, 2015 Ark. 94, *24, 457 S.W.3d 641, 657 (2015) (Hart, J., concurring in part) (quoting *Jegley*, 349 Ark. 600, 80 S.W.3d 332) (internal brackets omitted). The right to have one's ballot counted free from arbitrary interference is a fundamental right guaranteed by Article 3, section 2 of the Arkansas Constitution. *Davidson v. Rhea*, 221 Ark. 885, 256 S.W.2d 744 (1953); *Henderson v. Gladish*, 198 Ark. 217, 217, 128 S.W.2d 257, 262 (1939). Therefore, on the claims that the Challenged Provisions violate fundamental rights under the Free and Equal Elections Clause, the Voter Qualifications Clause, the Equal Protection Clause, and the Freedom of Speech and Assembly Clauses, this Court must apply strict scrutiny.

Strict scrutiny also applies to Plaintiffs' free speech and assembly claims. The Arkansas Constitution's free speech guarantee accords the same level of "protection to individual rights" as "similar provisions of the United States Constitution." *McDaniel*, 2015 Ark. 941, at *8, 457 S.W.3d 641, 649. Thus, restrictions on speech in public fora, such as the sidewalks and rights-of-way outside of polling locations, trigger significantly heightened scrutiny.[6] In such areas, the government may only impose reasonable and content-neutral time, place, and manner restrictions on expressive activity that are narrowly tailored to serve a significant government interest, and must leave open ample opportunities for communication. *See Shoemaker v. State*, 343 Ark. 727, at 736-37, 38 S.W.3d 350, 355-56 (2001); *Orrell v. City of Hot Springs*, 311 Ark. 301, 306, 844

[6] "[Q]uintessential public forums" include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry Ed. Ass'n. v. Perry Local Ed. Ass'n*, 460 U.S. 37, 45 (1983).

S.W.2d 310, 313 (1992). Therefore, on the claims that the Voter Protection Ban violates the rights to freedom of speech and assembly, this Court must apply strict scrutiny.

2. The question of which legal standard applies is a factual question that should not be resolved on a motion to dismiss.

Even if some less exacting standard than strict scrutiny ultimately applies to Plaintiffs' claims, which Plaintiffs deny, the initial determination of "the level of scrutiny to apply"—which requires inquiries into *how* the Challenged Provisions interact with such rights—involves "fact-dependent inquiries." *Duronslet v. Cnty. of Los Angeles*, 266 F. Supp. 3d 1213, 1223 (C.D. Cal. 2017). "[I]t is improper to decide [such] factual questions on a motion to dismiss." *United Sys. of Ark., Inc. v. Beason & Nalley, Inc.*, 2014 Ark. App. 650, at *5-6, 448 S.W.3d 731, 734 (2014). At this stage, the Court must take as true Plaintiffs' allegations regarding the Challenged Provisions' impact on their fundamental rights. *Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761. The Court cannot accept Defendants' bald assertion that rational basis applies to each claim. And because Defendants' challenge to the merits of Plaintiffs' claims is premised entirely on the proposition that rational basis applies, *see* Mot. at 15–18, Defendants' motion should be denied.

The extent and severity of the burdens that challenged laws impose on the fundamental right to vote, which determines the appropriate level of scrutiny to apply, implicates questions of fact not appropriate for resolution in a motion to dismiss.[7] But so is the "[t]he existence of a state

[7] This is particularly true as to Plaintiffs' voting rights claims. In the federal context, for example, the United States Supreme Court has explained that while "not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it," *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 360 (1994) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)), *aff'd sub nom. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), federal courts weigh the burden that any challenged law imposes on the right to vote against the state interests in imposing the burden. *Id.* Because this balancing test necessarily requires factual development, federal courts routinely reject efforts to dismiss such claims at the pleading stage. *See, e.g.*, *Duke*, 5 F.3d at 1405 (explaining it was "impossible [] to undertake the proper" balancing analysis without a record); *id*. at 1405 & 1405 n.6 (court instructing district court to reassess claims with benefit of factual record "[b]ecause it is possible that upon remand the state's interests may not justify the burden upon the plaintiffs' asserted rights," noting "[t]he existence of a state interest . . . is a matter of proof"); *see also Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008); *One Wis. Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 905 (W.D. Wis.

interest," which courts have also held "is a matter of proof." *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993). Therefore, even if rational basis review was appropriate for a motion to dismiss a voting rights claim (it is not), there would still be questions of fact making dismissal improper at this stage. While some courts (notably, *not* in cases dealing with voting rights) have concluded that rationality review can present only a question of law, *Gilmore v. Cnty. of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005), others have rejected that assertion when the law's rationality requires a factual determination. *See Stamas v. Cnty. of Madera*, No. CV F 09-0753 LJO SMS, 2010 WL 2556560, at *6 (E.D. Cal. June 21, 2010) (explaining that determining the rationality of challenged action required "factual determinations not properly before the Court in a motion to dismiss"); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (denying government's summary judgment motion because the "rationality" of the government's actions involved "substantial factual questions").

The same factual development is necessary here. This Court cannot dismiss Plaintiffs' voting rights claims without considering an evidentiary record demonstrating the magnitude of the burden on the right to vote.

3. Plaintiffs have adequately pled facts establishing that the Challenged Provisions unconstitutionally impair or forfeit the fundamental right to vote.

As set out below, the operative complaint is replete with facts showing that each Challenged Provisions impairs or forfeits the fundamental right to vote in violation of the Arkansas Constitution.

2015). Thus, while Arkansas law requires strict, rather than some intermediate level of scrutiny under a balancing test, *see Kohls*, 2014 Ark. 427, at 16, 444 S.W.3d 844, 853 (explaining that the right to vote as enshrined under the Arkansas Constitution is not the same as under the U.S. Constitution), and even if the federal standard applied, factual development would still be necessary to determine the severity of the Challenged Provisions' burdens on the fundamental right to vote.

a. Act 736's Absentee Application Signature-Match Requirement unconstitutionally impairs or forfeits the right to vote.

Plaintiffs have pled facts establishing that the Absentee Application Signature-Match Requirement unconstitutionally impairs or forfeits the fundamental right to vote. Specifically, Plaintiffs have pled that the Requirement makes the signature matching process for obtaining an absentee ballot even more "error-prone and arbitrary" by restricting the universe of signatures canvassers can use when engaging in the process. Am. Compl. ¶ 63. Before the passage of Act 736, "elections officials who processed applications for absentee ballots had to match the voter's name, address, date of birth, and signature against registration 'records.'" *Id.* ¶ 64. Now, they must determine whether the absentee-ballot application signature matches the *single* signature from the voter's registration application. Doing so makes this process even more susceptible to error because "signatures can and do change," and often "significantly." *Id.* ¶ 71. Act 736 unjustifiably requires voters to sign their absentee-ballot application in the same exact way they signed their registration application, which could have been signed *decades* prior.

Plaintiffs further allege that Act 736's new mandate "will impede and, in some cases, entirely deny lawful voters their right to vote absentee as a result of arbitrary decisions by non-expert elections officials who are ill-equipped to accurately determine whether two signatures were in fact made by the same person." *Id.* at ¶ 63. This is especially true because factors such as "age, illness, injury, medicine, eyesight, alcohol, and drugs," and "mechanical factors such as the pen type" affect a person's signature and increase the odds of arbitrary rejection of an absentee application by the voter. *Id.* at ¶ 72. Moreover, "[g]iven that, aside from the 2020 election, absentee voting is only available to people who are overseas, in the military, unavoidably absent from their voting place on election day, or unable to vote on election day because of illness or physical disability, and who therefore cannot vote by any other method, Act 736 will result in the complete

disenfranchisement of many voters." *Id.* (citing Ark. Code Ann. § 7-5-402, § 7-5-406). This is exacerbated by the fact that election officials are offered no training whatsoever in comparing voter signatures, something the sponsor of Act 736 in the General Assembly admitted on the floor. Am. Compl., ¶¶ 67-68; *see also id.* at ¶ 74 ("Representative Lowery admitted that it was deeply problematic to 'ask[] our election workers, many of them who are not trained in verifying signatures, . . . to do it in seconds," while some forensic analysts say it sometimes takes 'hours' to verify a signature."). Voter Plaintiffs are among those Arkansas voters who will be specifically harmed. *See e.g., id.* at ¶¶ 17, 21, 136, 144.[8]

Plaintiffs have sufficiently pled that Act 736 impairs or forfeits the fundamental right to vote. Taking these allegations as true and considering them in the light most favorable to Plaintiffs, as is required on a motion to dismiss, *see Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761, the Court simply cannot countenance Defendants' assertion that Act 736 does not implicate, let alone significantly burden, the right to vote. As a result, strict scrutiny applies and Defendants' motion to dismiss must be denied. But even if some less exacting level of scrutiny applied (it does not), Plaintiffs have also pled that the Requirement is wholly unnecessary to prevent the specter of voter fraud, which does not exist to any real degree in Arkansas and is otherwise more than adequately prevented under numerous provisions of the Election Code. *See e.g.*, Am. Compl. ¶ 143. Even if Defendants did have such an interest in preventing something that does not exist in Arkansas, the arbitrary Absentee Application Signature-Match Requirement simply does not carry out that interest. *Id.*; *see also Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350; *supra* Section III.C.2 (explaining that, even if strict scrutiny does *not* apply dismissal under Rule 12(b)(6) would *still* be

[8] "Voter Plaintiffs" refers, collectively, to Dortha Dunlap, Leon Kaplan, Nell Matthews Mock, Jeffery Rust, Patsy Watkins and all of Plaintiffs League of Women Voters of Arkansas and Arkansas United's voter members and constituents.

improper). Forcing Arkansas absentee voters to try to recreate a signature used when they first registered to vote years or decades earlier is far more likely to result in the wrongful disenfranchisement than preventing nonexistent absentee voting fraud.

Contrary to Defendants' suggestion, Mot. at 17, 22, *McDonald v. Board of Election Commissioners of Chicago* provides no support for the assertion that laws limiting access to absentee voting do not implicate the right to vote. Since *McDonald* was decided, the U.S. Supreme Court has repeatedly clarified that there are no "litmus-paper test[s]" for determining whether a law imposes a permissible or impermissible burden on the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Instead, this determination is a highly factual inquiry that must be decided on a case-by-case basis. *Id.* Additionally, the Court's holding in *McDonald* was based on the plaintiffs' failure to *prove* the challenged law had "an impact on [plaintiffs'] ability to exercise the fundamental right to vote." *McDonald v. Bd. of Educ. Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). "Essentially[,] the Court's disposition of the claim in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (distinguishing *McDonald* and holding limitation on absentee ballots unconstitutional). Here, Plaintiffs have alleged that the Absentee Application Signature-Match Requirement—on its own, but particularly in conjunction with the other Challenged Provisions—imposes significant burdens on the right to vote by luring voters into relying on the absentee voting process and then arbitrarily preventing them from using it, leaving little or no time for the voter to use other voting methods. At this stage, the Court must take these allegations as true.

Accordingly, the Court should deny Defendants' motion to dismiss Count I.

b. Act 249's Affidavit Prohibition unconstitutionally impairs or forfeits the right to vote.

Plaintiffs have also adequately pled facts establishing that that the Affidavit Prohibition in Act 249 impairs or forfeits the right to vote. The General Assembly previously tried (and failed) to impose a *strict* voter ID law in 2013. *See* Am. Compl. ¶ 91. The Arkansas Supreme Court found that law unconstitutional in *Kohls*, 2014 Ark 427, 444 S.W.3d 844; *see also* Am. Compl. ¶ 92 (explaining the difference between strict and non-strict voter ID laws). The General Assembly tried again to make Arkansas' voter ID laws more restrictive in 2017 through Act 633, which also created the Affidavit Fail-Safe for voters lacking the required identification. Am. Compl. ¶ 94. Act 633's Affidavit Fail-Safe applied not only to in person voters, but also to absentee voters otherwise required to "[e]nclose a copy of valid photographic identification with his or her ballot when voting by absentee ballot." Ark. Const. art. 3, § 1; *see also* Act 633 (2017). Specifically, under Act 633's Affidavit Fail-Safe, voters who either lacked any form of acceptable photo identification or who could not produce such identification while voting in person or absentee could cast a provisional ballot, which would be counted if voters: (1) completed a sworn affidavit under penalty of perjury at the polls (or, if voting absentee, completed and returned a sworn statement) stating they are a registered voter and elections officials fail to determine the provisional ballot is invalid (i.e., the Affidavit Fail-Safe); or (2) returned to the county board of elections officials the required photo identification. Ark. Const. amend. 51 § 13(b)(4). For absentee voters, a completed (and automatically enclosed) Affidavit Fail-Safe could be returned in lieu of a photocopy of the voter's acceptable photo identification. Am. Compl., ¶ 97. Because of the Affidavit Fail-Safe, Act 633 was not a "strict" voter identification law. *Id*. ¶ 94.

Act 249 takes away the Affidavit Fail-Safe, imposing the same strict voter ID requirements that the Arkansas Supreme Court already struck in *Kohls*, 2014 Ark. 427, 444 S.W.3d 844. And,

as Plaintiffs adequately pled, Act 249's strict voter ID requirements impair or forfeit the right to vote, including but not limited to Voter Plaintiffs who lack acceptable voter identification. Am. Compl., ¶¶ 17, 18, 164-67. Those voters will be unable to cast an effective ballot because they will have nothing to return to county elections officials. And even those voters who *do* have an acceptable form of identification will be forced to trek to present their identification to elections officials. *Id*. ¶¶ 164, 167. This task will be virtually impossible for absentee voters who are out of the state or country.

But even if some less exacting level of scrutiny applied (it does not), Plaintiffs have also pled that Affidavit Prohibition is wholly unnecessary to prevent the specter of voter fraud, which does not exist to any real degree in the state and which is otherwise more than adequately prevented under numerous provisions of the Election Code. Am. Compl. ¶ 169. Even if Defendants did have such an interest in preventing something that does not exist in Arkansas, the Affidavit Prohibition does not serve, and is not in any way tailored to carry out, that interest. *Id.*; *see also Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350; *supra* Section III.C.2 (explaining that, even if strict scrutiny does *not* apply dismissal under Rule 12(b)(6) would *still* be improper).

That Act 249 attempted to amend Amendment 51, Section 13, cannot save the Affidavit Prohibition. *See* Mot. at 21–24. The Affidavit Prohibition does not meet the amendment requirements set out in Amendment 51, Section 19. This section allows the General Assembly to amend Sections 5 through 15 of Amendment 51 "in the same manner as required for amendment of laws initiated by the people, . . . so long as such amendments are *germane to* this amendment, and *consistent with its policy and purposes*." (emphasis added). Ark. Const. amend. 51 § 19. But the Affidavit Prohibition is neither "germane to" nor "consistent with [Amendment 51's] policy and purposes." *Id*. Amendment 51's purpose was to abolish poll taxes and "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." *Id*. § 1. Prohibiting voters from using the affidavit option to prove their identity under the penalty of perjury *prevents* eligible voters from casting ballots, a result neither germane nor consistent with the purpose of creating a permanent voter registration system.

Defendants argument that the Affidavit Prohibition's amendment to Amendment 51, Section 13 is germane to and consistent with Amendment 51's purpose turns on a misplaced reliance on *Haas*, 2018 Ark. 283, at *10, 556 S.W.3d 509, 516. In that case, the Arkansas Supreme Court considered a challenge to Act 633 (2017), which amended Amendment 51 to include a photo identification requirement *along with* the Affidavit Fail-Safe.[9] The court declined to find that Act 633's non-strict voter identification requirements were not germane to Amendment 51 and inconsistent with its policy and purposes of creating a system of voter registration, because some form of voter identification (including by affidavit) was at least arguably "relevant" to that same purpose. *Haas*, 2018 Ark. 283, at *8, 556 S.W.3d 509, 515 (noting that under Act 633, a voter was "required to show compliant identification *or* sign the voter-verification affidavit") (emphasis added); *id*, 2018 Ark. 283, at *11, 556 S.W.3d 509,. 516 ("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.").

But Defendants stretch *Haas* far beyond any plausible construction. According to Defendants, *Haas* somehow means that *any* method of voter identification requirements would be germane to and consistent with Amendment 51's purpose of creating a system of voter registration.

[9] In other words, Act 633 added a *non-strict* voter ID requirement to the Arkansas Constitution. *See* Am. Compl. ¶ 92 (explaining the difference between strict and non-strict voter ID laws).

But just because the Arkansas Supreme Court held that *non-strict* voter ID was "relevant" to the purpose of creating a voter registration system does not mean that Act 249's *strict* voter ID law—which Plaintiffs have adequately pled *will* burden and even disenfranchise some voters—is similarly "germane to" and "consistent with" the purpose of creating a voter registration system. In other words, the *Haas* court did not suggest that *further* restrictions would be germane to Amendment 51's purpose just because the General Assembly invokes that same purported goal.

The Court should not countenance Defendants' dangerous—and unsupported—proposition. If the Court adopted their argument, Arkansas would be able to enact *any* method of voter verification, no matter how burdensome or restrictive on the right to vote, so long as it comes with an Amendment to Article 3, § 1. For example, the General Assembly could amend the Arkansas Constitution to require proof of identity through a DNA test, or only accepting a passport as acceptable identification—such requirements would be "germane to" and "consistent with" Amendment 51's purpose because *some* method of verifying voter identity is relevant to that purpose. That cannot be, and is not, what the Arkansas Supreme Court intended—much less held—in *Haas*.

Accordingly, the Court should deny Defendants' motion to dismiss Count III.

c. Act 973's In-Person Ballot Receipt Deadline unconstitutionally impairs or forfeits the right to vote.

Again ignoring the legal standard for a Rule 12(b)(6) motion and making all inferences in favor of themselves, Defendants argue that moving the in-person deadline to return an absentee ballot back one business day (and therefore by three calendar days) is simply no big deal for voters. Mot. at 28. But, as Plaintiffs allege, moving the in-person absentee ballot deadline back by three days gives Arkansas the unfortunate and telling distinction of having the *earliest* ballot receipt deadline in the United States, *see* Am. Compl. ¶ 83, and imposes significant burdens on the right

to vote. *Id.* at ¶¶ 17, 19, 20 (explaining the individual burdens and concerns among the Voter Plaintiffs); *id.* ¶ 87 (explaining that the Act denies voters the ability to wait to vote their absentee ballots in light of late-breaking information that might not come to light until days before the election); *id.* ¶ 88 (how the timing of ballot requests will make timely returning an absentee ballot in-person an impossibility for some voters); *see also id.* ¶ 151. Even before Act 973, Arkansas had one of the earliest ballot receipt deadlines in the country, requiring that absentee ballots delivered in person be received on the Monday *before* election day. And Arkansas voters, like voters in other states, were regularly disenfranchised by that less restrictive deadline. *Id.* at ¶¶ 89-90. Absent relief, the number of voters disenfranchised by Act 973 will only increase. For example, because voters can lawfully apply by mail for absentee ballots up to seven (7) days before election day, *see* Ark. Code Ann. § 7-5-404(a)(3)(A)(ii), the new deadline gives those voters only three days or less to both receive by mail and return their ballots in person before an election. Am. Compl. ¶ 88.

In fact, the Governor refused to sign Act 973 for exactly this reason, explaining that the In-Person Ballot Receipt Deadline "unnecessarily limits the opportunities for voters to cast their ballot prior to the election." *Id.* at ¶ 82. Nevertheless, the General Assembly passed it over the Governor's veto. *Id.* at ¶ 83. The Governor was right: there is no rational, let alone compelling, justification for this arbitrary and burdensome change to the law.

Individually and collectively with the other Challenged Provisions, Act 973 meaningfully impinges upon the right to vote, and therefore heightened scrutiny must apply. Because Defendants apparently concede that there is no compelling interest in Act 973's burdens on the right to vote, Defendants' motion to dismiss Count II of the Amended Complaint must also be denied. *See Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350; *see also supra* Section III.C.2 (explaining that, even if strict scrutiny does not apply, dismissal under Rule 12(b)(6) would still be improper).

But even if some less exacting level of scrutiny applied (it does not), Plaintiffs have also adequately pled that the In-Person Ballot Receipt Deadline serves no legitimate interest whatsoever. Am. Compl. ¶ 155. Defendants effectively concede as much. Unlike the other Challenged Provisions—which Defendants attempt to justify by pointing to the non-existent threat of voter fraud—Defendants' only defense of Act 973 is self-described conjecture. *See* Mot. at 29 (arguing that because election administrators might "conceivabl[y]" benefit from an earlier deadline, that should be enough to allow for dismissal). Specifically, Defendants resort to hypotheticals: in their view, the law's wholly arbitrary deadline *might* reduce some burdens on election administrators. *Id.* (arguing, not that this is the case, but instead that "a conceivable rationale for its enactment will justify it"). But here Plaintiffs allege burdens on affected voters, not election administrators, and there is no reason to discriminate against them on their election day, making it half a week earlier than everyone else's voting day. At the pleading stage, the Court has no power to credit *Defendants*' factual assertions over Plaintiffs' claims. Instead, it must accept Plaintiffs' well-pled allegation that Act 973's earlier deadline imposes significant burdens and serves no purpose. Any reliance on election administration as a hollow putative justification here would be unavailing, because "[e]lections officials already have the capacity to process absentee ballots, as evidenced by their receipt of mailed absentee ballots, through the end of election day." *Id*. ¶ 155 (emphasis added).

