No. CV-21-581

IN THE SUPREME COURT OF ARKANSAS

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 — APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS and ARKANSAS UNITED, et al. — APPELLEES

On Appeal from the Pulaski County Circuit Court, Fifth Division
No. 60CV-21-3138 (Hon. Wendell L. Griffen)

Appellants' Brief

LESLIE RUTLEDGE
Arkansas Attorney General
MICHAEL A. MOSLEY (2002099)
Assistant Attorney General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 CENTER STREET, SUITE 200
LITTLE ROCK, ARKANSAS 72201
(501) 682-2081
MICHAEL.MOSLEY@ARKANSASAG.GOV

Counsel for Appellants

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JURISDICTIONAL STATEMENT

Plaintiffs filed suit against the Defendants in their official capacities (RP6), alleging that four acts passed by the 2021 Arkansas General Assembly violate their rights under the Arkansas Constitution. (RP4-38). The Defendants filed a motion to dismiss arguing sovereign immunity bars Plaintiffs' claims. (RP44,46). Plaintiffs amended their complaint. (RP73-120). Defendants again filed a motion to dismiss arguing, *inter alia*, sovereign immunity barred Plaintiffs' claims. (RP157,160).

Plaintiffs argued that sovereign immunity did not apply because they alleged that the acts were unconstitutional and the same operates as an exception to sovereign immunity. (RP345). The Circuit Court denied the Defendants' claim of sovereign immunity, stating: "Here, Plaintiffs allege that the Challenged Provisions are unconstitutional, satisfying the exception to sovereign immunity." (RP515).

Defendants filed the instant interlocutory appeal pursuant to Ark. R. App. P. Civil 2(a)(10) because they are entitled to sovereign immunity from suit. (RP518-520).

Jurisdiction lies in the Supreme Court under Ark. Sup. Ct. R. 1-2, subsection (a)(1) as the case involves the interpretation or construction of the Arkansas Constitution, subsection (a)(4) as it involves election procedures, (b)(1) as it involves issues of first impression, subsection (b)(4) as it involves issues of substantial public inter-

est, subsection (b)(5) as it involves significant issues needing clarification and development of the law, and subsection (b)(6) as it also involves substantial questions of law concerning the construction or interpretation of an act of the General Assembly.

/s/ Michael A. Mosley
Michael A. Mosley
Assistant Attorney General

Counsel for Appellant

STATEMENT OF THE CASE AND THE FACTS

During the 93rd meeting of the General Assembly, the Legislature passed, *inter alia*, four acts involving election mechanics: Act 249, Act 736, Act 973, and Act 728. Act 249 amended Section 13 of Amendment 51 of the Arkansas Constitution to remove the provision allowing a voter to obtain a provisional ballot if he or she fills out a sworn statement indicating that he or she is a registered voter, where the individual lacks photo identification. Ark. Const. amend. 51, § 13. Voter verification cards are provided free by county clerks via equipment provided to the Counties by the Secretary of State's office. Ark. Code Ann. § 7-5-324. Furthermore, if a voter does not have a valid form of photo identification in his or her possession at the time of casting a ballot, he or she may still cast a provisional ballot and, by the Monday following the election, cure the provisional ballot by presenting an acceptable form of photo identification to the county board of election commissioners or the county clerk. Ark. Const. amend. 51, § 13(b)(2)(A) & (b)(4).

Act 249 is compatible with the Arkansas Constitution, including but not limited to Article 3, § 1 as amended by Amendment 99 to the Arkansas Constitution. Article 3, § 1 of the Constitution now requires photo identification to vote. Thus, the citizens of the State clearly expressed their will in the passage of Amendment 99, and nothing in Amendment 99 provides for an "affidavit" exception to photo identi-

fication for an elector. *Id*. Plaintiffs' lawsuit challenges Act 249 and claims it violates Amendment 51, § 19. Plaintiffs claim the Act is not germane and consistent with the policy and purposes of Amendment 51. (RP113-115). Plaintiffs also cursorily claim that Act 249 violates Article 3, § 2 of the Arkansas Constitution ("Right of Suffrage") and Article 2, § 3 (Equal Protection Clause). (RP115).

Relevant to this case, Act 736 added a single word—application—to Ark. Code Ann. § 7-5-404 and omitted the word "records." Ark. Code Ann. § 7-5-404(a)(1)(A). The change to the language of the code was as follows (strikethrough and underlining in original):

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

Act 736 also amended, *inter alia*, Ark. Code Ann. § 7-5-404(a)(2)(A) as follows:

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

Clearly, most of the language in these two provisions pre-dated Act 736. The only additions or changes are the word "application" and the omission of the word "records" from subsection (a)(1)(A) and the addition of the word "application" in subsection (a)(2)(A).

