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CV-21-581

IN THE SUPREME COURT OF ARKANSAS

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

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

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, HONORABLE WENDEL GRIFFEN
PULASKI COUNTY CIRCUIT COURT CASE NO. 60CV-21-3138

APPELLEES' BRIEF

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TABLE OF CONTENTS

POINTS ON APPEAL

I. Appellants bring this appeal under Rule of Appellate Procedure-Civil 2(a)(10), which allows for interlocutory appeals of motions to dismiss based on the defense of sovereign immunity, but sovereign immunity is inapplicable here, where Appellees claim the challenged laws are unconstitutional and seek only equitable relief.

Martin v. Haas, 2018 Ark. 283, 556 S.W.3d 509.

Monsanto Co. v. Ark. State Plant Bd., 2019 Ark. 194, 576 S.W.3d 8.

II. Appellants incorrectly attempt to expand Rule 2(a)(10)'s narrow scope, which applies only to the purely legal question of sovereign immunity, to obtain a full merits review of the order denying their motion to dismiss.

Monsanto Co. v. Ark. State Plant Bd., 2019 Ark. 194, 576 S.W.3d 8.

Williams v. McCoy, 2018 Ark. 17, 535 S.W.3d 266.

III. Even if Rule 2(a)(10) authorized a full review of the merits of the order denying the motion to dismiss, Appellants' contention that the merits of their Rule 12(b)(6) arguments must be reviewed *de novo* is incorrect as a matter of law.

Ark. Dept. of Fin. & Admin. v. Lewis, 2021 Ark. 213, 633 S.W.3d 770.

Monsanto Co. v. Ark. State Plant Bd., 2019 Ark. 194, 576 S.W.3d 8.

IV. Even if Rule 2(a)(10) authorized a full review of the merits of the order denying the motion to dismiss, the circuit court's decision must be affirmed.

a. The circuit court correctly found that it was premature to decide on a motion to dismiss which legal standard will apply to the merits of the constitutional claims.

Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002).

Duke v. Cleland, 5 F.3d 1399 (11th Cir. 1993).

b. Appellees pleaded sufficient facts alleging that each of the four Challenged Provisions unconstitutionally impair or forfeit the fundamental, constitutional right to vote.

Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992).

Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002).

c. Appellees pleaded sufficient facts alleging that Act 728 abridges the fundamental, constitutional right to free speech and assembly.

Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182 (1999).

Buckley v. Valeo, 424 U.S. 1 (1976).

d. Appellees pleaded sufficient facts alleging that the Challenged Provisions violate the Equal Protection Clause.

Howton v. State, 2021 Ark. App. 86, 619 S.W.3d 29 (2021).

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Miscellaneous

STATEMENT OF THE CASE AND FACTS

Appellees are five individual voters, the youngest of whom is 68, who suffer from various medical conditions, and two non-partisan non-profit organizations, with hundreds of members statewide, that promote civic engagement and participation in our democracy. They pleaded facts alleging that four revisions to Arkansas law violate their constitutional rights to vote, speak, and assemble, and to the equal protection of laws. Appellees seek only declaratory and injunctive relief.

Sovereign immunity, the sole question at issue in this appeal under Rule of Appellate Procedure–Civil 2(a)(10), does not apply to claims for declaratory or injunctive relief against an illegal, unconstitutional, or *ultra vires* act. The circuit court correctly ruled that Appellees' well-pleaded allegations of fact were sufficient to defeat Appellants' motion to dismiss. The propriety of the court's ruling on this narrow question is all that is before this Court now. Because Appellees did so, this should be the end of the matter at this stage of the case. Appellants will have their chance to prove facts supporting their views of the challenged statutes, but the broader question of the merits of Appellees' claims is not (yet) properly before this Court.

Appellees allege that four statutes adopted by the 93rd General Assembly in 2021 (collectively, the "Challenged Provisions"), violate their fundamental rights—

and those of their members and constituents—enshrined in the Arkansas Constitution. *See* **(RP 73–120)**. In support, Appellees allege as follows:

Act 736 (the "Absentee Application Signature-Match Requirement") made it substantially harder for lawful voters to obtain an absentee ballot by making the signature-matching process more unreliable and error-prone than before. *See* **(RP 92–95)**. Act 736 requires rejection of absentee ballot applications when an election official determines that the voter's signature on the application does not match the signature on the original voter-registration application, which may be years or decades old. **(RP 92)**. This standardless process depends on a *single* comparator signature—even though other, more recent comparators may be, and usually are, available. **(RP 92)**. Signature matching experts universally find that, under conditions like these, erroneous rejections are inevitable. **(RP 93)**. The General Assembly imposed this new error-prone requirement without any evidence that Arkansas's prior system allowed for or resulted in any voter fraud. **(RP 93)**.

Before Act 736, officials could match voter signatures against registration "records," including past absentee-ballot applications or absentee ballot materials themselves. **(RP 92)**. While Arkansas law allows a voter to reapply for an absentee ballot if it is initially rejected because of a purported signature mismatch, Ark. Code Ann. § 7-5-404(a)(2)(B)(ii), Act 736 requires that the second (or third) application be compared to the same single comparator signature, creating a potential feedback

loop of erroneous rejections with no prospect of escape. **(RP 95)**. With each transaction, time is lost, making it less likely that the voter will successfully obtain their ballot with enough time before the deadline to return it. **(RP 95)**. If the voter's signature has changed from the earlier comparator because of age, infirmity or injury, the "do-overs" cure nothing, because the problem lies with the *comparator*. This narrowing of comparators is wholly unjustified, and the inevitable mistakes made in comparing signatures will disenfranchise voters properly entitled to absentee ballots. **(RP 93)**.

Act 973 (the "In-Person Ballot Receipt Deadline") unjustifiably shortened the deadline for voters to return absentee ballots in person, rendering invalid any ballots returned any later than the *Friday* before election day. **(RP 96)**. Until this change, voters had long been permitted to hand deliver their ballots in person up to and including the day before election day. **(RP 96)**. Arkansas now has the earliest absentee-ballot deadline in the country, and it imposes substantial burdens on lawful voters. **(RP 96, 97)**. Voters can apply for absentee ballots by mail or in person up to the Tuesday before election day. **(RP 97)**. Thus, under the new law, voters who timely apply for absentee ballots may have three days or less to *both* receive *and* return their ballots in person before election day, a virtually impossible scenario. **(RP 97)**. Absentee ballots delivered by mail are counted if they are received by 7:30 p.m. on election day, a full four days after the deadline for hand-delivered ballots.

