IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

ARKANSAS UNITED, et al.,

PLAINTIFFS,

v. **No. 5:20CV05193 TLB**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, et al.,

DEFENDANTS.

RESPONSE IN OPPOSITION TO MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Literally minutes before Election Day Plaintiffs brought this action urging this Court to rewrite Arkansas's longstanding voter-privacy laws. These laws, which aim to prevent fraudulent voter influence that masquerades as "assistance," have been in effect since 2009. Thus, Plaintiffs could have brought their lawsuit *over a decade ago*. Yet they did not even file their motion for ex parte relief (DE 4) until around 11:30 PM last night—just *minutes* before Election Day. By manufacturing an emergency through their own delay, Plaintiffs have prejudiced Defendants' ability to respond. That is reason enough to deny the motion. *See In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020) (issuing writ of mandamus to dissolve "procedurally suspect" ex parte temporary restraining order).

Still worse, as this Court acknowledged last week, "mandating . . . changes" while "voting is ongoing seems likely to further disrupt county election processes." *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2020 WL 6269598, at *5 (W.D. Ark. Oct. 26, 2020). And that's even more true now, where the election day polls have already opened and voting is ongoing. But Plaintiffs make no effort to justify their last-minute request under the Su-

preme Court's clear instruction that federal courts not alter state election procedures when elections are pending. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *see also United States v. City of Philadelphia*, No. No. 2:06-CV-4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006) (three-judge district court) (denying motion by the United States for preliminary injunction under Section 208 of the Voting Rights Act based in part on *Purcell* grounds).

Plaintiffs' omission on this point is particularly troubling given the Supreme Court's recent actions. This election year alone, the Court has on *nine* different occasions either stayed a lower court's last-minute injunction or refused to vacate a court of appeals' stay. At this late hour, there simply is "not room for ongoing debate" in the federal courts about changes to state election laws, as the Seventh Circuit put it *three weeks ago* when summarily reversing an injunction of an Indiana election law. *See Common Cause Indiana v. Lawson*, No. 20-2911, 2020 WL 6255361, at *5 (7th Cir. October 13, 2020).

Setting aside the procedural impropriety of Plaintiffs' eleventh-and-a-half hour request—which, again, is sufficient to deny the current motion—their claims also are not likely to succeed on the merits. Although they purport to bring two claims, both hinge on a misreading of Section 208 of the Voting Rights Act, codified at 52 U.S.C. 10508. Indeed, a few weeks ago, a Michigan district court refused to grant a preliminary injunction on an analogous claim under Section 208, although it granted other preliminary relief that the Sixth Circuit stayed pending appeal. *See Priorities USA v. Nessel*, No. 19-13341, 2020 WL 54742432, at *13-14 (D. Mich. Sept. 17, 2020), *stay pending appeal granted*, — F.3d —, No. 20-1931, 2020 WL 6156878 (6th Cir. Oct. 21, 2020). Plaintiffs discuss a prior *Nessel* decision but not this one. And they fail to discuss a Texas district court's rejection of a similar claim years ago based on the plain text of Section 208

and its legislative history. *See Ray v .Texas*, No. 2-06-CV-385 (TJW), 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008).

Plaintiffs try to inflate the appearance that their claims are likely to succeed by ignoring this authority contrary to their claims. Because they are not likely to succeed—not to mention because of their inexcusable delay—this Court should deny their motion.

STANDARD OF REVIEW

A preliminary injunction is itself an extraordinary, disfavored remedy, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)—let alone an ex parte temporary restraining order changing election procedures on Election Day, *see In re Rutledge*, 956 F.3d at 1027. But the analysis for either relief is generally the same. Plaintiffs bear the burden of establishing the propriety of the requested relief, and they must make "a clear showing" they have carried that burden. *Winter*, 555 U.S. at 22; *see Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Plaintiffs are only entitled to relief upon showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 24-25; *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

Two aspects of this lawsuit make Plaintiffs' task here particularly difficult. First, because Plaintiffs' requested injunction would prevent "implementation of a duly enacted state statute," they must first make a "*more rigorous* showing" than usual "that [they are] 'likely to prevail on the merits.'" *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (emphasis added) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). That requirement guards against attempts to "thwart a state's presumptively reasonable democratic processes." *Rounds*, 530 F.3d at 733. "A more rigorous standard 'reflects the idea that government policies implemented through legislation or

regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. U.S.*, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam)). Second, Plaintiffs' burden "is a heavy one where, as here, granting the preliminary injunction will give [Plaintiffs] substantially the relief it would obtain after a trial on the merits." *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991).