Accordingly, the Court should deny Defendants' motion to dismiss Count II.

d. Act 728's Voter Support Ban unconstitutionally impairs or forfeits the right to vote.

Finally, Plaintiffs have adequately pled that Act 728's burdens on the fundamental rights of voters, including the Voter Plaintiffs, are significant. *See, e.g.*, Am. Compl. ¶ 173 ("The Voter Support Ban will harm all the individual plaintiffs, who range between the ages of 68 and 85 and

to varying degrees have difficulty waiting in line because of various age, health, and mobility issues," as well as " members of the League of Women Voters of Arkansas and Arkansas United [who] will be harmed because those organizations have engaged—and if not for the Ban would engage—in voter support efforts within the arbitrary 100-foot perimeter."). Moreover, Plaintiffs have adequately pled that the burdens imposed by the Voter Support Ban fall heaviest on voters living in counties with the most sizeable Black populations, because these voters are disproportionately long likely to wait for hours to cast their ballots. *Id.* at ¶ 118. In Pulaski County, for example, some voters waited for *four hours* to vote in the 2020 general election. *Id.* Voters in Jonesboro also reportedly waited to vote for over an hour. *Id.* At least before Act 728, nonpartisan organizations were permitted to provide these voters with the small comforts of free water and snacks to alleviate some of the extreme burdens imposed by being required to wait on such long lines. *Id.* at ¶¶ 120-21. In fact, Senator Kim Hammer, the primary sponsor of the Ban, acknowledged in House State Agencies and Government Affairs Committee hearing on April 12 that that Ban grew out of concerns about groups "handing out bottled waters and other things." *Id.* at ¶ 121.

Plaintiffs have also adequately pled that Defendants lack any compelling state interests in advancing Act 728's burdens on the right to vote, and even if they did, Act 728 neither serves nor is tailored to carry out any such interest. *See, e.g.*, *id.* ¶¶ 125, 129-30, 132, 178; *see also Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350; *supra* Section III.C.2 (explaining that, *even if* strict scrutiny applied, dismissal under Rule 12(b)(6) would *still* be improper). Indeed, even now, Defendants fail to provide any interest at all, let alone a compelling one, in prohibiting providing free water and snacks to voters, especially in disproportionately Black counties where voters have historically faced extremely long wait times to vote.

But even if some less exacting level of scrutiny were to apply (it does not), Plaintiffs' challenge to the Voter Support Ban's impairment of the fundamental right to vote would still survive Defendants' motion. Plaintiffs allege that the Ban furthers no legitimate interest, and Defendants only seeming attempt to rebut that is both confused and confusing. Defendants mischaracterize Act 728 by claiming that it only prohibits "electioneering within the 100-foot zone or loitering there." Mot. at 26. That is obviously inaccurate. Act 728 prevents anyone who is not "entering or leaving a building where voting is taking place" from "*enter*[*ing*]" the "area within one hundred feet" of the polling place doors. Ark. Code Ann. § 7-1-103(a)(23) (emphasis added). To hand water to voters standing within the 100-foot zone, Plaintiffs must "enter" that area. Because Plaintiffs would not also be "entering or leaving" the polling place when they do so, this political activity is now a crime. Defendants do not offer any purpose for this prohibition.

Accordingly, the Court should deny Defendants' motion to dismiss Count IV.

4. Plaintiffs have adequately pled facts establishing that the Voter Support Ban unconstitutionally abridges the fundamental rights to free speech and assembly.

Plaintiffs have also adequately pled that Act 728 separately abridges Arkansas United and the League of Women Voters of Arkansas's fundamental rights to freedom of speech and association. *See, e.g.*, Am. Compl. ¶¶ 119-22, 128, 179-81. Specifically, the Voter Support Ban violates the right to speech and assembly protected in the Arkansas Constitution, which declares that the right of the people to peaceably "assemble, to consult for the common good; and to petition . . . shall never be abridged." Ark. Const. art. 2 § 4. The Constitution confirms that "[t]he free communication of thoughts and opinions, is one of the most invaluable rights of man…" Ark. Const. art. 2, § 6. As the Arkansas Supreme Court has explained, at minimum, Arkansas' state constitutional guarantee of free speech provides just as much protection as the First Amendment to the United States Constitution. *See McDaniel*, 2015 Ark. 94, at *8, 457 S.W.3d 641, 649 ("While

state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution, this court has not yet held that to be the case with regard to article 2, § 6."). And the rights to speech and assembly are closely intertwined. *See id.*, 2015 Ark. 94, at *9, 457 S.W.3d 641, 650 (if a statute does not violate free speech rights under the Arkansas Constitution, it "likewise does not violate those rights under article 2, § 4").

As federal courts have explained, the First Amendment (and thus the Arkansas Constitution) protects the rights of free speech and expression, particularly the "interactive communication concerning political change" that is appropriately described as "core political speech." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988)). Under federal law, limitations on such speech and expression is subject to "exacting scrutiny." *Id.* at 202 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)). This standard requires Defendants to prove that the restriction is "substantially related to important governmental interests" and that the interest cannot be served by "less problematic measures." *Id.* at 202, 204. Because that burden belongs to Defendants, Rule 12(b)(6) dismissal is inappropriate for this claim.

In any event, Plaintiffs have pled facts demonstrating that Act 728 triggers *and* cannot survive exacting scrutiny. Act 728 prohibits Plaintiffs from handing water to voters who are waiting in line and within 100 feet of the polling place. This activity constitutes protected core political speech because it encourages voters to stay in line and vote, thus serving Plaintiffs' missions of promoting civic engagement and ensuring eligible voters can cast a ballot. Am. Compl. ¶¶ 119-21, 129, 180-81. And Act 726 is by no means substantially related to the purported goal of preventing electioneering near the polling place because such activity is *already* prohibited by

existing law. *See* Ark. Code Ann. § 7-1-103(a)(8).

But even if some less exacting level of scrutiny were to apply, Plaintiffs' allegations that the Voter Support Ban infringes on the rights to speech and assembly would survive even the least rigorous rational basis review. The only argument Defendants make in defense of Act 728 turns on a misplaced reliance on a readily distinguishable case. *See* Mot. at 27-28 (citing *Burson v. Freeman*, 504 U.S. 191, at 211 (1992) and unjustifiably suggesting that *Burson* controls analysis of the Voter Support Ban). Defendants make no attempt to explain how *Burson*, a case in which the U.S. Supreme Court upheld a Tennessee *electioneering* perimeter law, insulates the Voter Support Ban's infringement on the rights to speech and assembly, which prohibits the *non-electioneering* activity of nonpartisan groups providing voters with water or snacks. Notably, "electioneering" is limited to activity that "advocates for or against any candidate, issue, or measure on a ballot," Ark. Code Ann. § 7-1-103(a)(7)(C)(i). It does *not* include the non-partisan expressive conduct of providing water or snacks to voters as a comfort to them while they wait in long lines to vote. As noted, Arkansas law already prohibits electioneering within this 100-foot perimeter. *Id.* at § 7-1-103(a)(8). Act 728 would be mere surplusage if that was its purpose. Defendants do not deny that Act 728 does (and was designed to) prevent Plaintiffs' expressive activity, and they fail to explain how the compelling state interest in *electioneering* perimeters upheld in *Burson*—an interest in preventing "voter intimidation," 504 U.S. 191, at 112—is implicated when non-partisan groups merely provide water or snacks to voters waiting in line. *Burson* is therefore readily distinguishable, and Defendants have failed to articulate any legitimate state interest in curtailing the protected speech and assembly that Plaintiffs' activity entails.

Accordingly, the Court should deny Defendants' motion to dismiss Count IV.

D. Defendants are not entitled to sovereign immunity.

Sovereign immunity poses no bar to Plaintiffs' claims. As Defendants appear to acknowledge, *see* Mot. at 30, Arkansas's sovereign immunity doctrine "allow[s] actions that are illegal, are unconstitutional or are *ultra vires* to be enjoined." *Haas*, 2018 Ark. 283, at *8, 556 S.W.3d 509, 514 (quoting *Cammack v. Chalmers*, 284 Ark. 161, at 163, 680 S.W.2d 689, 690 (1984)). In other words, "the defense of sovereign immunity is inapplicable in a lawsuit seeking only declaratory or injunctive relief and alleging an illegal, unconstitutional, or ultra vires act." *Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at *4, 611 S.W.3d 493, 498 (2020). Here, Plaintiffs seek only declaratory or injunctive relief, and, as just explained above, they have alleged unconstitutional acts. Thus, sovereign immunity "is inapplicable." *Id.*

V. Conclusion

For the above-stated reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

Respectfully submitted, this 10th day of August, 2021.

/s/ Jess Askew III
KUTAK ROCK III
124 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201-3740
Telephone: (501) 975-3141
Facsimile: (501) 975-3001
jess.askew@kutakrock.com

Preston Eldridge
ELDRIDGE LAW FIRM, PLLC
407 President Clinton Ave., Suite 201
Little Rock, AR 72201
preston@eldridgefirm.com

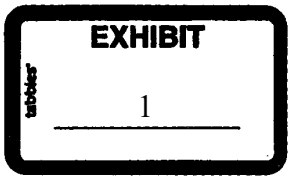
Kevin J. Hamilton*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
khamilton@perkinscoie.com

Elisabeth C. Frost**
Alexi M. Velez*
Zachary J. Newkirk*
Meaghan M. Mixon*
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
efrost@perkinscoie.com
avelez@perkinscoie.com
znewkirk@perkinscoie.com
mmixon@perkinscoie.com

Heidee Stoller*
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: (503) 727-2000
Facsimile: (503) 727-2222
hstoller@perkinscoie.com

Counsel for Plaintiffs

**Motions for Pro Hac Vice Pending*
*** Motions for Pro Hac Vice Forthcoming*



IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

LEAGUE OF WOMEN VOTERS OF ARKANSAS, ROBERT WILLIAM ALLEN, JOHN MCNEE, and AELICA I. ORSI, **PLAINTIFFS,**

v. **No. 5:20CV05174 PKH**

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.**

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs—who have not cast absentee ballots—urge this Court to rewrite Arkansas's longstanding absentee-ballot-verification requirement in the midst of an election. But that anti-fraud provision has been on the books since 2005, and Plaintiffs could have brought even their COVID-19–related claims months ago, as this Court has already recognized. DE 23 at 1-2. Yet Plaintiffs inexcusably delayed bringing this suit for facial injunctive relief until after absentee voting was already underway, prejudicing Defendants and exposing the false urgency of their claims. The Supreme Court has repeatedly cautioned against federal courts enjoining election rules at the last minute. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Indeed, this election year alone, the Court has on *seven* different occasions either stayed a lower court's last-minute injunction or refused to vacate a court of appeals' stay. And, in fact, earlier today, the Seventh Circuit summarily reversed an Indiana district court for granting relief similar to that which Plaintiffs seek here. *See Common Cause Indiana v. Lawson*, No. 20-2911, slip op. at 5 (7th Cir. October 13, 2020) (there is "no room for ongoing debate" on changes to election laws at

this point). The nearness of the November 2020 election is a result of Plaintiffs' own delay and prevents the relief they seek in their preliminary-injunction motion.

Plaintiffs' claims fail for a host of other reasons, too. As a threshold matter, they have not demonstrated their standing. Not a single Plaintiff has cast an absentee ballot, and no absentee ballot would be rejected even on the speculative scenarios Plaintiffs conjure. They have shown no concrete and particularized injury. As if that were not enough, the injury they attempt to allege is not redressable by a court order against Defendants. Only the 75 county boards of election commissioners (one for each Arkansas county) have the state-law authority to take any of the actions that Plaintiffs ask this Court to require. *See* Ark. Code Ann. 7-4-107(a)(1), 7-5-414(c), 7-5-416. Arkansas law is clear that the Secretary and the State Board have no authority to effectuate the relief Plaintiffs seek. *See Ark. St. Bd. of Election Comm'rs v. Pulaski Cty. Election Comm'n*. 2014 Ark. 236, at 17, 437 S.W.3d 80, 90 (holding that the State Board has no authority to create a new procedure permitting the cure of absentee-ballot deficiencies). Therefore, Plaintiffs' purported injury is not redressable by a favorable decision against Defendants.

Even if Plaintiffs could overcome these serious jurisdictional and procedural obstacles, their claims would still fail on the merits. Because Arkansas's absentee-ballot-verification requirement does not implicate the fundamental right to vote, only rational-basis review applies, which the requirement easily survives. *See Tully v. Okeson*, No. 20-2605, — F.3d —, 2020 WL 5905325, at *2 (7th Cir. October 6, 2020). But even if this Court were to apply some other test, the requirement would pass muster. Under the *Anderson-Burdick* framework, it imposes only minimal burdens and thus need only be reasonable and nondiscriminatory, which it certainly is. And under the test for procedural-due-process claims, Plaintiffs' claim would fail because the

State's interests are strong, the Plaintiffs' interests are weak, and the risk of error is extraordinarily low. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

Because Plaintiffs' claims fail on the merits, they are not entitled to an injunction, and this Court need not consider the remaining injunction factors. But Plaintiffs also do not face irreparable harm, and the balance of equities and the public interest favor Arkansas. In light of the numerous fatal deficiencies of Plaintiffs' claims, the Court should deny Plaintiffs' motion for a preliminary injunction without a hearing.

BACKGROUND

Elections in the United States have "always been a decentralized activity," with elections administered by local officials and their 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 via 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 absentee.[1]

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). The State assists local election officers in making the voting process accessible to voters with disabilities and those concerned with the health risks posed by the ongoing COVID-19 pandemic. Ark. Code Ann. 7-5-311; Ex. F, State Board Guidance Regarding the November 3, 2020 General Election; *see* Election Information, ADA Compliance, *Ark. St. Bd. of Election Comm'rs*, https://www.arkansas.gov/sbec/election-information/. This year, on July 29, the State Board of Election Commissioners issued guidance to county clerks and county boards concerning the November election in light of COVID-19. Ex. F, State Board Guidance Regarding the November 3, 2020 General Election.

The State Board gave many recommendations designed to protect those voting in person, which should reassure anyone who is concerned about health risks associated with voting early or on Election Day. The guidance suggests that:

- All election officers wear face coverings when in the polling place and at all times when social distancing is not possible. *Id.* at 1.
- Counties should encourage voters to wear face coverings, and face coverings should be offered to voters if supplies are available. *Id.*
- Counties that offer COVID-19 screening procedures should permit voters who fail the screening to vote in a location separate from other voters. *Id.*

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

- Polls should be arranged so voters may practice social distancing. *Id.* at 2.
- Voting booths and other voting equipment should be spaced no less than six feet apart, and poll workers should allow voters to form a line that maintains social distancing. *Id.*
- Voters should be permitted to enter and exit through different doors where feasible. *Id.*
- Sanitizer that is at least 60% alcohol should be placed near entrances and exits. *Id.*
- Items that voters may physically contact should be regularly cleaned, and voting equipment should be sanitized after each use. *Id.* at 2-3.
- Voters should be provided with disposable styluses. *Id.* at 3.

The counties have adopted these recommendations.[2] If there are any questions or concerns, voters can contact their local election officials for information about what precautions are being observed and what accommodations might be available at their local polling place.

Absentee voting is normally limited to voters who meet certain statutory criteria. Ark. Code Ann. 7-5-402. For the November 2020 election, however, it also available by executive order to voters who fear that in-person voting would pose a health risk to them or others for reasons including the COVID-19 pandemic. Ex. A at 4 (Executive Order 20-44); *see* Ex. B at 2 (Executive Order 20-45 readopting Executive Order 20-44). Absentee ballots may be requested at any time until seven days before the election. Ark. Code Ann. 7-5-404(a)(3)(A). Applicants may request a ballot by completing a downloadable form and submitting it either in person, by mail, or electronically. *Id.*; *see* Arkansas Application for Absentee Ballot, https://www.sos.arkansas.gov/uploads/elections/Absentee_Ballot_Application_1.pdf. But voters do not have to use the form; they can also request an absentee ballot by supplying the required information by letter or postcard or electronically. Ark. Code Ann. 7-5-404(a)(3)(B).

[2] As explained more fully below, Plaintiffs' failure to join the counties as Defendants in this action is prejudicial to Defendants. Here and elsewhere Defendants must rely on arguments based solely on information and belief concerning the counties' administration of the election.

Arkansas is one of only eight States that issues absentee ballots to voters more than 45 days before the election.[3] For the November election, county boards of election commissioners were responsible for providing county clerks with absentee ballots for mailing by September 17, 2020. Ark. Code Ann. 7-5-211(c); *id.* 7-5-407(a)(1).

Many other States require applicants to take any additional steps to obtain a ballot, such as signing before a notary public or other official authorized to administer oaths, obtaining a witness signature, or providing a copy of photo identification. *Cf., e.g.*, Ala. Code 17-9-30(b); Miss. Code. Ann. 23-15-715(b); S.D. Codified Laws 12-19-2. But Arkansas imposes no such requirements on Arkansans seeking to vote absentee.

Absentee voters are provided with a ballot, a voter-statement form, a secrecy envelope printed with the words "Ballot Only," a return envelope printed with the county clerk's address, and instructions for voting and returning the absentee ballot to the county clerk. Ark Code Ann. 7-5-409(b). The process for completing and returning an absentee ballot is as follows:

- Voters mark the ballot, place it in the "Ballot Only" secrecy envelope, seal that envelope, and then place it inside the return envelope. Ark. Code Ann. 7-5-412.
- Voters complete the voter statement, which includes spaces for a signature, printed name, date of birth, and address, as well as an optional verification of identity, in which voters may certify under penalty of perjury that they are registered to vote and that they are the registered voter. Ark. Code Ann. 7-5-409(b)(4)(B)-(C).
- Generally, voters must either provide photo identification or sign the verification. Ark. Const. amend. 51, sec. 13(b)(1)(A); Ark. Code Ann. 7-5-412; *see id.* 7-5-416(b)(1)(F).
- Voters place the voter statement into the return envelope, seal it, and deliver it to the county clerk.

[3] "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.

- Ballots must be hand-delivered to the county clerk by the close of business the day before the election or, if mailed, must be received by 7:30 p.m. on Election Day. Ark. Code Ann. 7-5-411(a).

The absentee votes of those who do not provide a copy of their photo identification will be counted, in the absence of any other deficiency, if they sign the verification of identity. *See* Ark. Const. amend. 51, sec. 13(b)(5)(A); Ex. D, County Board of Election Commissioners Procedures Manual, at 42. Unlike in many other States, the voter statement is not required to be notarized or witnessed by any other person.[4] Ark. Code Ann. 7-5-409(b)(4)(C).

"The processing, counting, and canvassing of the absentee ballots shall be under the supervision and at the direction of the county board of election commissioners," Ark. Code Ann. 7-5-414(c), which are bipartisan entities, *id.* 7-4-102(a)(2). Not less than 20 days before the November election—for this election, that is tomorrow, October 14—county boards are required to give public notice in a newspaper of general circulation in the county of the time and location of the opening, processing, canvassing, and counting of ballots, including absentee ballots. Ark. Code Ann. 7-5-202(a)(1)(F). Under Executive Order 20-44, election officials may open the outer envelopes and process and canvass absentee voter correspondence beginning October 19, 2020. Ex. A at 4 (extending to 15 days the 7-day period established by Ark. Code Ann. 7-5-416(a)).

At that time, election officers open each return envelope and "compare the name, address, date of birth, and signature of the voter's absentee application with the voter's statement." Ark.

[4] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

Code Ann. 7-5-416(b)(1)(F)(i). All election officials at a polling place are required to have completed training coordinated by the State Board within twelve months before the election. Ark. Code Ann. 7-4-107(b)(2)(C)(i), 7-4-109(e)(1). That includes training on the uniform statewide standard for verifying signatures and other information contained on voter statements returned with absentee ballots. Ex. J, Jonathan Davidson Decl. Among other things, officials at that training are instructed:

- "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1.
- The dates of birth and addresses also must match. Ex. C at 1.
- Election officials "[r]eject a ballot on the basis that the signatures do not compare *only* if there is a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1.
- "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1.
- "If the county board of election commissioners determines that the application and the voter's statement do not compare as to name, address, date of birth, and signature, the absentee ballot shall not be counted." Ark. Code Ann. 7-5-416(b)(1)(F)(ii).

The processing and counting of absentee ballots is open to the public, and "candidates and authorized poll watchers may be present in person or by a representative . . . during the opening, processing, canvassing, and counting of the absentee ballots." *Id.* 7-5-416(a)(4). Poll watchers may "inspect any or all ballots at the time the ballots are being counted," and may "[c]all to the attention of the election sheriff any occurrence believed to be an irregularity or violation of election law." *Id.* 7-5-312(e) (Poll Watcher Rights and Responsibilities).

Thirty-one States including Arkansas conduct signature verification, comparing the signature submitted with the absentee ballot with a signature already on file.[5] Twenty-five States allow no cure period for deficiencies.[6] Only 18 states permit voters to correct signature discrepancies.[7]

Election officers may open the "Ballot Only" envelopes for the purpose of counting the ballots only beginning at 8:30 a.m. on Election Day. Ark. Code Ann. 7-5-416(a)(1). Any person who receives an absentee ballot but who elects to vote in person by early voting or on Election Day will be permitted to cast a provisional ballot. *Id.* 7-5-201(f); *see id.* 7-5-411(b). If any absentee vote is not counted, the county board "shall promptly notify the person who cast the vote." *Id.* 7-5-902(a). The notification must be in writing and must "state the reason or reasons the vote was not counted." *Id.* 7-5-902(b).

