IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

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

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

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

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Come Now Defendants, in their official capacities, by and through Attorney General Leslie Rutledge and Assistant Attorney General Michael A. Mosley, and for their Brief in Support of Motion for Summary Judgment herein state and allege:

I. INTRODUCTION

During the 93rd General Assembly, the Legislature passed, *inter alia*, four acts involving election mechanics: Act 736, Act 973, Act 249, and Act 728. Act 736 added a single word—application—to Ark. Code Ann. § 7-5-404. The Act requires that a voter's signature on an absentee ballot application be "similar" to the signature on his or her voter registration application record. Act 973 moved the deadline for voters to turn in absentee ballots one business day back, from the Monday before the election

to the Friday before the election. Act 249 amended Amendment 51 of the Arkansas Constitution to remove the provision allowing a voter to cast 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 required photo identification. Finally, Act 728 prohibits remaining within 100 feet of a the primary entrance to a place where voting is occurring, except it permits persons to be within the 100 foot zone if they are entering or leaving a building in that zone for a lawful purpose.[1]

Plaintiffs—organizations and/or associations and individuals—bring suit against Defendants in their official capacities, i.e., the State of Arkansas, challenging the four acts. The Plaintiffs initially filed suit, and the Defendants moved to dismiss the Complaint. Plaintiffs then amended the Complaint. The Amended Complaint added individual Plaintiffs rather than just the organization and/or associations. *See Amended Complaint*, ¶¶ 17-21. It also added various allegations regarding Arkansas United in paragraphs fifteen and sixteen. *Amended Complaint*, ¶¶ 15-16. Otherwise, the Amended Complaint was not materially different from the original Complaint.

Plaintiffs claim, *inter alia*, that the Acts violate their members' voting rights under the Arkansas Constitution. Plaintiffs allege violations of the Equal Protection Clause found in the Arkansas Constitution at Article 2, § 3, and the "Right of Suffrage" provisions found at Article 3, § 2. Plaintiffs also challenge Act 249 and claim that it fails to "effectively amend" Amendment 51 of the Arkansas Constitution, based

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

on the standard set forth in Amendment 51, §19 for such amendments. *Amended Complaint* ¶¶ 161-164. Additionally, Plaintiffs allege that some of the acts create qualifications for voters not found in Article 3, § 1 of the Arkansas Constitution. Finally, Plaintiffs claim that Act 728 violates their rights to free speech and expression under the Arkansas Constitution.

Plaintiffs erroneously claim 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. However, the four acts do not impair or impede the right to vote itself at all; rather, the acts involve election mechanics only. Thus, strict scrutiny does not apply, although, assuming *arguendo* a more rigorous standard did apply, the challenged acts would survive any such review. Nevertheless, the standards that apply here are as follows: whether the Acts are "clearly incompatible" with the Arkansas Constitution, and rational-basis review.

Because all four acts pass the applicable standards of review on the undisputed facts, they are constitutionally valid. Further, and independently, the Defendants are entitled to sovereign immunity. Consequently, this Court should grant summary judgment.

II. BACKGROUND

The United States Constitution vests States with "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Elections in the United States have "always been a decentralized activity," with elections administered by local officials and election rules set by state

legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *cf.* U.S. Const. art. I, sec. 2, cl. 1. These voting rules must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (noting that election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in person on Election Day: the first laws authorizing absentee voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote by absentee ballot. *See* Paul G. Steinbicker, "Absentee Voting in the United States," 32 Am. Pol. Sci. Rev. 898, 898 (1938). Today, while all States permit some form of absentee voting, States continue to balance the interests in promoting voting and preventing fraud in a variety of ways, with different States adopting different rules governing when, how, and where voters may vote.[2]

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

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

III. UNDISPUTED MATERIAL FACTS

All of the Plaintiffs were deposed during discovery in this matter. Their testimony confirms that they lack standing and that they cannot demonstrate via proof any severe burden on the right to vote.

Plaintiff Patsy Watkins testified that she voted in person in the last two general elections, not by absentee ballot. **Exhibit A, Deposition of Patsy Watkins**, 5:10-12. She is a member of the League of Women Voters (LOWV) of Arkansas. *Id.* at 6:7-9. Notwithstanding the allegation that she has not updated her voter registration, and, thus, her signature on file, she testified that she has moved several times and has updated her registration each time. *Id.* at 6:10-18. She suspects she did sign a document each time she updated her registration. *Id.* 6:19-21. While Ms. Watkins alleges that she is concerned her registration signature will not "match" her signature on an absentee ballot application, she has not voted via absentee ballot in the last two elections as stated. *Id.* at 8:10-16. Indeed, in the next election in 2022 she claims she does not know whether she will vote in person or not. *Id.* at 10:10-13. She conceded that whether she votes in person is her personal choice. *Id.* at 10:14-18.

Ms. Watkins is Caucasian. *Id.* at 12:25—13:1. While in line waiting to vote in the 2020 general election, no one offered Ms. Watkins water or a snack while within

the 100-foot zone. *Id*. at 14:2-6. Ms. Watkins further testified that, had someone left an ice chest in the 100-foot zone with a sign that said "free water for anyone" she probably would have taken a free water. *Id*. at 17:7-13. Ms. Watkins is not planning on giving up her driver's license any time soon. *Id*. at 17:23-25.

Ms. Watkins understands that fraudulent voting is a crime. *Id*. at 18:1-2. She agreed further that preventing crime is a laudable purpose. *Id*. at 18:3-5. Ms. Watkins pays any bills she has to mail within 24 hours of receiving them, by choice. *Id*. at 18:16-24. Critically, Ms. Watkins conceded that the laws challenged in this lawsuit allegedly create obstacles to voting that "may seem to be very small." *Id*. at 21:20-25, 22:1-3, 22:18-21. Also critically, when asked if she signed her name twice, whether she could tell if the two signatures appeared "similar," Ms. Watkins testified: "I suppose." *Id*. at 24:1-8.

