IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH JUDICIAL DISTRICT, FIFTH DIVISION

60CV-21-3138

LEAGUE OF WOMEN VOTERS OF ARKANSAS
ARKANSAS UNITED
DORTHA DUNLAP
LEON KAPLAN
NELL MATTHEWS MOCK
JEFFERY RUST PLAINTIFFS

JOHN THURSTON, In his official capacity as the Secretary of State of Arkansas
WENDY BRANDON,
SHARON BROOKS,
JAMIE CLEMMEE,
BELINDA HARRIS-RITTER,
WILLIAM LUTHER,
J. HARMON SMITH, each in their official capacities as members of the
State Board of Election Commissioners of Arkansas DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION TO STAY

On March 24, 2022, the Court entered a Memorandum Order that set out its findings of fact, conclusions of law, and analysis of the legal issues and evidence based on the March 15 thru 18, 2022 bench trial in this case. The Memorandum Order stated that "Plaintiffs met their burden of proof by a preponderance of the evidence that (1) all four Challenged Provisions

(Acts 736, 973, 249, and 728) violate the Free and Equal Elections Clause, Ark. Const. art. 2 § 3, and the Equal Protection Clause, Ark. Const. art. 2 § 3; (2) Acts 736 and 973 violate the Voter Qualifications Clause, Ark. Const. art. 2 § 1; (3) Act 249 violates Section 19 of Amendment 51; and (4) Act 728 violates the rights to freedom of speech and assembly in the Arkansas Constitution, Ark. Const. art. 2 § 4; Ark. Const. art. 2 § 6." (*See*, Findings of Fact, Conclusions of Law, and Memorandum Order Granting Declaratory Judgment and Permanent Injunctive Relief, p. 10). The Court entered judgment consistent with its Memorandum Order on March 24, 2022 declaring Acts 736, 973, 249, and 728 of the 93rd General Assembly unconstitutional and permanently enjoining their operation and enforcement.

On March 24, 2022, Defendants filed notice of appeal and their motion for stay of judgment enjoining enforcement of Acts 249, 728, 736, and 973. Defendants assert in their motion for stay 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." Plaintiffs object to the motion for stay of judgment.

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)).

Rule 62(c) of the Arkansas Rules of Civil Procedure provides that when "an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court from which the appeal is taken, in its discretion, may suspend, modify, restore or grant an injunction during the pendency of the appeal..." "[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 its issuance. *See id.*

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)).

As the Court stated in its Memorandum Order, "Plaintiffs met their burden to prove that Acts 249, 736, and 973 violate the rights of registered Arkansas voters, and that Act 728 violates the right of Arkansans to assemble and offer expressive non-electioneering speech, conduct, comfort within 100 feet of the primary exterior entrance of a polling place. Defendants failed to show that Acts 249, 728, 736, and 973 further the compelling governmental interest of preventing fraudulent voting in Arkansas and bolstering public confidence in election security."

The Court detailed the proof at length in its Memorandum Order. The testimony from the Voter Plaintiffs (Dortha Jeffus Dunlap, Nell Matthews Mock, Jeffery Rust, Dr. Patsy Watkins) and on behalf of the Organizational Plaintiffs (Bonnie Miller for the League of Women Voters of Arkansas, Mireya Reith for Arkansas United) and proved that Acts 249, 728, 736, and

973 will impair their rights as registered voters to free and unfettered access to vote and have their votes counted.

As the Court stated in its Memorandum Order:

> The testimony of Dr. Linton Mohammed is clear, convincing, and undisputed that Act 736's, "signature matching rules and procedures, which allow individuals without adequate training—and without guidance—to reject the signatures on absentee ballot applications, will result in a significant number of erroneous rejections." Dr. Mohammed further concluded that, "Arkansas election officials are likely to reject properly completed absentee ballot applications, signed by the correct voter, because of their incorrect determination that the signatures on the absentee ballot applications are not genuine." Simply put, there is no evidence that the signature comparison standard prescribed by Act 736 will further the governmental interest in promoting confidence in election integrity and preventing voter fraud.

