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

LEAGUE OF WOMEN VOTERS OF ARKANSAS, ROBERT WILLIAM ALLEN, JOHN MCNEE, and AELICA I. ORSI, **PLAINTIFFS,**

v. **No. 5:20CV05174 PKH**

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

BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiffs—who have not cast absentee ballots—urge this Court to rewrite Arkansas's longstanding absentee-ballot-verification requirement in the midst of an election. But that antifraud provision has been on the books since 2005, and Plaintiffs could have brought even their COVID-19–related claims months ago, as this Court has already recognized. DE 23 at 1-2. Yet Plaintiffs inexcusably delayed bringing this suit for facial injunctive relief until after absentee voting for the November election was already underway. Therefore the doctrine of laches bars any relief.

Plaintiffs' claims fail for a host of other reasons, too. As a threshold matter, they have not demonstrated their standing. Not a single Plaintiff has cast an absentee ballot, and no absentee ballot would be rejected even on the speculative scenarios Plaintiffs conjure. They have shown no concrete and particularized injury. As if that were not enough, the injury they attempt to allege is not redressable by a court order against Defendants. Only the 75 county boards of election commissioners (one for each Arkansas county) have the state-law authority to

take any of the actions that Plaintiffs ask this Court to require. *See* Ark. Code Ann. 7-4-107(a)(1), 7-5-414(c), 7-5-416. Arkansas law is clear that the Secretary and the State Board have no authority to effectuate the relief Plaintiffs seek. *See Ark. St. Bd. of Election Comm'rs v. Pulaski Cty. Election Comm'n*. 2014 Ark. 236, at 17, 437 S.W.3d 80, 90 (holding that the State Board has no authority to create a new procedure permitting the cure of absentee-ballot deficiencies). Therefore, Plaintiffs' purported injury is not redressable by a favorable decision against Defendants.

Even if Plaintiffs could overcome these serious jurisdictional and procedural obstacles, sovereign immunity would still bar their claims because there is no ongoing violation of federal law. Arkansas's absentee-ballot-verification requirement does not implicate the fundamental right to vote, and only rational-basis review applies, which the requirement easily survives. *See Tully v. Okeson*, No. 20-2605, — F.3d —, 2020 WL 5905325, at *2 (7th Cir. October 6, 2020). But even if this Court were to apply some other test, the requirement would pass muster. Under the *Anderson-Burdick* framework, it imposes only minimal burdens and thus need only be reasonable and nondiscriminatory, which it certainly is. And under the test for procedural-due-process claims, Plaintiffs' claim would fail because the State's interests are strong, the Plaintiffs' interests are weak, and the risk of error is extraordinarily low. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

This Court need not consider the remaining injunction factors to determine that Plaintiffs' claims fail. But Plaintiffs also do not face irreparable harm, and the balance of equities and the public interest favor Arkansas. In light of the numerous fatal deficiencies of Plaintiffs' claims, the Court should grant Defendants' motion.

BACKGROUND

Elections in the United States have "always been a decentralized activity," with elections administered by local officials and their rules set by state legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *cf.* U.S. Const. art. I, sec. 2, cl. 1. These voting rules must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (noting that election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in person on Election Day: The first laws authorizing *absentee* voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote via absentee ballot. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938). Today, while all States permit some form of absentee voting, States continue to balance the interests in promoting voting and preventing fraud in a variety of ways, with different States adopting different rules governing when, how, and where voters may vote absentee.[1]

In striking this balance, Arkansas lawmakers have provided voters a variety of ways to safely and securely cast a ballot. These include early in-person voting, in-person voting on Election Day, and absentee voting. Ark. Code Ann. 7-5-418 (early voting); *id.* 7-5-102 (Election

[1] *See* Nat'l Conference of State Legislatures, *Absentee & Mail Voting Policies in Effect for the 2020 Election* (updated Oct. 9, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx.

Day); *id.* 7-5-401 *et seq.* (absentee voting). The State assists local election officers in making the voting process accessible to voters with disabilities and those concerned with the health risks posed by the ongoing COVID-19 pandemic. Ark. Code Ann. 7-5-311; Ex. F, State Board Guidance Regarding the November 3, 2020 General Election; *see* Election Information, ADA Compliance, *Ark. St. Bd. of Election Comm'rs*, https://www.arkansas.gov/sbec/election-information/. This year, on July 29, the State Board of Election Commissioners issued guidance to county clerks and county boards concerning the November election in light of COVID-19. Ex. F, State Board Guidance Regarding the November 3, 2020 General Election.

The State Board gave many recommendations designed to protect those voting in person, which should reassure anyone who is concerned about health risks associated with voting early or on Election Day. The guidance suggests that:

- All election officers wear face coverings when in the polling place and at all times when social distancing is not possible. *Id.* at 1.
- Counties should encourage voters to wear face coverings, and face coverings should be offered to voters if supplies are available. *Id.*
- Counties that offer COVID-19 screening procedures should permit voters who fail the screening to vote in a location separate from other voters. *Id.*
- Polls should be arranged so voters may practice social distancing. *Id.* at 2.
- Voting booths and other voting equipment should be spaced no less than six feet apart, and poll workers should allow voters to form a line that maintains social distancing. *Id.*
- Voters should be permitted to enter and exit through different doors where feasible. *Id.*
- Sanitizer that is at least 60% alcohol should be placed near entrances and exits. *Id.*
- Items that voters may physically contact should be regularly cleaned, and voting equipment should be sanitized after each use. *Id.* at 2-3.
- Voters should be provided with disposable styluses. *Id.* at 3.

The counties have adopted these recommendations.[2] If there are any questions or concerns, voters can contact their local election officials for information about what precautions are being observed and what accommodations might be available at their local polling place.

Absentee voting is normally limited to voters who meet certain statutory criteria. Ark. Code Ann. 7-5-402. For the November 2020 election, however, it also available by executive order to voters who fear that in-person voting would pose a health risk to them or others for reasons including the COVID-19 pandemic. Ex. A at 4 (Executive Order 20-44); *see* Ex. B at 2 (Executive Order 20-45 readopting Executive Order 20-44). Absentee ballots may be requested at any time until seven days before the election. Ark. Code Ann. 7-5-404(a)(3)(A). Applicants may request a ballot by completing a downloadable form and submitting it either in person, by mail, or electronically. *Id.*; *see* Arkansas Application for Absentee Ballot, https://www.sos.arkansas.gov/uploads/elections/Absentee_Ballot_Application_1.pdf. But voters do not have to use the form; they can also request an absentee ballot by supplying the required information by letter or postcard or electronically. Ark. Code Ann. 7-5-404(a)(3)(B).

Arkansas is one of only eight States that issues absentee ballots to voters more than 45 days before the election.[3] For the November election, county boards of election commissioners were responsible for providing county clerks with absentee ballots for mailing by September 17, 2020. Ark. Code Ann. 7-5-211(c); *id.* 7-5-407(a)(1).

[2] As explained more fully below, Plaintiffs' failure to join the counties as Defendants in this action is prejudicial to Defendants. Here and elsewhere Defendants must rely on arguments based solely on information and belief concerning the counties' administration of the election.

[3] "Voting Outside the Polling Place, Table 7: When States Mail Out Absentee Ballots," *National Conference of State Legislatures* (Sept. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx.

Many other States require applicants to take any additional steps to obtain a ballot, such as signing before a notary public or other official authorized to administer oaths, obtaining a witness signature, or providing a copy of photo identification. *Cf.*, *e.g.*, Ala. Code 17-9-30(b); Miss. Code. Ann. 23-15-715(b); S.D. Codified Laws 12-19-2. But Arkansas imposes no such requirements on Arkansans seeking to vote absentee.