Plaintiff Nell Mock is likewise a Caucasian female. She testified that she registered to vote in Arkansas in 1992, but registered at her current address in 2001. **Exhibit B**, **Deposition of Nell Matthews Mock**, 10:9-13. Upon registering in 2001, she signed an application to register. *Id*. at 10:14-24, 11:13-18. Despite having arthritis in her hand, Ms. Mock speculated that if she filled out her absentee application packet in the morning before having done a lot with her hand during the day, her signature would be more like her signature when she registered in 2001. *Id*. at 14:18-24. Furthermore, because of her arthritis, Ms. Mock plans to update her registration application. *Id*. at 15:1-7. Significantly, the Pulaski County Circuit Clerk even recommended that Ms. Mock update her registration application. *Id*. at 15:8-14.

Ms. Mock voted via absentee ballot in both the 2020 general election and in a runoff election in 2020. She conceded she was able to mail her general election ballot to the county in sufficient time. *Id*. at 16:6-8. While she got busy before the runoff election and had two weeks still to submit her absentee ballot, she decided by choice to drop off her ballot for the runoff at the county office. *Id*. at 16:16-25. Ms. Mock owns a car, drives, and does not plan to give up her driver's license any time soon. *Id*. at 18:1-11.

Ms. Mock voted in person in a 2021 library millage election. *Id*. at 19:19-22. Her polling location is within walking distance of her home. *Id*. at 19:23-25. When she pays bills via United States Mail, she pays them as soon as she receives them. *Id*. at 23:21-25. She agrees that paying bills is an effort people must put forth on their own. *Id*. at 24:4-8. She agrees that knowing when a bill is due and planning are required to ensure timely delivery of payments she sends. *Id*. at 25:10-19. She is aware that in Arkansas a registered voter can receive an absentee ballot at least 45 days before an election. *Id*. at 25:20-23. Despite her allegation that she is concerned about mail delivery, she chose to use the mail to send her absentee ballot to the county during the 2020 general election. *Id*. at 27:9-25. Indeed, she conceded she had "ample opportunity to get the ballot, look at it, fill it out, send it in, put it back into its envelope, take it to the post office and it was a good – I would have to look at the date stamp again, but it was a good two weeks before the Tuesday general election." *Id*. at 27:21-25; 28:1. She agreed she had plenty of time to perform those tasks. *Id*. at 28:2-8.

Another individual Plaintiff, Leon Kaplan, testified via deposition in this action. **Exhibit C**, **Deposition of Leon Kaplan**. Mr. Kaplan is a 79 year old Caucasian male, has a car, and has an Arkansas driver's license. *Id.* at 6:23-25 – 7:1-3. Despite his allegation in the amended complaint that he planned to rely on the sworn statement to cast a provisional ballot in the next election, that is not his plan per his testimony. *Id.* at 7:4-6. In fact, Mr. Kaplan recently voted in person at a local election. *Id.* at 7:7-16. Mr. Kaplan used his driver's license to vote at that election, not a sworn statement. *Id.* at 11:13-14; 27:17-21. Mr. Kaplan has a disability tag on his car, and his daughter (or another person) would assist him at a polling location if he needed such assistance. *Id.* at 11:23-24; 12:3-14; 15:2-5. Mr. Kaplan erroneously believes Act 728—which Plaintiffs have dubbed a "voter support ban"—includes the term "assistance" in its text. *Id.* at 22:11-21.

Plaintiff Jeffrey Rust is also a Caucasian male. He voted in a recent sales tax election. **Exhibit D**, **Deposition of Jeffrey Rust**, 11:2-3. At that election, he voted in person. *Id.* at 11:11-12; 32:10-14. During that event, his wife accompanied him into the polling location. *Id.* at 32:15-16. He does not usually vote by absentee ballot, but did in the 2020 general election. *Id.* at 11:21-22. Mr. Rust has various disabilities including chronic neck and back pain. *Id.* at 12:3-9. Mr. Rust still drives. *Id.* at 15:19-20.

Despite the allegation in the Amended Complaint that Mr. Rust dropped off his absentee ballot for the 2020 election the Saturday before the election, he testified it actually might have been a week before the election. *Id.* at 33:3-21. He testified

that he had plenty of time after receiving his absentee ballot to fill it out and drop it off early. *Id*. at 34:6-17. At his deposition, Mr. Rust was asked to sign his name three times. He then agreed that his signatures were "similar." *Id*. at 36:20-22 – 37:1. He agreed, although he had not previously thought about it, that he could update his voter registration signature with the county. *Id*. at 44:1-18.

Ms. Dortha Dunlap is also a Caucasian Plaintiff in this action. **Exhibit E**, **Deposition of Dortha Dunlap**. Ms. Dunlap voted via absentee ballot in the 2020 general election. *Id*. at 6:11-15. She registered to vote in Arkansas in 2017. *Id*. at 6:24-25 – 7:1. She testified that if she has a "good, solid place that she is writing on and it's not a bad day," her signature is probably closer to her voter registration signature. *Id*. at 8:20-25 – 9:1-2. She has no knowledge of whether her ballot was accepted or rejected in 2020 for the general election. *Id*. at 9:21-23. She is proactive in paying bills via mail with a check, and does so within two or three days of receiving a bill. *Id*. at 10:5-13. That, she agrees, is her choice. *Id*. at 10:14-15. For the 2020 general election, she mailed her absentee ballot in, rather than dropping it off. *Id*. at 10:17-25. She did so early enough so that it would be received on time by her county. *Id*. She owns a car and drives occasionally. *Id*. at 12:1-4. She currently has a valid driver's license and does not need to renew it for a while. *Id*. at 13:10-21. Despite her allegation in the amended complaint that she requires assistance at a polling location because she uses a walker, she has not voted in person in about five years. *Id*. at 14:12-23. Indeed, she prefers not to vote in person. *Id*. at 15:3. Crucially, Ms. Dunlap has worked for a county processing votes and agrees it can be chaotic. *Id*. at 16:8-25.