STANDARD OF REVIEW

A preliminary injunction is an extraordinary, disfavored remedy. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). Plaintiffs bear the burden of establishing the propriety of a preliminary injunction, and they must make "a clear showing" they have carried that burden. *Id.* at

[5] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," Processing, Verifying and Counting Absentee Ballots, *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

[6] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," Processing, Verifying and Counting Absentee Ballots, *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#missing.

[7] "Table 15: State that Permit Voters to Correct Signature Discrepancies," *National Conference of State Legislatures* (Sept. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx.

22; *see Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Plaintiffs are only entitled to a preliminary injunction upon showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 24-25; *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

Two aspects of this lawsuit make Plaintiffs' task here particularly difficult. First, because Plaintiffs' requested injunction would prevent "implementation of a duly enacted state statute," they must first make a "*more rigorous* showing" than usual "that [they are] 'likely to prevail on the merits.'" *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (emphasis added) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). That requirement guards against attempts to "thwart a state's presumptively reasonable democratic processes." *Rounds*, 530 F.3d at 733. "A more rigorous standard 'reflects the idea that government policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. U.S.*, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam)). Second, Plaintiffs' burden "is a heavy one where, as here, granting the preliminary injunction will give [Plaintiffs] substantially the relief it would obtain after a trial on the merits." *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991).

Plaintiffs cannot meet their heightened burden of demonstrating they are likely to prevail on the merits in this case.

ARGUMENT

I. With absentee voting ongoing and ballot processing beginning days from now, an injunction altering the process would create electoral chaos.

"As an election draws closer, th[e] risk will increase" that a court order altering electoral procedures will itself disenfranchise voters by creating "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006) (per curiam). And in this case, an election is not merely close, it is already here. Indeed, a week-and-a-half ago, the Eleventh Circuit said that "we are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed." *New Ga. Project v. Raffensperger*, No. 20-13360-D, — F.3d —, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020).

That is because absentee voting has already begun in Arkansas and elsewhere. Each county clerk had an independent responsibility under state law to mail absentee ballots to voters by September 18. Ark. Code Ann. 7-5-407(a)(2). Granting Plaintiffs' requested preliminary injunction would mean contradicting the instructions provided with those ballots—some of which have almost assuredly been completed and returned. Ark Code Ann. 7-5-409(b)(2). Such an injunction would also mean altering county boards' absentee-ballot procedures after those procedures have already begun. Tomorrow, October 14, is the deadline for county boards to give public notice of the time and location of the opening, processing, canvassing, and counting of absentee ballots for the November election. Ark. Code Ann. 7-5-202(a)(1)(F). To comply with that deadline, county boards must have already made arrangements with newspapers for printing that public notice.[8] And by executive order, this Monday, October 19—less than one week from

[8] *See, e.g.*, "Cleveland County Public Notice of General Election," Arkansas Press Association (Oct. 7, 2020), https://www.publicnoticeads.com/ar/search/view.asp?T=PN&id=3132/10072020_26118113.htm; "Ashley County Election Commission Proclamation and Designation of Polling Places," Arkansas Press Association (Oct. 7, 2020), https://www.publicnoticeads.com/

now—elections officials may begin to "open outer envelopes, process, and canvass absentee voter correspondence." Ex. A, Executive Order 20-44.

As this description of the process makes clear, absentee voting is happening now. This Court should not change the rules according to Plaintiffs' claims. Voters must have confidence that the electoral rules will not change after they have already cast their votes. Denying Plaintiff's preliminary-injunction motion will "assur[e] voters that all will play by the same, legislatively enacted rules." *Raffensperger*, 2020 WL 5877588, at *4. And ordering Arkansas to devise new absentee-voting procedures while the State is *already conducting an election* would seriously hamper "its interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud." *Id.* State election officials would need to split their time between their ongoing electoral responsibilities and implementing an entirely new absentee-voting system. Changing the rules now, with ballots already mailed and processing to begin in days, would risk undermining Arkansans' "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

As if that were not enough reason to deny Plaintiffs' preliminary-injunction motion, in-person voting also begins this Monday, October 19. Ark. Code Ann. 7-5-418(a). And election day is three weeks from today. "Given that voting is already underway in [Arkansas], we have crossed *Purcell*'s warning threshold." *Tully v. Okeson*, No. 20-2605, — F.3d —, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020).

AR/search/view.asp?T=PN&id=3107/10072020_26117568.htm; "Notice of 2020 General Election, Cross County, Arkansas," Arkansas Press Association (Oct. 2, 2020), https://www.publicnoticeads.com/AR/search/view.asp?T=PN&id=3141/10022020_26113315.htm.

As recently as last week, the Supreme Court reiterated its instruction that lower federal courts not intervene at the last minute in state elections. On October 5, it stayed a preliminary injunction of certain South Carolina absentee-voting requirements. *See Andino v. Middleton,* No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). Indeed, including *Andino*, the Supreme Court this year has reiterated on *seven different occasions* that federal courts should not enter injunctions altering election procedures close to deadlines. *See Clarno v. People Not Politicians Or.*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (staying an injunction that had suspended signature requirement for ballot initiative petitions); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. July 30, 2020) (same); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020) (staying an injunction that had suspended some antifraud rules for absentee voting during the COVID-19 pandemic); *Tex. Democratic Party v. Abbott*, No. 19A1055, 140 S. Ct. 2015 (June 26, 2020) (denying application to vacate stay of injunction entered by the Fifth Circuit in suit challenging vote by mail rules during COVID-19); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (denying application to vacate stay of injunction entered by the Sixth Circuit in suit challenging signature requirement for ballot initiative petitions); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (granting stay of injunction that had extended deadline for receipt and counting of absentee ballots).

The courts of appeals have followed the Supreme Court's lead on this point. In the last two weeks, at least six court of appeals decisions have stayed district courts' injunctions of state absentee-voting laws. *See Common Cause Indiana v. Lawson*, No. 20-2911 (7th Cir. Oct. 13, 2020) (summarily reversing an injunction of Indiana's absentee-ballot-receipt deadline); *People*

First Ala. v. Sec'y of State, No. 20-13695-B (11th Cir. Oct. 13, 2020) (staying September 30 injunction of Alabama absentee-voting laws but not of laws unrelated to absentee voting); *Tex. League of Un. Latin Am. Citizens v. Hughs*, No. 20-50867 (5th Cir. Oct. 12, 2020) (staying October 9 injunction requiring additional absentee-ballot drop-off locations); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, — F.3d —, 2020 WL 5951359, at *1 (7th Cir. Oct. 8, 2020) (staying September 21 injunction of Wisconsin absentee-voting laws); *Ariz. Democratic Party v. Hobbs*, No. 20-16759, — F.3d —, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020) (staying September 10 injunction of Arizona absentee-voting laws); *Raffensperger*, 2020 WL 5877588, at *1 (on October 2, staying August 31 injunction of Georgia absentee-voting laws).

Because a mid-election injunction would violate the Supreme Court's clear instruction—an instruction applied over and over this election by the Court and the courts of appeals—this Court should deny Plaintiffs' motion for a preliminary injunction.

II. Plaintiffs lack standing.

A. Because Plaintiffs cannot satisfy their burden of showing an injury, let alone an injury that is fairly traceable to the State, they lack standing.

1. The individual Plaintiffs allege only speculative injury.

"Standing is 'assessed under the facts existing when the complaint is filed.'" *Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 901 (8th Cir. 2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (plurality opinion)). But at the time Plaintiffs filed this lawsuit—let alone a week later when they filed their preliminary-injunction motion—Plaintiffs Allen, McNee, and Orsi *had not cast absentee ballots*, despite the fact that absentee voting was already well underway. *See* DE 13-2 at 4 ¶ 14 (Allen has not yet signed his absentee-ballot voter statement); DE 13-3 at 3 ¶ 9 (McNee "would like to vote by absentee ballot so long as [he] ha[s] some assurance that officials will not reject [his] ballot"); DE 13-4 at 5 ¶¶

14, 15 (Orsi has not yet "mail[ed] [her] absentee ballot to the Pulaski County clerk's office," and "prefer[s] to vote in person"). Even if, when filing their complaint, Plaintiffs were inclined to return their absentee ballots at some point before the statutory deadline, Plaintiffs could still fail to timely do so, or they could change their minds and vote in person early or on Election Day, as Arkansas law permits. Ark. Code Ann. 7-5-201; *id.* 7-5-411(b). Alternatively, as explained more fully below, due to the extraordinarily low rejection rate, even if Plaintiffs had returned their absentee ballots by the time they filed their complaint, they still would have failed to meet their burden of showing any reasonable possibility that their ballots would be affected. As it stands, there is nothing but the most speculative possibility that Plaintiffs could be injured by Arkansas's absentee-ballot-verification requirement. *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) ("A concrete injury must 'actually exist,' and it must be 'real,' not 'abstract.'" (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

In the typical case, a statute must be enforced against a plaintiff before she may challenge its constitutionality, but pre-enforcement review is available in some contexts if "threatened enforcement [is] sufficiently imminent"—that is, if there is "a credible threat" that the provision will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 160 (2014). But here Plaintiffs are merely "concerned" about a purely hypothetical rejection of ballots they have not even cast. DE 13-2 at 3 ¶ 14; DE 13-3 at 3 ¶ 7; DE 13-4 at 4 ¶ 10. Therefore, their purported injury is not sufficiently imminent for Article III purposes. *See Lujan*, 504 U.S. at 564 n.2 (quotation and citation omitted) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.").

Plaintiffs do not even attempt to allege an injury related to Arkansas's requirement that absentee ballots with a missing signature or a mismatched birth date or address be rejected. Plaintiffs do not, for example, allege that they have submitted, or will submit, or even *may* submit, a voter statement that is missing a signature or has a mismatched birth date or address. So Plaintiffs categorically lack standing to challenge Arkansas law concerning absentee ballots with these particular deficiencies.

Two Plaintiffs instead allege purely speculative injuries related to Arkansas's requirement that there not be "a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1; *see* DE 13-2 at 3 ¶¶ 12, 14 (Allen claims inconsistent handwriting and inability to remember whether he signed as "Robert" or "Bob"); DE 13-3 at 2 ¶ 8 (McNee claims inconsistent handwriting and inability to remember whether he signed as "John R." or "John Robert"). But Plaintiffs' allegations that they cannot remember signing as "Robert" or "Bob" or "John R." or "John Robert" cannot support Plaintiffs' standing because such differences expressly would not cause an absentee ballot to be rejected. Ex. J, Davidson Decl.

The State Board's guidance expressly states that "[a] name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1. Election officers are trained with the example that an absentee ballot with a signature of "Jon" versus "Jonathan" should not be rejected in the absence of some other reason to disqualify it. *See* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson

Decl. Under Arkansas law, county boards must "exercise [their] duties consistent with the training and materials provided by the State Board," Ark. Code Ann. 7-4-107(a)(2), and a "presumption exists that public officials will follow the law in performance of their duties," *Golden v. Frye*, No. 5:09CV00088 JMM-JVV, 2009 WL 3245701, at *3 (E.D. Ark. Oct. 6, 2009) (quoting *Haynes v. State*, 354 Ark. 514, 527 (2003)).

Plaintiff Orsi does not even claim a potential inconsistency between her signatures. *See* DE 13-4 at 4 ¶ 13 (claiming she signed a second copy of a voter statement because the first did not correspond to the signature on her application). Plaintiffs do not allege that her signature exhibits a "distinct and easily recognizable difference" that would cause the ballot to be disqualified. Ex. C at 1. And in fact, those signatures do not exhibit such a difference. *See* DE 13-6 at 21 ¶ 53, Figure 3 (photographs of Orsi's signatures). Orsi's absentee-ballot application would not be rejected for a mismatched signature under the State Board's standard.[9] Ex. J, Davidson Decl.

2. The League of Women Voters fails to allege a cognizable injury.

As for the League of Women Voters of Arkansas, it plainly lacks associational standing. The Supreme Court has repeatedly "required plaintiff-organizations to make specific allegations establishing that *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). Yet, despite purporting to represent the rights of the League's members, *see* DE 13 at 21, Plaintiffs make *no allegation* that *any* League member has been, or ever will be, af-

[9] Plaintiffs also provide photographs of several of Plaintiff McNee's signatures. *See* DE 13-6 at 23 ¶ 54, Figure 4. None of the variations in these signatures would cause an absentee ballot to be rejected under Arkansas's requirement. Ex. J, Davidson Decl.

fected by Arkansas's verification requirement in any way whatsoever. *Mo. Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007) (finding that advocacy organization lacked standing to challenge voting restriction because record did not show that organization's members had been denied right to vote because of the restriction). Plaintiffs' filings give no argument or evidence to support a claim that the League has associational standing. Therefore, the League lacks associational standing to assert any purported injury to the League's members and Plaintiffs have waived any claim to that effect.

Plaintiffs allege that the League has organizational standing on the grounds that it has diverted resources "toward warning voters through increased educational efforts against the[] risks [of disenfranchisement by Arkansas's verification requirement], adjusting their education to address common questions from members of the public, and following up with voters to ensure their ballots are counted." DE 13 at 23. That allegation amounts to the claim that for this election cycle the League has simply decided to emphasize absentee voting in the voter-education efforts that it undertakes every election cycle *as a matter of course*. And a cognizable resource-diversion injury is lacking where—as here—Plaintiffs fails to "identify any activities that [are] impaired" by the challenged requirement. *Jacobson v. Fla. Sec'y of State*, No. 19-14552, — F.3d —, 2020 WL 5289377, at *9 (11th Cir. Sept. 3, 2020).

To be sure, Plaintiffs claim that, "[t]raditionally," the League "expends its resources by, *inter alia*, organizing voter registration drives, holding events and candidate forums, distributing voter guides and absentee ballot applications, answering questions on general voting requirements, and fundraising." DE 13 at 24. But Plaintiffs make *no allegation* that the League has ceased or curtailed any of these activities as a result of Arkansas's absentee-ballot-verification requirement. And Plaintiffs' vague allegation that the League "must divert . . . resources away

from its regular advocacy, voter registration, and other election related activities," DE 11 at 6 ¶ 8, is so unspecific as to be not remotely "particularized." *Summers*, 555 U.S. at 493. And Plaintiffs' claim that Arkansas's *existing law* has forced them to divert resources in the lead up to this election also strains credulity. The absentee-ballot-verification requirement has been the law in Arkansas since at least 2005. *See* Ark. Code Ann. 7-5-416(b)(1)(F)(ii), *amended by* 2005 Ark. Act 880, 85th General Assembly, Reg. Sess., sec. 6 (Mar. 16, 2005) (providing that if the application and voter's statement do not compare as to name, address, date of birth, and signature, the absentee ballot shall not be counted).

Finally, because the League does not itself have the right to vote, it has no organizational standing to assert a voting-related due-process claim, in particular. *See Johnson v. Bredesen*, No. 3:07-0372, 2007 WL 1387330, at * 1 (M.D. Tenn. 2007) (finding that since an organization may not exercise a right to vote, it has no standing to assert a due-process claim concerning the alleged loss of a right to vote).

3. Plaintiffs' purported injuries are not fairly traceable to Arkansas.

The longstanding nature of this law highlights another way Plaintiffs lack standing: their alleged injury is not "fairly traceable to the challenged action of the defendant." *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (quoting *Summers*, 555 U.S. at 493). Plaintiffs have not shown that any alleged injury is "*caused by* private or official violation of law." *Summers*, 555 U.S. at 492 (emphasis added). Plaintiffs themselves repeatedly point to the COVID-19 pandemic as the cause of their purported injury. DE 11 at ¶¶ 2, 7, 11, 20, 25. But, needless to say, Arkansas did not cause COVID-19.

And, in fact, in light of the pandemic, Arkansas has taken action to *alleviate* any potential burden on the right to vote by making the casting and processing of absentee ballots easier—not

harder—in order to ensure that voters are not disenfranchised. Under Executive Order 20-44, absentee voting is available to voters who believe that in-person voting would pose a health risk to them or others for reasons including the COVID-19 pandemic. Ex. A at 4; *see* Ex. B at 2 (Executive Order 20-45 readopting Executive Order 20-44). Further, election officers may open the outer envelopes and process and canvass absentee voter correspondence beginning this Monday, October 19. Ex. A at 4 (extending to 15 days the 7-day period established by Ark. Code Ann. 7-5-416(a)). Ironically, it is Arkansas's commendable willingness to make absentee voting more accessible in light of the COVID-19 pandemic that has prompted Plaintiffs to argue that Arkansas election officials are *constitutionally required* to begin processing and canvassing absentee ballots 15 days before the election and to provide notice and a cure period for deficient ballots. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810-11 (1969) (rejecting a challenge to Illinois' absentee voter laws prompted by the state's laudable efforts to make absentee voting more accessible). It is for Arkansas—not the federal courts—to decide whether "to keep or to make changes to election rules to address COVID-19." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring in grant of application for stay).

Plaintiffs' complaint ultimately rests on allegations that more people will vote absentee as a result of the COVID-19 pandemic. *See* DE 11 at ¶¶ 2, 7, 11, 20; DE 13 at 8. But even if more absentee voters somehow translated into an injury, the Court cannot "hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020); *see Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020) (finding plaintiffs' inability to vote fairly traceable to Ohio only due to the combination of the state's confinement of plaintiffs in jail and the passing of the deadline for requesting absentee ballots).

B. Plaintiffs alternatively lack standing because their alleged injuries are not redressable by a court order against the Secretary or the State Board.

Arkansas law does not empower the Secretary and the State Board to require counties to begin processing absentee ballots at any particular point in time or to create a cure process for absentee-voting deficiencies. Therefore, Plaintiffs' purported injury is not redressable by a favorable decision, and they have no standing to sue the Secretary or the State Board.

Plaintiffs do not ask for an injunction of any rule established by either the Secretary or the State Board. Rather, their purported injury derives from a duly enacted statute concerning the counting of absentee ballots by county boards of election commissioners. Ark. Code Ann. 7-5-416(b)(1)(F)(ii). Their alleged injury is not redressable by an order against the Secretary or the State Board.

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). Each county board is responsible for the design and printing of its county's unique ballot and for meeting state and federal deadlines concerning the mailing of absentee ballots. *See* Ex. G at 36 ("2020 Election Dates," Secretary of State John Thurston (Jan. 2020), https://www.sos.arkansas.gov/uploads/2020_Election_Calendar_1-27-20_1.pdf) (citing Ark. Code Ann. 7-5-407(a)(2)); *see also, e.g.*, 52 U.S.C. 20302(a)(8)(A) (requiring absentee ballots to be mailed to qualifying voters under the Uniformed and Overseas Citizens Absentee Voting Act, "not later than 45 days before the election"). This year, the deadline for county boards to deliver each county's unique absentee ballots to clerks for mailing to all qualified absentee voters was September 17, which state law then required to be mailed by the clerks on September 18. *See* Ex. G at 35 (citing Ark. Code 7-5-407(a)).

The Secretary has no control over the processing of absentee ballots. When absentee ballots are returned, county boards have *exclusive* statutory authority to process, canvass, and count them. Ark. Code Ann. 7-5-414(c); Ark. Code Ann. 7-5-416. The Secretary has *no authority* to require counties to begin processing absentee ballots at any particular point in time or to create a cure process for absentee-voting deficiencies. As the chief election officer, the Secretary is analogously situated to the Attorney General, who, even as Arkansas's chief law enforcement officer, has no authority to require local law-enforcement officers to adopt particular law-enforcement procedures.

County boards must "exercise [their] duties consistent with the training and materials provided by the State Board." Ark. Code Ann. 7-4-107(a)(2). But the State Board has no authority to create *new absentee-voting procedures*. The Arkansas Supreme Court made this point clear in *Arkansas State Board of Election Commissioners v. Pulaski County Election Commission*. 2014 Ark. 236, at 16-17.

That case involved a challenge to State Board emergency rules that established "a method . . . for an absentee voter to be notified and to be given the opportunity to cure any deficiency resulting from the failure to submit the statutorily required identification with his or her absentee ballot." 2014 Ark. 236, at 3. The Arkansas Supreme Court rejected the State Board's contention that the rules were proper under its statutory authority to "[f]ormulate, adopt, and promulgate all necessary rules to assure . . . fair and orderly election procedures." Ark. Code Ann. 7-4-101(f)(5); *see Ark. State Bd. of Election Comm'rs*, 2014 Ark. 236 at 5, 10. The Court noted that the General Assembly had not established a procedure for notice and cure of absentee-voting deficiencies, and it found that the State Board "was given the authority to promulgate rules to *assure* fair and orderly election procedures; it was not given the authority to *create* those election

procedures where the legislature had not." *Ark. State Bd. of Election Comm'rs*, 2014 Ark. 236, at 16. So the court found the rules unconstitutional under the separation-of-powers doctrine. *Id.* Notably, the court's ruling on this point expressly would not have changed even if it meant that the State was found to be in violation of federal law. *Id.* at 16 n.4.