Absentee voters are provided with a ballot, a voter-statement form, a secrecy envelope printed with the words "Ballot Only," a return envelope printed with the county clerk's address, and instructions for voting and returning the absentee ballot to the county clerk. Ark Code Ann. 7-5-409(b). The process for completing and returning an absentee ballot is as follows:

- Voters mark the ballot, place it in the "Ballot Only" secrecy envelope, seal that envelope, and then place it inside the return envelope. Ark. Code Ann. 7-5-412.
- Voters complete the voter statement, which includes spaces for a signature, printed name, date of birth, and address, as well as an optional verification of identity, in which voters may certify under penalty of perjury that they are registered to vote and that they are the registered voter. Ark. Code Ann. 7-5-409(b)(4)(B)-(C).
- Generally, voters must either provide photo identification or sign the verification. Ark. Const. amend. 51, sec. 13(b)(1)(A); Ark. Code Ann. 7-5-412; *see id.* 7-5-416(b)(1)(F).
- Voters place the voter statement into the return envelope, seal it, and deliver it to the county clerk.
- Ballots must be hand-delivered to the county clerk by the close of business the day before the election or, if mailed, must be received by 7:30 p.m. on Election Day. Ark. Code Ann. 7-5-411(a).

The absentee votes of those who do not provide a copy of their photo identification will be counted, in the absence of any other deficiency, if they sign the verification of identity. *See* Ark. Const. amend. 51, sec. 13(b)(5)(A); Ex. D, County Board of Election Commissioners Procedures

Manual, at 42. Unlike in many other States, the voter statement is not required to be notarized or witnessed by any other person.[4] Ark. Code Ann. 7-5-409(b)(4)(C).

"The processing, counting, and canvassing of the absentee ballots shall be under the supervision and at the direction of the county board of election commissioners," Ark. Code Ann. 7-5-414(c), which are bipartisan entities, *id.* 7-4-102(a)(2). Not less than 20 days before the November election—for this election, that is tomorrow, October 14—county boards are required to give public notice in a newspaper of general circulation in the county of the time and location of the opening, processing, canvassing, and counting of ballots, including absentee ballots. Ark. Code Ann. 7-5-202(a)(1)(F). Under Executive Order 20-44, election officials may open the outer envelopes and process and canvass absentee voter correspondence beginning October 19, 2020. Ex. A at 4 (extending to 15 days the 7-day period established by Ark. Code Ann. 7-5-416(a)).

At that time, election officers open each return envelope and "compare the name, address, date of birth, and signature of the voter's absentee application with the voter's statement." Ark. Code Ann. 7-5-416(b)(1)(F)(i). All election officials at a polling place are required to have completed training coordinated by the State Board within twelve months before the election. Ark. Code Ann. 7-4-107(b)(2)(C)(i), 7-4-109(e)(1). That includes training on the uniform statewide standard for verifying signatures and other information contained on voter statements

[4] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

returned with absentee ballots. Ex. J, Jonathan Davidson Decl. Among other things, officials at that training are instructed:

- "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1.
- The dates of birth and addresses also must match. Ex. C at 1.
- Election officials "[r]eject a ballot on the basis that the signatures do not compare *only* if there is a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1.
- "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1.
- "If the county board of election commissioners determines that the application and the voter's statement do not compare as to name, address, date of birth, and signature, the absentee ballot shall not be counted." Ark. Code Ann. 7-5-416(b)(1)(F)(ii).

The processing and counting of absentee ballots is open to the public, and "candidates and authorized poll watchers may be present in person or by a representative . . . during the opening, processing, canvassing, and counting of the absentee ballots." *Id.* 7-5-416(a)(4). Poll watchers may "inspect any or all ballots at the time the ballots are being counted," and may "[c]all to the attention of the election sheriff any occurrence believed to be an irregularity or violation of election law." *Id.* 7-5-312(e) (Poll Watcher Rights and Responsibilities).

Thirty-one States including Arkansas conduct signature verification, comparing the signature submitted with the absentee ballot with a signature already on file.[5] Twenty-five States

[5] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," Processing, Verifying and Counting Absentee Ballots, *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

allow no cure period for deficiencies.[6] Only 18 states permit voters to correct signature discrepancies.[7]

Election officers may open the "Ballot Only" envelopes for the purpose of counting the ballots only beginning at 8:30 a.m. on Election Day. Ark. Code Ann. 7-5-416(a)(1). Any person who receives an absentee ballot but who elects to vote in person by early voting or on Election Day will be permitted to cast a provisional ballot. *Id.* 7-5-201(f); *see id.* 7-5-411(b). If any absentee vote is not counted, the county board "shall promptly notify the person who cast the vote." *Id.* 7-5-902(a). The notification must be in writing and must "state the reason or reasons the vote was not counted." *Id.* 7-5-902(b).

STANDARD OF REVIEW

A complaint that fails to demonstrate the Court's jurisdiction or state a claim upon which relief can be granted must be dismissed. Fed. R. Civ. P. 12(b)(1) & 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility test involves two steps. First, this Court must determine which allegations are conclusory and, therefore, should be ignored. *See Iqbal*, 556 U.S. at 678. Second, the non-conclusory, factual allegations must be evaluated to determine whether they contain sufficient

[6] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," Processing, Verifying and Counting Absentee Ballots, *National Conference of State Legislatures* (Sept. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#missing.

[7] "Table 15: State that Permit Voters to Correct Signature Discrepancies," *National Conference of State Legislatures* (Sept. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx.

"factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). If the factual allegations "do not permit the court to infer more than the mere possibility of misconduct," then the complaint fails to show a plausible claim for relief. *Id*. at 679 (citing Fed. R. Civ. P. 8(a)(2)).

"Motions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts." *Jessie v. Potter*, 516 F.3d 709, 713 (8th Cir. 2008) (citing *Osborn v. United States*, 918 F.2d 724, 728-30 (8th Cir. 1990)). At the pleading stage, courts apply the Rule 12(b)(6) standard to the challenge to jurisdiction, and dismissal under Rule 12(b)(1) is appropriate "if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016); *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Carlesn*, 833 F.3d at 908 (quoting *Osborn*, 918 F.2d at 729 n.6).

To be entitled to a permanent injunction, Plaintiffs needed "to show *actual* success on the merits." *Oglala Sioux Tribe*, 542 F.3d at 229 (emphasis added). Only if Plaintiffs have actually succeeded on the merits does this Court go on to consider the other injunction factors: "the threat of irreparable harm" to Plaintiffs; the balance between that threat and the harm an injunction will inflict upon Arkansas and its citizens; and "the public interest." *Id.* In this way, the permanent-injunction standard resembles the "more rigorous" standard that applies where parties seek to preliminarily enjoin "a duly enacted state statute." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc). Requiring a rigorous showing of success

on the merits ensures that Arkansas's "presumptively reasonable democratic processes" are thwarted "only after an appropriately deferential analysis." *Id.* at 733.

Moreover, a deferential approach is even more warranted here because Plaintiffs have essentially challenged Arkansas's decisions about how to best balance electoral integrity and public health. Indeed, as this Court recently warned, federal courts must not "usurp[] the functions of the state government by second-guessing the State's policy choices in responding to the COVID-19 pandemic." *In re Rutledge*, 956 F.3d 1018, 1031 (8th Cir. 2020). After all, it is not unelected judges who bear primary responsibility for Americans' health and safety. Instead, the "'Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect."'" *Tex. Democratic Party*, 2020 WL 2982937, at *1 (quoting *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., concurring), and *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

ARGUMENT

I. Plaintiffs' claims are barred by sovereign immunity because there is no ongoing constitutional violation.

The Constitution, including the Eleventh Amendment, absolutely bars suits against a state or its agencies or departments, regardless of the relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Suits against state officials or employees are also barred when "the state is the real, substantial party in interest." *Id.* at 101. When a suit is brought against state employees in their official capacities, the suit "is the functional equivalent of a suit against the State" and is also barred by the Eleventh Amendment. *Zajrael v. Harmon*, 677 F.3d 353, 355 (8th Cir. 2012) (per curiam).