Plaintiffs cannot meet their heightened burden of demonstrating they are likely to prevail on the merits in this case.

ARGUMENT

I. An Election Day injunction would create electoral chaos that could have been avoided had Plaintiffs not delayed.

"As an election draws closer, th[e] risk will increase" that a court order altering electoral procedures will itself disenfranchise voters by creating "voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. This confusion can arise from disrupting county election officials' ability to maintain an orderly election. *See League of Women Voters*, 2020 WL 6269598, at *5 (holding that "mandating . . . changes by injunctive relief while absentee voting is ongoing seems likely to further disrupt county election processes during a period that has already been characterized by a host of disruptive pandemic-related changes to voting procedures, and—rightly or wrongly—to undermine confidence in the electoral process"). And in this case, an election is not merely close, it is already here. Over a month ago, in a case where the Eleventh Circuit stayed an injunction related to Georgia's absentee-voting laws, that court said, "[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed." *New Ga. Project v. Raffensperger*, No. 20-13360-D, — F.3d —, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020). That point has come and gone; early

voting in Arkansas is already finished, and today is Election Day. If *Purcell* means anything, it means that this Court should deny Plaintiffs' motion.

Plaintiffs do not address the prohibition on last-minute injunctions. And their discussion of the equitable injunction factors demonstrates their misunderstanding of state election procedure. According to Plaintiffs, changing state law on Election Day would make Arkansas's elections *easier* to administer. (*See* TRO Br., DE 4 at 16.) But there are 75 counties in Arkansas, each with an autonomous election commission. Granting Plaintiffs' motion would require Defendants to explain a federal court order to all 75 election commissions *on Election Day—i.e.*, while those commissions are supposed to be focused on ensuring a smooth election that instills confidence in the result. *See Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

These facts demonstrate the principle that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay). That is why—time and again—the Supreme Court has reiterated its instruction that lower federal courts not intervene at the last minute in state elections. So in the Wisconsin case, on October 26, it denied an application to vacate the Seventh Circuit's stay of an injunction concerning Wisconsin's Election Day deadline for absentee ballots. *Wisc. State Legislature*, 2020 WL 6275871.

This year, the Supreme Court has reiterated no less than *nine* times, including that case, that federal courts should not enter orders affecting election procedures close to elections. *See*

Merrill v. People First of Ala., No. 20A67, 2020 WL 6156545 (U.S. Oct. 21, 2020) (staying an injunction of Alabama's ban on curbside voting); *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020) (staying an injunction of an absentee-ballot witness requirement); *Clarno v. People Not Politicians Or.*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (staying an injunction that had suspended signature requirement for ballot initiative petitions); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. July 30, 2020) (same); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020) (staying an injunction that had suspended some antifraud rules for absentee voting during the COVID-19 pandemic); *Tex. Democratic Party v. Abbott*, No. 19A1055, 140 S. Ct. 2015 (June 26, 2020) (denying application to vacate stay of injunction entered by the Fifth Circuit in suit challenging vote by mail rules during COVID-19); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (denying application to vacate stay of injunction entered by the Sixth Circuit in suit challenging signature requirement for ballot initiative petitions); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (granting stay of injunction that had extended deadline for receipt and counting of absentee ballots).

The courts of appeals have followed the Supreme Court's lead on this point. Just over a week ago, the Eighth Circuit stayed an injunction that altered Missouri's absentee-voting requirements. *See Org. for Black Struggle v. Ashcroft*, No. 20-3121, — F.3d —, 2020 WL 6257167, at *4 (8th Cir. Oct. 23, 2020). And since the first of October, at least six court-of-appeals decisions have stayed district courts' injunctions of state voting laws. *See Common Cause Indiana v. Lawson*, No. 20-2911, — F.3d —, 2020 WL 6042121 (7th Cir. Oct. 13, 2020) (on motion for stay, summarily reversing an injunction of Indiana's absentee-ballot-receipt deadline); *People First Ala. v. Sec'y of State*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020)