Plaintiffs want county boards to begin processing absentee ballots no later than 15 days before the election and to create a cure process for absentee-voting deficiencies. DE 11 at 25 ¶ b. But they expressly challenge *only* a statute concerning the *county boards'* verification of absentee ballots, DE 11 at 25 ¶ a (citing Ark. Code Ann. 7-5-416(b)(1)(F)(ii)), and not rules promulgated by either the Secretary or the State Board. And instead of naming the county boards as defendants, Plaintiffs ask this Court to enjoin the Secretary and the State Board to "require election officials"—i.e., the county boards—to take these actions. DE 11 at 25 ¶ b. Because the Secretary and the State Board lack that authority, Plaintiffs' purported injury is not redressable, and this Court should dismiss this action for lack of subject-matter jurisdiction.

III. The county boards are necessary and indispensable parties.

For related reasons, this Court should deny the preliminary injunction and dismiss this action under Rule 19 of the Federal Rules of Civil Procedure. The county boards are necessary and indispensable parties that Plaintiffs have not joined as defendants.

Election administration in Arkansas is decentralized. As explained above, county boards have exclusive statutory authority to process, canvass, and count absentee ballots and to "[e]nsure compliance with all legal requirements relating to the conduct of elections." Ark. Code Ann. 7-4-107(a)(1); *id.* 7-5-414(c), 7-5-416. In *Chicago, Milwaukee, & St. Paul Railroad Company v. Adams County*, the Ninth Circuit found county boards of commissioners and county treasurers were indispensable parties because they were "repeatedly and specifically designated"

by statute as the collectors of the taxes, and that they were in fact the "active agents" in collecting them. 72 F.2d 816, 819, 820 (9th Cir. 1934). The county treasurers had a "legal interest in the question of whether or not a court will order [them] to refrain from performing a duty apparently prescribed by statute." *Id.* at 819. Here, the statute Plaintiffs challenge gives "the county board of election commissioners" the duty to determine whether the absentee-ballot "application and the voter's statement do not compare as to name, address, date of birth, and signature." Ark. Code Ann. 7-5-416(b)(1)(F)(ii). The county boards unquestionably have an interest in whether this Court orders them to refrain from performing this statutory duty.

In fact, Plaintiffs want the county boards to go far beyond shunning this duty to observing entirely new procedures to effect a cure period simultaneous with the height of their processing, canvassing, and counting ballots in the days immediately surrounding the election. Ex. J, Davidson Decl. Further, there are likely to be numerous county-specific reasons, unknown to the Secretary or the State Board, why disposing of this action in the absence of the county boards will impede their ability to administer the election or protect their interests, or otherwise would leave them subject to inconsistent obligations. Indeed, any judgment rendered in this action will potentially prejudice county boards because the Secretary and the State Board cannot adequately represent their peculiar interests. In other words, "as a practical matter," it may "impair or impede" the counties' "ability to protect the[ir] interest[s]" to "dispos[e] of th[is] action in [their] absence." Fed. R. Civ. P. 19(a)(1)(B)(i).

Further, the county boards are indispensable parties because, as explained above, the Secretary and State Board are unable to provide the relief Plaintiffs seek. "The question of indispensability of parties is dependent . . . on the ability and authority of the defendant before the court to effectuate the relief which the party seeks." *Adamietz v. Smith*, 273 F.2d 385, 387 (3d Cir.

1960). *Adamietz* affirmed the dismissal of a lawsuit for failure to join indispensable commission members who had sole authority to reinstate the plaintiff to his former position. *Id.* at 387-88. The defendant was "neither able nor authorized" to grant the relief the plaintiff sought. *Id.* at 387. Similarly here, Plaintiffs want county boards to begin processing absentee ballots 15 days before the election and to allow for cure of absentee-ballot deficiencies. Neither the Secretary nor the State Board has authority to institute new absentee-voting procedures. *See Ark. St. Bd. of Election Comm'rs*, 2014 Ark. 236, at 16-17. The absent necessary-and-indispensable county boards are the only entities able to provide that relief. *See also United Publ'g & Printing Corp. v. Horan*, 268 F. Supp. 948, 950 (D. Conn. 1967) (federal defendants were indispensable parties because judgment will affect both local and federal administrations, and local defendants alone could not effectuate relief); *E. States Petroleum & Chem. Corp. v. Walker*, 177 F. Supp. 328, 333 (S.D. Tex. 1959) (appeals board members were indispensable parties because they are the only parties authorized to allocate the import increase plaintiff sought, and failure to join the board was basis for dismissal of action).

Finally, the Secretary and the State Board are themselves prejudiced by an inability to mount a complete defense to Plaintiffs' claims. *See Estrella v. V & G Mgmt. Corp.*, 158 F.R.D. 575, 580 (D.N.J. 1994) (finding absence of unnamed defendants may be prejudicial to named defendants in suit involving multiple tortfeasors by affecting the nature of the litigation). For example, the 75 counties possess county-specific documents that are unavailable to either the Secretary or the State Board. Relevant to Plaintiffs' claims, these include county-specific instructions for marking absentee ballots that give notice to voters that their ballots will be rejected if there is a missing or mismatched signature, birth date, or address. These also include Plaintiffs

Allen, McNee, and Orsi's absentee-ballot applications. The counties likewise possess information concerning the health precautions that are being observed and what accommodations are available to voters at various polling places. Such information would tend to alleviate Plaintiffs Allen, McNee, and Orsi's concerns about opportunities for voting in person and demonstrate that absentee voting is not the only feasible option for people with concerns about the health risks of COVID-19. Neither the Secretary nor the State Board have possession, custody, or control of these and other important pieces of evidence that would be material to a proper defense of Arkansas's verification requirement against Plaintiffs' claims.

IV. Plaintiffs are unlikely to succeed on the merits.

Even if Plaintiffs could overcome these serious jurisdictional and procedural obstacles, their claims would still fail on the merits.

A. Laches bars relief on all claims in this case.

Despite COVID-19's disruption of daily life since mid-March and the Arkansas absentee-ballot-verification requirement's existence since 2005, Plaintiffs delayed bringing this action until after absentee ballots had already been mailed out to voters and some had already been cast. *See* Ark. Code Ann. 7-5-407(a); *id.* 7-5-416(b)(1)(F)(ii). Even after filing suit, Plaintiffs waited six *more* days to file their motion for a preliminary injunction. Plaintiffs offer no excuse for their monumental delay, which has prejudiced Defendants' ability to defend this lawsuit. Laches therefore bars Plaintiffs' claims. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979) (holding that laches bars a claim where (1) a plaintiff inexcusably delays bringing suit, (2) resulting in prejudice to the defendant). Laches bars even constitutional claims. *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1182 (9th Cir. 1988); *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619, 631 (S.D.N.Y. 1989).

First, there is no question that plaintiffs have inexcusably delayed in bringing this suit. Delays in bringing election-related claims are unjustified when plaintiffs wait to file their lawsuit until elections deadlines are imminent. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Ind. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907-09 (D. Ariz. 2005); *Marshall v. Meadows*, 921 F. Supp. 1490, 1493-94 (E.D. Va. 1996). Courts have foreclosed plaintiffs from seeking injunctive relief in election-related suits filed *weeks* prior to a candidate filing deadline. *Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970).

Here, Plaintiffs delayed bringing their challenge to the Act until *after* absentee voting for the November election was already underway and less than a month before counties are required to give public notice of the times and locations for the processing of absentee ballots. Ark. Code Ann. 7-5-407(a) (deadline for delivery of absentee ballots to county clerks for mailing to voters); *Id.* 7-5-202(a)(2) (public notice requirement); *see* Ex. G at 35. Plaintiffs' choice to wait until after voting had already begun to bring this lawsuit amounts to inexcusable delay.

Second, Plaintiffs' inexcusable delay unduly prejudices Defendants. The State Board has conducted training for election officers, including training on the absentee-ballot-verification requirement long before Plaintiffs brought this action. Ex. J, Davidson Decl. Undue prejudice exists where election plans were finalized well in advance of a plaintiff's suit, and counties have already conformed their precincts and readied their election machinery to implement the plan. *Ariz. Minority Coal.*, 366 F. Supp. 2d at 909. Any injunctive relief at this point would require Arkansas's 75 county boards to implement entirely new procedures on the fly, with many unan-

swered questions and confusion likely to lead to inconsistent practices. Plaintiffs' delay undoubtedly prejudices not just Defendants but also all of Arkansas's counties—not to mention Arkansas voters.

Further, Plaintiffs' inexcusable delay has unjustifiably forced Defendants to defend against their claims on an emergency, preliminary-injunction timeline. *See* DE 23, Order Denying Motion to Expedite, at 2 ("[T]here is some merit to Defendants' argument that Plaintiffs' own delay until September 22, 2020 to file this action contributes to the urgency."). The emergency nature of this litigation has prejudiced Defendants' ability to mount a full defense by leaving precious little time to develop facts for the Court to assess in ruling on whether to grant Plaintiffs' request for preliminary-injunctive relief. Further, Plaintiffs' delay has left Defendants without an opportunity to locate qualified experts to provide testimony and to cross-examine Plaintiffs' avowed expert's testimony.

"Under certain circumstances, such as where an impending election is imminent and a [s]tate's election machinery is already in progress, equitable considerations . . . justify a court in withholding relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Injunctive relief is inappropriate in light of equitable considerations where "greater harm lies in casting doubt on and imperiling the upcoming election." *Berry v. Kander*, 191 F.Supp.3d 982, 988 (E.D. Mo. 2016) (denying candidate's request for injunction against Secretary of State's enforcement of congressional districts in upcoming election). Because Plaintiffs' inexcusable delay has prejudiced Defendants, laches bars Plaintiffs' claims, and the Court should deny Plaintiffs' motion for a preliminary injunction.

B. Plaintiffs' right-to-vote claim is not likely to succeed.

For a host of independent (albeit somewhat related) reasons, Plaintiffs' right-to-vote claim is unlikely to succeed on the merits. As explained below, the Court should dispose of

Plaintiffs' request for an injunction without analyzing any burden because Plaintiffs have no liberty interest in the right to vote or in voting by absentee ballot. Even if there were such an interest, Plaintiffs would be entitled only to the process inherent in the legislative process. Further, Arkansas's absentee-ballot-verification requirement does not implicate the fundamental right to vote. It is, therefore, subject to rational-basis review, which it easily survives. But even if this Court were to examine any burden, it would be minimal, and *Anderson-Burdick* would be satisfied.

1. The Court should dispose of Plaintiffs' claim as a threshold matter without examining any burden.

Without examining any burden, the Court should dispose of Plaintiffs' request for an injunction as a threshold matter. *See Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 2020 WL 5095459, at *15-20 (M.D. Tenn. Aug. 28, 2020). That is because Plaintiffs' claim arises from their allegations that Arkansas's signature-verification process is "prone to error" and allows no cure.[10] DE 13 at 34; *see id.* at 33-36. But their purported burden does not arise from any alleged unconstitutionality of the absentee-ballot-verification *requirement* that the voter-statement signature must "compare" to the absentee-ballot-application signature. Instead, it arises solely from the alleged *inaccuracy* of election officers' determination of whether those signatures in fact compare. In other words, Plaintiffs' assertion that an absentee ballot may be erroneously rejected is very different from the assertion that the absentee-ballot-verification requirement *itself* is an unconstitutional criterion. The former is a complaint concerning the risk of

[10] Plaintiffs' burden discussion does perfunctorily mention "missing" signatures. DE 13 at 34. But, as explained above, Plaintiffs categorically lack standing to challenge Arkansas law concerning absentee ballots with missing signatures because they have not alleged any facts supporting an injury related to Arkansas's requirement that absentee ballots with missing signatures be rejected.

an erroneous deprivation that would sound in procedural due process if the right to vote were recognized as a liberty interest. *See Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *20. More on this below; suffice it for now to say that Plaintiffs have no cognizable due-process liberty interest.

Because Plaintiffs' discussion of the purported burden focuses exclusively on allegations that Arkansas's "signature matching" process is unreliable and allows no cure (thus allegedly falling short of "due" process), DE 13 at 34; *see id.* at 33-36, neither an analysis under *Anderson-Burdick* nor *Mathews v. Eldridge*, 424 U.S. 319 (1976), is appropriate because there is no cognizable due-process liberty interest in the right to vote absentee, and even if there were, Plaintiffs would be entitled only to the process inherent in the legislative process.

i. There is no cognizable procedural-due-process liberty interest in the right to vote or in voting by absentee ballot.

The Fourteenth Amendment right to procedural due process guarantees adequate procedures before allowing a State to deprive persons of their property, liberty, or life. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted).

Although the constitutional right to vote is "fundamental," *McDonald*, 394 U.S. at 807, it is *not* a "liberty interest" for procedural-due-process purposes. The unanalyzed assertion to the contrary by the district court on which Plaintiffs rely is contradicted by the great weight of federal appellate authority. *See Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 2951012, at *8 (D.N.D. June 3, 2020) (proclaiming, without analysis, that "[b]eyond debate, the right to vote is a constitutionally protected liberty interest"). Courts of appeals regularly apply

McDonald to hold that "the right to vote is fundamental, but it is not a 'liberty' interest for purposes of procedural due process." *Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *11; *see, e.g.*, *Tex. League of Un. Latin Am. Citizens v. Hughs*, No. 20-50867, slip op. at 10 n.6 (5th Cir. Oct. 12, 2020) (staying injunction requiring additional absentee-ballot drop-off locations and noting that "[t]he Secretary persuasively argues that, under [*McDonald*]," the number of drop-off locations "does not implicate the right to vote at all"); *Raffensperger*, 2020 WL 5877588, at *7 (Lagoa, J., concurring) (the right to vote is not a procedural-due-process liberty interest).

Perhaps more importantly for this case, the Supreme Court has unambiguously held that the right to vote *by absentee ballot* is not a fundamental interest that triggers Fourteenth Amendment protections. *See, e.g.*, *McDonald*, 394 U.S. at 807-08 ("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 . . . ."). Indeed, "the right to vote in a state election, in itself, is not a right secured by the Constitution or by federal law. Thus, even an improper denial of the right to vote for a candidate for a state office achieved by state action 'is not a denial of a right of property or liberty secured by the due process clause.'" *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1, 7 (1944)) (ellipsis omitted). And in *League of Women Voters of Ohio v. Brunner*, the Sixth Circuit held that even when an election system "impinges on the fundamental right to vote," it does not "implicate procedural due process" because voting is not a liberty interest protected by the due process clause. 548 F.3d 463, 479 (6th Cir. 2008).

"[W]here no such interest exists, there can be no due process violation." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). *Dobrovolny* held that initiative-petition organizers had no protected property or liberty interest that entitled them to notice of the precise minimum number of signatures required to place an initiative on the ballot before they filed their petitions with the State. *Id.* But the Eighth Circuit rejected that claim, observing that "the procedures involved in the initiative process, including the calculation of the number of signatures required to place an initiative measure on the ballot, are state created and defined," and "[t]he state retains the authority to interpret the scope and availability of any state-conferred right or interest." *Id.* (quotation, citation, and alteration omitted). Because the Plaintiffs had no "right under state law" to prior notice of the exact number of signatures required to place an initiative on the ballot, they likewise had no interest entitling them to due-process protection. *Id.*

Here, Plaintiffs correctly recognize that "there is no constitutional right to vote by absentee ballot." DE 11 at 22 ¶ 53. As in *Dobrovolny*, the procedures involved in voting absentee, including the verification requirement, are state-created and state-defined. Arkansas retains the authority to interpret the terms on which that process is available. Because Plaintiffs have no right under Arkansas law to pre-election notice or an opportunity to cure deficient voter statements, they have no interest entitling them to further procedural-due-process protections. Therefore, neither an *Anderson-Burdick* analysis nor a *Mathews* analysis is appropriate.

ii. Even if Plaintiffs had a cognizable liberty interest, they would be entitled only to the process inherent in the legislative process.

"In deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action." *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *20 (11th Cir. Sept. 11, 2020) (en banc) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441,

445-46 (1915)). When the State deprives a person of life, liberty, or property through general laws that apply "to more than a few people," the affected persons are not entitled to any process beyond that provided by the legislative process. *See Bi-Metallic*, 239 U.S. at 445; *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986) ("[T]he legislative process affords all the procedural due process required by the Constitution."); *Collier v. City of Springdale*, 733 F.2d 1311, 1316 n.5 (8th Cir. 1984) ("The protections of procedural due process do not apply to legislative acts."). Our "Republican Form of Government" itself protects rights of the general public. U.S. Const., art. IV, sec. 4; *see Bi-Metallic*, 239 U.S. at 445 ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). "In short, the general theory of republican government is not due process through individual hearings and the application of standards of behavior, but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will." *Collier*, 733 F.2d at 1316;

Because Arkansas's absentee-ballot-verification requirement is a law of general applicability enacted by the Arkansas General Assembly, it is a legislative act not constitutionally susceptible of further procedural-due-process protections. "The 'process' that [Arkansas's absentee] voters are entitled to before their . . . ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case." *Raffensperger*, 2020 WL 5877588, at *8 (Lagoa, J., concurring). This Court should dispose of Plaintiffs' claim as a threshold matter, without further discussion of their claim's merits.

2. The absentee-ballot-verification requirement does not trigger heightened scrutiny and easily survives rational-basis review.

i. The absentee-ballot-verification requirement does not implicate the fundamental right to vote.

"[T]he Supreme Court [has] 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*, 2020 WL 5905325, at *2 (citing *McDonald*, 394 U.S. at 807); *accord Burdick*, 504 U.S. at 433 ("[T]here is no constitutional right to an absentee ballot."). Indeed, Plaintiffs concede that "there is no constitutional right to vote by absentee ballot." DE 11 at 22 ¶ 53.

Here, Arkansas's permitting, in addition to in-person voting, the casting of absentee ballots subject to the verification requirement certainly does not make it *harder* for voters to cast their ballots. It does not implicate the fundamental right to vote, and this Court should apply the rational-basis test used by the Supreme Court in *McDonald*, where the plaintiffs challenged an absentee-ballot statute but failed to show any burden on the fundamental right to vote. 394 U.S. at 807-09; *see Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." (citing *McDonald*, 394 U.S. at 802); *see Tully*, 2020 WL 5905325, at *2 (applying *McDonald*'s rational-basis test where there was no showing of an infringement on the fundamental right to vote); *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) (same); *see also Miller v. Thurston*, 967 F.3d 727, 738–39 (8th Cir. 2020) (reversing an injunction based on the erroneous holding that the plaintiffs' First Amendment rights were implicated by Arkansas's in-person notarization requirement).

Because Plaintiffs' claims do not implicate the fundamental right to vote, the absentee-ballot-verification requirement is subject to rational-basis review.

ii. The absentee-ballot-verification requirement easily survives rational-basis review.

The absentee-ballot-verification requirement easily survives rational-basis review. Indeed, Plaintiffs nowhere contend otherwise.

Arkansas's absentee-ballot-verification regime serves several important interests. Foremost among these are its interest in verifying voters' identities in order to combat and deter 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) (collecting authorities). With an absentee ballot, there are also more opportunities for parties other than the voter to view the ballot, thus raising the risk that a "feeble or unaware" voter may be the victim of absentee-ballot fraud. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 512-13 (2003). As the popularity of voting absentee increases, so does the opportunity for such fraud. *Id.*; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195 n.12 (2008) (op. of Stevens, J., announcing the judgment of the Court) (observing that "much of the [recent examples of voter fraud were] actually absentee ballot fraud or voter registration fraud").

For its part, Arkansas has an especially egregious and well-documented history of absentee-ballot fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. The memoir of the Hon. Tom Glaze, the late Arkansas Supreme Court Justice and crusader against election fraud, explains that "Arkansas . . . is the one state where fraud was so dire and so perniciously ignored that citizens were forced to conduct their own investigations and file lawsuits to obtain an honest accounting and tabulation of the votes." Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* x (2011).

Glaze remarks that "[i]f you want to steal an election, the absentee box is the place to begin." *Id.* at 39. That observation is borne out by the rampant absentee-ballot falsification that typified Arkansas elections throughout the twentieth century. He explains that, for example, the Conway County sheriff's holing up in the courthouse on election night in 1958 to stuff the ballot box with fraudulent absentee ballots was a common practice of that era. *Id.* at 39-40. The 1964 passage of Amendment 51, which established a voter registration system, was the first "challenge to the whole culture of election theft" in Arkansas. *Id.* at 33. But efforts to reform absentee balloting were rebuffed by recalcitrant elements in the legislature, *id.* at 69-72, 210, and citizen lawsuits proved almost entirely fruitless. *See, e.g.*, 137-63.

Not until the closing years of the twentieth century did the General Assembly begin to enact strict requirements for handling absentee ballots, *id.* at 210, and even that not has not rooted out absentee-ballot fraud in Arkansas. For example:

- In 1999, 518 absentee ballots were invalidated in a special election for a municipal judgeship in Camden, overturning the certified results and changing the outcome. *Id.* at 210-11.

- In 2003, a Phillips County, Arkansas man named Larry Gray pleaded guilty to fraudulently applying for hundreds of absentee ballots and submitting 98 of them to influence the outcome of the Democratic primary. *See United States v. Gray*, No. 4:02CR00185 (E.D. Ark 2002); "Election Fraud Cases," *The Heritage Foundation*, https://www.heritage.org/voterfraud/search?&state=AR.

- In 2005, hundreds of fraudulent absentee ballots were cast in a state-senate primary election. Glaze, *Waiting for the Cemetery Vote*, at 211-14.

