

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
FIFTH DIVISION**

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

**PLAINTIFFS**

**v.**

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

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

**DEFENDANTS**

**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY**

Plaintiffs, by and through their undersigned counsel, and for their Opposition to Defendants' Motion to Stay, state:

**INTRODUCTION**

1. At issue in this action are four new election laws passed by the 93<sup>rd</sup> General Assembly, Acts 736, 973, 249, and 728 (the "Challenged Provisions"), challenged by Plaintiffs on the grounds that they violate Plaintiffs' rights to vote, speak, and assemble, and to the equal protection of laws under the Arkansas Constitution.<sup>1</sup> Prior to trial, which was held before this Court from March 15 to 18, 2022, the parties conducted extensive discovery and litigated both a motion

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<sup>1</sup> Plaintiffs are two organizations, the League of Women Voters of Arkansas (the "League") and Arkansas United (together, the "Organizational Plaintiffs") and five Arkansas voters: Dortha Dunlap, Leon Kaplan, Nell Matthews Mock, Jeffery Rust, and Dr. Patsy Watkins (the "Voter Plaintiffs").

to dismiss and a motion for summary judgment before this Court, as well as several interlocutory appeals before the Arkansas Supreme Court.

2. At the trial, the parties presented evidence through live testimony, documentary exhibits, and deposition recordings. After carefully considering the evidence before it, the Court ruled in Plaintiffs' favor. On March 24, 2022, the Court explained its decision in a written order, accompanied by an 86-page memorandum opinion, which permanently enjoined "Defendants, as well as their respective officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with the parties and the parties' officers, agents, servants, employees and attorneys, from enforcing or conducting any activities pursuant to Acts 736, 973, 249, or 728." *Id.*

3. The Court's decision was carefully considered and based on decades of Arkansas case law and precedent. The Court thoughtfully addressed Defendants' arguments, but found that, based on the extensive evidentiary record before it, the Challenged Provisions were unconstitutional. Mere hours after the Court issued its orders, Defendants filed a Notice of Appeal and the present Motion to Stay. *See* Def's Mot. to Stay ("Mot.").

4. Issuance of a stay is an extraordinary remedy that is rarely granted. As the party requesting the stay, Defendants bear the burden of demonstrating that (1) they have not just any likelihood, but a *strong* likelihood of success on the merits; (2) they will be irreparably injured absent a stay; (3) issuance of a stay will not substantially injure other parties; and (4) the stay is in the public interest.

5. Defendants' sole argument for the extraordinary remedy they seek—that a stay is "appropriate and necessary in order avoid confusion for election officials and voters, and to preserve the status quo pending the outcome of the appeal," Mot. ¶ 3— meets none of these requirements. Defendants do not even explain why they believe their appeal has merit, much less

establish that they have a strong likelihood of success. They similarly fail to satisfy any of the other necessary factors: they will not be irreparably harmed absent a stay, issuance of a stay will substantially injure *Plaintiffs*—as well as countless other Arkansas voters—who have a right to vote in elections free from unconstitutional impediment, and, for similar reasons, issuing a stay would run counter to the public interest.

6. Plaintiffs respectfully request that the Court deny Defendants’ Motion to Stay.

## **ARGUMENT**

### **A. Legal Standard**

7. Unless otherwise ordered by the Court, final judgment in an action seeking injunctive relief shall not be stayed during the pendency of an appeal. Ark. R. Civ. P. 62(a). When an appeal is taken from a final judgment granting an injunction, the Court may in its discretion restore or grant, modify, or suspend that injunction during the pendency of any appeal. Ark. R. Civ. P. 62(c).

8. Arkansas Rule of Civil Procedure 62 is substantially identical to its federal counterpart. *Compare* Ark. R. Civ. P. 62, *with* Fed. R. Civ. P. 62. “Based upon the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of a significant precedential value.” *City of Fort Smith v. Carter*, 364 Ark. 100, 107, 216 S.W.3d 594, 599 (2005) (citing *Smith v. Washington*, 340 Ark. 460, 10 S.W.3d 877 (2000)).

9. “[A]n order regarding a motion to stay is a matter lying within the sound discretion of the trial court.” *May Const. Co. v. Riverdale Dvlpt. Co., LLC*, 345 Ark. 239, 242, 45 S.W.3d 815, 818 (2001). A party does not have a right to a stay of injunctive relief pending appeal. *See Miller v. Thurston*, No. 5:20-CV-05070, 2020 WL 2850223, at \*1 (W.D. Ark. June 2, 2020) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)). Indeed, “[a] stay . . . pending appeal is an extraordinary

remedy.” *Memphis Publ’g Co. v. Fed. Bureau of Investigation*, 195 F. Supp. 3d 1, 3 (D.D.C. 2012).