Here, Plaintiffs' complaint exclusively names state officials as Defendants. It also seeks declaratory and injunctive relief in an attempt to invoke the *Ex Parte Young* fiction, which allows a narrow range of actions against public officials. *See Ex Parte Young*, 209 U.S. 123 (1908). This exception to the Eleventh Amendment does not save Plaintiffs' claims because the *Ex Parte Young* rule does not permit a suit directly against the state or its agencies. *See Papasan v. Allain*, 478 U.S. 265, 276-77 (1986). True, the Defendants are potentially subject to suit under *Ex Parte Young*, but the rule permits only a suit seeking prospective relief against an *ongoing* violation of a federal right. *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011).

As explained more fully below, Plaintiffs have not adequately pled claims for injunctive or declaratory relief because they do not face an ongoing violation of any constitutional right. *See, e.g., Park v. Forest Serv. of the U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000). As such, Defendants are entitled to sovereign immunity and Plaintiffs' complaint should be dismissed in its entirety.

II. Plaintiffs lack standing.

A. Because Plaintiffs cannot satisfy their burden of showing an injury, let alone an injury that is fairly traceable to the State, they lack standing.

1. The individual Plaintiffs allege only speculative injury.

"Standing is 'assessed under the facts existing when the complaint is filed.'" *Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 901 (8th Cir. 2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (plurality opinion)). But at the time Plaintiffs filed this lawsuit—let alone a week later when they filed their preliminary-injunction motion—Plaintiffs Allen, McNee, and Orsi *had not cast absentee ballots*, despite the fact that absentee voting was already well underway. *See* DE 13-2 at 4 ¶ 14 (Allen has not yet signed his absentee-ballot voter statement); DE 13-3 at 3 ¶ 9 (McNee "would like to vote by absentee ballot so long as [he] ha[s] some assurance that officials will not reject [his] ballot"); DE 13-4 at 5 ¶¶

14, 15 (Orsi has not yet "mail[ed] [her] absentee ballot to the Pulaski County clerk's office," and "prefer[s] to vote in person"). Even if, when filing their complaint, Plaintiffs were inclined to return their absentee ballots at some point before the statutory deadline, Plaintiffs could still fail to timely do so, or they could change their minds and vote in person early or on Election Day, as Arkansas law permits. Ark. Code Ann. 7-5-201; *id.* 7-5-411(b). Alternatively, as explained more fully below, due to the extraordinarily low rejection rate, even if Plaintiffs had returned their absentee ballots by the time they filed their complaint, they still would have failed to meet their burden of showing any reasonable possibility that their ballots would be affected. As it stands, there is nothing but the most speculative possibility that Plaintiffs could be injured by Arkansas's absentee-ballot-verification requirement. *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) ("A concrete injury must 'actually exist,' and it must be 'real,' not 'abstract.'" (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

In the typical case, a statute must be enforced against a plaintiff before she may challenge its constitutionality, but pre-enforcement review is available in some contexts if "threatened enforcement [is] sufficiently imminent"—that is, if there is "a credible threat" that the provision will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 160 (2014). But here Plaintiffs are merely "concerned" about a purely hypothetical rejection of ballots they have not even cast. DE 13-2 at 3 ¶ 14; DE 13-3 at 3 ¶ 7; DE 13-4 at 4 ¶ 10. Therefore, their purported injury is not sufficiently imminent for Article III purposes. *See Lujan*, 504 U.S. at 564 n.2 (quotation and citation omitted) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.").

Plaintiffs do not even attempt to allege an injury related to Arkansas's requirement that absentee ballots with a missing signature or a mismatched birth date or address be rejected. Plaintiffs do not, for example, allege that they have submitted, or will submit, or even *may* submit, a voter statement that is missing a signature or has a mismatched birth date or address. So Plaintiffs categorically lack standing to challenge Arkansas law concerning absentee ballots with these particular deficiencies.

Two Plaintiffs instead allege purely speculative injuries related to Arkansas's requirement that there not be "a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1; *see* DE 13-2 at 3 ¶¶ 12, 14 (Allen claims inconsistent handwriting and inability to remember whether he signed as "Robert" or "Bob"); DE 13-3 at 2 ¶ 8 (McNee claims inconsistent handwriting and inability to remember whether he signed as "John R." or "John Robert"). But Plaintiffs' allegations that they cannot remember signing as "Robert" or "Bob" or "John R." or "John Robert" cannot support Plaintiffs' standing because such differences expressly would not cause an absentee ballot to be rejected. Ex. J, Davidson Decl.

The State Board's guidance expressly states that "[a] name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1. Election officers are trained with the example that an absentee ballot with a signature of "Jon" versus "Jonathan" should not be rejected in the absence of some other reason to disqualify it. *See* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson Decl. Under Arkansas law, county boards must "exercise [their] duties consistent with

the training and materials provided by the State Board," Ark. Code Ann. 7-4-107(a)(2), and a "presumption exists that public officials will follow the law in performance of their duties," *Golden v. Frye*, No. 5:09CV00088 JMM-JVV, 2009 WL 3245701, at *3 (E.D. Ark. Oct. 6, 2009) (quoting *Haynes v. State*, 354 Ark. 514, 527 (2003)).

Plaintiff Orsi does not even claim a potential inconsistency between her signatures. *See* DE 13-4 at 4 ¶ 13 (claiming she signed a second copy of a voter statement because the first did not correspond to the signature on her application). Plaintiffs do not allege that her signature exhibits a "distinct and easily recognizable difference" that would cause the ballot to be disqualified. Ex. C at 1. And in fact, those signatures do not exhibit such a difference. *See* DE 13-6 at 21 ¶ 53, Figure 3 (photographs of Orsi's signatures). Orsi's absentee-ballot application would not be rejected for a mismatched signature under the State Board's standard.[8] Ex. J, Davidson Decl.

2. The League of Women Voters fails to allege a cognizable injury.

As for the League of Women Voters of Arkansas, it plainly lacks associational standing. The Supreme Court has repeatedly "required plaintiff-organizations to make specific allegations establishing that *at least one* identified member had suffered or would suffer harm" to support a claim of associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). Yet, despite purporting to represent the rights of the League's members, *see* DE 13 at 21, Plaintiffs make *no allegation* that *any* League member has been, or ever will be, affected by Arkansas's verification requirement in any way whatsoever. *Mo. Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007) (finding that advocacy

[8] Plaintiffs also provide photographs of several of Plaintiff McNee's signatures. *See* DE 13-6 at 23 ¶ 54, Figure 4. None of the variations in these signatures would cause an absentee ballot to be rejected under Arkansas's requirement. Ex. J, Davidson Decl.

organization lacked standing to challenge voting restriction because record did not show that organization's members had been denied right to vote because of the restriction). Plaintiffs' filings give no argument or evidence to support a claim that the League has associational standing. Therefore, the League lacks associational standing to assert any purported injury to the League's members and Plaintiffs have waived any claim to that effect.