Bonnie Miller is the president of the League of Women Voters of Arkansas, and was deposed as LOWV's witness under Ark. R. Civ. P. 30(b)(6). **Exhibit F**, **Deposition of Bonnie Miller**, 5:18-21. LOWV allegedly has 323 members in the State of Arkansas. *Id*. at 8:6-11. LOWV does not keep demographic information regarding its members. *Id*. at 8:17-19. Specifically, LOWV cannot provide an exact number of African-American members of LOWV. *Id*. at 8:20-23. Two individual Plaintiffs in this lawsuit, Nell Mock and Dortha Dunlap, are members of LOWV and both are Caucasian females. *Id*. at 9:23-25.

Ms. Miller has not been the president of LOWV during a national election. *Id*. at 10:22-25. LOWV hosts monthly training sessions at which it discusses how to register to vote, voting laws, and election laws. *Id*. at 13:15-19. These trainings occur year round. *Id*. at 13:23-24. Since the pandemic began, LOWV has hosted the trainings only via Zoom. *Id*. at 14:2-3. The meetings are open to LOWV members and the general public. *Id*. at 14:7-11. The only cost associated with the trainings is a Zoom subscription. *Id*. at 48:12-16.

LOWV was aware of the four acts challenged in this lawsuit immediately after the 2021 General Assembly. *Id*. at 15:12-14. While Ms. Miller solely uses a PowerPoint presentation for the monthly meetings, she has not included the information about the four acts challenged in this case in that presentation. *Id*. at 16:2-5; 26:21-23. She has not made any changes to the PowerPoint presentation since she became the president of LOWV. *Id*. at 16:25 – 17:1-2. LOWV understands the new acts challenged in this case, but apparently does not plan to update the

PowerPoint presentation to reflect them. *Id*. at 17:17-24. Nevertheless, at the monthly trainings, LOWV does discuss the new acts, and does not need to include them in the PowerPoint presentation because they are discussed verbally. *Id*. at 18:4-13.

LOWV also hosts "forums" and "town halls" during each year. *Id*. at 19:10. LOWV does not keep track of persons who attend their trainings, forums, or town halls. *Id*. at 21:11-13. At trainings since she has been president of LOWV, Ms. Miller is "sure" the change created by Act 973 regarding the deadline to drop off an absentee ballot has "come up." *Id*. at 26:7-17.

LOWV, via Ms. Miller, later testified that the purpose of the monthly meetings is *not* to teach people about new election laws. *Id*. at 27:18-25 – 28:1; 28:17-20. LOWV publishes a book entitled *Government in Arkansas*. *Id*. at 19:11-12. Ms. Miller testified that the book LOWV publishes has not been updated since the last legislative session. *Id*. at 29:21-23. However, the LOWV website claims that the book was, in fact, updated after the 2021 session. *Id*. at 38:14-21; *see also* https://my.lwv.org/arkansas/government-arkansas. Crucially, LOWV does not even know whether it pays the authors of *Government in Arkansas* to update the book after a legislative session. *Id*. at 31:22-24. LOWV does not know how much it cost the last time LOWV updated the book. *Id*. at 33:19-22; 49:3-15. The book is available online for anyone to access free of charge. *Id*. at 32:5-9; 33:9-12. LOWV does not know how much money is in its general account. *Id*. at 34:16-19. Ms. Miller agreed that, after each change in the law, *i.e.*, after each legislative session, the book becomes obsolete.

Id. at 36:8-10. Also importantly, LOWV utilizes materials provided for free to the public from the Secretary of State's website and the State Board of Election Commissioners' website. *Id*. at 36:19-23.

While Plaintiffs claim that the four acts challenged here will allegedly have a negative cumulative effect on voting, LOWV understands that Act 973 (regarding the drop off deadline for absentee ballots) and Act 728 (regarding the 100-foot zone) cannot operate together because they involve two different types of voters, *i.e.*, absentee voters and individuals voting in person, respectively. *Id*. at 44:12-24. LOWV cannot name anyone who has volunteered to perform any activity within the 100-foot zone at a polling location at any time. *Id*. at 54:3-13. LOWV has no information about whether any of its members voted via absentee ballot at the 2020 general election. *Id*. at 55:10-13. LOWV has no information about whether any of its members used the sworn statement, in lieu of identification, to vote in the 2020 general election. *Id*. at 55:14-19. LOWV has no knowledge of any member having his or her ballot rejected because of a dissimilar signature. *Id*. at 55:20-25.

LOWV cannot name a single individual, including any member of LOWV, who had an absentee ballot rejected because it was dropped off after the Friday before any election [after Act 973 became law]. *Id*. at 61:22-25 – 62:1-4. At recent local elections, following passage of Act 728, no member of LOWV sought to appear at a polling location in the 100-foot zone. *Id*. at 56:9-21. LOWV believes that it set up within the 100-foot zone at a location in Pulaski County, but does not know the polling location and there were no issues that occurred. *Id*. at 56:22-25 – 57:1-5. Additionally, LOWV

cannot name a single person it allegedly assisted in the line at a polling location, within the 100-foot zone. *Id*. at 58:19-24. LOWV agrees that it would have to speculate or guess that the four challenged acts in this case will allegedly disenfranchise a voter. *Id*. at 62:10-14.