If a signature on an application for an absentee ballot and a signature on a voter registration *application* are not "similar," the individual will be denied an absentee ballot, after having been notified by the county clerk of the rejection and the reason for it and having a chance to "cure the deficiency." Ark. Code Ann. § 7-5-409(a). Most relevant to this suit is subsection (a)(2)(B), which provides that if an absentee ballot is not provided due to the lack of similarity of signatures, the voter is given notice of the rejection and the opportunity to resubmit the request. The voter may also update his or her voter registration, and the signature on the absentee ballot application would only need to be "similar" to the updated registration application signature. Nothing in Act 736 restricts a county election official from comparing the similarity of signatures from an updated application. The requirement that signatures be similar pre-existed Act 736. The signatures must be "similar," not identical, notwithstanding Plaintiffs' mischaracterization of the Act as requiring the signatures to "match."

Plaintiffs challenge Act 736 on the basis that it allegedly impairs their right to vote. (RP108). Plaintiffs also allege that Act 736 violates the Equal Protection Clause of the Constitution at Article 2, § 3. (RP108). Further, Plaintiffs claim that Act 736 violates Article 3, § 1 of the Constitution because it allegedly adds qualifications for voters that are not present in the Constitution. (RP110).

Act 973 amended Ark. Code Ann. § 7-5-404(a)(3)(A) to provide that absentee ballots dropped off in person at the office of a county clerk must be received by the clerk "no later than the time the county clerk's office regularly closes on the Friday before election day." Arkansas is one of only eight States that issues absentee ballots to voters more than 45 days before an election. "Voting Outside the Polling Place, Table 7: When States Mail Out Absentee Ballots," *National Conference of State Legislatures* (Sept. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx. The Act moved the deadline to submit absentee ballots in person back one business day.

Plaintiffs claim that Act 973 violates Article 3, § 2 because it allegedly impairs or impedes the right to vote. (RP111). Further, Plaintiffs claim that the act violates the Equal Protection Clause of the Arkansas Constitution. (RP111-12). Finally, Plaintiffs claim that the act violates the Constitution by allegedly requiring qualifications for voters not present in the Constitution. (RP112).

Act 728 states: "A person shall not enter or remain in an area within one hundred feet (100) of the primary exterior entrance to a building where voting is taking place *except for a person entering or leaving a building where voting is taking place for lawful purposes*." (emphasis added).. A non-exhaustive list of lawful purposes for entering or exiting a polling location is set forth in Ark. Code Ann. § 7-5-

310(a)(3). Plaintiffs allege this is a "voter support ban," and appear to claim a constitutional right to obtain water or a snack while waiting in line to vote. (RP116). Plaintiffs allege that Act 728 violates Article 3, § 2, by allegedly denying voters water and snacks in line waiting to vote. (RP117). Plaintiffs also claim the act violates the Equal Protection Clause of the Constitution. (RP117). Finally, Plaintiffs claim the act violates their rights to speech and assembly under the Arkansas Constitution and claim the act "unconstitutionally criminalizes protected speech and expression." (RP118).

Defendants' filed a motion to dismiss against both the Complaint and Amended Complaint in the Circuit Court below. (RP44,47,157,160). The Circuit Court heard argument on the motion to dismiss the Amended Complaint on October 1, 2021. (RT1). Thereafter, the Circuit Court denied the motion to dismiss and Defendants took this interlocutory appeal. (RP512,518).

ARGUMENT

Plaintiffs have filed suit claiming the four acts are unconstitutional as more specifically detailed in the Statement of the Case and the Facts above. (RP6). Defendants raised the defense of sovereign immunity because Plaintiffs sued them in their official capacities only. *Banks v. Jones*, 2019 Ark. 204, at 3, 575 S.W.3d 111, 114 ("We have extended sovereign immunity to state agencies and state employees sued in their official capacities."). *Id*. The Defendants filed a motion to dismiss arguing, among other things, that sovereign immunity bars Plaintiffs' Complaint. (RP44,46). Plaintiffs then amended their complaint. (RP73-120). Defendants again filed a motion to dismiss the amended complaint, arguing, *inter alia*, that sovereign immunity barred Plaintiffs' claims. (RP157,160).

Plaintiffs argued that sovereign immunity did not apply because they claimed the acts were unconstitutional and the same operates as an exception to sovereign immunity. (RP345). The Circuit Court denied sovereign immunity and stated: "Here, Plaintiffs allege that the Challenged Provisions are unconstitutional, satisfying the exception to sovereign immunity." (RP515). Thus, whether the Plaintiffs have pled an exception to sovereign immunity in this case consistent with Ark. R. Civ. P. 8, entails exactly the same issue raised by Defendants under Ark. R. Civ. P. 12(b)(6) in their motions to dismiss, *i.e.*, that the facts pled by Plaintiffs fail to show that the acts in question are unconstitutional.