(*See*, Memorandum Order, pp. 80-81)

Likewise, the expert opinion testimony of Dr. Kenneth Mayer was clear, convincing, and uncontradicted that Acts 249, 728, 736, and 973 will impair the rights of Plaintiffs and that those measures will have a disproportionately suppressive impact on voter turnout and participation by minority, elderly, and other registered voters with low incomes and/or education attainment.

> Dr. Mayer testified that prior to the enactment of the Challenged Provisions, Arkansas already had among the highest absentee ballot rejection rates in the country. In 2020, Arkansas had the highest absent ballot rejection rate, one that was more than ten times higher than the national average.

Dr. Mayer believes the Challenged Provisions, whether taken individually or collectively, will disenfranchise Arkansas voters. By removing the Affidavit Fail-Safe option, Act 249 transformed Arkansas into what the National Conference of State Legislatures describes as a "strict" voter ID state. A state earns the "strict" designation if its laws require only limited forms of ID with no exceptions. Act 249's elimination of the Affidavit Fail-Safe removes the method by which more than 1,600 voters in Pulaski County alone voted in 2020. Although Dr. Mayer did not receive data from other counties, he is certain statewide usage exceeds what he observed in Pulaski County. Testimony by Mireya Reith from Arkansas United that members of the Fayetteville community had used the failsafe in recent elections corroborates this opinion.

Dr. Mayer testified that Act 249 also removes the Affidavit Fail-Safe for absentee voters who submit their ballots by mail, but it does not specify what exactly such voters must do to comply. Presumably, voters are expected to include a photocopy of their ID in the envelope with their ballot. But it is unclear that this is sufficient from reading the text of the statute. According to Dr. Mayer, including a photocopy of their ID in the envelope submitted by absentee voters who mail their ballots would prove extremely difficult for the voters in the approximately 14% of Arkansas households who do not have a computer and likely also lack access to a photocopier or printer. Act 249 will have an especially adverse impact on lower socioeconomic, minority, elderly, and younger voters who are less likely to possess the requisite forms of ID. Consequently, the burdens will be most severely felt by those subpopulations and increase the likelihood they are unfairly and erroneously disenfranchised as compared to their fellow citizens.

Act 973 will have a depressive effect for multiple reasons. The various absentee ballot deadlines increase the informational burdens on voters and the potential for confusion. Commissioner Inman's testimony corroborates this as she felt voters who had cast their ballots under the new deadline were more likely to be confused by the new change and potentially miss the new deadline. Act 973 also increases the likelihood that voters who originally intended to mail their absentee ballots but fear they will miss the deadline because of mail delays, would be turned away if they try to return their ballot in

person during the three-day window. Since 2016, more than 1,222 Arkansas voters returned their absentee ballots in person during the three-day window that Act 973 eliminates. Arkansas already had a very high absentee ballot rejection rate compared to other states, and Act 973 will lead to even more rejections and voter disenfranchisement.

Dr. Mayer testified that Act 728 will disproportionately impair and disenfranchise minority voters who are more likely to wait in lines longer than their white counterparts. Minority voters across the nation were more likely to wait at least 30 minutes in line to vote and on average wait nearly 30% longer to vote than their white counterparts. Act 728's lack of clarity creates the additional risk of unequal application of discretion. Given the criminal penalties of Act 728, this is a particularly concerning prospect because minority voters are more likely to face long lines where they will require assistance to endure the wait.

Dr. Mayer's analysis of Act 736 corroborates Dr. Linton Mohammed's expert opinion testimony regarding the unreliability of the signature matching process for verifying voters' identification. The academic literature shows that signature matching is an inherently error-prone process that relies on subjective standards, election offices use varying methods and standards even when considerable resources are devoted to training, and error rates resulting in improper rejections are high. In a Georgia study that reviewed absentee ballots rejected for mismatched signatures which were subsequently cured to illustrate this problem, the rejection error rates were 32.4% for the 2020 general election and 60.4% for the January 2021 runoff elections that followed.