Plaintiffs allege that the League has organizational standing on the grounds that it has diverted resources "toward warning voters through increased educational efforts against the[] risks [of disenfranchisement by Arkansas's verification requirement], adjusting their education to address common questions from members of the public, and following up with voters to ensure their ballots are counted." DE 13 at 23. That allegation amounts to the claim that for this election cycle the League has simply decided to emphasize absentee voting in the voter-education efforts that it undertakes every election cycle *as a matter of course*. And a cognizable resource-diversion injury is lacking where—as here—Plaintiffs fails to "identify any activities that [are] impaired" by the challenged requirement. *Jacobson v. Fla. Sec'y of State*, No. 19-14552, — F.3d —, 2020 WL 5289377, at *9 (11th Cir. Sept. 3, 2020).

To be sure, Plaintiffs claim that, "[t]raditionally," the League "expends its resources by, *inter alia*, organizing voter registration drives, holding events and candidate forums, distributing voter guides and absentee ballot applications, answering questions on general voting requirements, and fundraising." DE 13 at 24. But Plaintiffs make *no allegation* that the League has ceased or curtailed any of these activities as a result of Arkansas's absentee-ballot-verification requirement. And Plaintiffs' vague allegation that the League "must divert . . . resources away from its regular advocacy, voter registration, and other election related activities," DE 11 at 6 ¶ 8, is so unspecific as to be not remotely "particularized." *Summers*, 555

U.S. at 493. And Plaintiffs' claim that Arkansas's *existing law* has forced them to divert resources in the lead up to this election also strains credulity. The absentee-ballot-verification requirement has been the law in Arkansas since at least 2005. *See* Ark. Code Ann. 7-5-416(b)(1)(F)(ii), *amended by* 2005 Ark. Act 880, 85th General Assembly, Reg. Sess., sec. 6 (Mar. 16, 2005) (providing that if the application and voter's statement do not compare as to name, address, date of birth, and signature, the absentee ballot shall not be counted).

Finally, because the League does not itself have the right to vote, it has no organizational standing to assert a voting-related due-process claim, in particular. *See Johnson v. Bredesen*, No. 3:07-0372, 2007 WL 1387330, at * 1 (M.D. Tenn. 2007) (finding that since an organization may not exercise a right to vote, it has no standing to assert a due-process claim concerning the alleged loss of a right to vote).

3. Plaintiffs' purported injuries are not fairly traceable to Arkansas.

The longstanding nature of this law highlights another way Plaintiffs lack standing: their alleged injury is not "fairly traceable to the challenged action of the defendant." *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (quoting *Summers*, 555 U.S. at 493). Plaintiffs have not shown that any alleged injury is "*caused by* private or official violation of law." *Summers*, 555 U.S. at 492 (emphasis added). Plaintiffs themselves repeatedly point to the COVID-19 pandemic as the cause of their purported injury. DE 11 at ¶¶ 2, 7, 11, 20, 25. But, needless to say, Arkansas did not cause COVID-19.

And, in fact, in light of the pandemic, Arkansas has taken action to *alleviate* any potential burden on the right to vote by making the casting and processing of absentee ballots easier—not harder—in order to ensure that voters are not disenfranchised. Under Executive Order 20-44, absentee voting is available to voters who believe that in-person voting would pose a health risk to them or others for reasons including the COVID-19 pandemic. Ex. A at 4; *see* Ex. B at 2

(Executive Order 20-45 readopting Executive Order 20-44). Further, election officers may open the outer envelopes and process and canvass absentee voter correspondence beginning this Monday, October 19. Ex. A at 4 (extending to 15 days the 7-day period established by Ark. Code Ann. 7-5-416(a)). Ironically, it is Arkansas's commendable willingness to make absentee voting more accessible in light of the COVID-19 pandemic that has prompted Plaintiffs to argue that Arkansas election officials are *constitutionally required* to begin processing and canvassing absentee ballots 15 days before the election and to provide notice and a cure period for deficient ballots. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810-11 (1969) (rejecting a challenge to Illinois' absentee voter laws prompted by the state's laudable efforts to make absentee voting more accessible). It is for Arkansas—not the federal courts—to decide whether "to keep or to make changes to election rules to address COVID-19." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring in grant of application for stay).

Plaintiffs' complaint ultimately rests on allegations that more people will vote absentee as a result of the COVID-19 pandemic. *See* DE 11 at ¶¶ 2, 7, 11, 20; DE 13 at 8. But even if more absentee voters somehow translated into an injury, the Court cannot "hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020); *see Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020) (finding plaintiffs' inability to vote fairly traceable to Ohio only due to the combination of the state's confinement of plaintiffs in jail and the passing of the deadline for requesting absentee ballots).

B. Plaintiffs alternatively lack standing because their alleged injuries are not redressable by a court order against the Secretary or the State Board.

Arkansas law does not empower the Secretary and the State Board to require counties to begin processing absentee ballots at any particular point in time or to create a cure process for

absentee-voting deficiencies. Therefore, Plaintiffs' purported injury is not redressable by a favorable decision, and they have no standing to sue the Secretary or the State Board.

Plaintiffs do not ask for an injunction of any rule established by either the Secretary or the State Board. Rather, their purported injury derives from a duly enacted statute concerning the counting of absentee ballots by county boards of election commissioners. Ark. Code Ann. 7-5-416(b)(1)(F)(ii). Their alleged injury is not redressable by an order against the Secretary or the State Board.

The county boards have sole statutory authority to "[e]nsure compliance with all legal requirements relating to the conduct of elections." Ark. Code Ann. 7-4-107(a)(1). Each county board is responsible for the design and printing of its county's unique ballot and for meeting state and federal deadlines concerning the mailing of absentee ballots. *See* Ex. G at 36 ("2020 Election Dates," Secretary of State John Thurston (Jan. 2020), https://www.sos.arkansas.gov/uploads/2020_Election_Calendar_1-27-20_1.pdf) (citing Ark. Code Ann. 7-5-407(a)(2)); *see also, e.g.*, 52 U.S.C. 20302(a)(8)(A) (requiring absentee ballots to be mailed to qualifying voters under the Uniformed and Overseas Citizens Absentee Voting Act, "not later than 45 days before the election"). This year, the deadline for county boards to deliver each county's unique absentee ballots to clerks for mailing to all qualified absentee voters was September 17, which state law then required to be mailed by the clerks on September 18. *See* Ex. G at 35 (citing Ark. Code 7-5-407(a)).

The Secretary has no control over the processing of absentee ballots. When absentee ballots are returned, county boards have *exclusive* statutory authority to process, canvass, and count them. Ark. Code Ann. 7-5-414(c); Ark. Code Ann. 7-5-416. The Secretary has *no authority* to require counties to begin processing absentee ballots at any particular point in time

or to create a cure process for absentee-voting deficiencies. As the chief election officer, the Secretary is analogously situated to the Attorney General, who, even as Arkansas's chief law enforcement officer, has no authority to require local law-enforcement officers to adopt particular law-enforcement procedures.

County boards must "exercise [their] duties consistent with the training and materials provided by the State Board." Ark. Code Ann. 7-4-107(a)(2). But the State Board has no authority to create *new absentee-voting procedures*. The Arkansas Supreme Court made this point clear in *Arkansas State Board of Election Commissioners v. Pulaski County Election Commission*. 2014 Ark. 236, at 16-17.