The party seeking a stay bears the burden of proving circumstances justify issuance. *See id.*

10. In deciding whether to issue a stay, the Court considers whether the party seeking a stay has satisfied the following four factors: (1) they have made a strong showing they are likely to succeed on the merits; (2) they will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure other parties; and (4) the stay is in the public interest. *See id.* (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Brady v. Nat’l Football League*, 640 F.3d 785, 789 (8th Cir. 2011)).

11. Defendants’ Motion to Stay fails each of the four factors.

**B. Defendants are not likely to succeed on the merits.**

12. On the first factor, Defendants fail to explain why they have any likelihood of success on appeal—much less make the “strong showing” required for a stay. Instead, Defendants simply state that they “seek appellate review of the orders entered by this court because several important legal issues are implicated here. A stay is appropriate and necessary in order avoid confusion for election officials and voters, and to preserve the status quo pending the outcome of the appeal.” Mot. ¶ 3. As noted, Defendants bear the burden of demonstrating that they have a strong likelihood of success, and their generic statement that “several important legal issues are implicated” is clearly insufficient.

13. The Court’s 86-page opinion was extensive and carefully reasoned. It held, in accordance with decades of Arkansas case law, that the standard of review for a statute that infringes upon the fundamental right to vote under the Arkansas Constitution is strict scrutiny and that such a statute is unconstitutional unless “a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.”

Memorandum Order at 13-14 (citing *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) (quoting *Thompson v. Ark. Soc. Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984))).

14. The Court’s opinion was based on overwhelming and uncontroverted evidence that the Challenged Provisions impose severe, ongoing, and irreparable burdens on Plaintiffs’ and the public’s constitutionally protected rights. As the Court properly found, the Challenged Provisions are not mere administrative changes to the State’s election mechanics. They impose new and arbitrary procedural hurdles and conditions on the franchise and chill constitutionally protected expression.

15. Defendants failed to demonstrate that the Challenged Provisions advanced any state interest, let alone that any would be the least restrictive method of advancing a compelling state interest. Instead, Defendants produced only “conjecture, speculation, surmise, misinformation, baseless, and fabricated concerns about voter fraud and election insecurity.” Memorandum Order at 83-84. The Court held that such allegations do not constitute competent evidence under either rational basis or strict scrutiny review. *See id.* at 84.

16. In sum, the Court correctly applied the law to the evidence in this case, and properly found that “Plaintiffs met their burden to prove that” the Challenged Provisions violate the Arkansas Constitution. Memorandum Order at 85. In contrast, “Defendants failed to show [the Challenged Provisions] further the compelling governmental interests of preventing fraudulent voting in Arkansas and bolstering public confidence in election security.” *Id.*

17. In moving to stay this extensive and carefully reasoned order, Defendants do not even identify *what* they believe the Court got wrong, much less explain why they have a strong likelihood of success of obtaining reversal on appeal. Defendants’ failure to even attempt to carry their burden on this—the most important of the four factors—is reason alone to deny the motion to stay. But Defendants also fail to meet their burden on any of the other factors.

**C. Defendants will not be irreparably injured absent a stay.**

18. “[T]he party moving for stay must do more than merely allege that injury is possible; it must show that irreparable injury is likely to occur unless a stay is granted.” *Miller*, 2020 WL 2850223, at \*1 (citing *Nken*, 556 U.S. at 435; *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986)).

19. Defendants have not met this burden. Defendants have produced no evidence demonstrating that the permanent injunctions entered by the Court will result in administrative burdens, confusions, inefficiencies, difficulties or any other cognizable injury absent a stay—let alone that any such injury would be irreparable.

20. The Court’s injunction returns Arkansas’s voting regime to exactly what it was prior to enactment of the Challenged Provisions. Secretary of State John Thurston proclaimed that, under that preexisting voting regime, the November 2020 general election was the most successful in Arkansas history. Memorandum Order at 68, 72, 78. Defendants’ own admissions disprove any purported injury Defendants would suffer absent a stay.

**D. Issuance of the stay would substantially injure Plaintiffs.**

21. Conversely, Plaintiffs will suffer irreparable injury if a stay is issued. When constitutional rights are threatened or impaired by state statute, the Court presumes challengers will suffer irreparable injury. *See League of Women Voters of Missouri v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018). Indeed, the restrictions imposed by the Challenged Provisions on the Voter Plaintiffs’ fundamental rights to vote have been routinely deemed irreparable injuries. *See, e.g., id.* Likewise, courts have found that organizational plaintiffs face irreparable injury when they are forced to divert resources from other priorities or where their members are disenfranchised as a result of challenged laws. *See, e.g., id.* (collecting cases).

22. This Court has held that the Challenged Provisions violate Plaintiffs' fundamental constitutional rights. A stay of the Court's orders would result in violations of Plaintiffs' rights to vote, to speak, and to assemble under the Arkansas Constitution and would, therefore, irreparably injure Plaintiffs.