(RP 97). It is illogical to refuse to similarly accept ballots from voters who hand deliver them to ensure that their ballots actually reach election officials in those last critical days before the election. Act 973 will disenfranchise lawful voters without any reasonable justification. **(RP 97–98)**.

Act 249 (the "Voter ID Affidavit Prohibition") enacted a strict voter identification requirement for the first time in Arkansas. It eliminates a critical option previously available to voters who lack or cannot produce an accepted form of voter identification: the ability to affirm their identity under penalty of perjury in a written affirmation (the "Affidavit Fail-Safe"). **(RP 100, 102–03)**. Voters who used the Affidavit Fail-Safe cast provisional ballots, but those ballots were *automatically* counted if election commissioners could confirm the voter was eligible. **(RP 100–01)**. The Affidavit Fail-Safe protected against disenfranchisement, with no instances of fraud. **(RP 114, 116)**. By eliminating this option, Act 249 burdens voters without sufficient justification. **(RP 102–03)**. Act 249 has no exception for voters who lack an acceptable form of identification. **(RP 102)**. Those voters will be disenfranchised unless they can obtain acceptable voter identification and present it at the county clerk's office within six days of the election—imposing a burden that is not only unjustifiable, but likely impossible for many voters to complete in time, not least of all because the Secretary of State's website provides no information about the free identification, much less how to obtain it. **(RP 103, 115)**.

Act 728 (the "Voter Support Ban") impedes the expressive activities of non-profit non-partisan groups such as Appellees the League of Women Voters of Arkansas (the "League") and Arkansas United, which have provided water and light refreshments to voters in polling place lines as a celebratory expression of support for our democracy and the tenacity of voters who, in Arkansas, regularly endure excessively long lines—especially in Pulaski County, Arkansas's most racially diverse county. **(RP 105–06)**. Act 728 *criminalizes* "enter[ing]" an area within 100 feet of a polling place unless entering or leaving a building where voting is taking place for "lawful purposes." Ark. Code Ann. § 7-1-103(a)(24); **(RP 76–77, 106)**. Anyone who violates this provision commits a class A misdemeanor, which can result in a fine of up to $2,500 and incarceration of up to one year. Ark. Code Ann. §§ 5-4-201(b)(1), 5-4-401(b)(1); *see also id.* § 7-1-103(b)(1). There is *no guidance* on what constitutes a "lawful purpose" for individuals other than voters or election officials to enter this zone, and there are *no* exceptions for those engaging in the expressive activity of supporting voters who encounter long lines through innocuous, nonpartisan activities like handing out water and snacks. **(RP 105)**. As statements by the law's proponents reveal, Act 728's *purpose* was to prohibit such non-partisan voter-support activities. **(RP 105)**. Act 728's vague language also applies to exclude non-voting caretakers, friends, and family from providing support to a voter waiting in line. **(RP 105)**.

Appellants moved to dismiss. **(RP 157-190)**. Included in their thirty-page motion was a three-paragraph argument alleging that the case should be dismissed on sovereign immunity grounds because the equitable relief Appellees seek, if granted, would "control the actions of the state," by preventing violations of Arkansans' fundamental rights. **(RP 189)**. After full briefing and argument, the circuit court denied Appellants' motion on all grounds, including sovereign immunity. **(RP 517)**. On that question specifically, the circuit court, relying on this Court's long "recognized . . . exception to the defense of sovereign immunity when the State is acting . . . unconstitutionally," held that sovereign immunity is inapplicable because Appellees alleged facts that the Challenged provisions violate the Constitution and seek only equitable relief. **(RP 515)** (quoting *Williams v. McCoy,* 2018 Ark. 17, 3, 535 S.W.3d 266, 268).

Appellants appeal the circuit court's sovereign immunity holding under Rule 2(a)(10).

ARGUMENT

Appellees allege facts that enforcing the Challenged Provisions would violate their fundamental constitutional rights. To remedy these violations, Appellees seek only declaratory and injunctive relief. Under this Court's precedent, sovereign immunity is inapplicable in these circumstances. Moreover, the question of whether the circuit court correctly concluded that Appellees alleged sufficient facts to overcome or preclude a sovereign immunity defense at this stage is the only proper question at issue in this appeal, which Appellants bring under Rule 2(a)(10). But even if the Court could look beyond that narrow question, the circuit court's order must be affirmed.

First, even if some more expansive consideration of the merits of Appellants' Rule 12(b)(6) motion to dismiss were warranted under Rule 2(a)(10), that review should *not* be *de novo*, as Appellants contend. This Court has repeatedly held that motions to dismiss are generally reviewed for an abuse of discretion, and that only the purely legal question of sovereign immunity is subject to *de novo* review. Moreover, on a motion to dismiss, the only facts a court may consider are those alleged in the operative complaint, so Appellants' reliance on factual assertions to the contrary (i.e., that the Challenged Provisions do not burden fundamental rights) are plainly erroneous.

The thrust of most of Appellants' argument is that rational basis review should apply when reviewing the merits of Appellees' claims because Appellants claim (as a factual matter) the Challenged Provisions do not actually impair or burden any fundamental rights. But this Court has never held it appropriate to defer to the version of facts the defending party presents on a motion dismiss, and Appellants' attempt to upend the long-standing framework applied to such motions should be rejected. Moreover, the circuit court correctly held that the appropriate level of scrutiny on the merits of Appellees' constitutional claims turns on the factual question of whether the Challenged Provisions burden fundamental rights, making the decision as to what standard of review applies at this procedural juncture premature**. (RP 516-517)**. Specifically, *if* Appellees establish that the Challenged Provisions burden fundamental rights, *then* strict scrutiny applies. Appellants' contrary arguments, that Arkansans' fundamental rights are not burdened, must be considered on an evidentiary record—not at the preliminary motion to dismiss stage.

Second, Appellees easily satisfy the standards to overcome a Rule 12(b)(6) motion to dismiss by alleging facts that establish that the Challenged Provisions violate the fundamental rights to vote guaranteed under Article 3, equal protection under Article 2, and freedom of speech and assembly under Article 2 of the Constitution. Ark. Const. art. III § 2*; id.* art. II §§ 3, 4, 6.

