No.CV-22-149

IN THE SUPREME COURT OF ARKANSAS

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

v.

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



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

**EMERGENCY MOTION FOR IMMEDIATE STAY**

Appellants, John Thurston, Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, James Sharp, and J. Harmon Smith, in their official capacities as Secretary of State and members of the Arkansas State Board of Election Commissioners, respectfully, for their emergency motion for an immediate stay of the Circuit Court's order setting this matter for trial on March 15, 2022, and a stay of all circuit-court proceedings pending appeal, state:

1. Appellees filed suit in Pulaski County Circuit Court challenging Acts 249, 728, 736, and 973 of the 93rd Arkansas General Assembly under the Arkansas Constitution's right to suffrage, Free and Equal Elections Clause, and Equal Protection Clause. Appellees seek injunctive and declaratory relief.

2. Appellants moved for summary judgment and asserted that sovereign immunity bars this action. Appellees have not met proof with proof to establish any of the four challenged acts qualifies as an unconstitutional exception to the doctrine of sovereign immunity. R. 62-350.

3. On March 10, 2022, the Honorable Pulaski County Circuit Court Judge Wendell Griffen denied Appellants' motion for summary judgment on the issue of sovereign immunity. The action is scheduled for a bench trial on the merits beginning **March 15, 2022**. R. 1438-1445.



4. Pursuant to Arkansas Rule of Appellate Procedure 2(a)(10), Appellants are entitled to interlocutory appeal on the circuit court's denial of sovereign immunity. Appellants filed their Notice of Appeal on March 10, 2022. R. 1447-1449.

**5. Appellants respectfully request this Court enter an order staying trial pending resolution of this interlocutory appeal of the State Appellants' sovereign immunity defense.**

## Argument

6. A stay of this matter is warranted for multiple reasons. First, the record in this case is now lodged. Accordingly, the circuit court has been divested of jurisdiction to hold trial. *Myers v. Yingling*, 369 Ark. 87, 89, 251 S.W.3.d 287, 290 (2007) ("Once the record is lodged in the appellate court, the circuit court no longer exercises jurisdiction over the parties and the subject matter in controversy.")

7. Second, it is well-established that sovereign immunity is not just immunity from liability, but immunity from suit, and therefore should be resolved **before trial.** *Ark. Tech Univ. v. Link*, 341 Ark. 495, 501, 17 S.W.3d 809, 813 (2000). **Forcing Appellants to go to trial before this Court considers the merits of Appellants' sovereign immunity defense effectively deprives Appellants of sovereign immunity.**



8. This is especially egregious where, as here, Appellees have not met their substantial burden to overcome Appellants' sovereign immunity defense by proving each of the challenged acts is unconstitutional. *Gentry v. Robinson*, 2009 Ark. 634, 11 (On an appeal of a denial for motion for summary judgment based on sovereign immunity, the Court considers whether the evidentiary items presented by the moving party leave a material fact unanswered. In other words, to uphold a denial of sovereign immunity, the Court must determine whether the plaintiff met proof with proof to raise a fact question regarding a constitutional violation.).

9. Briefly, each of Appellees' challenges fails as a matter of law.

10. First, Act 249 properly amended Section 13 of Amendment 51 of the Arkansas Constitution. Section 13 of Amendment 51, entitled "Fail-safe voting—Verification of voter registration," governs the manner in which individuals unable to verify their voter registration through one of the eight identified forms may vote provisionally until their registration can be verified. Previously, section 13 of Amendment 51 permitted individuals who could not affirm their registration as required by law to cast a provisional ballot and "cure" the ballot in two ways. The individual could either submit a sworn statement under penalty of perjury stating he or she is registered to vote in the State of Arkansas and is the person registered to vote, or alternatively, go to the county board of election commissioners' office or the county clerk's office by noon on the Monday following the election and present an acceptable form of identification. Act 249 amended section 13 to remove the sworn statement provision, but it left in place the option of verifying a provisional ballot with the county clerk or county board of election commissioners. Act 249 made a similar change for those casting provisional ballots absentee who failed to include proper absentee ballot documentation.