That case involved a challenge to State Board emergency rules that established "a method . . . for an absentee voter to be notified and to be given the opportunity to cure any deficiency resulting from the failure to submit the statutorily required identification with his or her absentee ballot." 2014 Ark. 236, at 3. The Arkansas Supreme Court rejected the State Board's contention that the rules were proper under its statutory authority to "[f]ormulate, adopt, and promulgate all necessary rules to assure . . . fair and orderly election procedures." Ark. Code Ann. 7-4-101(f)(5); *see Ark. State Bd. of Election Comm'rs,* 2014 Ark. 236 at 5, 10. The Court noted that the General Assembly had not established a procedure for notice and cure of absentee-voting deficiencies, and it found that the State Board "was given the authority to promulgate rules to *assure* fair and orderly election procedures; it was not given the authority to *create* those election procedures where the legislature had not." *Ark. State Bd. of Election Comm'rs*, 2014 Ark. 236, at 16. So the court found the rules unconstitutional under the separation-of-powers doctrine. *Id.* Notably, the court's ruling on this point expressly would not have changed even if it meant that the State was found to be in violation of federal law. *Id.* at 16 n.4.

Plaintiffs want county boards to begin processing absentee ballots no later than 15 days before the election and to create a cure process for absentee-voting deficiencies. DE 11 at 25 ¶ b. But they expressly challenge *only* a statute concerning the *county boards'* verification of absentee ballots, DE 11 at 25 ¶ a (citing Ark. Code Ann. 7-5-416(b)(1)(F)(ii)), and not rules promulgated by either the Secretary or the State Board. And instead of naming the county boards as defendants, Plaintiffs ask this Court to enjoin the Secretary and the State Board to "require election officials"—i.e., the county boards—to take these actions. DE 11 at 25 ¶ b. Because the Secretary and the State Board lack that authority, Plaintiffs' purported injury is not redressable, and this Court should dismiss this action for lack of subject-matter jurisdiction.

III. The county boards are necessary and indispensable parties.

For related reasons, this Court should dismiss this action under Rule 19 of the Federal Rules of Civil Procedure. The county boards are necessary and indispensable parties that Plaintiffs have not joined as defendants.

Election administration in Arkansas is decentralized. As explained above, county boards have exclusive statutory authority to process, canvass, and count absentee ballots and to "[e]nsure compliance with all legal requirements relating to the conduct of elections." Ark. Code Ann. 7-4-107(a)(1); *id.* 7-5-414(c), 7-5-416. In *Chicago, Milwaukee, & St. Paul Railroad Company v. Adams County*, the Ninth Circuit found county boards of commissioners and county treasurers were indispensable parties because they were "repeatedly and specifically designated" by statute as the collectors of the taxes, and that they were in fact the "active agents" in collecting them. 72 F.2d 816, 819, 820 (9th Cir. 1934). The county treasurers had a "legal interest in the question of whether or not a court will order [them] to refrain from performing a duty apparently prescribed by statute." *Id.* at 819. Here, the statute Plaintiffs challenge gives "the county board of election commissioners" the duty to determine whether the absentee-ballot

"application and the voter's statement do not compare as to name, address, date of birth, and signature." Ark. Code Ann. 7-5-416(b)(1)(F)(ii). The county boards unquestionably have an interest in whether this Court orders them to refrain from performing this statutory duty.

In fact, Plaintiffs want the county boards to go far beyond shunning this duty to observing entirely new procedures to effect a cure period simultaneous with the height of their processing, canvassing, and counting ballots in the days immediately surrounding the election. Ex. J, Davidson Decl. Further, there are likely to be numerous county-specific reasons, unknown to the Secretary or the State Board, why disposing of this action in the absence of the county boards will impede their ability to administer the election or protect their interests, or otherwise would leave them subject to inconsistent obligations. Indeed, any judgment rendered in this action will potentially prejudice county boards because the Secretary and the State Board cannot adequately represent their peculiar interests. In other words, "as a practical matter," it may "impair or impede" the counties' "ability to protect the[ir] interest[s]" to "dispos[e] of th[is] action in [their] absence." Fed. R. Civ. P. 19(a)(1)(B)(i).

Further, the county boards are indispensable parties because, as explained above, the Secretary and State Board are unable to provide the relief Plaintiffs seek. "The question of indispensability of parties is dependent . . . on the ability and authority of the defendant before the court to effectuate the relief which the party seeks." *Adamietz v. Smith*, 273 F.2d 385, 387 (3d Cir. 1960). *Adamietz* affirmed the dismissal of a lawsuit for failure to join indispensable commission members who had sole authority to reinstate the plaintiff to his former position. *Id.* at 387-88. The defendant was "neither able nor authorized" to grant the relief the plaintiff sought. *Id.* at 387. Similarly here, Plaintiffs want county boards to begin processing absentee ballots 15 days before the election and to allow for cure of absentee-ballot deficiencies. Neither

the Secretary nor the State Board has authority to institute new absentee-voting procedures. *See Ark. St. Bd. of Election Comm'rs*, 2014 Ark. 236, at 16-17. The absent necessary-and-indispensable county boards are the only entities able to provide that relief. *See also United Publ'g & Printing Corp. v. Horan*, 268 F. Supp. 948, 950 (D. Conn. 1967) (federal defendants were indispensable parties because judgment will affect both local and federal administrations, and local defendants alone could not effectuate relief); *E. States Petroleum & Chem. Corp. v. Walker*, 177 F. Supp. 328, 333 (S.D. Tex. 1959) (appeals board members were indispensable parties because they are the only parties authorized to allocate the import increase plaintiff sought, and failure to join the board was basis for dismissal of action).

Finally, the Secretary and the State Board are themselves prejudiced by an inability to mount a complete defense to Plaintiffs' claims. *See Estrella v. V & G Mgmt. Corp.*, 158 F.R.D. 575, 580 (D.N.J. 1994) (finding absence of unnamed defendants may be prejudicial to named defendants in suit involving multiple tortfeasors by affecting the nature of the litigation). For example, the 75 counties possess county-specific documents that are unavailable to either the Secretary or the State Board. Relevant to Plaintiffs' claims, these include county-specific instructions for marking absentee ballots that give notice to voters that their ballots will be rejected if there is a missing or mismatched signature, birth date, or address. These also include Plaintiffs Allen, McNee, and Orsi's absentee-ballot applications. The counties likewise possess information concerning the health precautions that are being observed and what accommodations are available to voters at various polling places. Such information would tend to alleviate Plaintiffs Allen, McNee, and Orsi's concerns about opportunities for voting in person and demonstrate that absentee voting is not the only feasible option for people with concerns about the health risks of COVID-19. Neither the Secretary nor the State Board have possession,

custody, or control of these and other important pieces of evidence that would be material to a proper defense of Arkansas's verification requirement against Plaintiffs' claims.

IV. Plaintiffs claims cannot succeed on the merits.

Even if Plaintiffs could overcome these serious jurisdictional and procedural obstacles, their claims would still fail on the merits.

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

Despite COVID-19's disruption of daily life since mid-March and the Arkansas absentee-ballot-verification requirement's existence since 2005, Plaintiffs delayed bringing this action until after absentee ballots had already been mailed out to voters and some had already been cast. *See* Ark. Code Ann. 7-5-407(a); *id.* 7-5-416(b)(1)(F)(ii). Plaintiffs offer no excuse for their monumental delay, which has prejudiced Defendants' ability to defend this lawsuit. Laches therefore bars Plaintiffs' claims. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979) (holding that laches bars a claim where (1) a plaintiff inexcusably delays bringing suit, (2) resulting in prejudice to the defendant). Laches bars even constitutional claims. *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).

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 law until *after* absentee voting for the November election was already underway and less than a month before counties are required to give public notice of the times and locations for the processing of absentee ballots. Ark. Code Ann. 7-5-407(a) (deadline for delivery of absentee ballots to county clerks for mailing to voters); *Id.* 7-5-202(a)(2) (public notice requirement); *see* Ex. G at 35. Plaintiffs' choice to wait until after voting had already begun to bring this lawsuit amounts to inexcusable delay.