I. Standard of Review

Rule 2(a)(10) permits interlocutory appeal from an order denying a motion to dismiss based on the defense of sovereign immunity. Whether a party is immune from suit is a pure question of law reviewed *de novo*. *See Ark. Dept. of Fin. & Admin. v. Lewis*, 2021 Ark. 213, at 2-3, 633 S.W.3d 767, 770. In conducting that review, this Court looks only to the allegations in the complaint, takes all facts alleged as true, and views them in a light most favorable to the plaintiff. *Id*.; *see also Monsanto Co. v. Ark. State Plant Bd.*, 2019 Ark. 194, at 8-9, 576 S.W.3d 8, 13.

II. Sovereign immunity is inapplicable because Appellees allege facts showing that the Challenged Provisions are unconstitutional and seek only equitable relief.

This Court has been clear: the defense of sovereign immunity is inapplicable in a lawsuit seeking declaratory or injunctive relief and alleging an illegal, unconstitutional, or ultra vires act. In *Martin v. Haas*, which similarly involved a claimed violation of the right to vote, this Court unequivocally dismissed the State's defense for that reason alone:

> Because appellee has asserted that Act 633 violates qualified voters' constitutional right to vote and seeks declaratory and injunctive relief, not money damages, this action is not subject to the asserted sovereign-immunity defense.

2018 Ark. 283, at 8, 556 S.W.3d 509, 515. The only analysis necessary to dispose of the sovereign immunity defense is to ask whether the plaintiffs (a) sufficiently allege a violation of constitutional rights, and (b) seek only equitable relief; if they

do, the defense fails. *See id*.; *see also Monsanto*, 2019 Ark. 194, at 9, 576 S.W.3d at 8, 13.

In *Monsanto*, 2019 Ark. 194, at 9, 576 S.W.3d at 13, this Court noted this task on a motion to dismiss is "simple" and has never required full examination of the merits of the constitutional claims. *See id.* at 9, 576 S.W.3d at 13. Indeed, in *Haas* this Court quickly disposed of the sovereign immunity defense *despite* finding that the law was *not* unconstitutional on the merits of a preliminary injunction in the very same decision. 2018 Ark. 194, at 7–8, 556 S.W.3d at 514–15.

The circuit court thus hewed to clear precedent. Appellees allege the Challenged Provisions infringe their constitutional rights to vote, speak, and assemble, and to equal protection of laws. Relying on this Court's long "recognized . . . exception to the defense . . . when the state is acting . . . unconstitutionally," the circuit court properly held that "sovereign immunity does not bar Plaintiffs' claims" because "Plaintiffs allege that the Challenged Provisions are unconstitutional, satisfying the exception to sovereign immunity." **(RP 515)** (quoting *Williams,* 2018 Ark. 17, 3).

Here, Appellees seek only declaratory and injunctive relief based on allegedly unconstitutional acts. **(RP 118–119)**. Accordingly, sovereign immunity is inapplicable.

III. Rule 2(a)(10) allows for only a narrow appeal on the question of sovereign immunity; it does not authorize a full merits review.

Appellants go further than Rule 2(a)(10) and this Court's precedent allow, attempting to expand this appeal beyond the narrow question of whether the circuit court correctly denied of the sovereign immunity argument at the motion to dismiss stage, and seeking a full review on the merits. Appellants reiterate, essentially in full, their motion to dismiss, which turned largely on their Rule 12(b)(6) contention that the Challenged Laws should receive rational basis review on the merits (and not strict scrutiny, as Arkansas precedent holds applies to laws that infringe upon fundamental rights). Appellants' theory is that the sovereign immunity exception does not apply because—on the merits as Appellants argue or foresee them—the Challenged Provisions are not unconstitutional. Appellants' Br. at 16, 18-19. Not only does this argument put the cart well before the horse, it also fundamentally misunderstands the procedural posture of this appeal.

As this Court has made clear, Rule 2(a)(10) permits Appellants to bring this interlocutory appeal only on the narrow question of sovereign immunity; it does not authorize a full review of the merits of the underlying order. *Williams*, 2018 Ark. 17, at 5, 535 S.W.3d at 269 ("Rule 2 does not authorize an interlocutory appeal from the denial of a motion to dismiss generally."). Accordingly, in *Williams*, this Court refused to hear an argument that a party's claim "fail[ed] and should be dismissed under [Rule 12(b)(6)]" because, as this Court explained, that question "does *not*

implicate sovereign immunity." *Id.* (emphasis added). The same result necessarily follows here.

The fact that a plaintiff must plead facts which, if true, would establish that the state action in question was illegal, unconstitutional, or *ultra vires*, to survive a sovereign immunity challenge on a motion to dismiss, *see Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, at 4–5, 611 S.W.3d 493, 498, does not somehow expand the narrow scope of appeal under Rule 2(a)(10). In *Wiley*, the plaintiffs pleaded *no facts* supporting certain elements of their non-constitutional claims. *See id.* at 7, 611 S.W.3d at 499. In contrast, Appellees here plead facts to satisfy all elements of their claims as to the unconstitutionality of the Challenged Provisions. (RP 73-120; *see also id.* at 515-17).

Contrary to Appellants' assertion, Appellees never agreed that Rule 2(a)(10) permits anything but a narrow appeal on the sovereign immunity question. *See* Appellants' Br. at 16 (citing RP 345). Appellants argued sovereign immunity last in their brief, and Appellees simply mirrored that format. *See Monsanto*, 2019 Ark. 194, at 9, 576 S.W.3d at 13 (the question of sovereign immunity is a "simple one"); *Haas*, 2018 Ark. 283, at 8, 556 S.W.3d 509, 515 ("Because appellee has asserted that Act 633 violates qualified voters' constitutional right to vote and seeks declaratory and injunctive relief, not money damages, this action is not subject to the asserted sovereign-immunity defense."). This hardly means that Appellees

somehow agreed that raising the sovereign immunity defense entitles Appellants to a full interlocutory appeal on the merits. Appellants overreach in their interpretation of Appellees' brief, just as they overreach with *Wiley* and Rule 2(a)(10).

Appellants' arguments about the level of judicial review are merits arguments on a motion to dismiss that are not within the scope of this appeal. The question of sovereign immunity is separate from the level of scrutiny the Challenged Laws will receive in this action on the merits. The former goes to whether Appellees allege facts that, if true, would establish the Challenged Provisions violate their constitutional rights. It is only at the subsequent merits stage that the court determines the proper level of scrutiny to apply, based on its conclusion, following a careful review of the evidence, whether the Challenged Provisions burden the fundamental rights at issue.