11. Act 249 does not impose a severe burden on Appellees. First, each of the Appellees possesses a state-issued photographic identification card, so the fail-safe provision is inapplicable to Appellees, and cannot therefore cause any burden

to them. Importantly, this Court has previously upheld the in-person fail-safe provision as constitutional. *Martin v. Haas*, 2018 Ark. 283, at 9, 556 S.W.3d 509, 515. Appellees failed to explain how the removal of the affidavit provision somehow turns the in-person fail-safe provision into an unconstitutional one. Thus, Act 249 does not create a severe burden because it still permits voters without acceptable identification to vote provisionally in a constitutionally permissible way.

12. Second, Act 728 amended Ark. Code Ann. § 7-1-103 to establish a 100-foot perimeter around polling places. Individuals may be within 100-feet of the polling place if they are entering for a lawful purpose. Appellees argue this forces voters to choose between basic sustenance or the right to vote, by denying volunteers, such as Appellees, from handing out food and water to voters. As an initial matter, there is no constitutional right to water or a snack while voting. Moreover, on its face, Act 728 only limits any *unlawful* acts within the one-hundred-foot (100') zone. Nothing prohibits anyone from leaving an ice chest with water or snacks in that zone, nor does anything in the Act prevent Appellees from bringing their own water or food with them while they wait in line within the 100-foot zone. Likewise, the Act does not prohibit any organization or individual from positioning themselves outside of the 100-foot zone with water and snacks. Finally, Act 728 does not prevent a voter with a disability from bringing a caretaker into that zone

*nor could it*, as such activity is expressly permitted by Ark. Code Ann. § 7-5-310, which explicitly authorizes a voter to choose an assistor to accompany them.

13. Third, Act 736 amended various provisions of Arkansas law concerning absentee ballots. Of relevance, Act 736 requires the signature on a voter's absentee ballot application be "similar" to that on the individual's voter registration application to receive an absentee ballot. This was not a material change from the previous version which required signature "records" to bear a "reasonable likeness" to each other. In their challenge, Appellees mischaracterize Act 736. Act 736 only requires that signatures be similar; it does not require an exact match. Furthermore, Act 736 is not a severe or substantial burden on the right to vote because voters may update their registration signature at any time. Finally, the clarifications of Act 736 actually *improve* the procedures for obtaining an absentee ballot. The previous version of Ark. Code Ann. § 7-5-404 did not contain any instructions or information about what to do if an absentee ballot was rejected. As amended by Act 736, Ark. Code Ann. § 7-5-404 now requires the county clerk to provide prompt notice to the voter of the rejection, including by phone or email, and allow the voter to resubmit the request. Ark. Code Ann. § 7-5-404(a)(2)(B)(i); *Id.* at § 7-5-404(a)(2)(B)(ii); *Id.* at § 7-5-404(a)(2)(C)(i). Thus, Act 736 actually adds additional procedural safeguards to alert voters as to when their request for an absentee ballot has been rejected.

14. Fourth, Act 973 also amended regulations regarding absentee ballots by requiring individuals dropping off absentee ballots in person to turn them in by close of business the Friday before election day. Previously, the deadline to submit absentee ballots in person was the Monday before election day. The addition of one business is not a severe burden on the right to vote, especially considering that Arkansas voters have 45 days to obtain an absentee ballot—one of the longest periods in the country. Furthermore, Appellees may still mail their ballot in by 7:30 p.m. on Election Day.

15. In sum, Appellees are challenging statutes regarding *election mechanics*—not statutes concerning the right to suffrage itself. Such regulations are entitled only to rational basis review, and this test is more than satisfied by the State's compelling interests in preventing voter fraud and intimidation, and holding elections that are organized and allow a timely counting of ballots.



16. Finally, Appellees challenged each of the four Acts under Arkansas's Equal Protection Clause. Contrary to Appellees' claims, Article 2, section 3 of the Arkansas Constitution does not preclude all statutory classifications. *Cook v. State*, 906 S.W.2d 681. Each Appellee failed to prove that he or she was treated differently than others who were similarly situated to him or her. *Brown v. State*, 2015 Ark.16, at 6–7, 454 S.W.3d 226, 231. Nor did Appellees prove that any alleged classification rested on feigned differences or that the distinctions had no relevance to the State's

explained purpose. *Graves v. Greene County*, 2013 Ark. 493, at 7, 430 S.W.3d 722, 727. Consequently, Appellees woefully failed to overcome the State's sovereign immunity defense.

17. Finally, a stay of this matter is warranted given the circuit court's order expressing uncertainty about the correct legal standard of review in this case—whether it is rational basis, strict scrutiny, application of the *Anderson-Burdick* test, or something else entirely. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). In resolving the issue of Sovereign Immunity on appeal, the appellate court can determine the legal standard applicable to each of the challenged Acts.