Second, Plaintiffs' inexcusable delay unduly prejudices Defendants. The State Board has conducted training for election officers, including training on the absentee-ballot-verification requirement long before Plaintiffs brought this action. Ex. J, Davidson Decl. 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, with many unanswered questions and confusion likely to lead to inconsistent practices. Plaintiffs' delay undoubtedly prejudices not just Defendants but also all of Arkansas's counties—not to mention Arkansas voters.

Because Plaintiffs' inexcusable delay has prejudiced Defendants, laches bars Plaintiffs' claims, and the Court should grant Defendant's motion to dismiss.

B. Plaintiffs' right-to-vote claim cannot succeed.

For a host of independent (albeit somewhat related) reasons, Plaintiffs' right-to-vote claim cannot succeed on the merits. As explained below, the Court should dispose of Plaintiffs' claims without analyzing any burden because Plaintiffs have no liberty interest in the right to vote or in voting by absentee ballot. Even if there were such an interest, Plaintiffs would be entitled only to the process inherent in the legislative process. Further, Arkansas's absentee-

ballot-verification requirement does not implicate the fundamental right to vote. It is, therefore, subject to rational-basis review, which it easily survives. But even if this Court were to examine any burden, it would be minimal, and *Anderson-Burdick* would be satisfied.

1. The Court should dispose of Plaintiffs' claim as a threshold matter without examining any burden.

Without examining any burden, the Court should dispose of Plaintiffs' request for an injunction as a threshold matter. *See Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 2020 WL 5095459, at *15-20 (M.D. Tenn. Aug. 28, 2020). That is because Plaintiffs' claim arises from their allegations that Arkansas's signature-verification process is "prone to error" and allows no cure.[9] DE 13 at 34; *see id.* at 33-36. But their purported burden does not arise from any alleged unconstitutionality of the absentee-ballot-verification *requirement* that the voter-statement signature must "compare" to the absentee-ballot-application signature. Instead, it arises solely from the alleged *inaccuracy* of election officers' determination of whether those signatures in fact compare. In other words, Plaintiffs' assertion that an absentee ballot may be erroneously rejected is very different from the assertion that the absentee-ballot-verification requirement *itself* is an unconstitutional criterion. The former is a complaint concerning the risk of an erroneous deprivation that would sound in procedural due process if the right to vote were recognized as a liberty interest. *See Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *20. More on this below; suffice it for now to say that Plaintiffs have no cognizable due-process liberty interest.

[9] Plaintiffs' burden discussion does perfunctorily mention "missing" signatures. DE 13 at 34. But, as explained above, Plaintiffs categorically lack standing to challenge Arkansas law concerning absentee ballots with missing signatures because they have not alleged any facts supporting an injury related to Arkansas's requirement that absentee ballots with missing signatures be rejected.

Because Plaintiffs' discussion of the purported burden focuses exclusively on allegations that Arkansas's "signature matching" process is unreliable and allows no cure (thus allegedly falling short of "due" process), DE 13 at 34; *see id.* at 33-36, neither an analysis under *Anderson-Burdick* nor *Mathews v. Eldridge*, 424 U.S. 319 (1976), is appropriate because there is no cognizable due-process liberty interest in the right to vote absentee, and even if there were, Plaintiffs would be entitled only to the process inherent in the legislative process.

i. There is no cognizable procedural-due-process liberty interest in the right to vote or in voting by absentee ballot.

The Fourteenth Amendment right to procedural due process guarantees adequate procedures before allowing a State to deprive persons of their property, liberty, or life. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted).

Although the constitutional right to vote is "fundamental," *McDonald*, 394 U.S. at 807, it is *not* a "liberty interest" for procedural-due-process purposes. The unanalyzed assertion to the contrary by the district court on which Plaintiffs rely is contradicted by the great weight of federal appellate authority. *See Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 2951012, at *8 (D.N.D. June 3, 2020) (proclaiming, without analysis, that "[b]eyond debate, the right to vote is a constitutionally protected liberty interest"). Courts of appeals regularly apply *McDonald* to hold that "the right to vote is fundamental, but it is not a 'liberty' interest for purposes of procedural due process." *Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *11; *see, e.g.*, *Tex. League of Un. Latin Am. Citizens v. Hughs*, No. 20-50867, slip op. at 10 n.6 (5th Cir. Oct. 12, 2020) (staying injunction requiring additional absentee-ballot drop-off locations and noting that "[t]he Secretary persuasively argues that, under [*McDonald*]," the

number of drop-off locations "does not implicate the right to vote at all"); *New Ga. Project v. Raffensperger*, No. 20-13360-D, — F.3d —, 2020 WL 5877588, at *7 (11th Cir. Oct. 2, 2020) (Lagoa, J., concurring) (the right to vote is not a procedural-due-process liberty interest).

Perhaps more importantly for this case, the Supreme Court has unambiguously held that the right to vote *by absentee ballot* is not a fundamental interest that triggers Fourteenth Amendment protections. *See, e.g., McDonald*, 394 U.S. at 807-08 ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise . . . ."). Indeed, "the right to vote in a state election, in itself, is not a right secured by the Constitution or by federal law. Thus, even an improper denial of the right to vote for a candidate for a state office achieved by state action 'is not a denial of a right of property or liberty secured by the due process clause.'" *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1, 7 (1944)) (ellipsis omitted). And in *League of Women Voters of Ohio v. Brunner*, the Sixth Circuit held that even when an election system "impinges on the fundamental right to vote," it does not "implicate procedural due process" because voting is not a liberty interest protected by the due process clause. 548 F.3d 463, 479 (6th Cir. 2008).

"[W]here no such interest exists, there can be no due process violation." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). *Dobrovolny* held that initiative-petition organizers had no protected property or liberty interest that entitled them to notice of the precise minimum number of signatures required to place an initiative on the ballot before they filed their petitions with the State. *Id.* But the Eighth Circuit rejected that claim, observing that "the procedures involved in the initiative process, including the calculation of the number of signatures required

to place an initiative measure on the ballot, are state created and defined," and "[t]he state retains the authority to interpret the scope and availability of any state-conferred right or interest." *Id.* (quotation, citation, and alteration omitted). Because the Plaintiffs had no "right under state law" to prior notice of the exact number of signatures required to place an initiative on the ballot, they likewise had no interest entitling them to due-process protection. *Id.*

Here, Plaintiffs correctly recognize that "there is no constitutional right to vote by absentee ballot." DE 11 at 22 ¶ 53. As in *Dobrovolny*, the procedures involved in voting absentee, including the verification requirement, are state-created and state-defined. Arkansas retains the authority to interpret the terms on which that process is available. Because Plaintiffs have no right under Arkansas law to pre-election notice or an opportunity to cure deficient voter statements, they have no interest entitling them to further procedural-due-process protections. Therefore, neither an *Anderson-Burdick* analysis nor a *Mathews* analysis is appropriate.

ii. Even if Plaintiffs had a cognizable liberty interest, they would be entitled only to the process inherent in the legislative process.