IV. Even if Rule 2(a)(10) authorized a full review of the merits, Appellants are not broadly entitled to *de novo* review, or review of evidence outside the Appellees' pleadings.

Even if Appellants could obtain a full review of the merits under Rule 2(a)(10) (and, for the reasons discussed, they cannot), *de novo* review attaches only to pure questions of law, whereas Appellants plainly argue the facts.

The true thrust of Appellants' argument on appeal—as in their motion to dismiss below—is that rational basis review should apply to all Appellees' claims. Indeed, the phrase "rational basis" is repeated fourteen times throughout Appellants' brief. This flawed theory is based on Appellants' assertion that—as a *factual* matter—none of the Challenged Provisions actually burden any fundamental rights. *See* Appellants' Br. at 3, 20-42.

However, as the circuit court correctly held, the question of whether strict scrutiny or rational basis review applies to Appellees' constitutional claims turns on the factual questions of *whether* the Challenged Provisions burden fundamental rights. *See* **(RP 516)** ("Whether the validity of the challenged legislative enactments is governed by rational basis or strict scrutiny review is a question of law that requires consideration of the facts pertinent to the challenged enactments"). Because these questions (as well as the state's purported interests in the Challenged Provisions) implicate "questions of fact, the issue of which legal standard applies is not ripe for determination and will be addressed when the case is considered on the merits." **(RP 517)**. Accordingly, the circuit court held "that the Amended Complaint contains sufficient factual allegations to withstand dismissal at this stage." *Id.*

Appellants nevertheless contend that, because this Court has held that the *sovereign immunity* question is an issue of pure law that must be reviewed *de novo*, and because their theory is that Rule 2(a)(10) allows them to relitigate the *entirety*

of their motion to dismiss on such an *interlocutory* appeal, their rehashing of all arguments on the merits of their motion must also be reviewed *de novo*. *See* Appellants' Br. at 17. This circular argument has no basis in law and furthermore shows *why* Appellants' argument as to the scope of Rule 2(a)(10) cannot be reconciled with this Court's recent sovereign immunity opinions. Appellants' attempt to obtain *de novo* review of the merits contravenes precedent reviewing orders denying motions to dismiss under an abuse of discretion standard, including those that also raise a sovereign immunity defense. *See e.g.*, *Monsanto*, 2019 Ark. 194, at 8, 576 S.W.3d at 13. Appellants' argument also defies the Court's reasoning that *de novo* review applies only to purely legal questions. *See e.g.*, *Lewis*, 2021 Ark. 213, at 2, 633 S.W.3d at 770 (stating sovereign immunity is subject to *de novo* review because it is a purely legal question).

Moreover, Appellants' arguments for rational basis review are, in contrast, fact-based. *See e.g.*, Appellants' Br. at 21 (alleging the Challenged Provisions "at most . . . involve election mechanics, not the franchise itself"); *id.* at 35 (asserting that Appellees' burdens are "self-imposed"); *id.* at 27 (asserting the Challenged Provisions are necessary to combat (nonexistent) voter fraud). In any event, the circuit court considered these arguments but correctly found that Appellees sufficiently allege factual allegations that, if proven, will establish that the Challenged Provisions impede on their fundamental rights under the Arkansas

Constitution, and that, without a factual record, it would be premature to determine what level of scrutiny applies. **(RP 516-17)**; *see also infra* at 22-24; *cf. Duke v. Cleland*, 5 F.3d 1399, 1405 & n.6 (11th Cir. 1993) (explaining it was "impossible [] to undertake the proper" analysis to determine whether a law *burdened the right to vote* and therefore implicated a certain level of scrutiny on a motion to dismiss due to the absence of a factual record).

Furthermore, Appellants appear to seek something even more far reaching than *de novo* review. As evidenced by their reliance on sources outside the pleadings and not referenced below (e.g., on issues such as fraud, other states' alleged fraud prevention methods, and the state's alleged interests in the Challenged Provisions), *see* Appellants' Br. at 29, 32, 33, Appellants seem to view this Court as sitting in something akin to original jurisdiction. They cite *no* authority that would allow them to present brand-new evidence to this Court on this appeal, under any standard. Not only do appellate courts generally refuse to consider evidence outside the record, *Potter v. City of Tontitown*, 371 Ark. 200, at 206, 264 S.W.3d 473, 478 (2007), Appellants' attempted introduction of their own evidence is compounds the error because the only facts to be considered on appeal of an order denying a motion to dismiss are those *Appellees* alleged, which must be taken as true. *See Lewis*, 2021 Ark. 213, at 2-3, 633 S.W.3d at 770.

V. Even if the Court were to reach beyond sovereign immunity, the circuit court's decision denying the motion to dismiss must be affirmed.

Even if this Court were to find that Rule 2(a)(10) authorized a full, searching review of the entire order denying the motion to dismiss—including Appellants' Rule 12(b)(6) arguments—the decision must be affirmed. Appellees plead facts that, if proven, will establish that enforcing of the Challenged Provisions will violate Appellees' fundamental rights guaranteed by the Constitution. Nothing more is required at this stage in the proceedings.

A. The circuit court did not err in declining to decide the proper legal standard on the merits at this early stage in the proceedings.

In considering Appellants' motion to dismiss under Rule 12(b)(6), the circuit court correctly treated all alleged facts as true and viewed them in the light most favorable to Appellees. *See Deitsch v. Tillery*, 309 Ark. 401, 405, 833 S.W.2d 760, 761 (1992). In so doing, it "liberally construed" the pleading as "sufficient," because the operative complaint "advise[s]" the Appellants of their "obligations and allege[s] a breach of them." *Id.* The Amended Complaint thus contains "a statement in ordinary and concise language of facts showing that [plaintiffs are] entitled to relief." Ark. R. Civ. P. 8(a)(1).