Review of whether an exception to sovereign immunity applies necessarily requires review of whether Plaintiffs stated facts upon which relief can be granted. This is because the Court has required Plaintiffs, even Plaintiffs seeking only equitable relief such as declaratory or injunctive relief, to state *facts* showing an exception to sovereign immunity. *Banks*, 2019 Ark. 204, at 4, 575 S.W.3d 111, 115. Even though the Court has recognized an exception to sovereign immunity where a party claims unconstitutional action by the State, the Court said in *Banks*: "A plaintiff seeking to surmount sovereign immunity under this exception is not exempt from complying with our fact pleading requirements." *Id*. As discussed below, Plaintiffs' have failed to plead facts sufficient to demonstrate that the acts in question are unconstitutional, failing to overcome the exception to sovereign immunity, and thus, the Defendants are entitled to sovereign immunity.

I. Standard of Review

De novo review is the proper standard in this appeal. "The determination of whether an official is entitled to claim immunity from suit is purely a question of law." *Smith v. Brt*, 363 Ark. 126, 130, 211 S.W.3d 485, 489 (2005; *Hutchinson v. McArty*, 2020 Ark. 190, at 4-5, 600 S.W.3d 549, 552.

II. Defendants are entitled to sovereign immunity.

An official-capacity claim against a State official is a claim against the State itself. *Harris v. Hutchinson*, 2020 Ark. 3, at 7, 591 S.W.3d 778, 782-83. The Arkansas Constitution "unequivocally" states: "[t]he State of Arkansas shall never be made defendant in any of her courts." *Harris*, 2020 Ark. at *4, 591 S.W.3d at 781 (quoting Ark. Const., art. 5, § 20).

"If a judgment in favor of a plaintiff would operate to control the action of the State or subject it to liability, the suit is one against the State and is barred by the doctrine of sovereign immunity." *Id*. The Court must inquire as to whether the relief requested by the Plaintiffs will serve to control the actions of the State *or* subject it to liability. *Ark. Dept. of Eviron. Qual. v. Al-Madhoun*, 374 Ark. 28, 32-33, 285 S.W.3d 654, 658-59 (2008).

While an exception exists for immunity where a Plaintiff shows the State has acted ultra vires, arbitrarily, capriciously, unconstitutionally, or in bad faith and only seeks injunctive relief, Plaintiffs here cannot make and have not made that showing. As stated, Plaintiffs have relied upon the "unconstitutional" exception to sovereign immunity. *Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at 4, 611 S.W.3d 493, 498; (RP345). A party relying on an exception to sovereign immunity, even in a case such as this seeking only injunctive and declaratory relief, must still plead, with sufficient facts, the exception upon which the party relies. *Banks*, 2019 Ark. 204, at 4, 575

S.W.3d 111, 115; *Hutchinson*, 2020 Ark. 190, at 5, 600 S.W.3d 549, 552-53 ("'[a] complaint alleging illegal and unconstitutional acts by the State as an exception to the sovereign immunity doctrine must comply with our fact-pleading rules.'") (quoting *Williams v. McCoy*, 2018 Ark. 17, at 3, 535 S.W.3d 266, 268); *Wiley*, 2020 Ark. 395, at 4-5, 611 S.W.3d at 498.

The acts are constitutional and are, thus, not ultra vires, illegal, or unconstitutional. "[A]n act will be struck down only when there is a clear incompatibility between the act and the constitution." *Bakalekos v. Furlow*, 2011 Ark. 505, 9, 410 S.W.3d 564, 571. Plaintiffs recognized the identity of the issues involving their proposed exception to immunity and whether they pled sufficient facts on the merits below: "Here, Plaintiffs only seek declaratory or injunctive relief, and, *as just explained above, they have alleged unconstitutional acts*." (RP345). The explanation "above" was Plaintiffs' argument that they pled sufficient facts to establish the alleged unconstitutionality of the acts at issue. Defendants similarly addressed the issue of Plaintiff's allegations in the context of Ark. R. Civ. P. 12(b)(6) in the Circuit Court below. ("*As detailed above*, the acts in question are constitutional and are, thus, not ultra vires or illegal."). (RP189).

As discussed herein, Plaintiffs failed to (a) state facts upon which relief could be granted against the challenged acts and, thus, failed (b) to sufficiently plead facts demonstrating an exception to sovereign immunity.

III. The Applicable Standard to Assess the Acts is Rational Basis.

For Plaintiffs to prevail, they are required to show one or more of the four acts are "clearly incompatible" with the Arkansas Constitution, although "any doubt must be resolved in favor of constitutionality." *Martin v. Haas*, 2018 Ark. 283, at 9, 556 S.W.3d 509, 515. This principle is essential for this Court to assess the Plaintiffs' claims here.

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

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest

> citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id.