Leslie Mireya Reith is the founder and executive director of Arkansas United ("AU") and testified as AU's witness pursuant to Ark. R. Civ. P. 30(b)(6). **Exhibit G**, **Deposition of Leslie Mireya Reith**, 5:4-7. AU does not possess or track the demographic information of its members. *Id*. at 7:5-9. Ms. Reith claimed that AU educates its members regarding election laws in Arkansas. *Id*. at 19:4-12. Ms. Reith agreed that election laws can change as often as every two years, after each General Assembly. *Id*. at 19:13-15. Importantly, AU is already equipped to change its educational materials when election laws change. *Id*. at 19:16-18. While Ms. Reith claimed that updating educational materials is outside of the scope of any grant AU receives, she later testified that AU's "general support" grant includes education as a reason for receiving funds. *Id*. at 62:2-11; 64:7-9. She conceded that changing educational materials AU possesses is something AU already does and has done for 10 years. *Id*. at 19:19-20; 21:20-22. Therefore, (a) any allegation of diversion of resources is inaccurate because AU *does* have a grant that includes funds for educational sources, and (b) even before the 2020 general election, AU had to update educational materials. *Id*. at 20:18-20. More crucially, AU's mission is not education. *Id*. at 21:7-10.

Most importantly, AU has no information—other than its own speculation—regarding the effect the four challenged acts in this case will allegedly have on AU's members. *Id*. at 64:21-24. AU conceded that it is not contending the challenged laws will affect its members any more than they allegedly affect nonmember Caucasian individuals. *Id*. at 48:13-18. AU also conceded it has not offered education on the new laws since they were passed. *Id*. at 53:3-7; 22:13-14. According to Ms. Reith, one reason AU has not offered such education is the pandemic. *Id*. at 56:10-11. This is despite the fact that AU held a state convention in November of 2021. *Id*. at 56:24. At the convention, AU put together a 100-page binder, but again, the binder does not include materials reflecting the new laws AU challenged here. *Id*. at 59:7-9. That was AU's choice. *Id*. at 60:1-3. AU agreed that if the Secretary of State ("SOS") or State Board of Election Commissioners ("SBEC") updated their online training materials for poll workers and others to reflect the new laws, that would obviate the need for AU to prepare such materials. *Id*. at 60:21-25 – 61:1.

AU has no information that it has kept reflecting the use of the "sworn statement" by any one of its members to cast a provisional ballot. *Id*. at 57:15-21. AU has no data whatsoever reflecting that any member's absentee ballot was rejected because his or her signature was not similar. *Id*. at 60:7-10. At a recent local election, after passage of the challenged acts, AU did not provide any voter assistors for its members or others. *Id*. at 60:13-16. At the 2020 general election, AU claims it provided water outside of the 100-foot zone. *Id*. at 67:24-25 – 68:1-5; 69:16-19.

AU erroneously believes that Act 736 requires signatures to exactly match, despite no language at all indicating that is the case. *Id*. at 27:18-20. AU has no knowledge about what signatures, other than voter registration application signatures, could be considered for similarity by county election officials before Act 736. *Id*. at 28:10-18; 29:11-14. AU is aware that voters can update their registration applications, and AU provides awareness campaigns "every election cycle" to advise persons they can update their signatures. *Id*. at 30:20-25. During the 2020 general election cycle—before the enactment of the acts challenged in this case—AU already provided education to its members regarding when absentee ballots must be dropped off. *Id*. at 32:25 – 33:1-3.

AU, via Ms. Reith, testified that their educational materials are created in a word processing application. *Id*. at 34:1-13. AU has no information about any member in particular who used the sworn statement that Act 249 disallowed. *Id*. at 37:8-17. However, AU already has training materials that reflect the law regarding the sworn statement, and because they use a simple word processor, it would not be difficult to change their materials to reflect the challenged acts. *See Id*. at 37:24-25 – 38:1-22.

AU did not offer water or snacks to voters in line at any polling location at the 2020 general election. *Id*. at 39:7-20. AU cannot say whether it will offer water or snacks to voters in line in future elections. *Id*. at 40:4-7. AU claims it is engaging in an educated speculation that any of the four challenged acts would burden any member's right to vote *Id*. at 44:1-8.

III. STANDARD OF REVIEW

Motion for Summary Judgment Standard

"The purpose of our summary judgment rule is to expeditiously determine cases without necessity for formal trial where there is no substantial issue of fact and is in the nature of an inquiry to determine whether genuine issues of fact exist." *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 423, 683 S.W.2d 601, 604 (1985) (citation omitted). Summary judgment is not an extreme or drastic remedy, but rather is "one of the tools in a trial court's efficiency arsenal[.]" *Thomas v. Stewart*, 347 Ark. 33, 37, 60 S.W.3d 415, 417 (2001). Denying summary judgment when this Rule is satisfied would expose "the litigants to unnecessary delay, work and expense in going to trial when the trial judge would be bound to direct a verdict in movant's favor after all evidence is adduced." *Joey Brown Interest, Inc.*, 284 Ark. at 423, 683 S.W.2d at 604.

Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *Wilcox v. Wooley*, 2015 Ark. App. 56, 454 S.W.3d 792 (quoting *Harvest Rice, Inc. v. Fritz & Mertice Lehman Elevator & Dryer, Inc.*, 365 Ark. 573, 575–76, 231 S.W.3d 720 (2006)). Accordingly, summary judgment must be entered for the defendant where, as here, the plaintiffs cannot meet the defendant's proof with proof of their own that demonstrates the existence of a genuine issue of material fact. Ark. R. Civ. P. 56(c)(2). Indeed, the Rule makes clear: summary judgment "*shall* be rendered forthwith if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion." *Id*. (emphasis added). Here, the Defendants are entitled to summary judgment.

IV. DISCUSSION

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

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

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

concerned, *inter alia*, voter identification. *Id.* at *1, 556 S.W.3d at 511. The Court said:

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

Id. at *8, 556 S.W.3d at 515. The Court has also said: "for equity to act, there must be proof of (1) irreparable harm and (2) no adequate remedy at law." *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 302, 954 S.W.2d 221, 224 (1997). Here, Plaintiffs seek only equitable relief from the Court. Plaintiffs have not alleged irreparable injury or the threat thereof by the four Acts. *Id.* The undisputed evidence detailed above further demonstrates that Plaintiffs cannot offer proof, only speculation, that they will suffer irreparable injury or the threat of irreparable injury because of the four acts.

Regarding standing, the United States Supreme Court has said that to demonstrate standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). A plaintiff bears the burden of establishing each element. *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (internal citation omitted).

Neither League of Women Voters nor Arkansas United is a "person" affected

by the four acts they challenge. They cannot vote as organizations and are not in a class of persons affected by the acts. Thus, those Plaintiffs lack standing. Furthermore, all Plaintiffs lack standing because speculative, abstract injuries cannot confer standing, and Plaintiffs' claims rest entirely on speculation as shown by the undisputed facts. *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016). Additionally, a statute must be enforced against a plaintiff before he or she may challenge its constitutionality. While pre-enforcement review is available in some contexts, that is true only where "threatened enforcement [is] sufficiently imminent"; that is, where a "credible threat" exists that the provision at issue will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-60 (2014). Given the undisputed facts, there is no valid argument that any of the Plaintiffs are subject to a credible threat that they will experience any harm, much less irreparable harm in this case.

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

or would suffer harm" to support a claim of associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). Neither Organization in this case could provide any information at deposition about any of its members who had or would suffer harm. Further, neither keeps any demographic information about members, rendering them ineligible to claim harm to any racial, ethnic, or socioeconomic group they argue would allegedly suffer harm. The Plaintiff Organizations simply cannot demonstrate associational standing because they cannot demonstrate *any* "identified" member that will suffer harm. Moreover, Plaintiff Organizations lack associational standing on the undisputed facts because they cannot show any of their members would have standing in their own right to sue in this case. Furthermore, on the factual record, LOWV and AU cannot demonstrate that the interests at stake are germane to the their purposes. LOWV and AU cannot also demonstrate via facts that the claims asserted and the relief requested do not require the participation of individual members in the lawsuit. Demonstrably, Plaintiff Organizations fail to provide facts to demonstrate associational standing; the undisputed facts demonstrate they cannot meet the threshold standing requirements and their claims should be dismissed.

In paragraph 12 of the Amended Complaint, LOWV alleges that it is a nonpartisan, nonprofit membership organization that "encourages informed and active participation in the political process as part of its mission." It purports to bring "this suit on behalf of its members across Arkansas, many of whom will find it more difficult, if not impossible, to cast their ballots and participate in the democratic

process if the Challenged Provisions stand." In paragraph 15 of the Amended Complaint, Arkansas United alleges its mission is to promote and provide services to Arkansas's immigrant population, including promoting civic engagement and democratic participation. It claims membership of more than 800 individuals in the State of Arkansas, although at Ms. Reith's deposition, she adjusted that figure to a little over 600 members. **Exhibit G**, **Depo. of Reith** 7:12-14.

LOWV also alleges that in order to achieve its mission, "the League devotes substantial time, effort, and resources to helping Arkansas voters ensure their in-person and absentee ballots are properly cast and counted." *Amended Complaint*, ¶ 13. The four Acts do not injure LOWV or AU. Rather, the four laws simply require LOWV and AU, at most, to make minor adjustments in effecting their respective missions. LOWV complains that the Acts will require re-training of its members and volunteers. *Amended Complaint*, ¶ 14. Even assuming *arguendo* that were true, it does not amount to a claim of irreparable harm and it does not give LOWV standing here. However, it simply is not accurate based on LOWV's testimony detailed above. Most notably, despite repeated chances in monthly training sessions and the updating of LOWV's book online (which is provided to the public for free), LOWV has not suffered injury that it can point to. That is, LOWV cannot meet proof with proof that it allegedly has associational or organizational standing and, must be dismissed as a Plaintiff in this action.

Next, AU speculates that it will be required to divert scarce resources away from other policy priorities, because of the challenged Acts. As discussed herein,

Plaintiffs have mischaracterized the plain language of the challenged Acts and their fears are speculative. Such speculative future injury fails to confer standing on AU as an entity. *Braitberg*, 836 F.3d at 930. Moreover, AU cannot plausibly allege that the challenged Acts themselves will necessitate AU to divert its efforts away from whatever its other priorities happen to be. Indeed, how do the challenged Acts, according to their plain language instead of the Plaintiffs' unreasonable characterizations of the Acts' language, prevent Arkansas United from "encouraging voters to vote" at polling locations unless such conduct amounts to unlawful electioneering or loitering? The allegations in paragraphs fifteen and sixteen of the Amended Complaint simply make no sense: voters present at a polling location almost certainly do not need anyone's encouragement to vote as that is why the voters are presumably there in the first place.