Appellants' argument for dismissal was based on *Appellants'* premature and presumptive conclusion that *none* of the Challenged Provisions implicate, let alone infringe upon, any fundamental right. *See, e.g.*, **(RP 162)** (claiming the Challenged

Provisions "do not impair or impede the right to vote at all"); **(RP 175)** (asserting none of the Challenged Provisions "infringe on 'the right to suffrage'"). Appellants claimed that all four Challenged Provisions are matters of "election mechanics only," **(RP 162)**, and, therefore, rational basis review must apply, **(RP 175–77)**. The circuit court correctly deemed this argument premature because it would require the adoption of Appellants' preferred facts in defiance of the applicable standard of review. **(RP 516-17)**.

The circuit court recognized that, if Appellees are able to prove that the Challenged Provisions burden their fundamental rights, strict scrutiny applies. *Jegley v. Picado*, 349 Ark. 600, 616, 632, 80 S.W.3d 332, 339-40, 350 (2002). "When 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.'" *Id*. at 632, 80 S.W.3d at 350 (quoting *Thompson v. Ark. Social Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)); *see also* **(RP 516)** (describing standard and citing precedent); **(RT 44)** (same).

The circuit court correctly reserved judgment on the question of whether *in fact* the Challenged Provisions burden Appellees' constitutional rights, until it has an opportunity to review the evidence. *See* **(RP 516)** (holding that "[w]hether the validity of the challenged legislative enactments is governed by rational basis or

strict scrutiny review is a question of law that requires consideration of the facts pertinent to the challenged enactments"). *Cf. Duke*, 5 F.3d at 1405 & n.6 (finding it impossible to determine the legal standard that should apply on the merits of a claim that a law burdens the right to vote without a factual record).

Accordingly, even if Appellants' arguments under Rule 12(b)(6) were appropriate at this juncture, the circuit court's decision withholding judgment on the proper legal standard was appropriate and should be affirmed.[1]

B. Appellees state cognizable claims that each of the Challenged Provisions impairs or forfeits the fundamental right to vote as guaranteed by the Arkansas Constitution.

As the circuit court recognized, the operative complaint is replete with allegations that each of the Challenged Provisions impairs or forfeits the fundamental right to vote in violation of Article 3, Section 2 of the Arkansas Constitution, which guarantees that "[e]lections shall be free and equal," and that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited . . . ." (emphasis added); **(RP 513-17)**; **(RT 41–42)**. The circuit court

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[1] Indeed, the only alternative would have been for the Court to apply strict scrutiny at the motion to dismiss stage, because all facts alleged by Appellees' must be taken as true. *Lewis*, 2021 Ark. 213, at 2-3, 633 S.W.3d at 770. *See* **(RP 328-31)**.

also correctly found that Appellees sufficiently allege that Acts 736 and 973 violate the Voter Qualifications Clause in Article 3, Section 1, which guarantees that "any person" can vote as long as they are at least eighteen, a U.S. citizen, an Arkansas resident, and verify their identity. **(RP 513-17)**. The circuit court correctly denied the motion to dismiss.

1. Appellees allege that Act 736 impairs or forfeits the fundamental right to vote.

The circuit court correctly found that Appellees sufficiently alleged that Act 736's Absentee Application Signature-Matching Requirement unconstitutionally impairs or forfeits the fundamental right to vote, stating a claim under Article 3, Section 2 of the Constitution, and the Voter Qualification Clause of Article 3, Section 1, by imposing a new requirement on voters not contained within the Constitution, *i.e.*, that the voters signature on her absentee ballot application match the signature on her registration application. **(RP 513-517)**.

Appellees allege that the Requirement makes the signature matching process for obtaining an absentee ballot more "error-prone and arbitrary" by restricting the comparators election officials may rely on. **(RP 92)**. Before Act 736, "elections officials who processed applications for absentee ballots had to match the voter's name, address, date of birth, and signature against registration 'records.'" **(RP 92)**. Now, they must determine whether the signature on the absentee-ballot application matches the *single* signature from the voter's original registration application. **(RP**

92). The process far is more susceptible to error because "signatures can and do change," often "significantly." **(RP 93)**. As the sponsor of Act 736 has recognized, asking election workers to accurately match signatures is itself a troublesome proposition. **(RP 93)**; *see also* **(RP 94)** ("Representative Lowery admitted that it was deeply problematic to 'ask[] our election workers, many of them who are not trained in verifying signatures, . . . to do it in seconds," while some forensic analysts say it sometimes takes 'hours' to verify a signature."). And experts universally agree that non-expert signature matching results in a high rate of signatures erroneously identified as non-matching. **(RP 93)**. Thus, Act 736's new mandate "will impede and, in some cases, disenfranchise absentee voters as a result of arbitrary decisions by non-expert election officials who are ill-equipped to accurately determine whether two signatures were in fact made by the same person." **(RP 92)**. This is especially true because factors such as "age, illness, injury, medicine, eyesight, alcohol, and drugs," and "mechanical factors such as the pen type" affect a person's signature and increase the odds of arbitrary rejection. **(RP 93–94)**. And because absentee voters are generally those who are unavoidably absent from their voting place on election day, or unable to vote in person because of illness or physical disability, Act 736 will result in complete disenfranchisement. **(RP 92)** (citing Ark. Code Ann. § 7-5-402, § 7-5-406).

Taking these allegations as true and considering them in the light most favorable to Appellees, *see Deitsch*, 309 Ark. 401, at 405, 833 S.W.2d 760, 761, the circuit court correctly rejected Appellants' argument that Appellees failed to state a claim. This is true even if strict scrutiny is not ultimately applied to Plaintiffs' claims. As Appellees allege, there is no meaningful history of voter impersonation fraud in Arkansas, and, even if there were, numerous provisions of pre-existing Arkansas law more than adequately address such concerns. *See, e.g.*, **(RP 94, 109)**. Therefore, there is not even a rational basis for the Requirement. And in any event, the arbitrary Requirement cannot possibly serve any fraud prevention interest given its proven fallibility, especially when conducted by untrained lay people using only a one-to-one signature comparison. **(RP 92-96)**.

2. Appellees allege that Act 249 impairs or forfeits the fundamental right to vote.

The circuit court properly found that Appellees stated a claim against the Affidavit Prohibition on the grounds that it impairs or forfeits the right to vote in violation of Article 3, Section 2 of the Constitution. **(RP 513-17)**. Appellants do not deny that Act 249 impairs or impedes the right to vote in violation of Article 3, Section 2; instead, they argue that the disenfranchisement and other impairments of the right to vote imposed by Act 249 are immaterial, because they are foreclosed by this Court's decision in *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509 (2018). As

the history of voter identification laws in Arkansas shows, Appellants are incorrect and their reliance on *Haas* is misplaced.