The four challenged acts address precisely this principle of integrity in the electoral process. The availability of a provisional ballot which a voter can cure upon showing identification by the Monday following an election, the requirement that a person's identity is verified (Act 736 and Act 249), the prohibition on persons *unlawfully* entering the 100-foot zone at the polls (Act 728), and the requirement that voters return absentee ballots in person a single business day before they were previously due (Act 973), do not implicate the *right to vote*. Rather, at most, the laws at issue involve election mechanics, not the franchise itself. The United States Supreme Court has clearly made a distinction between laws like the acts challenged here and laws that actually implicate the right to vote. The Court reasoned in *McDonald v. Bd. of Election Com'rs of Chicago*, which addressed the Illinois system regarding absentee voting:

> [T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.

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

As a result, the Supreme Court employed rational-basis review. *Id*. at 809. The Court further reasoned:

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

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

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

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

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

The acts should receive rational-basis review. The acts are constitutional and not "clearly incompatible" with the Constitution. Additionally, Plaintiffs' challenge to Act 249 is governed by the standard set forth in Amendment 51, as discussed by this Court in *Martin*, 2018 Ark. 283, at 3-5, 556 S.W.3d at 512-13; that is, whether the act is "germane to, and consistent with," the purposes of Amendment 51. *Id*. at 2. Further, Plaintiffs' claim that some of the acts allegedly add qualifications for voters is incorrect when considering the plain and unambiguous language of the acts.

Finally, Plaintiffs have failed to state facts upon which relief can be granted as to their free speech and assembly claims against Act 728.

Plaintiffs erroneously argue that strict scrutiny applies. The Plaintiffs cited *Davidson v. Rhea*, 221 Ark. 885, 256, S.W.2d 744 (1953), among other cases, for that proposition. However, the Court's opinion in *Davidson* actually supports the *Defendants'* argument. *Davidson*, 221 Ark. at 889, 256 S.W.2d at 746 (adopting the reasoning from *Chamberlain v. Wood*, 15 S.D. 216, 88 N.W. 109 (1901) (emphasis added)). Thus, despite Plaintiffs' contention to the contrary in the Circuit Court, *Davidson* does *not* stand for the proposition that the "right to have one's ballot counted free from arbitrary interference" is a fundamental right requiring strict scrutiny.

Assuming *arguendo* that the acts created any burden Defendants submit the Court should adopt the *Anderson*/*Burdick* test. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the standards set forth in *Anderson* and *Burdick*, unless a "severe burden" on the right to vote has been alleged with sufficient facts rational-basis review should apply. *Republican Party of Pennsylvania v. Cortes*, 218 F.Supp.3d 396, 408 (E.D. Pa. 2016) ("Where the right to vote is not burdened by a State's regulation on the election process, however, the state need only provide a rational basis for the statute.") (citing *Donatelli v. Mitchell* 2 F.3d 508, 514 & n.10 (3d Cir. 1993)); *see also Clingman v. Beaver*, 544 U.S. 581,

593 (2005) ("When a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'")); *see* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 331 (2007) (explaining that review "in nonsevere-burden cases," such as in the case at bar, is "something like rational basis review").

This Court has embraced *Anderson*/*Burdick* in at least one voting case. *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 359-60 (1994) (plurality). In *Hill*, the Court said:

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

Id. (emphasis added). Justice Dudley's concurrence also embraced *Anderson*. *Id*. at 276, 872 S.W.2d 349, 364. Thus, a majority of Justices utilized *Anderson*/*Burdick*.

The *Anderson/Burdick* framework flows from two seminal Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The United States Supreme Court has long recognized that "States possess a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1," and local officials. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Moreover,

while voting is fundamental to our political system, "[i]t does not follow … that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (quotation marks omitted).

Courts apply a sliding-scale analysis to determine the constitutionality of voting laws. *See Burdick*, 504 U.S. at 432 (criticizing "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"). To "discern the level of scrutiny required" under this analysis and, thus, the nature of the interest a State needs in order to justify an election regulation courts must "analyze the burdens imposed" by that regulation. *Green Party of Arkansas (GPAR) v. Martin*, 649 F.3d 675, 681 (8th Cir. 2011). Where a State's election regime "imposes only modest burdens," the State's "important regulatory interests" in managing "election procedures" suffice to justify that regime. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Indeed, "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Alternatively, a more exacting standard, requiring a compelling interest and narrow tailoring, applies only to *severely* burdensome requirements. *See GPAR*, 649 F.3d at 677, 686-87 (upholding Arkansas's requirements for new political parties because "the burdens imposed" were "significantly outweighed by Arkansas's important regulatory interests"). Hence, the Defendants

"need not assert a compelling interest" unless Plaintiffs first establish that the challenged acts impose a *severe burden* on Plaintiffs' rights. *Wash. State Grange*, 552 U.S. at 458.

Plaintiffs have not alleged, via well-pled facts, any *severe* burden on their right to vote *because of* the Acts at issue. Indeed, Plaintiff's failure to allege a *severe* burden coupled with the State's clearly weighty interests in the integrity of elections as discussed below, should be enough to dispense with this case and merit reversal *in toto*.