(staying September 30 injunction of Alabama absentee-voting laws but not of laws unrelated to absentee voting); *Tex. League of Un. Latin Am. Citizens v. Hughs*, No. 20-50867, — F.3d —, 2020 WL 6023310 (5th Cir. Oct. 12, 2020) (staying October 9 injunction requiring additional absentee-ballot drop-off locations); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, — F.3d —, 2020 WL 5951359, at *1 (7th Cir. Oct. 8, 2020) (staying September 21 injunction of Wisconsin absentee-voting laws); *Ariz. Democratic Party v. Hobbs*, No. 20-16759, — F.3d —, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020) (staying September 10 injunction of Arizona absentee-voting laws); *Raffensperger*, 2020 WL 5877588, at *1 (on October 2, staying August 31 injunction of Georgia absentee-voting laws).

Because an Election Day order would violate the Supreme Court's clear instruction—an instruction applied over and over this election cycle by the Court and the courts of appeals—this Court should deny Plaintiffs' motion for a preliminary injunction.

II. Laches bars relief on all claims in this case.

The laws that Plaintiffs challenge have all been in effect since at least 2009—some since 2003. *See* 2009 Ark. Act 658, sec. 1, 87th General Assembly, Reg. Sess. (Mar. 27, 2009) (amending Ark. Code Ann. 7-1-103); *id.*, sec. 3 (amending Ark. Code Ann. 7-5-310); 2003 Ark. Act 1308, sec. 1, 84th General Assembly, Reg. Sess. (Apr. 14, 2003) (amending Ark. Code 7-5-310). Despite that, Plaintiffs delayed seeking judicial relief until 11:30 PM the night before Election Day in November 2020. Plaintiffs offer no excuse for this delay, which has prejudiced Defendants' ability to defend this lawsuit. Laches therefore bars Plaintiffs' claims.

Laches may bar claims of all sorts, even constitutional ones, if two elements are met: (1) a plaintiff inexcusably delays bringing suit, (2) resulting in prejudice to the defendant. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979); *see also Soules v.*

Kauaians for Nukolii Campaign Committee, 849 F.2d 1176, 1182 (9th Cir. 1988); *Gay Men's Health Crisis v. Sullivan*, 733 F. Supp. 619, 631 (S.D.N.Y. 1989). Both elements are met here.

First, there is no question that plaintiffs have inexcusably delayed in bringing this suit. Delays in bringing election-related claims are unjustified when plaintiffs wait to file their lawsuit until elections deadlines are imminent. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Ind. Redistricting Comm'n*, 366 F. Supp. 2d 887, 907-09 (D. Ariz. 2005); *Marshall v. Meadows*, 921 F. Supp. 1490, 1493-94 (E.D. Va. 1996). Courts have foreclosed plaintiffs from seeking injunctive relief in election-related suits filed *weeks* prior to a candidate filing deadline. *Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970). Here, Plaintiffs delayed bringing their challenge to the Act until late in the night before Election Day, even though the laws they challenge have existed for over a decade. Plaintiffs' choice to wait unquestionably amounts to inexcusable delay.

Second, Plaintiffs' inexcusable delay unduly prejudices Defendants. Undue prejudice exists where election plans were finalized well in advance of a plaintiff's suit, and counties have already conformed their precincts and readied their election machinery to implement the plan. *Ariz. Minority Coal.*, 366 F. Supp. 2d at 909. Any injunctive relief at this point would require Arkansas's 75 county boards to implement entirely new procedures *on the fly* and while they are supposed to be performing other tasks with many unanswered questions and confusion likely to lead to inconsistent practices. Plaintiffs' delay prejudices not just Defendants but also all of Arkansas's counties—not to mention Arkansas voters.

Further, Plaintiffs' inexcusable delay has unjustifiably forced Defendants to defend against their claims on an extraordinarily compressed timeline. The emergency nature of this litigation has prejudiced Defendants' ability to mount a full defense by leaving virtually no time to develop facts for the Court to assess in ruling on whether to grant Plaintiffs' request for relief.