- And in 2012, four Crittenden County, Arkansas men pleaded guilty to conspiracy to bribe voters to influence absentee votes. *See* "Four Crittenden County Men Charged with Conspiracy to Commit Election Fraud," *Archive of the United States Attorney's Office for the Eastern District of Arkansas*, https://www.justice.gov/archive/usao/are/news/2012/September/Hallumetal_electionfraud_Infoplea_090512.html.

In this last example, harking back to an infamous Arkansas tradition, the men admitted providing chicken dinners, cheap vodka, and cash to voters in exchange for their absentee ballots. *Id.*; *see* Glaze, *Waiting for the Cemetery Vote*, 177-92.

Arkansas's absentee-ballot-verification regime is a hard-won product of more than half a century of courageous efforts at reform of absentee voting in Arkansas. To be sure, even if Arkansas lacked such an egregious history of absentee-voting fraud, the State would still "be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). But that history demonstrates its necessity better than any prognostications about how unscrupulous persons might take advantage of a system without it.

Arkansas's verification regime also serves important interests in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."). "[T]he interest in orderly administration . . . provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford*, 553 U.S. at 196 (op. of Stevens, J.). The "signature-matching process," in particular, "promotes orderly election administration," and helps to combat and deter fraud and even the appearance of fraud. *League of Women Voters of Ohio*, 2020 WL 5757453, at *11. These interests "are weighty and undeniable." *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008); *see Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (finding the State's interests in preventing voter fraud, increasing voter

confidence by eliminating appearances of voter fraud, and easing administrative burdens on election officials are "undoubtedly important").

Plaintiffs argue that an additional cure process would entail minimal administrative burden because Arkansas already provides a cure process for absentee-ballot applications that contain a mismatched signature. *See* Ark. Code Ann. 7-5-404(A)(2). But contrary to Plaintiffs' suggestion, the same process could not be used. Cure of mismatched signature submitted with an absentee ballot would require a much more intensive and administratively burdensome process.

Unlike county clerks' processing of absentee-ballot applications, county boards must give public notice of the time and location of all processing of absentee ballots. Ark. Code Ann. 7-5-202(a)(2). The processing of absentee ballots is open to the public, and candidates and poll watchers must be permitted to be present. Ark. Code Ann. 7-5-416(a)(4). Further, unlike an absentee-ballot *application*, which can be simply resubmitted by mail or electronically, a voter statement submitted with an absentee ballot is subject to a strict chain of custody and can be processed only in the presence of two election officials. *See* Ark. Code Ann. 7-5-416(b). Any cure of a deficient ballot would thus require the voter to travel to the ballot-processing location. Ex. J, Davidson Decl. So an additional cure process would pose significant administrative burdens precisely at the time when election officers are the busiest. *See id.* The State's current process serves its important interest in reducing administrative burdens.

Further, the State's interest in "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (op. of Stevens, J.). "[T]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* (quotation and citation omitted); *Purcell*, 549 U.S. at 4 ("Confidence in the integrity of

our electoral processes is essential to the functioning of our participatory democracy."). "A federal court enjoining part of the State's procedure for maintaining the security of mail-in voting in the weeks leading up to the election could further undermine public confidence in elections." *League of Women Voters of Ohio*, 2020 WL 5757453, at *15.

Any one of these interests, by itself, is sufficient to justify Arkansas's absentee-ballot-verification regime. Taken together, they demonstrate the manifold benefits of that antifraud protection to Arkansas's electoral system. Because it furthers these important interests, the absentee-ballot-verification requirement easily survives rational-basis review.

3. The absentee-ballot-verification requirement would survive *Anderson-Burdick* scrutiny.

The Framers did not give federal courts a mandate to micromanage State election laws. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). To the contrary, "[t]he Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' U.S. Const. Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Thus the Supreme Court has made clear that strict scrutiny does not apply to election regulations, including absentee-ballot regulations, that burden voting rights. *Id.* at 432; *see Libertarian Party of N. Dakota v. Jaeger*, 659 F.3d 687, 694-95 (8th Cir. 2011) (making clear this is an "undue burden" test rather than traditional strict scrutiny).

The Supreme Court instead uses a "single standard for evaluating challenges to voting restrictions" that burden constitutional rights—the *Anderson-Burdick* framework. *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012); *see Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) ("The Supreme Court has addressed [First Amendment, Due Process, or Equal Protection] claims collectively using a single analytic framework."); *LaRouche v. Fowler*, 152

F.3d 974, 987-88 (D.C. Cir. 1998) (following the Supreme Court's use of "a single basic mode of analysis" for such claims). The Eighth Circuit proceeds accordingly. *Moore v. Martin*, 854 F.3d 1021, 1026 n.6 (8th Cir. 2017) (analyzing First Amendment and Due Process claims under a single *Anderson-Burdick* analysis). The *Anderson-Burdick* analysis is a "sliding standard of review." *Id.* at 739. To "discern the level of scrutiny required," courts "analyze the burdens imposed" by a regulation. *Green Party of Arkansas v. Martin*, 649 F.3d 675, 681 (8th Cir. 2011). Where it "imposes only modest burdens, . . . the State's important regulatory interests" in managing "election procedures" suffice to justify it. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Alternatively, a more exacting standard—requiring a compelling interest and tailoring—applies to severely burdensome requirements. *See Martin*, 649 F.3d at 680.

The absentee-ballot-verification requirement imposes no severe burden but would satisfy *Anderson-Burdick* even if it did.

i. The absentee-ballot-verification regime's potential burden on the right to vote is minimal and therefore is justified by Arkansas's important interests.

Plaintiffs' motion only alleges a burden posed by the process for verifying absentee ballots and, in particular, the alleged inaccuracy of election officers' signature comparisons. Their motion asserts no burden posed by the *verification requirement itself*. But even if it did, any potential burden imposed by that requirement would be minimal. Similarly, even if Plaintiffs' actual alleged burdens based on the *process* were cognizable under *Anderson-Burdick* (which they aren't), those purported process burdens would also be minimal. As a result, Arkansas's absentee-ballot-verification regime is justified by the State's important interests.

a. If the Court were to consider the potential burden on the right to vote posed by the absentee-ballot-verification requirement itself, any such burden would be minimal.

First, to begin with the obvious: Arkansas has *not* precluded Plaintiffs from voting—whether by absentee ballot or otherwise. Yet Plaintiffs baselessly assert that the absentee-ballot-verification requirement poses "an undue burden on the fundamental right to vote." DE 13 at 33; *see, e.g.*, DE 11 at ¶¶ 61, 62. But that is wrong. Courts applying *Anderson-Burdick* "must not evaluate each clause [of a State's election law] in isolation" because then "any rule" regulating the conditions for casting an effective ballot "seems like an unjustified burden." *Luft v. Evers*, 963 F.3d 665, 671, 675 (7th Cir. 2020); *see id.* ("One less-convenient feature does not an unconstitutional system make."). Instead, "[c]ourts weigh these burdens against the state's interests by looking at the whole electoral system." *Id.* at 671-72. Any burden must be evaluated "within the landscape of *all opportunities* that [Arkansas] provides to vote." *Mays*, 951 F.3d at 785 (emphasis added); *League of Women Voters of Ohio v. LaRose*, No. 2:20-CV-3843, 2020 WL 5757453, at *10 (S.D. Ohio Sept. 27, 2020). Plaintiffs fail even to attempt such a system-wide analysis.

Arkansas offers a variety of ways to safely and securely cast a ballot, including absentee voting, early in-person voting, and in-person voting on Election Day. Ark. Code Ann. 7-5-401 *et seq.* (absentee voting); *id.* 7-5-418 (early voting); *id.* 7-5-102 (Election Day). Plaintiffs overstate the potential burden caused by Arkansas's absentee-ballot-verification requirement by dismissing in-person opportunities to vote on account of the COVID-19 pandemic. But the Court cannot "hold private citizens' decisions to stay home . . . against the State." *Thompson*, 959 F.3d at 810; *see Tully*, 2020 WL 5905325, at *2 ("Indiana's absentee-voting laws are not to blame. It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot."); *League of Women Voters of Ohio*, 2020 WL 5757453, at *10.

The State assists local election officers in making the voting process accessible to voters with disabilities. Ark. Code Ann. 7-5-311; *see* Election Information, ADA Compliance, *Arkansas State Board of Election Commissioners*, https://www.arkansas.gov/sbec/election-information/. In addition, on July 29, the State Board issued guidance to county clerks and county boards concerning the November election in light of COVID-19. Ex. F. The State Board gave many recommendations designed to protect those voting in person, which should reassure anyone who is concerned about health risks associated with voting in person. The guidance suggests that:

- All election officers wear face coverings when in the polling place and at all times when social distancing is not possible. *Id.* at 1.
- Counties should encourage voters to wear face coverings, and face coverings should be offered to voters if supplies are available. *Id.*
- Counties that offer COVID-19 screening procedures should permit voters who fail the screening to vote in a location separate from other voters. *Id.*
- Polls should be arranged so voters may practice social distancing. *Id.* at 2.
- Voting booths and other voting equipment should be spaced no less than six feet apart, and poll workers should allow voters to form a line that maintains social distancing. *Id.*
- Voters should be permitted to enter and exit through different doors where feasible. *Id.*
- Alcohol-based sanitizer with at least 60% alcohol should be placed near entrances and exits. *Id.*
- Items that voters may physically contact should be regularly cleaned, and voting equipment should be sanitized after each use. *Id.* at 2-3.
- Voters should be provided with disposable styluses. *Id.* at 3.

If there are any questions or concerns, voters can contact their local election officials for information about what precautions are being observed and what accommodations might be available at their local polling place.

Because Plaintiffs have not returned their absentee ballots, and given the precautions counties are taking to alleviate health risks posed by COVID-19, Plaintiffs could still safely take advantage of opportunities to vote in person early or on Election Day. In either case their signatures would not be subject to the rule that their voter statements must compare to their absentee-ballot applications. At bottom, in light of Plaintiffs' various opportunities to vote—including safe options that do not implicate the absentee-ballot-verification requirement—any burden posed by Arkansas's absentee-ballot-verification requirement is virtually nonexistent.

Second, Plaintiffs provide no evidence bearing on "the relevant question for assessing whether a voter is substantially burdened" by Arkansas's verification requirement, namely, "how many voters attempted to [comply with the requirement] but were unable to do so with reasonable effort." *Brakebill v. Jaeger*, 932 F.3d 671, 679 (8th Cir. 2019). That is undoubtedly because, for voters who choose to vote absentee, any burden imposed by the absentee-ballot-verification requirement is trivially low. To satisfy it, voters need only return, at any time between September 17 and November 3, a voter statement containing a signature, name, birth date, and address that compares with those on their recent absentee-ballot application. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *see id.* 7-5-407(a)(1), 7-5-411(a), 7-5-211(c); *see also Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *18 ("Substantively, that's really it: they must provide a signature and suffer it to be compared with a former signature."). Addressing the burden imposed by a similar signature-verification requirement, the Ninth Circuit found that the burden was minimal. *Lemons*, 538 F.3d at 1104; *see Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *7 (D. Ariz. Sept. 10, 2020) (finding a "minimal" burden because "there is nothing generally or inherently difficult about signing an envelope by Election Day").

Just as voters who fail to request an absentee ballot by the October 27 deadline cannot fault Arkansas for their inability to vote absentee, those who fail to provide a voter statement with a signature, name, birth date, and address that compare to their application cannot do so. *See Mays*, 951 F.3d at 792 ("[E]lectors who fail to vote early cannot blame Ohio law for their inability to vote; they must blame their own failure.").

Further, unlike in many other States, a voter-statement signature is not required to be notarized or witnessed by any other person. Ark. Code Ann. 7-5-409(b)(4)(C); "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," *National Conference of State Legislatures* (September 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (April 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx. Courts have deemed more rigorous signature requirements as less than severe. In *Miller*, for example, the Eighth Circuit held that, in this COVID-19 era, Arkansas's in-person signature requirement for initiative petitions posed a "less than severe" burden and that its in-person petition notarization requirement imposed *no* burden cognizable under the First Amendment. 967 F.3d 727, 738, 740 (8th Cir. 2020); *see Kendall v. Balcerzak*, 650 F.3d 515 (4th Cir. 2011) (upholding stringent signature and notarization requirements on referendum petitions).

Whatever scintilla of plausibility Plaintiffs' burden allegations may have derives from their mischaracterization of the vanishingly slight burden on the right to vote (i.e., signing and providing one's name, birth date, and address) with the consequences for noncompliance (i.e., rejection of an absentee ballot). But the mere fact that the absentee-ballot-verification requirement might result in a person's ballot being rejected in particular cases does not translate into a

severe burden on the right to vote. For example, the plaintiffs in *Crawford* challenged a state law that could have resulted in a person's exclusion from voting for inability to provide government-issued photo identification. 553 U.S. 181 (op. of Stevens, J.). Yet Justice Stevens, joined by two other justices, concluded that the law imposed "only a limited burden on voters' rights." *Id.* at 203. The concurring opinion of Justice Scalia, joined by two additional justices, agreed that "the burden at issue is minimal and justified." *Id.* at 204 (Scalia, J., concurring in the judgment). So a clear majority of the Court found no severe burden even where a requirement might result in a person being excluded from voting.

Plainly, the mere fact that Plaintiffs must *do something* in order make their vote count does not mean that their right to vote is unconstitutionally burdened if they fail to do it. There is no right to cast an effective vote in violation of state laws that can be complied with through reasonable effort. *See id.* at 198 (op. of Stevens, J.) (finding "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote").

The infirmity of Plaintiffs' claim is further underscored by their inability to satisfy the high standard for a facial challenge to Arkansas's absentee-ballot-verification requirement. Facial challenges "are disfavored for several reasons," including that they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Washington State Grange*, 552 U.S. at 450-51. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891 (8th Cir. 2017) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "To succeed challengers [must] establish that no set of circumstances exists

under which [the Act] would be valid, or that the statute lacks any plainly legitimate sweep." *Id.* at 891-92 (quotation and citation omitted). Plaintiffs cannot hope to satisfy that high standard.

Third, and finally, the absentee-ballot-verification requirement is generally applicable and nondiscriminatory. It applies to all voters equally, regardless of race, sex, age, disability, or party. *See Dudum v. Arntz*, 640 F.3d 1089, 1106 (9th Cir. 2011) ("We have repeatedly upheld as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process." (quotation and citation omitted)). And Plaintiffs have not even alleged otherwise. For these reasons, any burden posed by Arkansas's absentee-ballot-verification requirement would be minimal.

b. As explained above, however, Plaintiffs' burden discussion does not truly focus on the requirement per se. Instead, Plaintiffs focus exclusively on their allegations that Arkansas's signature-verification *process* is "prone to error" and allows no cure. DE 13 at 34; *see id.* at 33-36. Those allegations concern the risk of an erroneous deprivation that would sound in procedural due process if the right to vote were recognized as a liberty interest (which, as explained above, it is not). *See Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *20. As already explained, this alleged process-based burden is not cognizable under *Anderson-Burdick* or any other constitutional standard. Regardless, even if *Anderson-Burdick* applied, the process's alleged burden would be minimal as well.

The fraction of voters whose ballots are rejected as a result of the absentee-ballot-verification process is miniscule. Plaintiffs allege that in each of 2016 and 2018, only a fraction of one percent of returned absentee ballots were rejected either for a missing or mismatched signature. DE 11 at 17-18 ¶ 39; *see Arizona Democratic Party*, 2020 WL 5423898, at *7 (finding a

"minimal" burden where "over 99% of voters timely comply" and explaining that if the regulation "imposed significant burdens, it is reasonable to expect that more voters would fail to overcome" them). The data are worth examining.[11] In 2016, a total of 27,625[12] absentee ballots were submitted, with only 179 (or 0.6%) rejected for missing a signature and only 94 (or 0.3%) rejected for a mismatched signature. Likewise, in 2018, a total of 15,208 absentee ballots were submitted, with only 85 (or 0.5%) rejected for a "voter signature problem" and only 21 (or 0.1%) rejected for a mismatched signature.[13] That means that in both years, more than 99% of absentee ballots were determined to be compliant with the absentee-ballot-verification requirement.

Compared to other cases that have found nonsevere burdens on the right to vote, any burden here is infinitesimal. In *Brakebill*, the Eighth Circuit vacated a facial injunction of North Dakota's voter-identification requirement where 88% of the eligible voters were unaffected by the law. 932 F.3d at 681. The court rejected the plaintiffs' contention that a facial injunction

[11] Defendants' Exhibit H and I are PDFs converted from Excel spreadsheets that isolate the relevant Arkansas data for 2016 and 2018. This data is comes from the website of the U.S. Election Assistance Commission, https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys.

Data for 2016 is contained in the Excel version of the 2016 dataset on the Commission's website at the link above. It can be located under the tab at the bottom of the spreadsheet labeled "SECTION C." The 2016 Data Codebook PDF document contains explanations for each column. Accordingly, column C1a shows absentee ballots transmitted to voters. C1b shows absentee ballots returned. Column C5b shows absentee ballots rejected for a missing signature. And column C5d shows absentee ballots rejected for a mismatched signature.

Data for 2018 is contained in the Excel version of the "EAVS Datasets Version 1.3" on the Commission's website at the link above. The 2018 EAVS Data Codebook Excel document contains explanations for each column. Accordingly, column C1a shows absentee ballots transmitted by mail to voters. C1b shows absentee ballots returned. Column C4c shows absentee ballots rejected because of a "voter signature" problem. And column C4e shows absentee ballots rejected for a mismatched signature.

[12] Plaintiffs misreport this number as 27,525. DE 11 at 17 ¶ 39.

[13] For 2018 data, it is not clear whether "voter signature" problem is inclusive of the reported mismatched signatures. So there may have been even fewer rejections than Plaintiffs allege in 2018.

should issue mere because *some* voters were severely burdened. The court explained that, "even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters." *Id.* at 678 (quoting *Crawford*, 553 U.S. at 202); *see also Obama for Am.*, 697 F.3d at 433 (holding that a burden is not severe even where "approximately 100,000 voters" would be precluded from early voting the three days before the election).

There is no allegation that any Plaintiff was in any of these tiny groups of persons with deficient absentee ballots. And, tellingly, Plaintiffs do not argue that the percentage of rejected Arkansas absentee ballots is higher than that of other States.

Plaintiffs provide absolutely no evidence that Arkansas's signature-verification process disenfranchises voters. They have not, for example, come forward with even a single example of an absentee ballot that has been *wrongly* rejected. Instead, Plaintiffs allege that Arkansas's signature-verification process is "prone to error" because, as they claim, "[l]aypersons—as compared to Forensic Document Examiners (FDEs)—have a significantly higher rate of error in determining whether signatures are *genuine*." DE 11 at 14-15 ¶ 31 (emphasis added). But that is entirely beside the point because Arkansas election officers are *not* tasked with determining whether signatures are "genuine." Ex. J, Davidson Decl. Rather, their task is merely to identify cases where there is a "distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1. That task falls into a whole other category. Further reducing the risk of any possible error is the fact that the comparison of signatures is *not* between the voter statement and the voter registration—in between which several years may have elapsed. Rather, it is between the voter statement and the absentee-ballot

application, which are completed within a shorter timeframe, generally only a matter of days or weeks.

Election officers know they "are not handwriting experts," Ex. C at 1, and there is a strong presumption in favor of counting absentee ballots. "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1; *see* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson Decl. "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1. An absentee ballot is rejected only if the bipartisan county board determines that the ballot should be rejected after a second round of review. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *id.* 7-4-102(a)(2). The processing and counting of absentee ballots is open to the public, and "candidates and authorized poll watchers may be present in person or by a representative . . . during the opening, processing, canvassing, and counting of the absentee ballots." Ark. Code Ann. 7-5-416(a)(4). Poll watchers may "[c]all to the attention of the election sheriff any occurrence believed to be an irregularity or violation of election law," and may also "inspect any or all ballots at the time the ballots are being counted." Ark. Code Ann. 7-5-312(e) (Poll Watcher Rights and Responsibilities).

Because of these voter protections, this case is like *Lemons*, where the Ninth Circuit held that the Oregon Secretary of State's signature-comparison process for verifying referendum petition signatures did not violate voters' procedural-due-process rights. 538 F.3d at 1104-05. Like here, the verification process was "already weighted in favor of accepting questionable signatures, in part because only rejected signatures are subject to more than one level of review by

county elections officials." *Id.* at 1105. Further, as here, the procedures allowed members of the public to observe the signature-verification process and challenge decisions by county elections officials. *Id.* The court found that requiring the State to provide individual notice that voters' signatures had been rejected and to afford them an opportunity to cure would impose a "significant burden" on election officials, while "the burden on plaintiffs' interests from the state's failure to adopt their proposed procedures is *slight at most*." *Id.* (emphasis added). Therefore, "[w]hen viewed in context, the absence of notice and an opportunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights." *Id.* at 1104.