In *GPAR*, the Green Party complained about, *inter alia*, costs associated with hiring individuals to collect signatures. Plaintiffs allege similar burdens in this case including that, *inter alia*, they will be required to travel to obtain an identification because of the elimination of the affidavit provision to permit a provisional ballot to be counted. Concerning the GPAR's alleged costs, the Eighth Circuit said:

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

GPAR, 649 F.3d at 683.

Because rational-basis review applies, which allows the Court or Parties to hypothesize reasons for challenged legislation, and because a "State's important regu-

latory interests are generally enough to justify reasonable, non-discriminatory restrictions," the Court can decide this case as a matter of law. *See Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005).

The Defendants have asserted many critical, legitimate, and compelling interests justifying the challenged acts including the prevention of voter fraud and the need for organization during elections, which is an important facet of overall election integrity. Plaintiffs have argued below that there is no evidence of voter fraud in the State of Arkansas. Even assuming *arguendo* that Plaintiffs were correct in this allegation, such lack of evidence is not relevant here. In *Crawford v. Marion County Elec. Bd.*, the United States Supreme Court noted that the record contained " … no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. 181, 194 (2008). Nevertheless, because there was no severe burden, the State's *asserted* interests sufficed to justify a voter identification law. *Id*. at 196. The Court said:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. Indeed, the State has the authority to impose prophylactic safeguards to "'deter or detect fraud and to confirm the identity of voters." *Id*. at 197 (internal citation

omitted); *see also Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) ("*Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government."); *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (city need not "present evidence of past instances of voting fraud").

In *Crawford*, the Court also said: "… public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id*. at 197. As discussed herein, the four acts in question do not violate any of Plaintiffs' asserted constitutional rights.

IV. The Acts are Constitutional.

The United States Constitution vests States with "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Elections in the United States have "always been a decentralized activity," with elections administered by local officials and election rules set by state legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *cf.* U.S. Const. art. I, sec. 2, cl. 1. These voting rules must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d

1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015).

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in person on Election Day: the first laws authorizing absentee voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote by absentee ballot. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938). States continue to balance the interests in promoting voting and preventing fraud in a variety of ways, with different States adopting different laws and regulations governing when, how, and where voters may vote. *See* Nat'l Conf. of State Legislatures, *Absentee & Mail Voting Policies in Effect for the 2020 Election* (updated Nov. 9, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx.

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).

A. Act 249 is constitutional.

Act 249 of the 93rd Arkansas General Assembly amended Amendment 51, § 13(b)(4) and (5) of the Arkansas Constitution, which concerns what is known as "fail-safe voting and verification of voter registration." In *Martin*, Haas challenged Act 633 of 2017, which also amended Amendment 51. 2018 Ark. 283, at 3-5, 556 S.W.3d at 512-13. Act 633's amendment to Amendment 51 provided for a comprehensive voter verification and identification scheme within the Arkansas Constitution itself. 2018 Ark. 283, at 3-5, 556 S.W.3d at 512-13.

In this case, Plaintiffs challenge Act 249, which amended Amendment 51, to eliminate the "sworn statement" (usually referred to as the "affidavit") provision of Act 633. That provision was one of two ways a voter could cast a provisional ballot where the voter lacked photo identification on Election Day. However, Act 249 did *not* remove the provision in Amendment 51 from Act 633 that a voter may still cast a provisional ballot if the voter returns to the "county board of election commissioners or the county clerk" by noon on the Monday following the election and presents a document or identification card. That provision is now found at Amendment 51, § 13(b)(4)(A).

Consequently, Amendment 51, as amended by Act 249, still permits a voter without identification on Election Day to cast a provisional ballot and gives the voter six days to return with compliant identification. *See Crawford*, 553 U.S. at 197-98.

As in *Crawford*, in which the State provided free voter IDs, such identification is issued by the counties in the State of Arkansas for free. Ark. Code Ann. § 7-5-324; *Crawford*, 553 U.S. at 198. If a voter returns in that six-day period with compliant identification, his or her provisional ballot will be counted. Any alleged burden created by the Act is not a "severe burden." Thus, rational-basis review applies, and the State's interests are sufficiently weighty to justify the act. Indeed, in *Crawford*, the Court said:

> For most voters who need them, the inconvenience of making a trip to the BMV [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the ***usual burdens of voting***.

Id. at 198 (emphasis added).

Act 249 is compatible with the Arkansas Constitution, in particular the provisions of Article 3, § 1 cited above, as amended by Amendment 99, which give the General Assembly the power to provide by law when a provisional ballot may be counted. Article 3, § 1 of the Constitution requires photo identification to vote. With the passage of Amendment 99, the citizens of the State clearly expressed their will regarding photo identification requirements for voting, and nothing in Amendment 99 provided for an "affidavit" exception to photo identification for an elector. Ark. Const. art. 3, § 1.

