CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.*, APPELLANTS

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, *et al.*, APPELLEES

APPELLEES' OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION

Appellees respectfully submit that Appellants' Emergency Motion for Immediate Stay ("Motion") should be denied. Appellants fail to meet their burden on any of the factors for a stay, and their Motion is premised on the wrong standard of review, largely ignores and even contradicts the extensive factual record from trial, improperly disregards the Circuit Court's factual findings, and misstates the controlling legal principles.

The Court's opinion in *Thurston v. League of Women Voters of Ark.*, 2022 Ark. 32, 639 S.W.3d 319, summarizes the claims and procedural history of this litigation. Briefly, Appellees allege Acts 736, 973, 249, and 728 (the "Challenged Provisions") are unconstitutional. After a full trial, and carefully considering the

evidence and arguments, the Circuit Court entered judgment on all claims and permanently enjoined Appellants from enforcing the Challenged Provisions.

ARGUMENT

A. Legal Standard

As a threshold matter, Appellants ignore that this Court applies a highly deferential standard of review to the Circuit Court's findings of fact. Instead, Appellants assert that this Court reviews the decision below de novo. Appellant's Emergency Mot. for Stay of Inj. ("Mot.") at 5. While this is the standard applicable to the Circuit Court's interpretation of *law*, this Court is not faced with review of purely legal issues—if it were, there would have been no need for a trial. The Circuit Court's decision turned specifically on the extensive factual record before it, and its findings are all entitled to "special deference" from this Court, given "the superior position of the trial judge to evaluate the credibility of witnesses and their testimony" in a bench trial. *Chambers v. Ratcliff*, 2009 Ark. App. 377, at *3, 309 S.W.3d 224 (2009). Under the well-established standard of review, this Court "will not reverse the circuit court's findings of fact unless they are clearly erroneous." *Bridges v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 50, at *1, 571 S.W.3d 506.

Appellants' Motion is conspicuously silent on the evidence at trial and the Circuit Court's lengthy findings of fact about the significant burdens the Challenged

Provisions impose on fundamental rights and the lack of *any* state interest.[1] But evaluating whether Appellants have a likelihood of success on the merits requires the Court to review those burdens, the state's asserted interests, and the fit between those interests and the laws. These are all questions that rely on the Circuit Court's findings of fact. *Wilmoth v. Sec'y of N.J.*, 731 F. App'x 97, 103-04 (3d Cir. 2018) (remanding for record development on whether state interest was compelling and regulation narrowly tailored); *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993). As a result, Appellants misstate the applicable standard of review.

B. Appellants cannot meet any of the requirements for a stay.

When considering a motion to stay pursuant to Rule 8 of the Arkansas Rules of Appellate Procedure—Civil, this Court is "guided by four factors: (1) [whether the petitioner has made a strong showing of] likelihood of success on the merits; (2) the likelihood of irreparable harm to the petitioner absent a stay; (3) whether the

[1] Worse still, Appellants make arguments that *directly contradict* the Circuit Court's findings of fact. *See infra* Part B.1.c). Appellants also make factual claims in their Motion for which they presented no evidence at trial. For example, they assert that "multiple local elections have occurred, without the harms Plaintiffs allege since th[e Challenged Provisions] went into effect." Mot. at 1. But Appellants presented no such evidence at trial.

grant of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Smith v. Pavan*, 2015 Ark. 474, at *3 (2015). Under any standard of review, Appellants' Motion fails on all fronts.

1. Appellants cannot establish any likelihood of success.

First, and most significantly, Appellants are unlikely to succeed on the merits. Appellants argue that the Circuit Court "erroneously applied strict scrutiny" to the Challenged Provisions. Mot. at 5. They are wrong. Because the Challenged Provisions infringe upon fundamental rights to vote, speak, and assemble, *see infra* B.1.d), they are subject to strict scrutiny under this Court's precedent. *Davidson v. Rhea*, 221 Ark. 885, 256 S.W.2d 744 (1953); *Henderson v. Gladish,* 198 Ark. 217, at 217, 128 S.W.2d 257, 262 (1939); Ark. Code Ann. § 6-60-1002.[2] "When a statute