Furthermore, Ms. Reith initially claimed education was not part of the grants AU receives to operate, purportedly requiring AU and its staff to occasionally divert resources to education on the new laws. However, Ms. Reith then contradicted that testimony and conceded part of their general services grant includes an education component. Thus, these acts simply will not require AU to do anything that it does not already purportedly do. In addition, AU has clearly disclaimed any intention to educate persons on the new laws where it had a November 2021 convention with a 100-page handout, and neither addressed the new laws. It has not, and will not be required, to divert resources away from other priorities to educate its members on

the new laws, and cannot claim organizational standing where it has not conducted any training to its members on the new laws.

The organization/association Plaintiffs have not and cannot articulate a resource-diversion injury that is "fairly traceable to the challenged action of the defendant[s]," and both lack associational and organizational standing. *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (internal quotation omitted).

Furthermore, in many paragraphs of the Amended Complaint, the Plaintiffs cite statistics regarding Black voter turnout and claim that the Acts at issue will allegedly exacerbate such voter turnout. *Amended Complaint*, pp. 14-15. It is unclear if any member of either Plaintiff Organization is similar to Haas in the *Martin* case; indeed, as the undisputed facts show, neither organization has any demographic information about its members and cannot say whether the new acts will in any affect any member, short of speculation. As a result, it is not possible for the Court to know whether the Plaintiffs' members ever will be affected by the challenged acts in any way whatsoever. *Mo. Protection & Advocacy Services, Inc. v.* Carnahan, 499 F.3d 803, 810 (8th Cir. 2007). Furthermore, the descriptions by LOWV and AU of their organizations' aims fails to inform the Court or the Defendants if "the interests at stake are germane to" the purposes or mission of either association. Neither purports to be an organization working to ensure Black voters are not disenfranchised, yet they purport to bring this suit on behalf of such voters. On the undisputed factual record, neither entity can provide information about the demographics of their

organizations and cannot provide facts showing any of the new acts have affected a single **identified** member of their organizations.

It is also undisputed that *none* of the individual Plaintiffs belongs to a suspect class; they are all Caucasian individuals. Thus, Plaintiffs' citation to statistics regarding Black voter turnout is immaterial to *Plaintiffs'* claims. The Plaintiffs cannot raise the rights of third parties not before the Court and the Court must assess whether *these* Plaintiffs have standing. *Pankey v. Webster*, 816 F.Supp. 553, 560 (W.D. Mo. 1993). On the undisputed factual record, Plaintiffs lack standing and Defendants are entitled to summary judgment.

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

Plaintiffs also cannot succeed on their claims because they have not demonstrated the Defendants caused or will cause any injury alleged. As a result, Plaintiffs do not have standing against these Defendants. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253-58 (11th Cir. 2020). Even the Secretary of State's

position as the "chief election officer of the state" with "general supervision and administration of the election laws" does not make any purported injury caused by the county boards' future actions traceable to the Secretary of State or SBEC. *Id*. at 1253; *see also Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181 (11th Cir. Dec. 21, 2020). Plaintiffs ignore the "settled principle that it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury." *Jacobson*, 974 F.3d at 1254 (internal citation omitted).

For instance, AU testified that it is concerned with the way the new challenged acts will be interpreted. **Exhibit G**, **Depo. of Reith**, 42:8-19. AU specifically testified that it was concerned "poll workers" would misinterpret the term "lawful purposes" in Act 728 regarding the 100-foot zone. *Id*. Plaintiffs are concerned about the application and interpretation of the challenged acts by county officials, and their concern is that a voter will allegedly be disenfranchised because of such interpretation. *Id*. at 42:20-23; 43:20-21; 51:8-15. AU testified that its concern is with county election officials who are not defendants in this case. *Id*. at 51:16-17. A judgment against the Secretary of State, or SBEC would not have any effect on the county election officials who actually administer elections. Thus, Plaintiffs do not have standing against these Defendants and Defendants are entitled to summary judgment.

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

On the factual record following discovery, Plaintiffs have also failed to name necessary, indispensable, and interested parties. As stated, AU testified that it is concerned with the way the new challenged acts will be interpreted. **Exhibit G**, **Depo. of Reith**, 42:8-19. AU specifically testified that it was concerned "poll workers" would misinterpret the term "lawful purposes" in Act 728 regarding the 100-foot zone. *Id*. Plaintiffs are concerned about the application and interpretation of the challenged acts by county officials, and their concern is that a voter will allegedly be disenfranchised because of such interpretation. *Id*. at 42:20-23; 43:20-21; 51:8-15. AU explicitly testified that its concern is with county election officials that are not defendants in this case. *Id*. at 51:16-17. Furthermore, the Secretary of State's 30(b)(6) witness, Josh Bridges, confirmed that counties are necessary and interested parties here. **Exhibit H**, **Deposition of Josh Bridges**. Mr. Bridges testified that "each voter is responsible to the poll workers and to the local election officials that they are who they say they are and are qualified to vote in a given election." *Id*. at 59:2-7. He further testified regarding the presentment of an identification: "I can't speak on behalf of all 75 county commissioners. I don't know if that's the method that they chose to allow for those voters to come and provide that identification. Each county operates differently. And like I said before, they are in charge of running the elections in the counties …." *Id*. at 68:6-12.

Each county election board and its officials *at least* are necessary parties under Fed. R. Civ. P. 19 and "interested parties" under the Declaratory Judgment Act, on

the grounds that they have an "interest which would be affected by the [declaratory relief]." Ark. Code Ann. § 16-111-111(a).