18. Rule 8 of the Arkansas Rules of Appellate Procedure—Civil grants this Court the discretion to stay a lower-court order pending appeal. *Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). This Court's consideration of a request for a stay includes preservation of the status quo ante, if possible, and the prejudicial effect of the passage of time necessary to consider the appeal. *Id.* The Court is also guided by four factors: (1) the appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm to the appellant absent a stay; (3) whether the grant of the stay will substantially injure the other parties interested in the proceeding; and (4) the public interest. *See id.*

19. Each of the four *Pavan* factors weigh in favor of Appellants. First, as explained above, Appellees are unlikely to succeed on the merits of their claim because they have not proven that any of the four acts are unconstitutional. Such a showing is required to overcome Appellants' sovereign immunity defense. Ark. Const. art. 5, § 20; *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

20. Second, Appellants will suffer irreparable harm absent a stay, as forcing Appellants to participate in a trial on these matters effectively waives Appellants' defense of sovereign immunity. *Ark. Tech Univ. v. Link*, 341 Ark. 495, 501, 17 S.W.3d 809, 813 (2000).

21. Third, the grant of a stay will not substantially injure Appellees. Instead, granting a stay promotes judicial efficiency and economy. Without a stay, both parties will participate in a four-day long trial while the very same issues are considered by this Court on appeal. This could result in a complete waste of judicial resources and party resources, should the circuit court's final order conflict with the opinion of this Court. Or, alternatively, it may result in the matter needing to be re-tried under the correct standard of review, as set forth in any order on remand by this Court.

22. Finally, the public interest weighs in favor of conserving state resources pending appeal.

23. Appellants anticipate the Appellees will argue, on response, that this appeal is barred by law of the case and *stare decisis*. Appellees are incorrect. This appeal is not barred because the first appeal answered an entirely separate question from the question presented by this appeal. In the first appeal, the question was whether the circuit court erred when it denied Thurston's Rule 12(b)(6) motion to dismiss based on sovereign immunity. *See Thurston v. League of Women Voters of Arkansas*, 2022 Ark. 32, at 5, --- S.W. 3d --- (*Thurston I*). The issue was whether Appellees alleged sufficient facts, on the face of the complaint, to state a constitutional violation and survive a sovereign immunity defense ***at that stage of the litigation***. This Court found that the Appellees alleged sufficient facts to survive sovereign immunity, and it affirmed the circuit court's order denying Thurston's motion to dismiss. *Id.* At 7.



24. The question presented in *this* appeal is whether, at the summary judgment stage, the Appellees met proof with proof, and ***proved*** that their claims fall within an exception to sovereign immunity. This simply is not the same question presented to the Court in *Thurston I*.

25. There is a difference between a suit being barred on the face of the complaint—for instance, because a plaintiff sues the state for money damages—and a suit stating a claim for which relief *may* be granted that nevertheless cannot survive summary judgment. In *Thurston I*, this Court merely determined that the Appellees

stated a claim for which relief *may* be granted. This Court specifically noted that the circuit court ***did not reach the merits of this matter***, and as a result, the only issue before this Court in *Thurston I* was whether the circuit court erred in denying the motion to dismiss based on sovereign immunity.

26. Summary judgment is an entirely different standard of review. ***Importantly, the circuit court has now reached the merits of the case***. R. 1439-1446. The circuit court's findings on the merits of the case, as decided at the summary judgment stage, are what are now before this Court for review. This Court has not issued an opinion on the merits of this matter. As such, *stare decisis* and law of the case are wholly inapplicable here.



27. Appellees argument on *stare decisis* yields an absurd result by having the same standard of review govern a motion to dismiss and a motion for summary judgment. The standards are clearly not one and the same, but are governed under different procedural rules and different burdens. *See* Ark. R. Civ. P. 12(b)(6); Ark. R. Civ. P. 56.

28. Next, Appellants anticipate Appellees will make the novel argument that Rule 2(a)(10) of the Rules of Appellate Procedure—Civil disallows serial interlocutory appeals in the same case. Appellees Response at ¶ 25. This is a nonsensical reading of a plain rule, and "or" is not such a workhorse in this sentence

as Appellees would have us believe. Rather, "or" is connecting two entities that "order" modifies.