"Under certain circumstances, such as where an impending election is imminent and a [s]tate's election machinery is already in progress, equitable considerations . . . justify a court in withholding relief." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Injunctive relief is inappropriate in light of equitable considerations where "greater harm lies in casting doubt on and imperiling the upcoming election." *Berry v. Kander*, 191 F.Supp.3d 982, 988 (E.D. Mo. 2016) (denying candidate's request for injunction against Secretary of State's enforcement of congressional districts in upcoming election). Because Plaintiffs' inexcusable delay has prejudiced Defendants, laches bars Plaintiffs' claims, and the Court should deny Plaintiffs' motion.

III. Because Plaintiffs misread the plain text and legislative history of Section 208, they are unlikely to succeed on the merits.

By ignoring precedent that undermines their claims, Plaintiffs treat their success on the merits as a foregone conclusion. (*See* TRO Br., DE 4 at 9-13.) As an initial matter, although Plaintiffs purport to bring two different claims, both are claims based on Section 208 of the Voting Rights Act, 52 U.S.C. 10508. (*See* Compl., DE 2 ¶¶ 55-63.) Because Section 208 properly interpreted does not support either claim, they are not likely to succeed on the merits. This Court should deny their motion.

For starters, Plaintiffs misinterpret the plain text of Section 208. According to Plaintiffs' interpretation, Section 208 prohibits States from placing any limitations whatsoever on who may assist voters in the voting booth. (*See* DE 4 at 10.) But federal courts considering analogous

claims have rejected such a broad reading of Section 208. Recently, the District of Michigan rejected precisely this argument in *Nessel,* when it considered a request to preliminarily enjoin state law regarding absentee-ballot applications. *See* 2020 WL 54742432, at *4, 13-14. Plaintiffs rely on that court's denial of the defendants' motion to dismiss last May. (*See* DE 4 at 11-12.) Surprisingly, however, they do not address that court's more recent preliminary-injunction decision.

In that recent decision, the court interpreted the plain language of Section 208 and refused to preliminarily enjoin Michigan's limitations on who may assist voter in submitting absentee-ballot applications. *See Nessel,* 2020 WL 54742432, at *4. The *Nessel* plaintiffs "contend[ed] that § 208 preempts Michigan's Absentee Ballot Law because Michigan's law prohibits voters who need help returning their absentee ballot applications from receiving assistance from the person of their choice." *Id.* at *13. Based on Section 208's plain language, the court rejected the contention that Section 208 prohibits States from creating any limitations whatsoever on who can assist voters. "Section 208 does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice. In other words, the statute employs the indefinite article 'a' which by its very term is non-specific and non-limiting, as opposed to the definite article 'the,' which by its terms is specific and limiting." *Id.* at *14. This word choice by Congress, the *Nessel* court said, "suggests that some state law limitations on the identity of persons who may assist voters is permissible." *Id.* So the *Nessel* court refused to enjoin Michigan's law. *Id.*

A Texas district court came to a similar conclusion over a decade ago. Yet Plaintiffs also ignore that court's decision. *See Ray v. Texas*, No. 2-06-CV-385 (TJW), 2008 WL 3457021 (E.D. Tex. Aug. 7, 2008). The Texas law in *Ray* limited a voter to witnessing only a single other

voter's early voting application. *Id.* at *1. And the *Ray* plaintiffs challenged that limitation based on the same arguments that Plaintiffs rely on here. "The plaintiffs ask the court to construe 'a person of the voter's choice' to mean that the voter may choose *any* person, without limitation." *Id.* at *7. The *Ray* court interpreted the plain language of Section 208 much like the *Nessel* court. "Section 208 allows the voter to choose a person who will assist the voter, but *it does not grant the voter the right to make that choice without limitation*." *Id.* (emphasis added). Instead, States have some power under Section 208 to "limit[] the available choices to certain individuals." *Id.* The *Ray* court thus refused to enjoin the challenged Texas law. *Id.* at *7-8.

Rejecting the very argument that Plaintiffs make here left an open question in *Nessel* and *Ray*: What limits does Section 208 place on a State's power to regulate who may assist voters? On this point, both courts turned to Section 208's legislative history, which Plaintiffs also misinterpret. (*See* TRO Br., DE 4 at 12-13.) As with any other regulation of election procedure, those courts said that States may regulate the pool of those from whom voters may choose an assistor, "provided that [its] restrictions are reasonable and non-discriminatory." *Ray*, 2008 WL 3457021, at *7.