**E. Public interest weighs heavily against issuance of a stay.**

23. It is not just Plaintiffs who will be irreparably injured by a stay of the Court's injunctions. A stay would impose severe burdens on every Arkansan. The Arkansas Constitution demands that all eligible Arkansans have fair and equitable access to the franchise and can freely exercise their constitutionally protected rights to free speech and assembly. The Challenged Provisions are antithetical to this command because they inject uncertainty and arbitrary hurdles into the voting process that burden election officials, Plaintiffs, and all Arkansans alike.

24. Defendants claim, without citation to any factual or legal support, that "[a] stay is appropriate and necessary in order to avoid confusion for election officials and voters, and to preserve the status quo pending the outcome of the appeal." Mot. ¶ 3. Neither argument holds any water.

25. First, a stay of this Court's orders would exacerbate confusion for election officials and voters, not avoid it. Defendants have previously represented to this Court that the expeditious resolution of this case is necessary to provide clarity to Arkansan election officials and to allow for the orderly conduct of the rapidly-approaching primary election. *See* Ex. A, Defs.' Mot. to Expedite Appeal ¶¶ 5–6 ("Trial on the merits is set for February 15, 2022. This trial date is necessary to permit a decision on the merits before Arkansas's primary elections in May of 2022. Election officials, including the [Defendants], must have sufficient time to know what election laws will be in effect.").

26. Now, having reached that resolution, Defendants have decided they would rather muddy the waters by allowing unconstitutional laws to remain in effect during an appeal that may well extend beyond the primary election. Ballots for the primary election must be delivered to overseas and military voters in less than two weeks, on April 8, 2022. Ark. Code § 7-5-407(a). Early voting begins in six weeks, on May 9. Ark. Code § 7-5-418(a)(1)(A). A stay of this Court's orders pending appeal would all but ensure that the Challenged Provisions would be in place during the May primary election, thereby violating the constitutional rights of thousands of Arkansas voters.

27. Second, a stay would not preserve the status quo. The status quo is that Acts 736, 973, 249, and 728 have been permanently enjoined by an Arkansas court after a full trial on the merits and issuance of findings of fact, conclusions of law, and an order granting declaratory judgment and permanent injunctive relief.

28. Accordingly, the balance of equities and public interest weigh heavily against issuance of stay.

WHEREFORE, Plaintiffs respectfully request the Court deny Defendants' Motion to Stay.

Respectfully submitted,

**/s/ Jess Askew III**

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**CERTIFICATE OF SERVICE**

I, Jess Askew III, hereby certify that I served the Clerk of Court with the foregoing, and all exhibits hereto, on this 28th day of March 2022, via the e-flex electronic filing system, which shall send notice to all counsel of record.

**/s/ Jess Askew III**  
Jess Askew III

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# Exhibit A

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CV 2021- 581

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IN THE ARKANSAS SUPREME COURT

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.

Case No. CV 2021- 581

THE LEAGUE OF WOMEN VOTERS  
OF ARKANSAS and ARKANSAS UNITED

APPELLEES

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**MOTION TO EXPEDITE APPEAL AND TO IMPOSE EXPEDITED  
BRIEFING SCHEDULE**

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Appellants, for their motion to expedite this appeal and to impose an expedited  
briefing schedule, state:

1. The underlying action challenges four Acts of the 2021 General Assembly that relate to elections.
2. Appellees, who are plaintiffs below, allege that the new statutes violate the Arkansas Constitution, and they seek injunctive relief. Appellants assert the laws are constitutional under the Arkansas Constitution.
3. Appellants moved to dismiss the complaint below on grounds of, *inter alia*, sovereign immunity.

4. The trial court denied the motion to dismiss on grounds of, *inter alia*, sovereign immunity, and Appellants bring this interlocutory appeal under Ark. R. Civ. P.—Civ. 2(a)(10), based on the denial of sovereign immunity.

### **I. Request to Expedite**

5. Trial on the merits is set for February 15, 2022.

6. This trial date is necessary to permit a decision on the merits before Arkansas's primary elections in May of 2022. Election officials, including the Appellants, must have sufficient time to know what election laws will be in effect before the afore-referenced primaries.

7. Respectfully, based on the interests in an expedited decision in this case from this Court, Appellants contend this appeal should be expedited.

### **II. Expedited Briefing Schedule**

8. Counsel for both Appellants and Appellees have conferred and agree on the following proposed expedited briefing schedule in this appeal:

- a. Appellants' Opening Brief: December 29, 2021
- b. Appellees' Brief: January 10, 2022
- c. Appellants' Reply Brief: January 13, 2022

WHEREFORE, Appellants respectfully request that this Court expedite this appeal, order expedited briefing, and grant all other just and proper relief.

Respectfully submitted,  
LESLIE RUTLEDGE

Attorney General

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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 December, 2021, via the e-flex electronic filing system, which shall send notice to all Counsel of Record.

Michael A. Mosley  
Michael A. Mosley