Dr. Mayer anticipates there to be similar problems in Arkansas where officials employ similarly inconsistent and subjective standards. To confirm this, Dr. Mayer analyzed the signature rejection rates for absentee ballots in Arkansas since data was not available for absentee ballot application rejection rates. Of the counties that did report their data, rejection rates varied widely from county to county, reflecting the inconsistent standards for signature comparison from county to county. Dr. Mayer testified that Act 736 takes the subjective and inherently error-prone signature matching process already in

place and exacerbates its effects. This will not only increase overall rejection rates, but also erroneous rejection rates.

Dr. Mayer opined that Act 736 will not enhance election security or integrity. He testified that voter fraud is "vanishingly rare" nationally and in Arkansas. Since 2002, there have been only four instances of confirmed election fraud in Arkansas. There is no material voter fraud in Arkansas and nothing indicating that Arkansas elections are not secure. Moreover, there have been no instances of fraud or misconduct associated with (1) the Affidavit Fail-Safe eliminated by Act 249; (2) absentee ballots being turned in in-person the day before election day; (3) absentee ballot application signature matching, or (4); people handing out water or snacks to voters waiting in line.

Dr. Mayer's expert testimony was not contradicted.

(*See*, Memorandum Order, pp. 40-44).

The Court summarized the proof at trial in its Memorandum Opinion on suppressive effect of Acts 728 and 973 as follows.

The Court finds that Plaintiffs met their burden of proof by a preponderance of the evidence that Act 728 violates their rights to freedom of speech and assembly that are protected by the Constitution of Arkansas and the Constitution of the United States. There is no law in Arkansas against being within 100 feet of the primary exterior entrance of a polling location and handing out bottled water, providing comfort to persons who are waiting the enter the polling location, or engaging in other lawful conduct. Defendants presented no evidence showing that giving water and other comfort to persons waiting to enter polling places caused disruptions, civil disturbances, violation of laws against electioneering, loitering, and voter intimidation, or any other offenses.

The Court finds that Plaintiffs met their burden of proof by a preponderance of the evidence that Act 973 violates their right to vote. The evidence was clear and convincing that moving the deadline for in-person return of absentee ballots from the Monday

before election day to the Friday before election day provides no administrative benefit because the election workers who handle and canvass absentee ballots are not the same people who staff polling places for early voting and election-day voting, at least in Pulaski County. Based on her experience in election administration, Commissioner Inman testified that Act 973's change to the deadline may confuse voters, making it less likely they will return their ballot in time. The Court found the testimony of Plaintiffs persuasive that for absentee voters who miss the Friday in-person return deadline, mailing the absentee ballot involves the risk that the ballot may not arrive by election day. Voters in that situation would have to vote provisionally in person which Director Shults and Mr. Bridges concede defeats the whole purpose of voting by absentee ballot. As Governor Hutchinson stated when he refused to sign Act 973, "[Act 973] unnecessarily limits the opportunities for voters to cast their ballot prior to the election."

Furthermore, Defendants presented no proof to substantiate the asserted administrative benefit of shortening the deadline for submission of in-person absentee ballots from the Monday before election day to the Friday before election day. All ballots cast during an election by qualified voters as of the end of election day – including absentee ballots that must be canvassed – must be processed. Provisional ballots must be analyzed by election officials to determine if they will be counted. Although election day ends the time for casting ballots, election officials are obligated to process and canvass ballots after polls close on election day and for the next ten (10) days in order for county clerks to certify election results to the Secretary of State ten days after election day.