29. The rule provides that "[a]n appeal may be taken from a circuit court order to the Arkansas Supreme Court from 'an order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity.'" An order denying a motion to dismiss is a distinct and separate order from an order denying a motion for summary judgment. Far from indicating that a litigant must choose between appealing an order denying a motion to dismiss or an order denying summary judgment based on immunity, the Rule simply indicates that these are *kinds of orders* which may be appealed.

30. In other words, the Rule can be read as: "[a]n appeal may be taken from a circuit court order to the Arkansas Supreme Court from an order denying a motion to dismiss . . . based on the defense of sovereign immunity or the immunity of a government official." Ark. R. App. P.—Civ. 2(a)(10). Alternatively, "[a]n appeal may be taken from a circuit court order to the Arkansas Supreme Court from an order denying a . . . motion for summary judgment based on the defense of sovereign immunity or the immunity of a government official." Ark. R. App. P.—Civ. 2(a)(10). There is nothing in this language that indicates that this is an either-or situation, that the government gets only one opportunity to seek the Supreme Court's review of a circuit court's interpretation of an immunity defense. Indeed, it is not

unusual for the government to raise immunity at successive stages of litigation and appeal any denials of immunity, precisely because of the differing governing standards applicable to each order, as previously described.

31. Appellants anticipate Appellees will argue that Appellants summary judgment motion and the order denying it were nullities. Appellees are incorrect. ***Importantly, the circuit court entered the order currently being appealed on March 10, 2022, after this Court issued its mandate and the circuit court was once again vested with jurisdiction***. R. 1439-1446.

32. Appellants' motion for summary judgment was submitted to the clerk while the first appeal in this matter was pending. R. 62-350. Parties may submit papers to the clerk at any time. That does not mean the circuit court has immediate jurisdiction to rule on motions submitted to the clerk if an appeal is pending before the Supreme Court of Arkansas.



33. While a matter is pending appeal, a trial court retains jurisdiction only to consider collateral matters to the case. *Nameloc, Inc. Jack, Lyon, & Jones, P.A.*, 362 Ark. 175, 208 S.W.3d 129 (2005). As Appellants indicated at the February 11, 2022, proceeding, Appellants believed such proceeding was a status conference to

clear up administrative matters, not a hearing to argue the merits of the case.[1] Regardless of whether the proceeding ultimately was a status hearing or not, neither the parties in this case nor the Honorable circuit judge have the power to divest the Arkansas Supreme Court of jurisdiction.

34. Additionally, the February 11 hearing is immaterial as ***no order was entered that day*.** The circuit court orally indicated on February 11 how it planned to rule on the motion for summary judgment. This was not, in fact, a ruling. **The order currently being appealed was entered on March 10, 2022, after this Court entered its mandate and the circuit court was once again vested with jurisdiction.** R. 1439-1446. Therefore, the order, and Appellants' second interlocutory appeal are both proper and not null.

35. At this stage, there is no prejudice to Appellants by staying this matter due to a need for clarity on election procedures. Appellees have not moved for a preliminary injunction, nor has one been issued. There is no question that the challenged acts are in effect, thus, there is nothing to clarify.



[1] Appellants have arranged to obtain the transcript of this hearing. To date, Appellants have not received the transcript, but will supplement the record once it arrives.

36. Finally, Appellants reiterate that sovereign immunity is immunity *from suit*, ***and will be effectively waived if the Appellants are forced to appear at trial.*** Further, guidance from this Court on the appropriate standard of review is imperative before a final hearing, and, without a stay, vast amount of judicial, state, and party resources may be unnecessarily used or even wasted, should the parties have to re-try the case after this Court issues its opinion on appeal.

## CONCLUSION

37. Based on the foregoing, Appellants respectfully request an emergency stay of the Circuit Court's March 10 Order setting this matter for trial, as well as a stay of all proceedings in the Circuit Court pending the final disposition of this appeal or, in the alternative, a temporary stay until the Court decides this motion.

WHEREFORE, Appellants pray that their Emergency Motion for Immediate Stay is granted or, in the alternative, for a temporary stay and for all other relief to which they may be entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Brittany Edwards, hereby certify that on March 10, 2022, I electronically filed the foregoing with the Clerk of the Court using the e-*Flex* system, which shall send notice to all Counsel of Record.

/s/ *Brittany Edwards*
Brittany Edwards