Plaintiffs argue the act adds a qualification not present in Article 3, § 1 of the Constitution for voters. However, removing the affidavit provision is simply another step in the implementation of Amendment 99's photo ID requirements, which, again, do not provide for an affidavit as an alternative to photo identification. The act does not *add* a qualification, nor another type of cost or burden, to vote. Rather, it is clearly consistent with Article 3, § 1 as amended. Thus, Plaintiffs' qualification allegation fails and the Circuit Court should be reversed.

Amendment 99 protects the integrity of the vote and is designed to prevent voter impersonation fraud. "Voting fraud is a serious problem in U.S. elections … and it is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *see also* Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* (University of Arkansas Press 2011). Further, "the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake." *Tully v. Okeson*, 977 F.3d 608, 611 (6th Cir. 2020) (citing *McDonald*, 394 U.S. at 807). The question presented here is whether a rational basis exists justifying the amendment to Amendment 51, and even a "conceivable" or hypothetical rational basis suffices to save such a law. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488-89 (1955). Here, election integrity and prevention of fraud are rational bases that serve to justify the law.

Furthermore, Plaintiffs claim the act failed to properly amend Amendment 51. The standard the Court has found appropriate for legislative amendments to Amendment 51 is whether an act, there Act 633 of 2017, is "*germane to the purposes*," of Amendment 51. *Martin*, 2018 Ark. 283, at 9-10, 556 S.W.3d at 515-16 (emphasis added). As Plaintiffs concede in this case, the Supreme Court in *Martin* found Act 633 of 2017 germane to the purposes of Amendment 51. (RP113). Thus, it is necessarily true that Act 249 is germane to the purposes of Amendment 51. Amendment 51 states:

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

Ark. Const. amend. 51, § 1. Act 249 simply removes the conceivable occurrence that someone could utilize the sworn statement, or affidavit, to commit voter fraud. The entirety of Act 633 of 2017 was found constitutional in *Martin*. The Court said:

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

Martin, 2018 Ark. 283, at 11, 556 S.W.3d at 516. The Court also found Act 633 was consistent with the purpose of Amendment 51. *Id*. at 12, 556 S.W.3d at 517. Therefore, because Act 249 only omits one provision of Act 633, which has already been

found constitutional, it is necessarily true that Act 249 is likewise germane to and consistent with the purposes of Amendment 51. Either way, the elimination of the "sworn statement" provision clearly relates to a "system of verifying that a person attempting to cast a ballot is registered to vote," and is, thus, germane and consistent with Amendment 51. *Martin,* 2018 Ark. 283, at 11, 556 S.W.3d at 516.

Plaintiffs also allege that Act 249 violates the Equal Protection Clause of Article 2, § 3. (RP115). However, Plaintiffs' allegations are insufficient to invoke that Clause. To mount an equal protection claim, Plaintiffs must allege and show that they are being treated less favorably than persons who are similarly situated in all relevant respects and must also allege and prove purposeful discrimination. *See Muntaqim v. Kelley*, 2019 Ark. 240, at 7, 581 S.W.3d 496, 501; *Flowers v. City of Minneapolis, Minn.*, 558 F.3d 794, 799 (8th Cir. 2009) (finding that a plaintiff must allege and prove that he or she is similarly situated in all relevant respects to alleged comparators). Persons with compliant identification are not similarly situated to persons lacking identification, and Plaintiffs do not allege purposeful discrimination. *See Second Baptist Church v. Little Rock Hist. Dist. Com'n*, 293 Ark. 155, 161-62, 732 S.W.2d 483, 486 (1987). Thus, their equal protection claim should fail.

Finally, Act 249 does not create a severe burden on the right to vote and Plaintiffs do not allege that it does, which alone justifies reversal. For instance, Plaintiff Dunlap states she does not plan to renew her driver's license. Even if true, that does

not preclude her from obtaining an identification card for free well before the next election. She cannot show harm and certainly cannot show a severe burden, nor does she allege such. Plaintiff Kaplan alleges he moved here in 2019 from Texas and wants to rely on the former affidavit provision of Act 249 to cast a provisional ballot. He recounts his alleged use of the affidavit provision in a recent election. He claims, without explanation, that burdens will exist in obtaining an identification card or other acceptable form of identification. Again, it is currently December of 2021 and he has ample time to obtain a proper form of identification that will enable him to cast a ballot prior to both the 2022 primaries and the 2022 general election, as do all of the Plaintiffs. Their unwillingness to do so simply has no bearing on the constitutional validity of Act 249, and alleging that such a self-imposed burden was created by the act is unreasonable.

B. Act 736 is constitutional.

Plaintiffs challenge Act 736 of the 93rd Arkansas General Assembly which amended, *inter alia*, Ark. Code Ann. § 7-5-404(a)(1)(A). The subsection now states:

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

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

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

All but three words of the language in these two provisions pre-existed Act 736. The only addition to or changes are the words "application" and "records." If a signature on an application for an absentee ballot and a signature on a voter registration *application* are not "similar" the individual will *likely* (because of the cure provisions noted below) be denied an absentee ballot. Under other existing provisions of that statute, specifically subsection (a)(2)(B), if an absentee ballot is not provided due to the lack of similarity of signatures, the voter is given notice of the rejection and the opportunity to resubmit the request. The voter may also update his or her voter registration, and the signature on the absentee ballot application would only need to be "similar" to the updated registration signature. The signatures must be "similar," not identical, notwithstanding Plaintiffs' mischaracterization of the language of the code reproduced in, but not changed by, Act 736.