By contrast, this case is plainly distinguishable from the cases Plaintiffs rely on to support their claim that Arkansas's requirement imposes a substantial burden. Arkansas law requires all election officials at a polling place to have completed training coordinated by the State Board within twelve months before the election. Ark. Code Ann. 7-4-107(b)(2)(C)(i), 7-4-109(e)(1). That includes training on the uniform statewide standard for verifying signatures and other information contained on voter statements returned with absentee ballots. Ex. J, Davidson Decl. That sets this case apart from, for example, *Democratic Executive Committee of Florida v. Lee*, in which the Court found a "serious" burden where Florida required signature verification but had neither uniform standards for matching signatures nor required any qualifications or training for those verifying the signatures. 915 F.3d 1312, 1319 (11th Cir. 2019). Florida "allow[ed] each county to apply its own standards and procedures for executing the signature-match requirement, virtually guaranteeing a crazy quilt of enforcement of the requirement from county to county." *Id.* at 1320. The record contained sworn declarations from eligible voters whose ballots were wrongly rejected for a signature mismatch. *Id.* at 1321. The record here contains no

such evidence, and Arkansas's statewide procedures are much different. Plaintiffs' other cases are similarly distinguishable.[14]

Plaintiffs concede that county boards provide persons whose votes were not counted "written notification that states the reasons the vote was not counted." DE 13 at 6 (citing Ark. Code Ann. 7-5-902). They recognize that "[t]his is done to prevent the voter from making the same mistake when filling out the absentee ballot voter statement in a future election." DE 13 at 7. Thus, if a hypothetical person's absentee ballot were rejected during the primary election, the notice would prevent them from making the same mistake during the general election. Moreover, counties provide absentee voters with notice of the requirements for casting an effective absentee vote, including notice that missing or mismatched signatures will result in a ballot's rejection. State law requires county clerks to provide absentee voters with "[i]nstructions for voting and returning the official absentee ballot to the county clerk." Ark. Code Ann. 7-5-409(b)(2). And Plaintiffs, in particular, make no allegation that they lack notice that a missing signature would cause any absentee ballot they may submit to be rejected. Even though in-depth notice of election officials' signature-verification procedures would not be constitutionally required, any

[14] *See Richardson v. Texas Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *2 (W.D. Tex. Sept. 8, 2020) (election officials were not required to receive training and had no guidance concerning the appropriate procedure or standard to determine whether voters' signatures "match[ed]," and a local election official stated that whether a ballot was rejected would depend on which person conducted the review); *Frederick v. Lawson*, No. 1:19-CV-01959-SEB-MJD, 2020 WL 4882696, at *3 (S.D. Ind. Aug. 20, 2020) (Indiana provided no standards for election officials to use in determining whether a signature was "genuine" and the plaintiffs were registered voters whose ballots were wrongly rejected because the signatures were not "genuine"); *Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *1 (W.D. Tex. July 28, 2020) (plaintiffs alleged that local election officials were not trained or given uniform standards by the State for signature verification but were left to "use their best judgment" to verify that voters' signatures "match[ed]").

burden posed by the requirement that voter statements compare with absentee-ballot applications is mitigated to the extent that voters have such notice.

For these reasons, any burden posed by Arkansas's absentee-ballot-verification process would be minimal.

c. "Because the burdens are less than severe," this Court "review[s] Arkansas's . . . requirement to ensure it is reasonable, nondiscriminatory, and furthers an important regulatory interest." *Miller*, 967 F.3d at 740. Arkansas need not show any compelling interest or tailoring. *Wash. State Grange*, 552 U.S. at 458. And Plaintiffs do not allege that the requirement is discriminatory. As explained above, Arkansas has important interests, variously, in verifying voters' identities in order to combat and deter voter fraud, in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government. Because it reasonably serves these important interests, Arkansas's absentee-ballot-verification regime does not unduly burden the right to vote and therefore satisfies *Anderson-Burdick* scrutiny.

ii. Arkansas's absentee-ballot-verification regime is also narrowly tailored to the compelling interest of preserving election integrity.

Because the absentee-ballot-verification regime is justified by Arkansas's compelling interest in the integrity of its electoral process, it would satisfy even the stricter scrutiny reserved for severely burdensome regulations. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4 (citation omitted).

Arkansas's verification regime is also narrowly tailored to the interest of preserving election integrity. There is a strong presumption in favor of counting absentee ballots, and doubts

are construed in favor of the voter. Election officers "[r]eject a ballot on the basis that the signatures do not compare *only* if there is a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1 (emphasis added). "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1; *see* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson Decl. "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1. An absentee ballot is rejected only if the bipartisan county board determines that the ballot should not be counted after its second round of review. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *id.* 7-4-102(a)(2).

For these reasons, and others set forth above, the absentee-ballot-verification regime would survive the stricter scrutiny reserved for severely burdensome requirements, and *Anderson-Burdick* is satisfied.

C. Plaintiffs' due-process claim is also not likely to succeed under *Mathews*.

As explained above, the Supreme Court and the Eighth Circuit use a "single standard for evaluating challenges to voting restrictions"—the *Anderson-Burdick* framework. *Obama for Am.*, 697 F.3d at 430; *see Moore*, 854 F.3d at 1026 n.6 (analyzing First Amendment and Due Process claims under a single *Anderson-Burdick* analysis). But Plaintiffs separately analyze a procedural-due-process claim of the sort that the Ninth and Eleventh Circuits have rejected in the past few days, each holding that district courts "erred in accepting the plaintiffs' novel procedural due process argument." *Ariz. Democratic Party*, 2020 WL 5903488, at *7 n.1; *Raffensper-*

ger, 2020 WL 5877588, at *3. Although a separate due-process analysis is not warranted, Defendants will respond to the arguments in Plaintiffs' brief using the due-process analysis to highlight the deficiency of that claim.

As set forth above, there is no cognizable due-process liberty interest in the right to vote absentee, and even if there were, Plaintiffs would be entitled only to the process inherent in the legislative process. Further, Arkansas's absentee-ballot-verification requirement is subject to rational-basis review because it does not burden Plaintiffs' voting rights. But even if Plaintiffs did have a protectable liberty interest and the other claim-dispositive barriers did not apply, that would only get Plaintiffs to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Under this test, Plaintiffs' claim fails.

1. The private interest in casting an absentee ballot is weak.

Here the affected private interest is quite weak. True, as Plaintiffs argue, an interest in the right to vote is profound. *See* DE 13 at 28 (invoking an interest in the "fundamental right to vote"). But "the Supreme Court [has] 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*, 2020 WL 5905325, at *2 (citing *McDonald*, 394 U.S. at 807). Plaintiffs have no right to cast an absentee ballot. Period. Thus they surely have no right to cast *two* absentee ballots (one defective and a second after a cure). As explained above, absentee voting is just one among a variety of ways that Arkansas allows

registered voters to cast a ballot. If the laws allowing voting absentee were to disappear tomorrow, registered voters could still safely and securely vote in person during the state's early-voting window (which begins in less than a week, on October 19) or on Election Day, as explained above. So the private interest is weak.

2. The risk of an erroneous rejection is miniscule, so additional process is unwarranted.

The risk of an erroneous rejection here is extraordinarily low. Given the multiple persons involved in the absentee-ballot-review process and the exceptional simplicity of "is it signed or not" determinations, the erroneous-rejection rate for ballots missing signatures is vanishingly small, if not zero. And as explained above, for mismatched signatures, election officers applying the uniform, statewide standard are *not* tasked with determining whether signatures are "genuine," but only with identifying cases where there is a "distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1. That is a very forgiving standard that will result in the rejection of only a fraction of counterfeit signatures. So erroneously rejected signatures, if any, will likely be outnumbered by erroneously-accepted signatures.

Further, as also explained above, the data show that in 2016 only 0.3%, and in 2018 only 0.1%, of absentee ballots were rejected *at all* for a signature mismatch. That means that between 99.7% and 99.9% of absentee ballots are unaffected by the verification process. Even assuming that *all* of those mismatched-signature determinations were erroneous rejections—a dubious assumption—that still shows an infinitesimal error rate. The Ninth Circuit has found a risk of potential error 40 times higher to be "low." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1035 (9th Cir. 2012) (finding that "the risk of error was low" where "only 4% of veterans who file benefits claims are affected."). But the true erroneous-rejection rate is almost certainly

much lower. Because the risk of error is already extraordinarily low, the value of any additional process is virtually nil.

3. The State's interest is strong.

Arkansas "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4. As explained more fully above, "[v]oting fraud is a serious problem in U.S. elections . . . , and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31. Arkansas has an especially egregious and well-documented history of absentee-ballot fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. Arkansas's absentee-ballot-verification regime is a hard-won product of more than half a century of courageous efforts at reform of absentee voting in the State. *See generally* Glaze, *Waiting for the Cemetery Vote*.

Also as explained more fully above, Arkansas's important interests in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government further demonstrate the importance of the verification requirement.

Given the strength of the State's important interests, the weakness of Plaintiffs' interest, and the vanishingly slight value of additional process, the Due Process Clause simply does not require Arkansas to provide the additional process Plaintiffs seek. So their claim fails.

V. The remaining preliminary-injunction factors also warrant denial of Plaintiffs' motion.

Because Plaintiffs' claim fails on the merits they are not entitled to an injunction, and this Court need not consider the remaining injunction factors. *See Jegley*, 864 F.3d at 957-58 (hold-

ing that where an injunction would prevent "implementation of a duly enacted statute," the movant must begin with a "more rigorous showing" than usual "that [he is] 'likely to prevail on the merits'") (quoting *Rounds*, 530 F.3d at 733); *see also Rounds*, 530 F.3d at 737 n.11 (holding that the remaining injunction "factors cannot tip the balance of harms in the movant's favor when the [likelihood of success] requirement is not satisfied"). But those other factors warrant denial of Plaintiffs' motion as well.

Plaintiffs complain about the entirely speculative possibility that Arkansas's absentee-ballot-verification requirement might conceivably harm them in the coming election. But Plaintiffs have not cast an absentee ballot, and fears about what could happen in some possible future cannot provide a basis for a preliminary injunction. *See, e.g.*, *Regan v. Vinick & Young*, 862 F.2d 896, 902 (1st Cir. 1988) ("Speculation or unsubstantiated fears about what may happen in the future cannot provide the basis for a preliminary injunction."); *NACCO Material Users, Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007) (same).

Plaintiffs bear the burden of proving that "the balance of equities so favors [them] that justice requires the court to intervene." *Dataphase Sys.*, 640 F.2d at 113. Given Arkansas's "paramount" interest in regulating its elections and the public interest in enforcing the law, *Miller*, 967 F.3d at 740, Plaintiffs cannot hope to meet this burden. An injunction would inflict irreparable harm on the State and be manifestly contrary to the public interest. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (holding that, by definition, a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State").

This harm to Arkansas and to its citizens is exacerbated by Plaintiffs' inexcusable delay in bringing this lawsuit. They might have sued months or even years ago. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S.

Ct. 1942, 1944 (2018) (per curiam). So Plaintiffs' dilatory litigation tactics alone would require denying injunctive relief. *See Little*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring in grant of stay) (granting stay where initiative would be precluded from appearing on the November ballot where the delay was "attributable at least in part" to the plaintiff, which "delayed unnecessarily" in pursuing relief) (internal quotations omitted); *McGehee v. Hutchinson*, 854 F.3d 488, 491 (8th Cir. 2017) (en banc) (holding that in matters of equity, delay on the part of the moving party creates "a strong equitable presumption against the grant" of relief). Plaintiffs' delay has made it impossible to resolve this case in time for the current election.

Indeed, voters in Arkansas and around the country are already casting absentee ballots. The public interest is best served by preserving Arkansas's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing absentee ballots on the fly. Further, the Supreme Court has made clear that the public interest is not served by court orders altering election procedures shortly before elections. *See Purcell*, 549 U.S. at 4-6. When a federal court is asked to enter an injunction even "weeks before an election," the court must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, *considerations specific to election cases*." *Id.* at 4 (emphasis added). Those election-case considerations include the danger that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5; *see Brakebill v. Jaeger*, 905 F.3d 553, 559-60 (8th Cir. 2018) (granting stay of injunction), *application to vacate stay denied*, 139 S. Ct. 10; *see also Nken v. Holder*, 556 U.S. 418, 435 (2009). The State has an interest in "the stability of its political system," *Storer*, 415 U.S. at 736, and "in avoiding confusion, deception, and even frustration of the democratic process at the general election," *Jenness*, 403 U.S. at 442; *see Mays v. Thurston*, No. 4:20-CV-341 JM, 2020

WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020) (explaining that a "last-minute restructuring of the state-absentee voting law[] would add further confusion and uncertainty and impair the public's strong interest in the integrity of the electoral process").

That is why the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see Thompson*, 959 F.3d at 813. And as displayed by the Court's recent actions, "for many years, [it] has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring in grant of application for stay). The equitable injunction factors also should lead this Court to deny the preliminary-injunction motion.

CONCLUSION

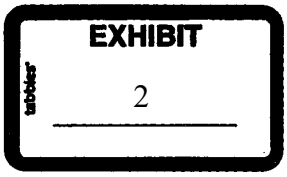
In light of the numerous fatal deficiencies of Plaintiffs' claims, Defendants respectfully request that the Court deny the Plaintiffs' motion for a facial preliminary injunction without a hearing.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

Michael A. Cantrell (2012287)
Assistant Solicitor General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2007
Fax: (501) 682-2591
Michael.Cantrell@ArkansasAG.gov

Attorneys for Defendants



IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

ARKANSAS UNITED, et al. **PLAINTIFFS,**

v. **No. 5:20-CV-05193-TLB**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, et al. **DEFENDANTS.**

BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT; AND ALTERNATIVELY, TO STAY DISCOVERY AND CERTIFY INTERLOCUTORY APPEAL

Section 208 of the Voting Rights Act does not apply to "limited English proficient" voters. It applies instead to "blind, disabled, or illiterate persons." 52 U.S.C. 10508. Plaintiffs' contrary interpretation of Section 208 would exceed Congress's enforcement authority. That is because with respect to limited English proficient voters, Congress never unequivocally declared its intention to abrogate sovereign immunity. Nor did it identify any relevant history of violations, as required for a valid exercise of Congress's enforcement authority under the Fifteenth Amendment. As a result, Plaintiffs have failed to state a claim.

Plaintiffs cannot state a claim for a host of other reasons, too. As a threshold matter, their claim is barred by sovereign immunity because Congress provided a comprehensive enforcement mechanism in the text of the Voting Rights Act, which precludes the exercise of federal jurisdiction under *Ex parte Young*, 209 U.S. 123 (1908). And in any case, *Ex parte Young* does not apply because Secretary Thurston and the members of the State Board of Election Commissioners have no authority to bring a criminal prosecution against Plaintiffs, their only alleged injury.

The Amended Complaint should likewise be dismissed because, despite suing numerous parties, Plaintiffs chose *not* to sue the only officials who are capable of bringing a criminal prosecution against them. Further, persons and advocacy organizations (such as Plaintiffs) that are not protected under Section 208 of the Voting Rights Act lack standing to assert the Section 208

rights of third-party voters not before the Court. Plaintiffs also cannot allege facts sufficient for standing because, among other things, they have no injury that is fairly traceable to the Secretary or the State Board, and even a favorable decision would not give them effective relief. Plaintiffs are likewise not entitled to relief because laches bars their request to enjoin the challenged laws, which have been on the books for over a decade.

Even if Plaintiffs could overcome these serious jurisdictional and procedural obstacles, their claims would still fail on the merits. That is because Section 208 applies to disabled or illiterate persons, not "limited English proficient" persons, and for the additional reason that in affording voters a choice of a trusted assistant, Congress did not vest voters with absolutely unfettered discretion.

In light of the numerous ways in which Plaintiffs fail to state a claim, the Court should grant Defendant's motion and dismiss Plaintiffs' Amended Complaint. But if the Court denies this motion, in light of the potential for an immediate appeal to the Eighth Circuit, it should certify threshold legal questions for appeal under 28 U.S.C. 1292(b) and stay discovery.

BACKGROUND

The Voting Rights Act of 1965 was landmark legislation that prohibited practices designed to frustrate African-Americans' exercise of the right to vote. First amended in 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970), then again in 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975), it was amended for a third time in 1982. Pub. L. No. 97-205, 96 Stat. 131 (1982). The bulk of the 1982 Amendments were modifications to existing sections of the Voting Rights Act.

But Section 208 was a new provision tacked onto the end of the 1982 Amendments as a result of concerns raised by the National Federation of the Blind. S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62 n.207 (1982) (citing the National Federation of the Blind's concern that voting "assistance provided by election officials . . . infringes upon their right to a secret ballot");

see Thomas M. Boyd and Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1419 n.357 (1983). Those concerns were expressed in a letter submitted by Dr. James Gashel, Director of Governmental Affairs for the National Federation of the Blind, who explained the need to balance blind citizens' interest in voter assistance with their interest in voter privacy. *Voting Rights Act: Hearings before the Sub-committee on the Constitution of the Committee on the Judiciary*, United States Senate, 97th Cong., 2d Sess. Vol. 2, Appx., at 64-66 (1982). Dr. Gashel explained that until the early 1960s, assistance to blind voters was largely provided by election officials. *Id.* at 65. Typically, election personnel from each party would accompany a blind voter into the booth to assist in marking the ballot and to guard against voter manipulation or other fraudulent conduct. *Id.* But that meant sacrificing the secret ballot and "suffer[ing] the indignity of second-class status every time they go to cast their ballots." *Id.* at 66. Dr. Gashel therefore urged the Senate to protect blind citizens' rights by allowing them to have assistance while at the same time protecting their privacy. *Id.*

Congress passed Section 208 upon finding that blind, disabled, and illiterate citizens "are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62 (1982). Citing the National Federation of the Blind letter, the Senate Report explained that "having assistance provided by election officials discriminates against those voters who need such aid because it infringes upon their right to a secret ballot and can discourage many from voting for fear of intimidation or lack of privacy." *Id.* at 62 n.207.

At the same time, the Report expressly "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures

shall be designed to protect the rights of voters." *Id.* at 63. "State provisions would be preempted only to the extent that they unduly burden the right recognized in [section 208], with that determination being a practical one dependent upon the facts." *Id.*

STANDARD OF REVIEW

A complaint that fails to demonstrate the Court's jurisdiction or state a claim upon which relief can be granted must be dismissed. Fed. R. Civ. P. 12(b)(1), (6) & (7).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility test involves two steps. First, this Court must determine which allegations are conclusory and, therefore, should be ignored. *See Iqbal*, 556 U.S. at 678. Second, the non-conclusory, factual allegations must be evaluated to determine whether they contain sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). If the factual allegations "do not permit the court to infer more than the mere possibility of misconduct," then the complaint fails to show a plausible claim for relief. *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)).

"Motions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts." *Jessie v. Potter*, 516 F.3d 709, 713 (8th Cir. 2008) (citing *Osborn v. United States*, 918 F.2d 724, 728-30 (8th Cir. 1990)). At the pleading stage, courts apply the Rule 12(b)(6) standard to the challenge to jurisdiction, and dismissal under Rule 12(b)(1) is appropriate "if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016); *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "In a factual attack, the court considers matters outside the pleadings, and the non-

moving party does not have the benefit of 12(b)(6) safeguards." *Carlsen*, 833 F.3d at 908 (quoting *Osborn*, 918 F.2d at 729 n.6).

I. Because Plaintiffs' interpretation of Section 208 would raise serious constitutional questions about the extent of Congress's enforcement authority under the Fifteenth Amendment, this Court should reject it.

This Court should reject Plaintiffs' interpretation of Section 208 under the canon of constitutional avoidance. *See Hammer v. Sam's E., Inc.*, 754 F.3d 492, 508 (8th Cir. 2014) ("It is a bedrock rule, repeatedly affirmed and beyond debate," that "[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." (quotations omitted)). Even if Plaintiffs' reading were plausible (and as explained more fully below, it's not), interpreting Section 208 to apply here would raise the specter that Congress had exceeded its enforcement authority under Section 2 of the Fifteenth Amendment.

The extent of Congress's power to enforce the Fifteenth Amendment implicates its power to subject States to suit; Congress may only do that pursuant to an express grant of constitutional authority. And as an initial matter, it is questionable whether the Fifteenth Amendment even grants Congress the power to legislatively abrogate state sovereign immunity. *See Mixon v. Ohio*, 193 F.3d 389, 399 (6th Cir. 1999) (noting that "the Supreme Court has not held" whether the Fifteenth Amendment grants the power to abrogate immunity). In that case, according to "the constitutional principle of sovereign immunity," which "pose[s] a bar to federal jurisdiction over suits against nonconsenting States," *Alden v. Maine*, 527 U.S. 706, 730 (1999), Plaintiffs' claims would be barred.

But setting aside the question of whether Congress enjoys the power under the Fifteenth Amendment to legislatively abrogate States' sovereign immunity, the fact is that Congress did

not do so in Section 208.[1] Determining whether Congress has validly abrogated state sovereign immunity involves four steps. First, the constitutional right at issue must be defined "with some precision." *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). Second, Congress must have made its intention to abrogate immunity "unmistakably clear in the language of the statute." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)). Third, Congress must have "identified a history and pattern" of unconstitutional violations of that right. *Id.* at 367. And finally, the means Congress chose to address those violations must be a "congruent and proportional" response to those violations. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). Plaintiffs cannot adequately plead that Section 208 was a valid exercise of Congress's enforcement authority at any step of this analysis.

A. Plaintiffs assert a right that neither the Fifteenth Amendment nor Section 208 protects.

Under the federal Elections Clause, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. Art. 1, sec. 4, cl. 1. Further, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991) (quotation and citation omitted). Indeed,

[1] Given the dearth of cases analyzing the validity of Congress's exercise of its enforcement power under the Fifteenth Amendment, the following discussion relies on the Court's cases analyzing congressional power under the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997) (describing Congress's power under the Fourteenth Amendment as "parallel" to that under the Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (describing Congress's power under the Fourteenth Amendment as "similar" to that under the Fifteenth Amendment).