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

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

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

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

In *Davis v. McKinley*, the Arkansas Court of Appeals found that a trial court could properly refuse to render a declaratory judgment where an interested party had not been named and, thus, the issuance of a declaratory judgment could not terminate the controversy at issue. 104 Ark. App. 105, 107, 289 S.W.3d 479, 480 (2008); *see also*

Johnson v. Robbins, 223 Ark. 150, 264 S.W.2d 640 (1954) (reversing trial court's failure to dismiss a declaratory judgment action where interested party not named). Such is the case here on the undisputed factual record. For this independent reason, the Defendants are entitled to summary judgment.

C. The appropriate standard to assess the challenged 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*, 2018 Ark. 283, at 9, 556 S.W.3d 509, 515. This principle is essential for this Court to assess the Plaintiffs' claims here. Further, "[b]ecause a court must avoid interpreting a statute in an unconstitutional manner, statutes should be construed so as to avoid doubt as to their constitutionality, if reasonably possible." CJS CONSTLAW § 248. As the United States Supreme Court has often said regarding canons of construing statutes: "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (quoting *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988)). This is the constitutional avoidance doctrine and it should be employed only if necessary by the Court, but it must be read in conjunction with the presumption that the acts are constitutional.

Plaintiffs claim 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 of 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 (Acts 736 and 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 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 expression claims against Act 728.

Plaintiffs previously cited *Davidson v. Rhea*, 221 Ark. 885, 256, S.W.2d 744 (1953), among other cases, for the erroneous proposition that strict scrutiny applies. 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)).

Assuming *arguendo* that the acts created any burden on Plaintiffs, Defendants submit the Court should employ the *Anderson/Burdick* test. 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). 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"). In the context of this motion, Defendants have also shown that, given the undisputed facts, they are entitled to judgment as a matter of law because the factual record fails to reveal a severe or even moderate burden on the *Plaintiffs'* right to vote. Again, Plaintiffs cannot raise the alleged rights of third parties and the Court must focus on any alleged burden to the Plaintiffs herein solely.

The Arkansas Supreme 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 of our Supreme Court utilized *Anderson/Burdick*.

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. Plaintiffs do not allege a severe burden *at all*. 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 judgment for Defendants.

More importantly, the undisputed facts fail to demonstrate a severe burden on the Plaintiffs' right to vote. At most, the Individual Plaintiffs provided testimony detailing the "usual burdens of voting." *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 198 (2008). Thus, strict scrutiny should not apply. Additionally, the Organization Plaintiffs cannot show any identified member of their organizations will experience alleged harm due to the acts. They lack standing, but even on the merits they cannot overcome the Defendants' entitlement to summary judgment because they cannot provide proof that any member will suffer *any* burden, much less a severe one.

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.

For these reasons, rational-basis review applies. Because rational-basis review applies, which allows the Court or Parties to hypothesize reasons for challenged legislation, and because a "State's important regulatory 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). Again, however, now that discovery has established an undisputed factual record failing to reveal any severe or even modest burden on Plaintiffs' rights, rational-basis review applies and Defendants are entitled to summary judgment.

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 are both important facets of overall election integrity. Plaintiffs have claimed 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*, 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 and the Defendants are entitled to summary judgment.

1. 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. *Id.*.

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 an 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," on the undisputed factual record in this case. Indeed, not a single Plaintiff lacks photo identification in contradiction of the Amended Complaint. Specifically, Leon Kaplan now possesses an Arkansas identification and has no intention of using the sworn statement to vote in any future election. 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. It certainly adds no cost or burden on any Plaintiff before the Court as the undisputed facts demonstrate because all of the Plaintiffs possess identification. The act is clearly consistent with Article 3, § 1 as amended and reconciles the language of the act to the will of the voters in amending the Constitution to require voter ID. Thus, Plaintiffs' qualification claim fails on the undisputed factual record and Defendants are entitled to summary judgment.

Amendment 99 and Act 249 protect the integrity of the vote and are 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 Act 249 failed to properly amend Amendment 51. The standard the Arkansas Supreme 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. 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.

As the undisputed facts show, only one Individual Plaintiff—Leon Kaplan—alleged in the Amended Complaint that he intended to use the sworn statement to cast a future provisional ballot because he lacked acceptable photo identification. However, Kaplan testified that he *does* have an Arkansas driver's license now, used it at a local election, and does not plan to use the sworn affidavit to vote in the future. Furthermore, the Plaintiff Organizations have no information that an ***identified*** member of either organization voted using the sworn statement in the 2020 general election, neither has demographic information on their members, and both could only speculate as to the alleged effect of the acts in the future. Thus, Plaintiffs "right to suffrage" claim against Act 249 must be dismissed on summary judgment.

Plaintiffs also allege that Act 249 violates the Equal Protection Clause of Article 2, § 3. However, Plaintiffs' allegations and the undisputed facts 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 and cannot provide evidence of 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). More importantly, Plaintiffs all possess compliant photo identification so the act has no effect on them. That is, the undisputed factual record confirms no Individual Plaintiff intends to utilize the sworn statement to vote in the future. The factual record also shows both LOWV and AU cannot demonstrate any burden of any kind caused by the acts. Rather, assuming *arguendo* that a member of either organization will be affected by the new laws, neither 30(b)(6) witness could provide proof of *any* member who has or allegedly will be disenfranchised.

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 summary judgment for the Defendants. 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. Moreover, her testimony detailed above belies her allegations. 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 alleged, without explanation, that burdens will exist in obtaining an identification card or other acceptable form of identification. Under oath, however, he admitted he does have acceptable identification to vote in Arkansas and

has voted utilizing that identification. Defendants are entitled to judgment as a matter of law.

2. 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. This act did nothing more than make a clarification in the law because, as Pulaski County Election Commissioner Susan Inman testified, the "application" is the "physical record," and, thus, they are the "same thing." **Exhibit I**, **Deposition of Inman**, 24:4-8.