In fact, the Court should disregard Plaintiffs' continued misreading of Act 736, which does not require signatures to "match," because, to consider it, the Court would have to add a word to the Act that is not present. The Court has repeatedly said:

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

Our Community, Our Dollars v. Bullock, 2014 Ark. 457, at 18, 452 S.W.3d 552, 563. Below, the Judge used a dictionary to review the word "similar," and found it

defined as "alike, resembling something but not the same." (RT16). The plain and unambiguous language of the act only requires that a signature on one document be "alike," or to resemble the compared signature but not be identical or the same.

Similarity comparison is a legitimate way to ensure the integrity of the election in a broader sense and to avoid fraud. It does not preclude an individual from voting in person if he or she otherwise establishes his or her identity and, thus does not impair, interfere with, or impede the right to vote.

Plaintiffs also claim Act 736 violates equal protection. Here, any putative voter who submits an application for an absentee ballot is demonstrably not similarly situated in all relevant respects to an individual voting in person. *See Muntaqim*, 2019 Ark. 240, at 7, 581 S.W.3d at 501; *Flowers*, 558 F.3d at 799. And, because the putative voter who wishes to cast an absentee ballot is not present at the polls for a poll worker to verify his or her identity, the legitimate and compelling governmental interest in avoiding voter fraud further justifies the act. "Voting fraud is a serious problem in U.S. elections … and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31; *see also* Glaze, *Waiting for the Cemetery Vote*. Moreover, Plaintiffs do not allege purposeful discrimination, which independently requires reversal. *See Second Baptist Church*, 293 Ark. at 161-62, 732 S.W.2d at 486.

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

> (b)(1) In addition to the qualifications under subsection (a) of this section, the General Assembly shall provide by law that a voter shall:
> (A) Present valid photographic identification before receiving a ballot to vote in person; and
> (B) Enclose a copy of valid photographic identification with his or her ballot when voting by absentee ballot.

Ark. Const. art. 3, § 1. These provisions were part of Amendment 99 to the Arkansas Constitution and amended Article 3, § 1. That Amendment became effective in 2018. Thus, Plaintiffs' citation to *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844 below is irrelevant.

The act is not "clearly incompatible" with the Constitution. It does not add any additional criteria for a voter to exercise his or her right to vote; it merely implements other provisions of Article 3, § 1, which clearly require a voter be registered and voting lawfully.

C. Act 973 is constitutional.

Act 973 amended Ark. Code Ann. § 7-5-404(a)(3)(A) to provide that absentee ballots dropped off in person at the office of a county clerk must be received by the clerk "no later than the time the county clerk's office regularly closes on the Friday before election day." Arkansas is one of only eight States that issue absentee ballots to voters 45 days or more before an election. Given the amount of time Arkansas

allows before an election for a voter to receive, complete, and return an absentee ballot, there is more than ample time for anyone with an absentee ballot to mail it to the county election officials.

Plaintiff Rust claims that in the 2020 general election, he dropped his ballot off on the Saturday before the election. (RP83). So, the new deadline is simply one calendar day back for Plaintiff Rust. Asking the Court to act in equity when the Plaintiff's claim is that a self-imposed burden will impair his right to vote is not warranted.

Here, allowing counties an additional day before Election Day to receive and begin canvassing absentee ballots will promote efficiency and organization and avoid counties' being inundated with hand-delivered absentee ballots closer to the election. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Thus, the act is constitutional.

Plaintiffs' equal protection challenge and voter qualification challenge should also fail. A voter, voting in person, is not similarly situated to a voter dropping off

an absentee ballot. The interest in organization regarding the receipt of absentee ballots is legitimate and is not similar to the circumstances of a voter who votes in person. Further, Plaintiffs did not allege purposeful discrimination against the act. Plaintiffs finally alleged the changed drop-off deadline added qualifications for voters allegedly in violation of the Constitution. Plaintiffs claim on this point likewise fails and they simply have failed to make any persuasive argument regarding the deadline for drop-off of absentee ballots. *See* (RP112).

D. Act 728 is constitutional.

Act 728 of the 93rd General Assembly provides that "A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place *except for a person entering or leaving a building where voting is taking place for lawful purposes*." (emphasis added). The act precludes persons unlawfully entering a polling location or loitering in the 100-foot zone. Electioneering is defined as "display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot." Ark. Code Ann. §7-1-103(a)(C)(i).