When considering challenges to laws like those in this case, courts should "defer[] to the decision of the elected representatives of the state, provided the challenged regulation does not unduly burden the right to vote." *Id.* Indeed, Congress expressly invoked the Supreme Court's well-established undue-burden standard for election regulations when it enacted Section 208. *See Nessel*, 2020 WL 54742432, at *14 ("In passing § 208, Congress explained that it would preempt state election laws 'only to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts.'" (quoting S. Rep. No. 97-417, at 63 (1982)). So in the absence of a severe burden, the only question is

whether Arkansas law "is reasonable, nondiscriminatory, and furthers an important regulatory interest." *Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020).

There is no evidence of a severe burden here. Plaintiffs speculate that Arkansas law makes their community-organizing activities more difficult (*see* Reith Decl., DE 4-1 ¶ 29), but they have offered no evidence that any voter has been denied the assistor of his or her choice because of Arkansas law. This evidentiary failure precludes a finding of a severe burden. They must provide "evidence of individual voters who were denied necessary assistance in the voting process." *Nessel*, 2020 WL 54742432, at *14. As in *Nessel*, "[g]iven the lack of evidence that any voters have been affected by the limits on their choice of assistance, there is no basis for the court to conclude that [the challenged] law stands as an obstacle to the objects of § 208." *Id.* As a result, there is no basis for finding that the challenged Arkansas laws severely burden Plaintiffs or any Arkansas voters.

Therefore, these laws are permissible as long as they "are reasonable and non-discriminatory." *Ray*, 2008 WL 3457021, at *7; *see Miller*, 967 F.3d at 740. Arkansas need not show any compelling interest or tailoring. *Wash. State Grange*, 552 U.S. at 458. Plaintiffs do not allege that the requirement is discriminatory. Like the Texas law in *Ray*, Arkansas's voter-privacy laws protect vulnerable populations from fraudulent or manipulative interference with their vote. *See Ray*, 2008 WL 3457021, at *5. The six-voter limit ensures that a person cannot influence an electoral result under the guise of assisting large numbers of voters at the polls. *See* Ark. Code Ann. 7-5-310(b)(4)(B). The requirement that poll workers keep a list of all assistors simply ensures that Arkansas can enforce that six-voter limit. *See* Ark. Code Ann. 7-5-310(b)(5). And without any sort of criminal penalty attached, Arkansas's voter-privacy laws would be ineffectual. *See* Ark. Code Ann. 7-1-103(a)(19), (b).

There can be no question that serving these antifraud goals is at least an *important* state interest—even a *compelling* one. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (finding the State's interests in preventing voter fraud, increasing voter confidence by eliminating appearances of voter fraud, and easing administrative burdens on election officials are "undoubtedly important"). In fact, Arkansas has an especially egregious and well-documented history of election fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. To be sure, even if Arkansas lacked such an egregious history of election fraud, the State would still "be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Indeed, because Arkansas's voter-privacy laws are justified by Arkansas's compelling interest in the integrity of its electoral process, it would satisfy even the stricter scrutiny reserved for severely burdensome regulations. *See Purcell*, 549 U.S. at 4 ("A State indisputably has a compelling interest in preserving the integrity of its election process." (citation omitted)). Section 208 does not prohibit Arkansas from working to prevent fraud.

The cases that Plaintiffs cite do not undermine the permissibility of Arkansas pursuing these antifraud interests. In *OCA-Greater Houston v. Texas*, for example, there was evidence that a particular individual "had been unable to complete her ballot due to the challenged state law limiting those eligible to assist as an interpreter." *Nessel*, 2020 WL 54742432, at *14 (discussing *OCA-Greater Hous.*, 867 F.3d 604 (5th Cir. 2017)). As already discussed, there is no

such evidence in this case, and thus there is no evidence of a severe burden. And in *DSCC v. Simon*, the Minnesota Supreme Court adheres to the same misinterpretation of Section 208's plain text advanced by Plaintiffs in this case, which would mean that States have no power whatsoever to limit the identity of those who may assist voters—not matter how strong a State's antifraud interests. *See* No. A20-1017, 2020 WL 6302422, at *6 (Minn. Oct. 28, 2020).