[2] Because the Challenged Provisions infringe upon fundamental rights, Appellees' equal protection claims are also subject to strict scrutiny. *Jegley*, 349 Ark. 600, at 631, 80 S.W.3d 332 (2002); *Arnold v. State*, 2011 Ark. 395, at *7-8, 384 S.W.3d 488. But even if they were subject to rational basis review, the Challenged Provisions would not survive because they create arbitrary distinctions that further no interest and lack any rational basis. Moreover, though Appellants claim an equal protection claim cannot be based on disparate impact, nothing Appellants cite for the proposition precludes such a claim.

infringes upon a fundamental right," it is subject to strict scrutiny and "cannot survive unless [Appellants show] 'a compelling state interest is advanced by the statute and the statute is the least restrictive method . . . .'" *Jegley v. Picado*, 349 Ark. 600, at 632, 80 S.W.3d 332 (2002) (quoting *Thompson v. Ark. Social Servs.,* 282 Ark. 369, at 374, 669 S.W.2d 878, 880 (1984)).

a) Appellants' Act 249 arguments fail.

The Circuit Court made extensive factual findings that Act 249 infringes on the rights of Arkansans and is not narrowly tailored to serve a compelling government interest, *see* 7RP 1587-94, but Appellants fail entirely to address them. Instead, they briefly argue that Act 249 cannot be unconstitutional because, they say, it is germane to Amendment 51 and a constitutional amendment can never be unconstitutional.[3] Act 249 is *not* germane to Amendment 51. The General Assembly may amend Sections 5 through 15 of Amendment 51 only "so long as such amendments are *germane to* this amendment, and *consistent with its policy and purposes*." Ark. Const. amend. 51, § 19 (1964) (emphases added). Amendment 51's

[3] Appellants did not raise the argument that a constitutional amendment cannot be unconstitutional below and have thus waived it. *Morgan v. Chandler*, 367 Ark. 430, at 436, 241 S.W.3d 224 (2006) ("[I]t is well settled that an appellant cannot make an argument for the first time on appeal.").

policy and purpose were to abolish the poll tax and provide a regulatory scheme governing the *registration* of voters. *Martin v. Haas*, 2018 Ark. 283, at 10, 556 S.W.3d 509, 516. Eliminating the option for voters to sign an affirmation under the penalty of perjury, as Act 249 does, is *neither* germane to *nor* consistent with Amendment 51's purposes, and—it does not make voting more secure because the affidavit was not a source of insecurity. *See* 7RP 1593-94. To hold otherwise would give the General Assembly carte blanche to impose any method of voter verification, no matter how burdensome or restrictive.

Act 249 is not germane to Amendment 51 or consistent with its policy and purpose: it burdens the right to vote—and does so unequally, particularly burdening minority, poor, and elderly Arkansans—and is not narrowly tailored.

b) Appellants' Act 728 arguments fail.

Likewise, Appellants do not engage with the evidence at trial—or the Circuit Court's factual findings—that establish that Act 728 violates Arkansans' rights to vote, assemble, and speak freely and is not narrowly tailored. *See* 7RP 1594-1602, 1609, 1637-38. Instead, they argue that, because 100-foot electioneering perimeters are constitutional, then Act 728 must surely be, too.

Appellants ignore that restrictions on electioneering passed constitutional muster only because the state "demonstrate[d] that [the] law [was] necessary to serve the asserted interest" of combatting voter intimidation and protecting election

integrity. *Burson v. Freeman*, 504 U.S. 191, 199, 206 (1992). Appellants cannot make that demonstration here (and certainly did not at trial) because electioneering, voter intimidation, and loitering are *already* criminalized under Arkansas law, 7RP 1595, 1637-38, 1642, "there have been no instances of fraud or misconduct associated with . . . people handing out water or snacks to voters waiting in line," *id.* at 1611, and Act 728 does not further prevent intimidation or ensure election integrity—Appellants "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," *id.* at 1648. Because Appellants did not and cannot demonstrate that the burdens Act 728 imposes on Arkansans' fundamental rights are necessary to serve the state's asserted interests, Appellants will not succeed in their appeal of the Circuit Court's ruling on claims involving Act 728.

c) Appellants' Act 973 arguments fail.