In 1999, the General Assembly passed Act 1454, requiring election officials to *request* to see a document confirming a voter's identification before casting a ballot. This remained Arkansas law for seventeen years, and, over the course of all elections conducted under the watchful eye of this law, "there have been just *three* criminal convictions of voter fraud in the state out of tens of millions of ballots cast." **(RP 90)**. In 2013, the General Assembly attempted to impose a *strict* photo identification law through Act 595. This Court struck down that law as unconstitutional in *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844. Act 595 "require[d]," without exception, "proof of identity in the form of a voter-identification card or a document or identification card showing the voter's name and photo issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in Arkansas with an expiration date." *Id.* at 2, 444 S.W.3d at 846. The Court held that Act 595 violated the Constitution by imposing additional qualifications on the right to vote not contained in Article 3, Section 1, which then required only that a voter be: (1) a citizen of the United States; (2) a resident of Arkansas; (3) at least 18 years old; and (4) lawfully registered to vote in the election. *Id.* at 11, 444 S.W.3d at 851. The Court rejected the State's argument that Act 595 was simply "a procedural means of determining whether an

Arkansas voter can 'lawfully register[] to vote in the election.'" *Id*. at 15, 444 S.W.3d at 853.

In 2017, the General Assembly enacted Act 633, which, unlike Act 595, included the Affidavit Fail-Safe to ensure that voters lacking identification—or absentee voters lacking a photocopier—could still vote by signing an attestation of identity under penalty of perjury. **(RP 99)**. Act 633 also amended Amendment 51, § 13(b)(4) and (5) of the Constitution to provide that, to establish that voters "are legally qualified to vote in that election, each voter shall verify his or her registration by" either presenting photo identification or casting a provisional ballot along with a sworn statement under penalty of perjury (the Affidavit Fail-Safe) attesting to the fact that "the voter is registered to vote in this state and that he or she is the person registered to vote." Act 633 (2017) at 4.

Act 633 was challenged in *Haas*, based on an assertion that its modifications to Amendment 51, § 13(b)(4) and (5) were unlawful, because the General Assembly may only amend Sections 5 through 15 of Amendment 51 "so long as such amendments are *germane to* this amendment, and *consistent with its policy and purposes*." Ark. Const. amend. 51, § 19 (emphases added). Amendment 51's policy and purpose are to abolish the poll tax and provide a regulatory scheme governing the *registration* of voters. *Haas*, 2018 Ark. 283, at 10, 556 S.W.3d at 516. The plaintiff in *Haas* argued that requiring either photo identification *or a sworn*

statement was not germane to or consistent with the policy or purpose of Amendment 51. However, the Court held: "We cannot say that Act 633's constitutional amendment is *clearly* not germane to Amendment 51 and not consistent with its policy and purpose." *Id.* at 13. Importantly, Act 633's Affidavit Fail-Safe mitigated against any risk of disenfranchisement. *Id.* at 8; 556 S.W.3d at 515 (explaining that under Act 633, appellee would be required to either "show compliant identification or sign the voter-verification affidavit").

In 2018, the General Assembly approved Issue 2 to be included on the ballot in the November general election. The ballot title provided: "An amendment to the Arkansas Constitution concerning the presentation of valid photographic identification when voting; requiring that a voter present valid photographic identification when voting in person or when casting an absentee ballot; and providing that the State of Arkansas issue photographic identification at no charge to eligible voters lacking photographic identification." HJR 1016 (2018).

Once passed, Issue 2, which became Amendment 99, amended Article 3, Section 1 of the Arkansas Constitution to include an additional qualification to vote, providing that:

> (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.

HJR 1016 (2018) at 2. Amendment 99 did not change the voter identification law itself but instead directed the General Assembly to later pass a law requiring Arkansans to present valid photo ID to cast a *non-provisional* ballot. *Id.* Indeed, Act 633 and its Affidavit Fail-Safe remained in place after the passage of Amendment 99, including during the 2020 general election. **(RP 100)**.

Importantly, Amendment 99 provided that a voter lacking acceptable identification shall be permitted to cast a provisional ballot, and that ballot must be counted "if the voter subsequently certifies the provisional ballot in a manner provided by law." HJR 1016 (2018) at 2. Thus, the amendment explicitly contemplated a process by which voters lacking identification could still successfully vote. As a result, the Affidavit Fail-Safe was not inconsistent with Amendment 99 because it was a method "provided by law" for the subsequent certification of a voter's provisional ballot. After all, Amendment 99 *did not* amend Amendment 51, § 13(b)(4) and (5) of the Arkansas Constitution, which continued to provide that a provisional ballot cast by a voter without acceptable photo identification would be counted upon signing the sworn statement or Affidavit Fail-Safe, requiring no further action by the voter. **(RP 100)**. Accordingly, Amendment 99 did *not* require the elimination of the Affidavit Fail-Safe, which continued to

allow voters without acceptable photo identification (or a photocopier, in the case of absentee voters) to avoid disenfranchisement.

Act 249, in contrast, *eliminated* the Affidavit Fail-Safe by amending Amendment 51, § 13(b)(4) and (5) and Arkansas Code § 7-5-308(f) to remove the Affidavit Fail-Safe option, thereby resurrecting the same strict voter ID law this Court struck down in *Martin v. Kohls*. Appellants nonetheless argue that *Haas* requires this Court to find that eliminating the Affidavit Fail-Safe is germane to and consistent with Amendment 51's purpose of abolishing poll taxes and "establish[ing] 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, § 19. Not so. Just because the Court once declined to find that a system of voter verification that included a failsafe option and therefore carried no risk of disenfranchisement was *clearly* not germane to Amendment 51 or inconsistent with its policy and purpose, does not mean that *any* system of voter verification, regardless of how many eligible voters it will disenfranchise, is necessarily germane to and consistent with Amendment 51's policy and purpose.

At bare minimum, because Act 249 is remarkably different in its impact on voters than Act 633, Act 249 requiresa fresh analysis under Amendment 51, § 19 to

determine whether eliminating the Affidavit Fail-Safe is consistent with and germane to the purpose of Amendment 51. Appellees allege, and the merits stage will decide, that eliminating the option for voters to prove their identity by signing an affirmation under the penalty of perjury is *neither* germane to nor consistent with Amendment 51's purpose of creating a voter registration system and abolishing the poll tax. To hold otherwise would give the General Assembly *carte blanche* to impose *any* method of voter verification—such as a law only permitting voters to utilize passports or concealed carry permits to vote.