Because Arkansas law is "reasonable in view of the State's goal of reducing the type of election fraud [it] addresse[s]," Plaintiffs are not likely to succeed on the merits of their claims. *Ray*, 2008 WL 3457021, at *7. This Court should therefore deny the motion.

IV. The remaining preliminary-injunction factors also warrant denial of Plaintiffs' motion.

Because Plaintiffs' claims fail on the merits they are not entitled to an injunction, and this Court need not consider the remaining injunction factors. *See Jegley*, 864 F.3d at 957-58 (holding that where an injunction would prevent "implementation of a duly enacted statute," the movant must begin with a "more rigorous showing" than usual "that [he is] 'likely to prevail on the merits'") (quoting *Rounds*, 530 F.3d at 733); *see also Rounds*, 530 F.3d at 737 n.11 (holding that the remaining injunction "factors cannot tip the balance of harms in the movant's favor when the [likelihood of success] requirement is not satisfied"). But those other factors warrant denial of Plaintiffs' motion as well.

Plaintiffs bear the burden of proving that "the balance of equities so favors [them] that justice requires the court to intervene." *Dataphase Sys.*, 640 F.2d at 113. Given Arkansas's "paramount" interest in regulating its elections and the public interest in enforcing the law, *Miller*, 967 F.3d at 740, Plaintiffs cannot hope to meet this burden. An injunction would inflict ir-

reparable harm on the State and be manifestly contrary to the public interest. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (holding that, by definition, a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State").

This harm to Arkansas and to its citizens is exacerbated by Plaintiffs' calculated delayin bringing this lawsuit. They might have sued months or even years ago. But they waited till half an hour before election day to file their motion. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). So Plaintiffs' dilatory litigation tactics alone would require denying injunctive relief. *See Little*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring in grant of stay) (granting stay where initiative would be precluded from appearing on the November ballot where the delay was "attributable at least in part" to the plaintiff, which "delayed unnecessarily" in pursuing relief) (internal quotations omitted); *McGehee v. Hutchinson*, 854 F.3d 488, 491 (8th Cir. 2017) (en banc) (holding that in matters of equity, delay on the part of the moving party creates "a strong equitable presumption against the grant" of relief). Plaintiffs' delay has made it impossible to resolve this case in time for the current election.

Indeed, voters in Arkansas and around the country are already casting Election Day ballots. The public interest is best served by preserving Arkansas's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedures on the fly. Further, the Supreme Court has made clear that the public interest is not served by court orders altering election procedures shortly before elections. *See Purcell*, 549 U.S. at 4-6. When a federal court is asked to enter an injunction even "weeks before an election," the court must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, *consid-*

erations specific to election cases." *Id.* at 4 (emphasis added). Those election-case considerations include the danger that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5; *see Brakebill v. Jaeger*, 905 F.3d 553, 559-60 (8th Cir. 2018) (granting stay of injunction), *application to vacate stay denied*, 139 S. Ct. 10; *see also Nken v. Holder*, 556 U.S. 418, 435 (2009). The State has an interest in "the stability of its political system," *Storer*, 415 U.S. at 736, and "in avoiding confusion, deception, and even frustration of the democratic process at the general election," *Jenness*, 403 U.S. at 442; *see Mays v. Thurston*, No. 4:20-CV-341 JM, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020) (explaining that a "last-minute restructuring of the state-absentee voting law[] would add further confusion and uncertainty and impair the public's strong interest in the integrity of the electoral process").

That is why the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see Thompson*, 959 F.3d at 813. And as displayed by the Court's recent actions, "for many years, [it] has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring in grant of application for stay). The equitable injunction factors also should lead this Court to deny the preliminary-injunction motion.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for ex parte relief.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

Nicholas J. Bronni (2016097)
Arkansas Solicitor General
Vincent M. Wagner (2019071)
Deputy Solicitor General
Michael A. Cantrell (2012287)
Assistant Solicitor General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2007
Fax: (501) 682-2591
Michael.Cantrell@ArkansasAG.gov

Attorneys for the Secretary of State and State Board of Election Commissioners