Commissioner Inman also confirmed that a 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. *Id*. at 24:9-18; 25:2-20. The signatures must be "similar," not identical, notwithstanding Plaintiffs' mischaracterization of the language of the code reproduced in, but not changed by, Act 736. Again, as stated above, the similarity comparison of signatures is up to the 75 counties, not the SOS or SBEC, further underscoring the importance of their joinder in this action.

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. This Court previously used a dictionary to review the word "similar," and found it defined as "alike, resembling something but not the same." 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. Moreover, the Plaintiffs who

testified regarding whether they could tell if their signatures looked "similar," confirmed they could.

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 and have not proven 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 the 2014 case of *Martin v. Kohls*, 2014 Ark. 427, 444

S.W.3d 844 is irrelevant. More importantly, the act only clarified what was already the law: the requirement of comparing signatures predates the act. The comparison of signatures is not a qualification for a voter, but this act did not add the comparison requirement in any event.

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. Thus, Plaintiff's qualification claim must fail and Defendants are entitled to summary judgment.

3. 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. Commissioner Inman testified that at three local elections in the fall of 2021, she was unaware of any absentee ballots which were dropped off but rejected. **Exhibit I**, **Deposition of Inman**, 19:1-12, 20:4-8.

Plaintiff Rust claims that in the 2020 general election, he dropped his ballot off on the Saturday before the election. However, Rust testified it might actually have

been a week before that Saturday when he dropped off his ballot. Therefore, Rust would not have run afoul of the new deadline to drop off absentee ballots.

Here, allowing counties an additional day before Election Day to begin canvassing absentee ballots will promote efficiency and organization and avoid counties' being inundated with hand-delivered absentee ballots the day immediately prior 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)). Commissioner Inman testified that the law permits the canvassing of absentee ballots to begin a week before the election. **Exhibit I**, 28:18-21. She agreed having the extra week, particularly in a federal election, is a good thing. *Id.* at 29:18-23. Most importantly, she testified that if every absentee ballot came in the Monday before a federal election, it would be chaotic for county workers to complete necessary tasks. *Id.* at 29:24-25 – 30:1-4. Plaintiff's claim that the new deadline creates any impediment to the right to vote should fail. Plaintiffs have provided no proof that the change from Monday to Friday will create any burden *on them* or any other voter, and the proof certainly shows no severe burden on the right to vote.

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 and have not proven 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. The law is a procedural law encompassed within the General Assembly's authority under the Arkansas Constitution. The due date to drop off an absentee ballot is not a qualification for a voter and there is no credible claim otherwise. Thus, Defendants are entitled to summary judgment.

4. 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* acts 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 the provisions of Ark. Code Ann. § 7-5-310 which explicitly permit a voter to choose an assistor to accompany them. Further, the act does not prevent a voter from bringing a dependent with him or her inside that zone. Plaintiffs add words to the act that are not present, which is impermissible. *Bullock*, 2014 Ark. 457, at 18, 452 S.W.3d at 563.

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. 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). He confirmed he would still ask his daughter for assistance if necessary at his deposition. Furthermore, Plaintiffs' concerns that the act will harm persons with difficulty standing in line due to physical, sensory, or other disabilities is clearly inaccurate where Ark. Code Ann. § 7-5-310(c) explicitly permits such individuals to skip the line.

Additionally, there is no constitutional right to water or a snack while voting. Nevertheless, nowhere does the act prevent any organization or individual, such as one of the Plaintiffs, 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 because it does not create any burden on the right to vote, much less a severe one.

Plaintiffs also allege an equal protection claim per Article 2, § 3. The act does not treat similarly situated individuals differently. Indeed, the act applies to any polling location. 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. The prevention of voter intimidation is a compelling

governmental interest and Plaintiffs can hardly argue otherwise. Finally, Plaintiffs do not allege or provide proof of purposeful discrimination.

Finally, Plaintiffs claim a "free speech" violation relative to Act 728 in a conclusory manner. Plaintiffs have failed entirely to develop this claim. 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 will not violate the law. The act is designed to

prevent voter intimidation, which is a compelling governmental interest. 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. Thus, again, Defendants are entitled to summary judgment.

D. The 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).

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. 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 v. Jones*, 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. And at the summary judgment stage, Plaintiffs must meet proof with proof on their asserted exception to sovereign immunity.

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. Here, Plaintiffs attempt to rely on the "unconstitutional" exception to sovereign immunity. However, whether they can demonstrate proof of that the acts are unconstitutional for purposes of Ark. R. Civ. P. 56, is exactly the same issue as whether Defendants have shown on the undisputed facts that the acts are constitutional as they pertain to the parties in this case. Because, as noted above, the undisputed facts demonstrate no severe or even significant burden on Plaintiffs' rights to vote, they also cannot establish the "unconstitutional" exception to sovereign immunity. Additionally, because Plaintiffs have provided no proof that any of the acts create additional qualifications for voters or violate equal protection, Plaintiffs cannot demonstrate the unconstitutional exception. Finally, because Plaintiffs cannot show a violation of their speech and expression rights, Plaintiffs cannot establish the unconstitutional exception to sovereign immunity. Defendants are entitled to summary judgment on the merits and also sovereign immunity.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' motion for summary judgment and dismiss the case with prejudice.

WHEREFORE, Defendants respectfully request the Court grant their motion, enter summary judgment in their favor, and for all other just and proper relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael A. Mosley, hereby certify that I served the Clerk of Court with the foregoing on this the 10th day of January, 2022, via the e-flex electronic filing system, which shall send notice to all Counsel of Record.

Michael A. Mosley
Michael A. Mosley