Here, Plaintiffs allege that Act 728 directly "impair[s] and forfeit[s]" the voting rights of their organization and its members allegedly in violation of Article 3, § 2. Plaintiffs allege that Act 728 bars voters from obtaining basic sustenance and therefore forces voters to choose between leaving the line and their health and safety.

The act only limits any *unlawful* act within the one hundred foot (100') zone. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (finding the 100-foot zone passes strict scrutiny). Nothing prohibits anyone from leaving an ice chest with water in that zone. The act does not prevent a voter with a disability from bringing an assistor into that zone, nor could it considering Ark. Code Ann. § 7-5-310. Further, the act does not prevent a voter from bringing a dependent with him or her inside that zone. Plaintiffs impermissibly add words to the act that are not present which is impermissible. *Bullock*, 2014 Ark. 457, at 18, 452 S.W.3d at 563.

Furthermore, Plaintiffs mischaracterize the act and its alleged effects. For instance, Plaintiff Kaplan claims that he requires assistance from his daughter or another family member to vote in person at a polling location. (RP82). Nothing in Act 728 would preclude Plaintiff Kaplan from bringing his daughter or other family member with him, given the act's plain and unambiguous language and also considering Ark. Code Ann. § 7-5-310(b)(2)(B). Furthermore, Plaintiffs' concerns that the act will harm persons with difficulty standing in line due to physical, sensory, or other disability is clearly inaccurate where Ark. Code Ann. § 7-5-310(c) explicitly permits such an individual to skip the line.

Nowhere in the language of the act is any organization or individual, such as one of the Plaintiffs, barred from providing sustenance 100 feet from the "primary exterior entrance to a building, where voting is taking place …" § 7-1-103(a)(23).

Further, Act 728 does not prevent any organization or individual, such as the Plaintiff Organizations, from leaving coolers full of water or snacks within 100 feet of the "primary exterior entrance to a building, where voting is taking place …" *Id*. Likewise, the act does not prohibit any organization or individual from positioning themselves outside of the 100-foot zone with water and snacks.

In their complaint, Plaintiffs mention that in 2020, voters in Pulaski County endured wait times as long as four hours; given wait times that long, lines must necessarily have stretched more than 100 feet from the "primary exterior entrance[s]" of some polling sites, allowing organizations and individuals such as the Plaintiffs to engage in the very conduct they claim is unduly burdened by Act 728. The act does not violate Article 3, § 2, of the Arkansas Constitution.

Plaintiffs also allege an equal protection claim per Article 2, § 3. The act does not treat similarly situated individuals differently and applies the provision at issue to anyone. It has a rational basis in that it prevents attempts to thwart other electioneering restrictions and prohibits loitering in the 100-foot zone. The act further protects the integrity of elections and serves to provide a safe venue for voters to vote without fear of intimidation. Finally, Plaintiffs do not allege purposeful discrimination.

Finally, Plaintiffs claim a "free speech" violation relative to this new act in a conclusory manner. Plaintiffs failed entirely to develop this claim below. The United

States Supreme Court has already found that the 100-foot zone passes strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Here, the act is content neutral and, again, should receive rational-basis review which, as discussed above, it passes. But, assuming *arguendo*, the Court were to disagree and find the act was required to pass strict scrutiny, the United States Supreme Court decision justifies the act here. Indeed, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citation omitted) (emphasis in original)). Act 728 is content-neutral and does not implicate the right to speech or expression at all. Again, Plaintiffs graft language onto the Act that simply is not present. They argue: "Act 728 prohibits Plaintiffs from handing water to voters who are waiting in line and within 100 feet of the polling place." Nowhere does the Act mention handing out water to anyone; the Act prohibits loitering in the 100 foot zone and further supports the prohibition on electioneering in that zone the United States Supreme Court has already found passes strict scrutiny. *Burson*, 504 U.S. 191 (1992).

The Act is content-neutral by its plain language. Unless the Plaintiffs are seeking to engage in electioneering within the 100-foot zone, which is lawfully prohibited, or loiter in that zone, they have not violated the law. Preventing voter intimidation is a legitimate and compelling governmental interest. The act is designed to

prevent voter intimidation. Plaintiffs have simply engaged in writing their own act to argue their speech claim; they have not discussed the actual language of Act 728 and their claim against it must fail.

CONCLUSION

For the foregoing reasons, the Circuit Court should be reversed and the case should be dismissed.

REQUEST FOR RELIEF

For all of the reasons set forth above, the Court should reverse the circuit court's denial of the motion to dismiss with instructions to dismiss the amended complaint with prejudice.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
MICHAEL A. MOSLEY (2002099)
Assistant Attorney General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
Michael.Mosley@ArkansasAG.gov

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 in that all "confidential information" has been excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

Further, this brief complies with the word-count limitation and has 8,342 words

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Michael A. Mosley
Michael A. Mosley

CERTIFICATE OF SERVICE

I certify that on December 29th, 2021, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will send notification of the filing to any participants.

/s/ Michael A. Mosley
Michael A. Mosley