"States have broad powers to determine the conditions under which the right of suffrage may be exercised." *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (quotation and citation omitted). Against this background legal framework that protects "the States' significant interest in self-determination," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 225 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part), the Fifteenth Amendment protects citizens' right to vote against intentional racial discrimination by the States, *see* U.S. Const. amend. 15, sec. 1 ("The right of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude.").[2] And Section 2 of that Amendment simply provides: "The Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. 15, sec. 2; *see City of Rome*, 446 U.S. 156, 177 (1980) (upholding ban on electoral changes that have merely a discriminatory impact, but only in jurisdictions with a demonstrable history of intentional racial discrimination).

The precise Fifteenth Amendment right at issue, then, is the right against intentional racial discrimination in voting. But Plaintiffs do not allege that any sort of intentional racial discrimination animated the challenged Arkansas laws. Indeed, they purport to protect the rights of "limited English proficient" voters—not a racial minority. Am. Compl., DE 79, ¶ 3.

Section 208 does not cover allegations of discrimination against such voters. Plaintiffs offer no argument for why it would; they merely assume the point. But the phrase "limited English proficient" does not appear in Section 208's text or anywhere in the legislative history of the 1982 Voting Rights Act Amendments. Rather, that phrase comes from the 1992 amendments to

[2] *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 63 (1980) (Stewart, J., announcing the judgment of the Court) ("None [of the Court's cases] has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation."); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (assuming that Section 1 of the Fifteenth Amendment "prohibits only intentional discrimination in voting").

(the very different) Section 203 of the Voting Rights Act. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921, codified at 52 U.S.C. 10503(b)(3)(B) (defining "limited-English proficient" as "unable to speak or understand English adequately enough to participate in the electoral process"). Section 203's requirements were expressly designed to prohibit differential treatment of, and disparate impact on, "language minorities." 52 U.S.C. 10503(a). Those requirements apply exclusively to jurisdictions meeting certain demographic criteria. *See id.* 10503(b)(2) (defining covered jurisdictions in terms of population percentages of "single language minorit[ies]" who are "limited-English proficient").

In contrast, Section 208 applies nationwide and was designed to protect the right to a secret ballot of the very different class of "blind, disabled, or illiterate persons." *See* 52 U.S.C. 10508 (section heading titled "§ 10508. Voting assistance for blind, disabled or illiterate persons"); s*ee Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947))). So Section 208 applies, *not* to jurisdictions defined in terms of "language minorit[ies]," but nationwide to "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write," 52 U.S.C. 10508, with the latter group identified as "illiterate persons." *Id.*

Section 208 does not extend to "limited English proficient" persons, and certainly not to any such persons in Arkansas, which has no Section 203-covered jurisdictions. *See* "Covered

Jurisdictions," About Language Minority Rights, *U.S. Dep't of Justice* (March 11, 2020)[3] (linking to "the most recent determinations for Section 203"[4]).

At very least, this fact demonstrates why this Court should reject Plaintiffs' interpretation of Section 208. And more importantly, because Plaintiffs have claimed a right that neither the Fifteenth Amendment nor Section 208 protects, their Amended Complaint should be dismissed.

B. Congress did not unequivocally declare its intention to abrogate sovereign immunity as to claims regarding "limited English proficient" voters.

The Court should also reject Plaintiffs' interpretation of Section 208—that it applies to limited English proficient voters—for additional reasons. Among them, there is no textual evidence that Congress authorized lawsuits against the States by limited English proficient voters. Therefore, Section 208 does not satisfy the rule that Congress must act with unmistakable clarity when it means to abrogate the States' sovereign immunity.

"If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear in the language of the statute*." *Gregory*, 501 U.S. at 460 (quotations and citations omitted) (emphasis added). This has been called the Supreme Court's "super-strong clear statement rule." William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 82 (1994). And it applies to congressional exercises of its enforcement power. *See Blatchford*, 501 U.S. at 786. This rule "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461.

Section 208's language falls well short of the unmistakable clarity required to abrogate the States' sovereign immunity from private-party suits. *See Christian Ministerial Alliance v.*

[3] https://www.justice.gov/crt/about-language-minority-voting-rights

[4] https://www.justice.gov/crt/file/927231/download

Arkansas, No. 4:19-CV-00402-JM, ECF 36 (E.D. Ark. Feb. 21, 2020) (order granting motion to dismiss and holding that Section 2 of the Voting Rights Act "does not chin the high bar set by the Supreme Court of expressing an 'unmistakably clear' intention to abrogate the States' right of immunity"). Section 208 simply provides, "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. 10508. The statute makes no reference to the States and does not provide private parties with a cause of action. *Id.*

But even if the statutory language did refer to the States and create a private right of action, it still would not have constituted a valid abrogation of the States' sovereign immunity. *Dellmuth v. Muth* illustrates why. 491 U.S. 223, 225 (1989). There, Congress enacted a statutory program for educating children with disabilities that "mandate[d] certain procedural requirements for participating state and local educational agencies." *Id.* Unlike Section 208, the statute in *Dellmuth* both created a private cause of action for violations of its provisions, *id.* at 228, and made "frequent reference to the States," *id.* at 232. Those facts, *Dellmuth* said, created "a permissible inference" that Congress intended the States "to be subject to damages actions for violations" of that statute. *Id.* at 232. "But such a permissible inference, whatever its logical force," would not be an "unequivocal declaration . . . that Congress intended to exercise its powers of abrogation." *Id.* What was lacking was an express statement to the effect that *the States themselves* could be sued under the statute's cause of action. Therefore, *Dellmuth* held that Congress had not abrogated the States' sovereign immunity. *Id.*

Dellmuth underscores that regulation of a State's conduct does not—even when combined with an express cause of action and frequent reference to the States—unequivocally establish that Congress intended for private individuals to enforce that provision through private lawsuits. *Id.* And Section 208 doesn't even do that much. Plaintiffs therefore cannot plausibly claim that Section 208's language amounts to an "unequivocal declaration" that Congress intended to abrogate the States' sovereign immunity. *Id.*

That, moreover, is even truer here, where Plaintiffs dubiously suggest that Section 208 covers "limited English proficient" persons. The statutory language plainly says nothing about such persons. Its refers rather to "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write," *i.e.*, "illiterate persons." 52 U.S.C. 10508. That is hardly an "unequivocal declaration" that Congress intended to abrogate the States' sovereign immunity with respect to claims brought by private parties wishing to assist "limited English proficient" voters.

To adopt Plaintiffs' interpretation of Section 208, the Court would need to overlook the fact that Congress has not unmistakably expressed an intention to abrogate sovereign immunity for claims brought by "limited English proficient" persons—to say nothing of claims brought by *third parties* claiming to assert the rights of such persons. Indeed, Plaintiffs are a private advocacy organization and its director. *See* Am. Compl., DE 79 ¶¶ 8-12. There is not anyone claiming to be a "limited English proficient" person who desires to be assisted in voting. *See id.*

Plaintiffs' interpretation raises serious, unanswered questions about the extent of Congress's power under Section 2 of the Fifteenth Amendment, which is reason enough to reject it, adopt a reasonable alternative interpretation—more on that reasonable alternative later in this brief—and dismiss the Amended Complaint.

C. Congress did not identify any "history and pattern" of constitutional violations.

Interpreting Section 208 to apply to limited English proficient voters would raise still more constitutional problems. Congress may exercise its enforcement power only when it has "identified a history and pattern" of constitutional violations of the right at issue. *Garrett*, 531 U.S. at 367; *see Hayden v. Pataki*, 449 F.3d 305, 331 (2d Cir. 2006) (remarking that the Supreme Court has upheld legislation as a valid exercise of Congress's enforcement power only where it pointed to evidence that "establishes a pattern of unconstitutional discrimination involving the particular practices proscribed by the remedial scheme at issue"). As related to limited English proficient voters—particularly those in Arkansas—Congress has identified no such history. As a result, adopting Plaintiffs' interpretation of Section 208 would raise a question about whether Congress had validly exercised its powers under Section 2 of the Fifteenth Amendment. This is yet another reason to reject Plaintiffs' reading of Section 208.

The Second Circuit has discussed in great detail the findings necessary to a valid exercise of Congress's enforcement authority. *See Hayden*, 449 F.3d at 331-32. That court began by discussing *Hibbs*, which addressed the constitutionality of a provision allowing employees to sue the States for violations of the Family Medical Leave Act ("FMLA"). 538 U.S. at 729. The constitutional question, said *Hibbs*, turned on whether the legislative record revealed evidence of a pattern of constitutional violations by the States. *Id.* With regard to the FMLA, the legislative record showed a history of state employers' leave policies discriminating based on gender stereotypes. *Id.* at 730-31 & nn.3-5. Congress then explicitly found that "States relied on invalid gender stereotypes in the employment context, *specifically in the administration of leave benefits*." *Id.* at 735 n.11 (quotation and alteration omitted). So the Court upheld the FMLA as a valid exercise of Congress's Section 5 power. *Id.* at 740.

The Second Circuit in *Hayden* then discussed the Supreme Court's similar decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), which upheld Title II of the Americans with Disabilities Act of 1990 ("ADA"). *See Hayden*, 449 F.3d at 331-32. When considering the ADA, Congress conducted 13 hearings and considered "the findings of a special task force that gathered evidence from all 50 states." *Id.* at 331 (discussing *Lane*, 541 U.S. at 516). The congressional "record revealed pervasive state laws discriminating against the disabled," specifically including discrimination in their access to courthouses. *Id.* (discussing *Lane*, 541 U.S. at 524, 526-27). "These findings constituted specific evidence that 'many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.'" *Id.* at 331-32 (quoting *Lane*, 541 U.S. at 527). By supporting the ADA with such exhaustive and specific findings, Congress had validly supported that statute as an exercise of its enforcement powers under the Fourteenth Amendment. *Lane*, 541 U.S. at 533-34.

In both *Hibbs* and *Lane*, the Supreme Court was not satisfied with generalized evidence of gender or disability discrimination in society. *See Hayden*, 449 F.3d at 332. Rather, the Court's discussion in those cases suggests that Congress must rely on "record evidence that demonstrates a pattern of pervasive discrimination *in the particular area in which Congress is attempting to legislate*." *Id.* In *Hibbs*, that meant "a widespread pattern of gender discrimination in the administration of leave benefits" in particular, not merely "a widespread patter of gender discrimination" in general. *Id.* (citing *Hibbs*, 538 U.S. at 735 n.11). Analogously, in *Lane*, Congress found "a pattern of discrimination against the disabled specifically in the provision of public services, including access to court proceedings." *Id.* (citing *Lane*, 541 U.S. at 527).

In contrast to the extensive and specific findings in those cases, "the Court has struck down federal legislation that was unsupported by evidence identifying a pattern of specific unconstitutional state action to be remedied." *Id.* For example, it struck down the Religious Freedom Restoration Act because its "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530. Similarly, the Court invalidated the Age Discrimination in Employment Act as applied to the States because "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 528 U.S. at 89. And the Court even found that Title I of the ADA (as opposed to Title II, which the Court considered in *Lane*) exceeded Congress's enforcement powers because "[t]he legislative record of the ADA . . . simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Garrett*, 531 U.S at 368; *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 640 (1999) (noting that Congress could not abrogate state sovereign immunity under its Section 5 powers via the Patent Remedy Act because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations").

Here, Plaintiffs do not allege that Congress made any findings that "limited English proficient" individuals have been denied the right to the assistance of a trusted person in the voting booth. They do not because they cannot: there are no such findings in the legislative record for Section 208. In fact, the letter from the National Federation of the Blind appears to be the only identifiable evidence that *any* person's interests may have received lesser protection by State laws regulating assistance to voters. In the absence of a record compiled by Congress specifi-

cally establishing that such laws have been used to discriminate against "limited English proficient" voters, Congress could not validly abrogate the States' sovereign immunity in enacting Section 208, at least as applied to third parties asserting the rights of "limited English proficient" voters, as Plaintiffs claim.

This would not be the first amendment to the Voting Rights Act to raise questions about the extent of Congress's enforcement authority against the States. The Supreme Court has specifically held that Congress exceeded its enforcement authority when enacting an amendment to the Voting Rights Act that prohibited the disenfranchisement of 18-year-olds in state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112, 118 (1970). There, Justice Black, announcing the judgment of the Court in a case that generated five separate opinions, concluded that "[s]ince Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections." *Id.* at 130; *see also James v. Bowman*, 190 U.S. 127 (1903) (law exceeded Congress's enforcement authority under the Fifteenth Amendment); *United States v. Reese*, 92 U.S. 214 (1875) (same).

Because Section 208's legislative record did not "identif[y] a history and pattern," *Garrett*, 531 U.S. at 367, of State violations of any right possessed by "limited English proficient" citizens to voting assistance, Plaintiff cannot adequately allege a Section 208 violation, and their Amended Complaint should be dismissed. Concluding otherwise would raise questions about whether Congress had validly exercised its enforcement authority under Section 2 of the Fifteenth Amendment when it enacted Section 208.

D. Plaintiffs' purported remedy is not "congruent and proportional" to remediate any alleged violations.

Finally, because Section 208's legislative record contains no findings of violations of the rights of "limited English proficient" persons, that provision could not have been a "congruent and proportional" response to any history and pattern of such violations. *City of Boerne*, 521 U.S. at 520. In *City of Boerne*, the Court held that, "[r]egardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation" because it "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. The same is true here. Interpreting Section 208 to apply broadly to "limited English proficient" voters on a nationwide basis to *any* law enacted in *any* jurisdiction (as Plaintiffs ask this Court to do) is completely out of proportion to the history of state regulation of assistance to blind voters described by the National Federation of the Blind as well as to the structure of the Voting Rights Act more broadly. *Compare* 52 U.S.C. 10308 (Section 208), *with id.* 10503(b)(2), (3)(B) (Section 203, which applies to "limited-English proficient" persons only in "covered jurisdictions").

Further, even assuming that Section 208 applied to "limited English proficient" voters in Arkansas, the link between the injury to be prevented by Congress ("infringe[ment] upon the[] right to a secret ballot," S. Rep. No. 417, 97th Cong., 2d Sess., at 62 n.207 (1982)) and Plaintiffs' misinterpretation of Congress's supposed remedy (a prohibition of *any limit whatsoever* on a person's choice of a trusted assistant) is too attenuated. This is especially the case given that Congress expressly contemplated that some state-created burdens on a voter's right to choose an assistant will be largely permitted. *See id.* at 63 (finding that "State provisions would be preempted *only to the extent that they unduly burden the right* recognized in [Section 208], with that determination being a practical one dependent upon the facts" (emphasis added)).

The remedy that Plaintiffs seek under Section 208, no less than the rights that they claim under the provision, calls into question the limits of Congress's enforcement authority under the Fifteenth Amendment. Applying Section 208 to Plaintiffs runs the risk of pushing the provision beyond Congress's constitutionally permissible limits. This Court should therefore reject Plaintiffs' interpretation of Section 208 and dismiss their Amended Complaint.

E. *Ex parte Young* does not save Plaintiffs' claim.

Claims against state officials in their official capacities are routinely dismissed under the Eleventh Amendment "as redundant of the claim against the [State]." *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010) (citing *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998)). That is because "a suit against a government officer in his official capacity is functionally equivalent to a suit against the employing governmental entity." *Id.* at 1257 (citing *Baker v. Chisom*, 501 F.3d 920, 925 (8th Cir. 2007)).

Although state officials can be subject to suit under *Ex parte Young*, 209 U.S. 123 (1908), that exception to sovereign immunity cannot save Plaintiffs' claim here, for the reasons set forth here and in the next section. But as a first principle, *Ex parte Young* "permit[s] the federal courts to vindicate *federal* rights." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 1984)) (emphasis added). Because any federal enforcement authority under the Fifteenth Amendment would be invalid as applied to Plaintiffs' claim, there is no federal right to vindicate, and the challenged Arkansas law is not an "unconstitutional" (or otherwise-invalid) "legislative enactment." *Id.* at 254. In essence, there is no "ongoing violation of federal law." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). Because an official enforcing Arkansas law does not come into conflict with federal law, he is not "stripped of his official or representative character" for the purpose of being subjected to suit under *Ex parte Young*. *Stewart*, 563 U.S. at 254.

II. Regardless of whether applying Section 208 to "limited English proficient" persons would exceed Congress's enforcement authority, sovereign immunity bars Plaintiffs' claim.

Regardless of the constitutional questions raised by Plaintiffs' misinterpretation of Section 208, they cannot overcome sovereign immunity. Plaintiffs would have recourse against the Secretary and the State Board only under the narrow exception established by *Ex parte Young*. But "the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Properly understood, *Ex parte Young* cannot save Plaintiffs' claim for three reasons in addition to those set forth in the previous section.

First, the detailed enforcement mechanisms of the Voting Rights Act contain no indication that Congress authorized state-officer suits under *Ex parte Young* to enforce it. And "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996).

The Voting Rights Act sets forth a complex framework for the enforcement of statutorily created prophylactic rights. *See* 52 U.S.C. 10301 *et seq.*; *id.* 10501 *et. seq.*; *id.* 10701 *et. seq.* In drafting and amending the Voting Rights Act, Congress could have used existing civil-rights enforcement mechanisms, as it has for other major pieces of legislation. *See, e.g.*, 42 U.S.C. 12133 (making the remedies available under the Civil Rights Act of 1964 available to any person alleging discrimination under the Americans with Disabilities Act). But Congress chose *not* to do that. Instead, it created an independent remedial scheme with a general enforcement mechanism that expressly empowers only the federal government to bring a cause of action based on violations of the Act's provisions. *See* 52 U.S.C. 10308(d). Allowing Plaintiffs to maintain a cause

of action under *Ex parte Young* would generate a judicially created remedy of a sort that the Court has cautioned against and that Congress did not contemplate in creating the Voting Rights Act. So *Young* cannot save Plaintiffs' claim, and the Amended Complaint should be dismissed.

Second, even if this Court created a remedy outside of the Voting Rights Act's enforcement regime, "*Young* . . . does not insulate from Eleventh Amendment challenge every suit in which a state official is the named defendant." *Papasan v. Allain*, 478 U.S. 265, 277 (1986). Rather, state officials can be made defendants only where they are "clothed with some duty with regard to the enforcement of the laws of the state," and where they "threaten or are about to commence proceedings either of a civil or criminal nature to enforce against parties affected an unconstitutional act." *Id.* at 156. "[T]he state officer defendant 'must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131-32 (8th Cir. 2019) (quoting *Ex parte Young*, 209 U.S. at 157).

Here, Plaintiffs do not seek an injunction of any rule established by the Secretary or the State Board. And neither State Defendant has threatened to commence criminal proceedings against Plaintiffs; indeed, neither even has the authority to do so. In particular, the they have *no authority* to prosecute violations of Arkansas Code Annotated section 7-1-103(a)(19) & (b)(1), under which Plaintiffs allege they face criminal prosecution. Am. Compl., DE 79 ¶¶ 12, 32. By suing the Secretary and the State Board, Plaintiffs have impermissibly made them parties as mere representatives of the State of Arkansas. Therefore, the "obvious fiction" of *Ex parte Young* does not apply, *Coeur D'Alene Tribe of Idaho*, 521 U.S. at 270, and Plaintiffs' claim against the Secretary and the State Board is barred by sovereign immunity.

Finally, the *Young* exception does not apply because, as explained below, Plaintiffs' claim fails as a matter of law. Plaintiffs therefore have not adequately pled any "ongoing violation of federal law." *Arneson*, 638 F.3d at 632. Again, their claim is barred by sovereign immunity, and the Court should dismiss the Amended Complaint.

III. Plaintiffs lack standing.

Plaintiffs cannot meet their burden of showing standing for several interrelated reasons. First, Plaintiffs cannot show an injury-in-fact under Section 208. Persons and advocacy organizations (such as Plaintiffs) that are not protected under Section 208 of the Voting Rights Act lack standing to assert the Section 208 rights of third-party voters not before the Court. As explained more fully above, Section 208 was designed to protect the right to a secret ballot of individuals who are disabled or illiterate. But Plaintiff Mireya Reith is not herself disabled or illiterate, so she cannot allege an injury in her own right under Section 208. True, Plaintiffs allege that Section 208 covers "limited English proficient" persons. But Plaintiffs nowhere allege that Ms. Reith is a "limited English proficient" person. So she cannot allege any Section 208 injury in her own right even under this implausible construal. The lack of a personal injury-in-fact cognizable under Section 208 is sufficient to doom her claim.

Nor could Ms. Reith save her claim by pointing to the rights of third parties who allegedly are "limited English proficient." A litigant "generally must assert his own legal rights and interests, and cannot rest h[er] claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (citation omitted) (internal quotation marks omitted). In *Kowalski*, the Supreme Court held that attorneys did not have third-party standing to assert a constitutional challenge on behalf of future clients. *Id*. at 134. In reaching that conclusion, the Court discussed a long line of authorities and observed that third-party standing has been approved only when litigants assert the rights of *known* claimants. *Id.* at 131, 134. Third-party

standing is not appropriate when the litigant asserts the rights of potential future claimants because there is "no relationship at all" between them. *Id.*

But Plaintiffs have not even done that much. They have not alleged the identity of any person desiring voter assistance under Section 208 during *any* election—past or future. In fact, Plaintiffs don't even allege that voters will seek their assistance in any future election. The Amended Complaint's allegations relate *exclusively* to the November 2020 election. *See* Am. Compl., DE 79 ¶ 19. Therefore, Plaintiffs lack third-party standing to assert the Section 208 rights of any third party.