The merits determination is whether Act 249 impairs or impedes the right to vote in violation of the Constitution. There is no question that, *at this procedural posture*, Appellees sufficiently *pleaded* that it does. **(RP 98-104, 112-16)**. Similarly, Appellees sufficiently pleaded that the specter of non-existent fraud cannot justify Act 249's burdens on the right to vote. *See id.*

3. Appellees allege that Act 973 impairs or forfeits the fundamental right to vote.

The circuit court also correctly found that Appellees adequately allege that the revisions made to the in-person absentee ballot deadline impairs or forfeits the right to vote in violation of Article 3, Section 2 of the Constitution and the Voter Qualification Clause of Article 3, Section 1 by imposing a disparate temporal deadline on absentee voters who return their ballots in person that does not appear in the Constitution. **(RP 513-17)**.

The General Assembly's revision gives Arkansas the dubious distinction of having the *earliest* ballot receipt deadline in the nation, *see* (RP 96), and imposes significant burdens on the right to vote. **(RP 81–82, 83–84)** (explaining the individual burdens and concerns among the Voter Appellees); *see also* **(RP 97, 111)**. Appellees further allege that lawful Arkansas voters were regularly disenfranchised by the less restrictive deadline in place before Act 973, which required that absentee ballots delivered in person be received on the Monday *before* election day, even then one of the earliest ballot receipt deadlines in the country. **(RP 97-98, 339)**. Act 973 ensures that the number of disenfranchised voters will only increase. Indeed, voters can lawfully apply by mail for absentee ballots up to seven days before election day, *see* Ark. Code Ann. § 7-5-404(a)(3)(A)(i), but the new deadline gives such voters three days or less to both receive and return their ballots in person before an election. **(RP 97)**.

Governor Hutchinson refused to sign Act 973 for exactly this reason, explaining that the In-Person Ballot Receipt Deadline "unnecessarily limits the opportunities for voters to cast their ballot prior to the election." **(RP 96)**. The Governor was right: there is no rational, let alone compelling, justification for this arbitrary and burdensome change to the law. Thus, even if strict scrutiny is not ultimately applied, Appellees adequately pleaded that the In-Person Ballot Receipt Deadline serves *no* legitimate interest. **(RP 112)**. Appellants effectively concede as

much. Unlike the other Challenged Provisions—which Appellants attempt to justify by pointing to the illusory threat of voter fraud—Appellants' only defense of Act 973 is self-described conjecture. *See* **(RP 188)** (arguing that because election administrators might "conceivabl[y]" benefit from an earlier deadline, that should be enough for dismissal). They resort to hypotheticals: in their view, the law's arbitrary deadline *might* reduce burdens on election administrators. **(RP 188)** (arguing that it is "a conceivable rationale for its enactment"). This is patently erroneous merits conjecture and especially in the procedural posture of a motion to dismiss.

4. Appellees allege that Act 728 impairs or forfeits the fundamental right to vote.

Finally, the circuit court correctly found that Appellees allege that Act 728's Voter Support Ban also impairs or forfeits the right to vote in violation of Article 3, Section 2 of the Constitution. **(RP 513-517)**; *see also, e.g.*, **(RP 117)** ("The Voter Support Ban will harm all the individual plaintiffs, who range between the ages of 68 and 85 and to varying degrees have difficulty waiting in line because of various age, health, and mobility issues," and the organizational plaintiffs and their members, who "have engaged—and if not for the Ban would engage—in voter support efforts within the arbitrary 100-foot perimeter."). Moreover, Appellees adequately pleaded that the burdens fall heaviest on voters living in counties with the most sizeable Black populations, where voters are disproportionately more likely

to wait for hours to vote. *See* **(RP 104)**. At least before Act 728, nonpartisan organizations could provide these voters with the small comforts of water and snacks to alleviate some of the extreme burdens imposed by long lines. **(RP 105)**.

Appellees allege that Appellants lack any compelling interests in advancing Act 728's burdens on the right to vote, and that Act 728 neither serves nor is tailored to carry out any such interest. **(RP 106, 107, 118)**. The primary sponsor of the Ban acknowledged in a public committee hearing on April 12 that that Ban grew out of concerns about groups "handing out bottled waters and other things." **(RP 105)**. Appellants identify no alleged interest, let alone a compelling one, in prohibiting nonpartisan non-profit groups from providing free water and snacks to voters, especially in disproportionately Black counties where voters have historically faced long wait times to vote. *See* **(RP 184–87)** (Appellants failing to identify any interest in prohibiting the provision of food and water to voters); **(RP 469–70)** (again failing to identify same on reply).

Appellants' claim that Act 728 is a redundant prohibition on "electioneering" or "loitering," **(RP 185)**, is discredited by the plain text of Act 728, which explicitly prohibits anyone who is not "entering or leaving a building where voting is taking place" from "enter[ing]" the "area within one hundred feet" of the polling place. Ark. Code Ann. § 7-1-103(a)(24). To hand water to voters standing within the 100-foot zone, the League, Arkansas United, and other nonpartisan nonprofit groups like

them, must necessarily "enter" that area. Because they would not also be "entering or leaving" the polling place when they do so, this expressive activity is now a crime punishable by up to a year in jail. Appellants assert *no* purpose for this prohibition on the expressive conduct of handing out water to voters—which by definition is not electioneering—let alone a compelling one.[2]

C. Appellees state a cognizable claim that Act 728 abridges the fundamental rights to free speech and assembly.

The circuit court also found that Appellees allege that Act 728 violates their freedom of speech and association, in violation of Article 2, Section 4 of the Constitution, which guarantees that the right of the people to peaceably "assembly, consult for the common good[,] and to petition . . . shall never be abridged," as well as in violation of Article 2, Section 6, which decrees that "[t]he free communication of thoughts and opinions[] is one of the most invaluable rights of man." **(RP 513-17)**. Appellees allege that Act 728 separately abridges Arkansas United's and the

[2] "Electioneering" is limited to activity that "advocates for or against any candidate, issue, or measure on a ballot." Ark. Code Ann. § 7-1-103(a)(7)(C)(i). It does not include the nonpartisan expressive conduct of providing water or snacks to voters as a comfort to them while they wait in long lines, or as an expression of solidarity with voters who show up to have their voices heard despite long lines to vote.