The only way moving the deadline for voters to deliver absentee ballots in person to the Friday before election day will reduce the workload for election officials is if registered voters do not submit absentee ballots or if election officials can disqualify and refuse to canvass absentee ballots from voters delivered to county clerks after the Friday before election day, four days before election day and almost two weeks before county clerks must certify election returns to the Secretary of State. As the Court stated when it announced its decision from the bench on March 18, the law is clear that states may not casually deprive a class of individuals of the right to vote because

> of some remote administrative benefit. *See, Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

(*See*, Memorandum Order, pp. 81-83)

No evidence was presented that fraudulent voting occurs in Arkansas – whether in person or by absentee voting – during the four-day bench trial. Director Daniel Shults of the State Board of Election Commissioners and Mr. Joshua Bridges of the Office of the Secretary of State acknowledged that purported concerns about fraudulent voting and election security broadcast through social media, reported by news media, and reported through telephone calls and email messages to their offices were based on misinformation and disinformation. Secretary of State Thurston declared that the November 2020 general election was the most successful in Arkansas history. Not a single allegation of fraudulent voting was made during the trial, let alone proved. And as the Court mentioned in its Memorandum Order, none of the members of the Arkansas General Assembly who sponsored and/or voted for passage of Acts 249, 728, 736, and 973 testified, let alone substantiated the purported concerns about fraudulent voting and election insecurity that were said to warrant passage of those measures.

Therefore, the Court concludes that it is unlikely that Defendants will succeed on the merits of their appeal. As the Court mentioned in its Memorandum Order, the Arkansas Supreme Court emphasized that "[w]hen a statute infringes upon a fundamental right," it is subject to strict scrutiny and "cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley 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). In addition, when an equal protection challenge brought under Article 2, Section 3 of the Arkansas Constitution implicates a "suspect classification"—such as a classification based on race—it "warrant[s] strict scrutiny." *Howton v. State*, 2021 Ark. App. 86, at 7, 619 S.W.3d 29, 35 (2021).

Defendants acknowledge that voting is a fundamental right. Hence, the Court applied the standard of judicial review in this case based on what has been clear law on this subject for generations. The Constitution of the United States protects the right of all qualified citizens to vote in state and federal elections. *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941). As was stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a

state to cast their ballots and have them counted..." 313 U.S., at 315, 61 S.Ct., at 1037.

The right of suffrage is a fundamental right in a free and democratic society. Especially since the right to exercise the voting franchise in a free and democratic society is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964). The Supreme Court of the United States made it clear generations ago that "fencing" out from the voting franchise a sector of the population *because of the way they may vote* is constitutionally impermissible. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965).

However, the evidence presented during the trial of this lawsuit demonstrates that Acts 249, 728, 736, and 973 are based entirely on conjecture, speculation, surmise, misinformation, and fear-mongering about allegations of voter fraud and election insecurity. Defendants concede that concerns about voter fraud and election insecurity in Arkansas are baseless and fabricated. Conjecture, speculation, surmise, misinformation, baseless, and fabricated concerns about voter fraud and election insecurity does not constitute competent evidence no matter whether one applies the

rational basis or strict scrutiny standard for evaluating the constitutionality of Acts 249, 728, 736, and 973. The law does not permit Defendants to rely on conjecture, speculation, surmise, misinformation, and fear-mongering about baseless assertions of voter fraud and election insecurity as substitutes for proof. *Glidewell v. Arkhola Sand & Gravel Co.*, 212 Ark. 318, 208 S.W.2d 4 (1948). Having heard four days of trial testimony from lay and expert witnesses, reviewed the documentary evidence, and analyzed the pertinent law, it would be absurd for the Court to conclude that Defendants are likely to succeed on the merits of their appeal in the face of the proof adduced at trial and the legal standard the Court was required to apply to it.

It is telling that Defendants do not even contend they are likely to succeed on the merits. Nor do they contend that they will be irreparably harmed absent a stay. The question the Court must consider in deciding Defendants' motion to stay the permanent injunctions as to the operation and enforcement of Acts 249, 728, 736, and 973 is whether the Defendants will suffer irreparable harm if the motion to stay is granted. Defendants have presented 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 to Defendants would be irreparable.