"In deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action." *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770, at *20 (11th Cir. Sept. 11, 2020) (en banc) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915)). When the State deprives a person of life, liberty, or property through general laws that apply "to more than a few people," the affected persons are not entitled to any process beyond that provided by the legislative process. *See Bi-Metallic*, 239 U.S. at 445; *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986) ("[T]he legislative process affords all the procedural due process required by the Constitution."); *Collier v. City of Springdale*, 733 F.2d 1311, 1316 n.5 (8th Cir. 1984) ("The protections of procedural due process do not apply

to legislative acts."). Our "Republican Form of Government" itself protects rights of the general public. U.S. Const., art. IV, sec. 4; *see Bi-Metallic*, 239 U.S. at 445 ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). "In short, the general theory of republican government is not due process through individual hearings and the application of standards of behavior, but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will." *Collier*, 733 F.2d at 1316;

Because Arkansas's absentee-ballot-verification requirement is a law of general applicability enacted by the Arkansas General Assembly, it is a legislative act not constitutionally susceptible of further procedural-due-process protections. "The 'process' that [Arkansas's absentee] voters are entitled to before their . . . ballots are rejected is the process that inured during the enactment of the law itself. Procedural due process, then, has nothing to do with this case." *Raffensperger*, 2020 WL 5877588, at *8 (Lagoa, J., concurring). This Court should dispose of Plaintiffs' claim as a threshold matter, without further discussion of their claim's merits.

2. The absentee-ballot-verification requirement does not trigger heightened scrutiny and easily survives rational-basis review.

i. The absentee-ballot-verification requirement does not implicate the fundamental right to vote.

"[T]he Supreme Court [has] told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake." *Tully*, 2020 WL 5905325, at *2 (citing *McDonald*, 394 U.S. at 807); *accord Burdick*, 504 U.S. at 433 ("[T]here is no constitutional right

to an absentee ballot."). Indeed, Plaintiffs concede that "there is no constitutional right to vote by absentee ballot." DE 11 at 22 ¶ 53.

Here, Arkansas's permitting, in addition to in-person voting, the casting of absentee ballots subject to the verification requirement certainly does not make it *harder* for voters to cast their ballots. It does not implicate the fundamental right to vote, and this Court should apply the rational-basis test used by the Supreme Court in *McDonald*, where the plaintiffs challenged an absentee-ballot statute but failed to show any burden on the fundamental right to vote. 394 U.S. at 807-09; *see Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." (citing *McDonald*, 394 U.S. at 802); *see Tully*, 2020 WL 5905325, at *2 (applying *McDonald*'s rational-basis test where there was no showing of an infringement on the fundamental right to vote); *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) (same); *see also Miller v. Thurston*, 967 F.3d 727, 738–39 (8th Cir. 2020) (reversing an injunction based on the erroneous holding that the plaintiffs' First Amendment rights were implicated by Arkansas's in-person notarization requirement).

Because Plaintiffs' claims do not implicate the fundamental right to vote, the absentee-ballot-verification requirement is subject to rational-basis review.

ii. The absentee-ballot-verification requirement easily survives rational-basis review.

The absentee-ballot-verification requirement easily survives rational-basis review. Indeed, Plaintiffs nowhere contend otherwise.

Arkansas's absentee-ballot-verification regime serves several important interests. Foremost among these are its interest in verifying voters' identities in order to combat and deter voter fraud. "Voting fraud is a serious problem in U.S. elections . . . , and it is facilitated by

absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (collecting authorities). With an absentee ballot, there are also more opportunities for parties other than the voter to view the ballot, thus raising the risk that a "feeble or unaware" voter may be the victim of absentee-ballot fraud. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 512-13 (2003). As the popularity of voting absentee increases, so does the opportunity for such fraud. *Id.*; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195 n.12 (2008) (op. of Stevens, J., announcing the judgment of the Court) (observing that "much of the [recent examples of voter fraud were] actually absentee ballot fraud or voter registration fraud").

For its part, Arkansas has an especially egregious and well-documented history of absentee-ballot fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. The memoir of the Hon. Tom Glaze, the late Arkansas Supreme Court Justice and crusader against election fraud, explains that "Arkansas . . . is the one state where fraud was so dire and so perniciously ignored that citizens were forced to conduct their own investigations and file lawsuits to obtain an honest accounting and tabulation of the votes." Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* x (2011).

Glaze remarks that "[i]f you want to steal an election, the absentee box is the place to begin." *Id.* at 39. That observation is borne out by the rampant absentee-ballot falsification that typified Arkansas elections throughout the twentieth century. He explains that, for example, the Conway County sheriff's holing up in the courthouse on election night in 1958 to stuff the ballot box with fraudulent absentee ballots was a common practice of that era. *Id.* at 39-40. The 1964 passage of Amendment 51, which established a voter registration system, was the first

"challenge to the whole culture of election theft" in Arkansas. *Id.* at 33. But efforts to reform absentee balloting were rebuffed by recalcitrant elements in the legislature, *id.* at 69-72, 210, and citizen lawsuits proved almost entirely fruitless. *See, e.g.*, 137-63.

Not until the closing years of the twentieth century did the General Assembly begin to enact strict requirements for handling absentee ballots, *id.* at 210, and even that not has not rooted out absentee-ballot fraud in Arkansas. For example:

- In 1999, 518 absentee ballots were invalidated in a special election for a municipal judgeship in Camden, overturning the certified results and changing the outcome. *Id.* at 210-11.
- In 2003, a Phillips County, Arkansas man named Larry Gray pleaded guilty to fraudulently applying for hundreds of absentee ballots and submitting 98 of them to influence the outcome of the Democratic primary. *See United States v. Gray*, No. 4:02CR00185 (E.D. Ark 2002); "Election Fraud Cases," *The Heritage Foundation*, https://www.heritage.org/voterfraud/search?&state=AR.
- In 2005, hundreds of fraudulent absentee ballots were cast in a state-senate primary election. Glaze, *Waiting for the Cemetery Vote*, at 211-14.
- And in 2012, four Crittenden County, Arkansas men pleaded guilty to conspiracy to bribe voters to influence absentee votes. *See* "Four Crittenden County Men Charged with Conspiracy to Commit Election Fraud," *Archive of the United States Attorney's Office for the Eastern District of Arkansas*, https://www.justice.gov/archive/usao/are/news/2012/September/Hallumetal_electionfraud_Infoplea_090512.html.

In this last example, harking back to an infamous Arkansas tradition, the men admitted providing chicken dinners, cheap vodka, and cash to voters in exchange for their absentee ballots. *Id.*; *see* Glaze, *Waiting for the Cemetery Vote*, 177-92.

Arkansas's absentee-ballot-verification regime is a hard-won product of more than half a century of courageous efforts at reform of absentee voting in Arkansas. To be sure, even if Arkansas lacked such an egregious history of absentee-voting 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). But that history

demonstrates its necessity better than any prognostications about how unscrupulous persons might take advantage of a system without it.

Arkansas's verification regime also serves important interests in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government. *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."). "[T]he interest in orderly administration . . . provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford*, 553 U.S. at 196 (op. of Stevens, J.). The "signature-matching process," in particular, "promotes orderly election administration," and helps to combat and deter fraud and even the appearance of fraud. *League of Women Voters of Ohio*, 2020 WL 5757453, at *11. These interests "are weighty and undeniable." *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008); *see 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").

Plaintiffs argue that an additional cure process would entail minimal administrative burden because Arkansas already provides a cure process for absentee-ballot applications that contain a mismatched signature. *See* Ark. Code Ann. 7-5-404(A)(2). But contrary to Plaintiffs' suggestion, the same process could not be used. Cure of mismatched signature submitted with an absentee ballot would require a much more intensive and administratively burdensome process.

Unlike county clerks' processing of absentee-ballot applications, county boards must give public notice of the time and location of all processing of absentee ballots. Ark. Code Ann. 7-5-202(a)(2). The processing of absentee ballots is open to the public, and candidates and poll watchers must be permitted to be present. Ark. Code Ann. 7-5-416(a)(4). Further, unlike an absentee-ballot *application*, which can be simply resubmitted by mail or electronically, a voter statement submitted with an absentee ballot is subject to a strict chain of custody and can be processed only in the presence of two election officials. *See* Ark. Code Ann. 7-5-416(b). Any cure of a deficient ballot would thus require the voter to travel to the ballot-processing location. Ex. J, Davidson Decl. So an additional cure process would pose significant administrative burdens precisely at the time when election officers are the busiest. *See id.* The State's current process serves its important interest in reducing administrative burdens.