League's fundamental rights to freedom of speech and association. **(RP 104–05, 106, 118)**. As this Court has explained, Arkansas' constitutional guarantee of free speech provides at least as much protection as the First Amendment. *See McDaniel v. Spencer*, 2015 Ark. 94, at 8, 457 S.W.3d 641, 649.

The First Amendment (and thus the Arkansas Constitution) protects the rights of free speech and expression, particularly the "interactive communication concerning political change" that is appropriately described as "core political speech." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). Under federal law, limitations on such speech and expression are subject to "exacting scrutiny." *Id.* at 202 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)). This standard will require Appellants to prove that the restriction is "substantially related to important governmental interests" and that the interest cannot be served by "less problematic measures." *Id.* at 202, 204. Because that burden belongs to Appellants, Rule 12(b)(6) dismissal is patently inappropriate for this claim.

Appellees pleaded facts which, once proven, will establish that Act 728 triggers *and* fails exacting scrutiny. Act 728 prohibits Appellees from handing water to voters waiting in line and within 100 feet of the polling place. **(RP 105, 118)**. This activity constitutes protected core political speech because it encourages voters to stay in line and vote, thus serving the League's and Arkansas United's missions of

promoting civic engagement and ensuring eligible voters can cast a ballot. **(RP 104–05, 106, 118)**. And Act 726 is by no means substantially related to the purported goal of preventing electioneering near the polling place because it criminalizes non-electioneering activity, and electioneering is *already* prohibited by existing law. *See* Ark. Code Ann. § 7-1-103(a)(8).

But even if some less exacting level of scrutiny were ultimately applied, Appellees' allegations that Act 728 infringes on the rights to speech and assembly would survive. Appellants' only argument in defense of Act 728 depends on misplaced reliance on a readily distinguishable case. *See* **(RP 186–187)** (citing *Burson v. Freeman*, 504 U.S. 191, at 211 (1992)). Appellants make no attempt to explain how *Burson*, a case upholding a Tennessee anti-*electioneering* perimeter law, insulates the Voter Support Ban's infringement on the rights to speech and assembly, given that it indisputably prohibits *non-electioneering* activity of nonpartisan groups providing voters with water or snacks. *See* **(RP 104–105, 118)**. Moreover, because Arkansas law already prohibits electioneering within a 100-foot perimeter, Ark. Code Ann. § 7-1-103(a)(8), Act 728 would be mere surplusage if that was its purpose. Because the Appellants can muster no convincing argument in defense of Act 728, Appellees' challenge would survive even the least rigorous review.

D. Appellees state cognizable claims that the Challenged Provisions violate the Equal Protection Clause.

Finally, the circuit court correctly concluded that Appellees sufficiently alleged that the Challenged Provisions violate Article 2, Section 3 of the Constitution, which guarantees that "[t]he equality of all persons before the law . . . shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." **(RP 513-17)**. Appellees allege that each of the Challenged Provisions violates the Equal Protection Clause by subjecting qualified voters to unequal treatment based on arbitrary classifications, as well as based on age, disability status, race, and poverty.

Specifically, Appellees allege (1) that Act 736 "makes arbitrary classifications between similarly-situated applicants whose signatures are deemed to match their original voter registration application and applicants whose signatures do not, based on the error-prone assessments of laypeople who are untrained in signature comparison" and "between similarly-situated voters based on age, disability, passage of time, handwriting, and any other factor that contributes to a changing signature" **(RP 109)**; (2) that Act 973 imposes arbitrary distinctions between absentee voters who return their ballots by mail versus those who return them in person **(RP 111-112)**; (3) that Act 249 imposes arbitrary distinctions based on whether a voter possess acceptable identification **(RP 115)**; and (4) that Act 728 imposes arbitrary distinctions on voters based on whether they reside in a county or

precinct that is subjected to exceedingly long lines to vote, particularly in predominately-Black communities **(RP 176)**. Appellees also repeatedly allege that the Challenged Provisions are purposeful in their discrimination, "that their true purpose is to make it harder for lawful Arkansas voters to successfully exercise their right to vote," and that they "will only exacerbate Arkansas's dismal voter-turnout rates—especially among Black voters." **(RP 77)**; *see also* (RP 78, 88, 109, 116). Appellees further allege that Act 728 will have disparate impacts on voters based on race, age, disability, and poverty. **(RP 118)**.

Appellants are therefore wrong to suggest that each of Appellees' equal protection claims might ultimately be subject to rational basis review. When an equal protection challenge 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. But even if some, or even all, of Appellees' equal protection claims were ultimately subject to rational basis review on the merits, Appellees nevertheless pleaded that the differences created by each of the Challenged Provisions are wholly arbitrary, further of no interest other than making it harder to vote, and therefore lack any rational basis in law. Appellants are not free to introduce facts to the contrary at this juncture, as Appellees' fact-based allegations must be taken as true. *Monsanto*, 2019 Ark. 194, at 8-9, 576 S.W.3d at 13.

REQUEST FOR RELIEF

For the foregoing reasons, the circuit court's decision holding that the sovereign immunity defense is inapplicable here should be affirmed.

Dated this 6th day of January, 2022.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2022, I electronically filed this brief using the Court's electronic filing system, which shall send notification of such filing to all counsel of record pursuant to Administrative Order No. 21, § 7(a).

I further certify that I have served the foregoing by first class mail on the following:

Honorable Wendell Griffen
Pulaski County Circuit Court
401 West Markham, Room 410
Little Rock, AR 72201

/s/ Jess Askew III
Jess Askew III

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

I hereby certify that this brief complied with Administrative Order No. 19's requirements concerning confidential information and that the brief conforms to the word-count limitations set forth in pilot Rule 4-2(d). Specifically, the jurisdictional statement, the statement of the case and the facts, argument, and request for relief altogether contain 8,551 words according to the word-count feature of Microsoft Word 365 ProPlus.

The Brief also complies with Administrative Order No. 21, Section 9 in that it does not contain hyperlinks.

Identification of paper documents not in PDF format:

There are no original paper documents not in PDF format included in the PDF document.

/s/ Jess Askew III
(Signature of filing party)

Jess Askew III
(Printed name)

KUTAK ROCK LLP
(Firm)

January 6, 2022
(Date)