Appellants don't merely ignore the evidence (and the Circuit Court's factual findings) in the record about Act 973; they make arguments *directly contrary* to those findings. Appellants claim that "it's hard to see how" Act 973 "could adversely impact anyone since any voter who misses the Friday deadline" can still vote in other ways. Mot. at 9. But that is not what the Circuit Court found. The Court credited testimony that "for absentee voters. . ., mailing the absentee ballot involves the risk

that the ballot may not arrive by election day[, and] [v]oters in that situation would have to vote provisionally in person which [Appellant's own witnesses] concede defeats the whole purpose of voting by absentee ballot." 7RP 1649.

Appellants acknowledge but do not challenge the Circuit Court's finding that Act 973 does not ease election administrators' burdens—the interest purportedly served by Act 973, *see* Mot. at 8-9 (noting finding but not disputing it)—nor could they, given the Circuit Court's detailed factual findings, *see* 7RP 1648-70. With no interest served by Act 973 and given the Circuit Court's factual findings, Appellants cannot show that they are likely to succeed on the merits of their appeal.

d) Appellants' Act 736 arguments fail.

Appellants' argument that they are likely to succeed on their appeal of Act 736 because Arkansas law provides notice and cure processes for absentee ballot applicants whose signatures are rejected, Mot. at 8, defies the Circuit Court's factual findings and unrefuted testimony that (1) the additional steps required to cure will prevent voters from curing, especially those with transportation and mobility limitations, 7RP 1617; and (2) voters' ability to update their comparator signatures by reregistering does not avoid the negative effects of Act 736, in part because "signatures vary from one execution to the next," "[e]ven when made by the same person, on the same day, within a short period of time. . . ." *Id.* at 1618, 1625. Appellants also contend that Act 736 is constitutional because absentee voting is a

privilege, not a right. But the case they cite refutes their argument. *Erickson v. Blair*, 670 P.2d 749, 754-55 (Colo. 1983) ("Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of [the right to vote] by those otherwise qualified to vote."). Moreover, Appellants fail entirely to address the evidence that Act 736 is not narrowly tailored to serve a compelling interest. *See* 7RP 1610-11, 1635-36, 1637.

Because Act 736 burdens a fundamental right and is not narrowly tailored to a compelling interest, Appellants are unlikely to succeed on their appeal.

C. The remaining factors counsel against issuance of a stay.

Appellants likewise fail to meet their burden on any of the remaining three factors. First, Appellants have not, and cannot, meet their burden of showing that irreparable injury is likely to occur without a stay. *Miller v. Thurston*, No. 5:20-CV-05070, 2020 WL 2850223, at *1 (W.D. Ark. June 2, 2020). Appellants will suffer no injury, let alone an irreparable one, by being restrained from infringing upon Arkansans' fundamental constitutional rights. *See United Food & Com. Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1216-1217 (D. Ariz. 2013).

Second, granting a stay would irreparably injure Appellees and other Arkansas voters. The testimony at trial proved that the Challenged Provisions infringe on constitutional rights of the Appellees. And when constitutional rights are impaired, irreparable injury is presumed. *See League of Women Voters of Mo. v.*

Ashcroft, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018). If the Motion is granted, the Challenged Provisions will irreparably harm Appellees by restricting access to the franchise through arbitrary and confusing administrative burdens that serve no administrative benefit and do not improve election integrity. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."); *N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *8 (M.D.N.C. Nov. 4, 2016). Ignoring the extensive and largely unrefuted trial evidence—and mischaracterizing the League and Arkansas United's testimony—Appellants contend the organizations' injuries are speculative because they do not know if they will be at the polls during the primary. But this only highlights the irreparable harm from the chilling effect on political speech: both organizations testified they were unsure they would be present at the polls *because* of Act 728 and its threat of criminal liability.

Third, the public interest favors maintaining the injunction. If the Motion is granted, unconstitutional laws that burden the Appellees' fundamental rights—and the rights of many thousands of other Arkansans—will be in effect. The status quo ensures Appellees' fundamental rights are not unconstitutionally burdened.

Accordingly, Appellees respectfully request that the Court deny Appellants' emergency motion for immediate stay.

Respectfully submitted,

/s/ *Jess Askew III*
Jess Askew III (86005)
KUTAK ROCK LLP
124 West Capitol Avenue, Suite 2000
Little Rock, Arkansas 72201-3740
Telephone: (501) 975-3141
Facsimile: (501) 975-3001
jess.askew@kutakrock.com

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 1st day of April 2022, via the e-flex electronic filing system, which shall send notice to all counsel of record.

/s/ *Jess Askew III*
Jess Askew III