The proof is equally persuasive on this factor that granting the stay of the permanent injunction as to Act 249, 736, and 973 will subject the Voter Plaintiffs and all other registered voters in Arkansas to laws that violate the right to vote. Staying the injunction as to Act 728 would subject the Organizational Plaintiffs and others who engage in non-electioneering expressive speech, conduct and comfort within 100 feet of the primary exterior entrance of a polling place to the risk of criminal punishment of up to one year in county jail and/ fine of up to $2500. Beyond that, it would mandate termination and forfeiture of future employment of state employees who engage in non-electioneering expressive speech, conduct, and comfort.

Act 249 eliminates the chance for in person voters to sign a written statement attesting, under penalty of perjury, to their identity and voter eligibility so they may cast a provisional ballot at the polling site. Act 249 also eliminates the chance for voters who cast absentee ballots but lack compliant photo identification to cast their absentee ballots by mail accompanied by a written statement attesting, under penalty of perjury, to their identity and that they are registered to vote, and have their absentee

ballots considered as provisional ballots so they can be canvassed and counted by election commissioners. Hence, Act 249 *disqualifies registered voters* who do not possess compliant photo identification from voting, whether in person or by absentee ballot, even if they declare under penalty of perjury that they are who they purport to be and that they are registered to vote. Staying the injunction as to Act 249 would prevent those voters from casting ballots in the upcoming primary election (beginning May 9 and concluding on May 24, 2022) – less than 60 days from now, any runoff elections, special elections, and in the November 2022 general election.

Staying the permanent injunction as to Act 736 will subject voters who apply for absentee ballots to have their signatures subjected to what Dr. Linton Mohammed termed "inherently unreliable" comparisons of the signatures with voter signatures on voter registration cards. Again, Dr. Mohammed testified that "Arkansas election officials are likely to reject properly completed absentee ballot applications, signed by the correct voter, because of their incorrect determination that the signatures on the absentee ballot applications are not genuine."

As Governor Hutchinson stated when he refused to sign Act 973, "[Act 973] unnecessarily limits the opportunities for voters to cast their ballot prior to the election." Staying the permanent injunction as to Act 973

will subject voters who cast absentee ballots to that unnecessary limitation on voting.

The obvious effect of granting Defendants motion will suppress voter turnout. Doing so will impair the right of registered voters who lack compliant photo identification to vote. It will "unnecessarily" limit the opportunities for voters to deliver their absentee ballots. Granting Defendants' motion to stay the injunction of Act 736 will infringe on the rights of persons to engage in expressive non-electioneering speech, conduct, and comfort assistance within 100 feet of the primary exterior entrance of polling locations during elections. The Court finds that those consequences constitute irreparable harms that Plaintiffs and other registered voters will suffer if the motion to stay the permanent injunction is granted.

Defendants contend that "[a] stay is appropriate and necessary in order to avoid confusion for election officials and voters." Acts 249, 728, 736, and 973 have never been applied to any elections in Arkansas before now. There is no proof that Arkansas election officials and voters were confused about how to conduct elections and cast in-person and absentee ballots before the General Assembly enacted those measures. The Court's injunction returns Arkansas's voting regime to exactly what it was prior to

enactment of the Challenged Provisions. Defendants, specifically the Secretary of State John Thurston proclaimed that, under the preexisting voting regime, the November 2020 general election was the most successful in Arkansas history. The Court heard lay and expert testimony that the challenged measures will suppress voter participation, that the signature comparison requirement of Act 736 is inherently unreliable, and that the challenged measures do not further the governmental interests of preventing voter fraud and promoting confidence in election security. In the face of this proof, the assertion that "[a] stay is appropriate and necessary in order to avoid confusion for election officials and voters" is nonsense.

Now, Defendants would rather allow 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.

None of the factors that must be satisfied in order to justify a stay has been established. In fact, Defendants have failed to even contend they exist, let alone supported that contention with any argument based on the proof. For the foregoing reasons, Defendants' motion to stay the permanent injunction of Acts 249, 728, 736, and 973 of the 93rd General Assembly must be DENIED.

ORDERED March 29, 2022.

WENDELL L. GRIFFEN
CIRCUIT JUDGE

Courts stand...as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or...non-conforming victims of prejudice and public excitement. Chambers v. Florida, 309 U.S. 227 (1940)