Further, even as to third parties Plaintiffs might hypothetically assist in the future, Plaintiffs have not alleged that they are "blind[], disab[led], or [unable] to read or write" under Section 208's terms. 52 U.S.C. 10508. Because Section 208 applies only to such persons, Plaintiffs have not alleged a Section 208 injury in relation to such third parties, and Plaintiffs lack standing. For the same reasons, it is not possible for "a favorable judicial decision" in this lawsuit to "prevent or redress the injury" that Plaintiffs allege. *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

Arkansas United lacks associational standing for similar reasons. The Supreme Court has repeatedly "required plaintiff-organizations to make specific allegations establishing that *at least one* identified member had suffered or would suffer harm" to support a claim of associational standing. *Summers*, 555 U.S. at 498 (emphasis added). Plaintiffs have failed to specifically allege any such harm, so they cannot show an injury.

Beyond Plaintiffs' lack of any injury, they lack standing to sue the Secretary and the State Board, in particular. The alleged burden on Plaintiffs' ability to assist third parties in voting derives from the possibility of criminal prosecution for violating Arkansas Code Annotated section

7-1-103(a)(19) & (b)(1), *see* Am. Compl., DE 79 ¶¶ 12, 32, which Plaintiffs implausibly claim violates Section 208 of the Voting Rights Act. But, as explained above, there is no threat that the Secretary or the State Board will enforce those criminal statutes because they have no authority to do so. Standing requires demonstrating that some injury is "fairly traceable" to the defendant by showing a causal connection between them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). But there is no causal connection between the State Defendants and any alleged injury to the Plaintiffs. Any injury is therefore not fairly traceable to the State Defendants. Plaintiffs' purported harm likewise is not redressable by a favorable decision because the State Defendants will not prosecute Plaintiffs regardless of whether this Court renders a decision in Plaintiffs' favor. *See Advantage Media v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006) (claim was not redressable where even in victory the plaintiff would be no closer to obtaining the goal of the litigation).

Because Plaintiffs cannot carry their burden to show standing, this Court lacks subject-matter jurisdiction over Plaintiffs' claims, and it should dismiss the Amended Complaint.

IV. Prosecuting attorneys are necessary-and-indispensable parties.

For related reasons, this Court should dismiss this action under Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure because prosecuting attorneys are necessary-and-indispensable parties that Plaintiffs have not joined as defendants.

Prosecution of criminal offenses in Arkansas is decentralized. Statutory authority to prosecute criminal actions belongs not to Secretary Thurston or to the State Board of Election Commissioners but to local prosecuting attorneys. *See* Ark. Code Ann. 16-21-103 ("Each prosecuting attorney shall commence and prosecute all criminal actions in which the state or any county in his district may be concerned.").

In *Chicago, Milwaukee, & St. Paul Railroad Company v. Adams County*, the Ninth Circuit found county boards of commissioners and county treasurers were indispensable parties because they were "specifically designated" by statute as the collectors of the taxes, and that they were in fact the "active agents" in collecting them. 72 F.2d 816, 819, 820 (9th Cir. 1934). The county treasurers had a legal interest in the question of whether a court would order them to refrain from performing their statutory duty. *Id.* at 819. Here the local prosecuting attorneys are charged with the duty to enforce the challenged statute. They unquestionably have an interest in whether this Court enjoins the statute at issue here.

Further, the local prosecuting attorneys are indispensable parties because, as explained above, the Secretary and the State Board are unable to provide the relief Plaintiffs seek. "The question of indispensability of parties is dependent . . . on the ability and authority of the defendant before the court to effectuate the relief which the party seeks." *Adamietz v. Smith*, 273 F.2d 385, 387 (3d Cir. 1960). *Adamietz* affirmed the dismissal of a lawsuit for failure to join indispensable commission members who had sole authority to reinstate the plaintiff to his former position. *Id.* at 387-88. The defendant was "neither able nor authorized" to grant the relief the plaintiff sought. *Id.* at 387.

Similarly here, Plaintiffs ask this Court to enjoin the State Defendants from criminal enforcement pursuant to Arkansas statutes which do not authorize them to prosecute Plaintiffs. The absent prosecuting attorneys are necessary and indispensable—the only entities authorized to bring any criminal enforcement action. *See United Publ'g & Printing Corp. v. Horan*, 268 F. Supp. 948, 950 (D. Conn. 1967) (federal defendants were indispensable parties because judgment will affect both local and federal administrations, and local defendants alone could not effectuate relief); *E. States Petroleum & Chem. Corp. v. Walker*, 177 F. Supp. 328, 333 (S.D. Tex.

1959) (appeals board members were indispensable parties because they are the only parties authorized to allocate the import increase plaintiff sought, and failure to join the board was basis for dismissal of action).

Because local prosecuting attorneys are necessary-and-indispensable parties whom Plaintiffs have chosen not to join, this Court should dismiss the Amended Complaint.

V. Laches bars Plaintiffs' claim.

Plaintiff Reith founded Arkansas United in 2010. Am. Compl., DE 79 ¶ 8. The laws that Plaintiffs challenge have all been in effect since at least 2009—some since 2003. *See* 2009 Ark. Act 658, sec. 1, 87th General Assembly, Reg. Sess. (Mar. 27, 2009) (amending Ark. Code Ann. 7-1-103); *id.*, sec. 3 (amending Ark. Code Ann. 7-5-310); 2003 Ark. Act 1308, sec. 1, 84th General Assembly, Reg. Sess. (Apr. 14, 2003) (amending Ark. Code 7-5-310). As early as "October 2020," Plaintiffs anticipated "that they would face an increase of limited-English voters on Election Day." Am. Compl., DE 79 at ¶ 55. Despite that, Plaintiffs delayed seeking judicial relief until 11:30 PM the night before Election Day. Plaintiffs offer *no excuse* for this monumental delay.

Laches can bar claims of all sorts, even constitutional ones, if two elements are met: (1) a plaintiff inexcusably delays bringing suit, (2) resulting in prejudice to the defendant. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979); *see also Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1182 (9th Cir. 1988); *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619, 631 (S.D.N.Y. 1989).

There is no question that plaintiffs inexcusably delayed bringing this suit. They did not bring suit for ten years. And Plaintiffs' inexcusable delay unduly prejudices Defendants. Undue prejudice exists where election plans were finalized well in advance of a plaintiff's suit, and the State has conformed their election machinery to implement the plan. *Ariz. Minority Coal. for*

Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887, 909 (D. Ariz. 2005). Any injunctive relief at this point would require the abandonment of familiar training and procedures and implementation of entirely new ones. Plaintiffs' delay prejudices not just Defendants but also all of Arkansas's counties—not to mention Arkansas voters.

The running of an analogous statute of limitation is a consideration in determining whether the length of Plaintiffs' delay was unreasonable and resulted in prejudice to Defendants. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979). Further, where "the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required." *Id.* at 807. Here, Plaintiffs delayed their challenge to the Act even beyond Arkansas's analogous three-year statute of limitation for claims of personal injury. Ark. Code Ann. 16-56-105.

Because Plaintiffs' inexcusable delay has prejudiced Defendants, laches bars Plaintiffs' claims, and the Court should deny Plaintiffs' motion.

VI. Plaintiffs cannot state a claim that the challenged law is preempted or violates Section 208 because it does not burden Plaintiffs' purported rights as a matter of law.

The Constitution vests States with a "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Further, federal courts "assum[e] that the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). And courts analyzing Section 208 claims "defer[] to the decision of the elected representatives of the state, provided the challenged regulation does not unduly burden the right to vote." *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). Plaintiffs propose a contrary interpretation of Section

208, one that would grant voters unfettered discretion to bring anyone at all into the voting booth with them. As explained below, that cannot be the correct interpretation of Section 208.

Instead, when enacting Section 208, Congress expressly invoked the Supreme Court's well-established undue-burden standard for election regulations. "In passing § 208, Congress explained that it would preempt state election laws 'only to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts.'" *Priorities USA v. Nessel*, No. 19-13341, 2020 WL 5742432, at *14 (E.D. Mich. Sept. 17, 2020) (quoting S. Rep. No. 97-417, at 63 (1982)). Plaintiffs do not allege that the challenged laws unduly burden their right to vote. Therefore, as with any other regulation of election procedures, the challenged laws are permissible "provided that those restrictions are reasonable and non-discriminatory." *Ray*, 2008 WL 3457021, at *7; *see Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020) (absent a severe burden, the only question is whether Arkansas law "is reasonable, nondiscriminatory, and furthers an important regulatory interest"). Arkansas need not show any compelling interest or tailoring. *Wash. State Grange*, 552 U.S. at 458.

A. The challenged laws are reasonable, nondiscriminatory, and further the compelling interest in election integrity.

The challenged statute here provides that "[n]o person other than [an election official] shall assist more than six (6) voters in marking and casting a ballot at an election." Ark. Code Ann. 7-5-310(b)(4)(B). A violation of this provision is a Class A misdemeanor. *Id.* 7-1-103(a)(19), (b)(1). Poll workers have a duty to maintain a list of the names and addresses of all persons assisting voters. *Id.* 7-5-310(b)(5).

Plaintiffs do not allege that the requirement is discriminatory or unreasonable. Indeed, the statute does not discriminate on the basis of race, sex, age, disability, religion, or political

party. And, like the Texas law in *Ray*, these laws further the important interest in protecting vulnerable populations from fraudulent or manipulative interference with their vote. *See Ray*, 2008 WL 3457021, at *5. The six-voter limit reasonably ensures that a person cannot influence an electoral result under the guise of assisting large numbers of vulnerable voters at the polls. *See* Ark. Code Ann. 7-5-310(b)(4)(B). The requirement that poll workers keep a list of all assistors simply ensures that Arkansas can enforce that six-voter limit. *See id.* 7-5-310(b)(5). And without any sort of criminal penalty attached, Arkansas's voter-privacy laws would be ineffectual. *See id.* 7-1-103(a)(19), (b).

There can be no question that serving these antifraud goals is an important state interest—even a *compelling* one. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (finding the State's interests in preventing voter fraud, increasing voter confidence by eliminating appearances of voter fraud, and easing administrative burdens on election officials are "undoubtedly important"). In fact, Arkansas has an especially egregious and well-documented history of election fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. To be sure, even if Arkansas lacked such an egregious history of election fraud, the State would still "be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

In enacting Section 208, Congress expressly "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 63 (1982). The challenged laws are designed to protect the rights of voters by affording them their choice of a trusted assistant while simultaneously precluding any one person from exercising an outsized influence on the votes of numerous vulnerable persons. Like the statute upheld in *Ray*, Arkansas's laws are well within the latitude retained by the States to regulate the field of persons who may assist voters. 2008 WL 3457021, at *7.

Finally, because Arkansas's laws are justified by Arkansas's compelling interest in the integrity of its electoral process, it would satisfy even the stricter scrutiny reserved for severely burdensome regulations. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process." (citation omitted)).

Because the challenged laws are reasonable, nondiscriminatory, and further the compelling interest in election integrity, Plaintiffs cannot state a claim, and the Amended Complaint should be dismissed.

B. Plaintiffs cannot state a claim because they misinterpret Section 208.

Although Plaintiffs purport to bring two claims, both hinge on a misinterpretation of Section 208 of the Voting Rights Act. *See* Am. Compl. ¶¶ 64-72. Under that provision, "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. 10508.

As already explained, *see supra* pp. 7-9, Plaintiffs incorrectly assume that Section 208 covers persons who are "limited English proficient." Am. Compl., DE 79 ¶ 3. Yet that phrase does not appear in Section 208's text or anywhere in the legislative history of the 1982 Voting

Rights Act Amendments, and that reading is contradicted by the U.S. Code section heading's description of those covered as "illiterate persons." *See* 52 U.S.C. 10508; *see Almendarez-Torres*, 523 U.S. at 234 (section headings are relevant to interpreting statutes). In fact, about a decade after enacting Section 208, Congress chose to add the phrase to an entirely different section of the Voting Rights Act but did not add it to Section 208. 52 U.S.C. 10503 (Section 203); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). Because Section 208 does not apply to "limited English proficient" voters, Plaintiffs cannot plausibly allege that Arkansas law poses any burden at all on their rights.

But, setting that issue aside, Plaintiffs also misinterpret Section 208 in a second way that dooms their claim. Like the plaintiffs in *Ray*, they "ask the court to construe 'a person of the voter's choice' to mean that the voter may choose any person, without limitation." 2008 WL 3457021, at *7. Yet, as that court recognized, under that implausible construction Section 208 would preempt even State *penal laws*. "[T]he State would be forced to honor the voter's choice to have an incarcerated family member [assist him or her]." *Id.* Rejecting that construal, the court instead concluded that "Section 208 empowers the voter to choose the person who will assist him or her, but the voter is not entitled to his or her preferred choice if that choice is reasonably restricted by the State." *Id.*; *see id.* ("The language of Section 208 allows the voter to choose a person who will assist the voter, but it does not grant the voter the right to make that choice without limitation.").

The court noted that the legislative record supported this construction. "The legislative history evidences an intent to allow the voter to choose a person whom the voter trusts to provide

assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals." *Id.* Congress did not intend Section 208 to afford disabled or illiterate persons absolutely unfettered discretion in their choice of a trusted assistant. Permissible limitations could include penal laws, health-and-safety regulations, and laws reasonably designed to combat voter fraud and manipulation of these vulnerable groups. Therefore, "[t]he State retains some latitude to restrict the field of persons who may assist [voters], notwithstanding the provisions of the Voting Rights Act." *Id.* And Plaintiffs' claim fails as a matter of law and must be dismissed.

C. Plaintiffs otherwise cannot state a claim.

Although Plaintiffs speculate that Arkansas law makes their community-organizing activities more difficult, *see* Reith Decl., DE 4-1 ¶ 29, they do not identity even a single voter who has been denied a trusted assistant because of Arkansas law. *See Nessel*, 2020 WL 54742432, at *14 (denying a preliminary injunction based on a Section 208 claim where Plaintiffs failed to point to "individual voters who were denied necessary assistance in the voting process."). At the pleading stage, Plaintiffs surely must at least *allege* the identity of a voter who has been adversely impacted. Especially with the recent election, absent any such allegation, "there is no basis for the court to conclude that [the challenged] law stands as an obstacle to the objects of § 208." *Id.*

Plaintiffs cannot state a claim under Section 208 of the Voting Rights Act. Therefore, the Court should dismiss the Amended Complaint.

VII. If the Court denies this motion to dismiss, the Court should certify threshold legal questions for appeal under 28 U.S.C. 1292(b) and stay discovery.

This motion raises unanswered, threshold legal questions concerning the proper interpretation and application of the Voting Rights Act. Did Congress intend Section 208 to apply to

limited-English proficient persons, or to any such persons in Arkansas, in particular? (No.) *See supra* at 6, 28-29. Did Congress unequivocally declare its intention to abrogate the States' sovereign immunity with respect to such persons? (No.) *See supra* at 9. Did Congress identify any pertinent history of violations? (No.) *See supra* at 12. Did Congress enact a remedy that is "congruent and proportional" to purported harms of the sort that Plaintiffs allege? (No.) *See supra* at 16. Should this Court create a private remedy outside of the Voting Rights Act's enforcement regime? (No.) *See supra* at 18-19. Do persons or advocacy organizations who are not themselves protected under Section 208 of the Voting Rights Act have standing to assert the Section 208 rights of third-party voters not before the Court? (No.) *See supra* at 20-21. Are Section 208 claims governed by the undue-burden legal standard? (Yes.) *See supra* at 25. These questions are not only issues of first impression in the Eighth Circuit but also novel questions of federal law that have yet to receive the considered attention of *any* court of appeals.

If the Court were to deny this motion to dismiss, these questions would appropriately be taken up on interlocutory appeal. First, many of these legal questions are "inextricably intertwined" with the State Defendants' sovereign-immunity defense. *Van Wyhe*, 581 F.3d at 648 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995)). Therefore, an appeal would be appropriate. *See id.*

But, second, this Court should certify these issues for appeal under 28 U.S.C. 1292(b) because they are "controlling questions[s] of law" for which the Court may deem there to be "substantial ground for difference of opinion," and "an immediate appeal" would undoubtedly "materially advance the ultimate termination of the litigation."

The Eighth Circuit has exercised its Section 1292(b) jurisdiction in countless cases that present threshold legal issues in a variety of contexts. *See, e.g.*, *Moore v. Apple Cent., LLC*, 893

F.3d 573 (8th Cir. 2018) (considering whether the Employee Retirement Income Security Act preempts state law, and, hence, whether federal or state law governed plaintiff's claims); *LaCurtis v. Express Med. Transporters, Inc.*, 856 F.3d 571, 576 (8th Cir. 2017) (considering whether a federal regulation is entitled to controlling deference in deciding a claim brought under the Fair Labor Standards Act); *Stokes v. DISH Network, L.L.C.*, 838 F.3d 948 (8th Cir. 2016) (considering whether, under Colorado law, certain satellite-television subscription agreements were illusory and whether the duty of good faith and fair dealing may be applied to require the provider to compensate its customers for programming changes); *Johnson v. W. Pub. Corp.*, 504 F. App'x 531, 532 (8th Cir. 2013) (unpublished per curiam) (considering whether a corporation violated the Driver's Privacy Protection Act by obtaining driver information in bulk with the sole purpose of selling it to third parties who had statutorily permissible uses for the information).[5]

In certifying the legal issue under Section 1292(b), the district court in *LaCurtis* noted that the legal issue it certified was "controlling" because it "could materially affect the outcome of the litigation, as it is the determinative legal issue for purposes of establishing Defendants' liability." *LaCurtis v. Express Med. Transporters, Inc.*, No. 4:15-CV-00427-AGF, 2016 WL 3569751, at *3 (E.D. Mo. July 1, 2016). It noted that there were substantial grounds for a difference of opinion when a question is one "of first impression" or one that "is difficult, novel, and

[5] For the remaining Section 1292(b) appeals decided within the past two decades, see *Perry v. Johnston*, 641 F.3d 953, 955 (8th Cir. 2011); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 874 n.1 (8th Cir. 2011); *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 979 (8th Cir. 2011); *E.E.O.C. v. Allstate Ins. Co.*, 528 F.3d 1042, 1044 (8th Cir. 2008); *Eggleton v. Plasser & Theurer Exp. Von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582, 583 (8th Cir. 2007); *Watson v. Philip Morris Companies, Inc., a Corp.*, 420 F.3d 852, 854 (8th Cir. 2005); *Budler v. Gen. Motors Corp.*, 400 F.3d 618, 620 (8th Cir. 2005); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1051 (8th Cir. 2004); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 834 (8th Cir. 2003); *United States v. Teeple*, 286 F.3d 1047, 1049 (8th Cir. 2002); *Higgins v. Carpenter*, 258 F.3d 797, 799 (8th Cir. 2001).

either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *Id.* The district court in *Moore* observed that if its ruling on the preemption issue were incorrect, then the case would proceed through litigation at the trial level and the Court would likely be reversed on appeal for incorrectly applying ERISA to the factual allegations. *Moore v. Apple Cent., LLC*, No. 5:16-CV-05069, 2017 WL 11195761, at *2 (W.D. Ark. Mar. 16, 2017). It reasoned that "years of potential litigation can be avoided by an interlocutory appeal of this controlling issue." *Id.*

Like *Moore* and *LaCurtis*, this case meets the criteria for certification under Section 1292(b). First, the legal questions are determinative for establishing whether the State Defendants have any liability. Second, the questions presented are questions of first impression that are difficult, novel, and imperfectly guided by only a few prior decisions. And, third, years of potentially fruitless litigation could be avoided by an interlocutory appeal of these issues. It follows that any order denying this motion to dismiss would be well suited for an interlocutory appeal under Section 1292(b).

District courts often stay proceedings pending resolution of an interlocutory appeal under Section 1292(b). *See, e.g.*, *Stokes*, 838 F.3d at 950 n.1 ("Pending this appeal, the district court stayed this case and a case presenting similar issues."); *Moore*, 2017 WL 11195761, at *2 (granting stay pending Section 1292(b) appeal). Likewise, here, a stay of discovery would be appropriate during the pendency of any appeal.

Therefore, in light of the potential for an immediate appeal to the Eighth Circuit, if the Court denies this motion to dismiss, it should certify the threshold legal questions for appeal under Section 1292(b) and stay discovery.

CONCLUSION

For the reasons set forth above, the Court should grant Defendant's motion and dismiss the Amended Complaint; or alternatively, stay discovery and certify an interlocutory appeal.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

Nicholas J. Bronni (2016097)
Arkansas Solicitor General
Vincent M. Wagner (2019071)
Deputy Solicitor General
Michael A. Cantrell (2012287)
Assistant Solicitor General
Michael A. Mosley (2002099)
Assistant Attorney General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2007
Fax: (501) 682-8162
Michael.Cantrell@ArkansasAG.gov

Attorneys for the Secretary of State and State Board of Election Commissioners