Further, the State's interest in "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197 (op. of Stevens, J.). "[T]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* (quotation and citation omitted); *Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). "A federal court enjoining part of the State's procedure for maintaining the security of mail-in voting in the weeks leading up to the election could further undermine public confidence in elections." *League of Women Voters of Ohio*, 2020 WL 5757453, at *15.

Any one of these interests, by itself, is sufficient to justify Arkansas's absentee-ballot-verification regime. Taken together, they demonstrate the manifold benefits of that antifraud

protection to Arkansas's electoral system. Because it furthers these important interests, the absentee-ballot-verification requirement easily survives rational-basis review.

3. The absentee-ballot-verification requirement would survive *Anderson-Burdick* scrutiny.

The Framers did not give federal courts a mandate to micromanage State election laws. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). To the contrary, "[t]he Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' U.S. Const. Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Thus the Supreme Court has made clear that strict scrutiny does not apply to election regulations, including absentee-ballot regulations, that burden voting rights. *Id.* at 432; *see Libertarian Party of N. Dakota v. Jaeger*, 659 F.3d 687, 694-95 (8th Cir. 2011) (making clear this is an "undue burden" test rather than traditional strict scrutiny).

The Supreme Court instead uses a "single standard for evaluating challenges to voting restrictions" that burden constitutional rights—the *Anderson-Burdick* framework. *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012); *see Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) ("The Supreme Court has addressed [First Amendment, Due Process, or Equal Protection] claims collectively using a single analytic framework."); *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998) (following the Supreme Court's use of "a single basic mode of analysis" for such claims). The Eighth Circuit proceeds accordingly. *Moore v. Martin*, 854 F.3d 1021, 1026 n.6 (8th Cir. 2017) (analyzing First Amendment and Due Process claims under a single *Anderson-Burdick* analysis). The *Anderson-Burdick* analysis is a "sliding standard of review." *Id.* at 739. To "discern the level of scrutiny required," courts "analyze the burdens

imposed" by a regulation. *Green Party of Arkansas v. Martin*, 649 F.3d 675, 681 (8th Cir. 2011). Where it "imposes only modest burdens, . . . the State's important regulatory interests" in managing "election procedures" suffice to justify it. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Alternatively, a more exacting standard—requiring a compelling interest and tailoring—applies to severely burdensome requirements. *See Martin*, 649 F.3d at 680.

The absentee-ballot-verification requirement imposes no severe burden but would satisfy *Anderson-Burdick* even if it did.

i. The absentee-ballot-verification regime's potential burden on the right to vote is minimal and therefore is justified by Arkansas's important interests.

Plaintiffs' filings allege only a burden posed by the process for verifying absentee ballots and, in particular, the alleged inaccuracy of election officers' signature comparisons. Even their motion for a preliminary injunction asserts no burden posed by the *verification requirement itself*. But even if they did, any potential burden imposed by that requirement would be minimal. Similarly, even if Plaintiffs' actual alleged burdens based on the *process* were cognizable under *Anderson-Burdick* (which they aren't), those purported process burdens would also be minimal. As a result, Arkansas's absentee-ballot-verification regime is justified by the State's important interests.

a. If the Court were to consider the potential burden on the right to vote posed by the absentee-ballot-verification requirement itself, any such burden would be minimal.

First, to begin with the obvious: Arkansas has *not* precluded Plaintiffs from voting—whether by absentee ballot or otherwise. Yet Plaintiffs baselessly assert that the absentee-ballot-verification requirement poses "an undue burden on the fundamental right to vote." DE 13 at 33; *see, e.g.*, DE 11 at ¶¶ 61, 62. But that is wrong. Courts applying *Anderson-Burdick* "must not

evaluate each clause [of a State's election law] in isolation" because then "any rule" regulating the conditions for casting an effective ballot "seems like an unjustified burden." *Luft v. Evers*, 963 F.3d 665, 671, 675 (7th Cir. 2020); *see id.* ("One less-convenient feature does not an unconstitutional system make."). Instead, "[c]ourts weigh these burdens against the state's interests by looking at the whole electoral system." *Id.* at 671-72. Any burden must be evaluated "within the landscape of *all opportunities* that [Arkansas] provides to vote." *Mays*, 951 F.3d at 785 (emphasis added); *League of Women Voters of Ohio v. LaRose*, No. 2:20-CV-3843, 2020 WL 5757453, at *10 (S.D. Ohio Sept. 27, 2020). Plaintiffs fail even to attempt such a system-wide analysis.

Arkansas offers a variety of ways to safely and securely cast a ballot, including absentee voting, early in-person voting, and in-person voting on Election Day. Ark. Code Ann. 7-5-401 *et seq.* (absentee voting); *id.* 7-5-418 (early voting); *id.* 7-5-102 (Election Day). Plaintiffs overstate the potential burden caused by Arkansas's absentee-ballot-verification requirement by dismissing in-person opportunities to vote on account of the COVID-19 pandemic. But the Court cannot "hold private citizens' decisions to stay home . . . against the State." *Thompson*, 959 F.3d at 810; *see Tully*, 2020 WL 5905325, at *2 ("Indiana's absentee-voting laws are not to blame. It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot."); *League of Women Voters of Ohio*, 2020 WL 5757453, at *10.

The State assists local election officers in making the voting process accessible to voters with disabilities. Ark. Code Ann. 7-5-311; *see* Election Information, ADA Compliance, *Arkansas State Board of Election Commissioners*, https://www.arkansas.gov/sbec/election-information/. In addition, on July 29, the State Board issued guidance to county clerks and county boards concerning the November election in light of COVID-19. Ex. F. The State Board

gave many recommendations designed to protect those voting in person, which should reassure anyone who is concerned about health risks associated with voting in person. The guidance suggests that:

- All election officers wear face coverings when in the polling place and at all times when social distancing is not possible. *Id.* at 1.
- Counties should encourage voters to wear face coverings, and face coverings should be offered to voters if supplies are available. *Id.*
- Counties that offer COVID-19 screening procedures should permit voters who fail the screening to vote in a location separate from other voters. *Id.*
- Polls should be arranged so voters may practice social distancing. *Id.* at 2.
- Voting booths and other voting equipment should be spaced no less than six feet apart, and poll workers should allow voters to form a line that maintains social distancing. *Id.*
- Voters should be permitted to enter and exit through different doors where feasible. *Id.*
- Alcohol-based sanitizer with at least 60% alcohol should be placed near entrances and exits. *Id.*
- Items that voters may physically contact should be regularly cleaned, and voting equipment should be sanitized after each use. *Id.* at 2-3.
- Voters should be provided with disposable styluses. *Id.* at 3.

If there are any questions or concerns, voters can contact their local election officials for information about what precautions are being observed and what accommodations might be available at their local polling place.

Because Plaintiffs have not returned their absentee ballots, and given the precautions counties are taking to alleviate health risks posed by COVID-19, Plaintiffs could still safely take advantage of opportunities to vote in person early or on Election Day. In either case their signatures would not be subject to the rule that their voter statements must compare to their absentee-ballot applications. At bottom, in light of Plaintiffs' various opportunities to vote—

including safe options that do not implicate the absentee-ballot-verification requirement—any burden posed by Arkansas's absentee-ballot-verification requirement is virtually nonexistent.

Second, Plaintiffs provide no evidence bearing on "the relevant question for assessing whether a voter is substantially burdened" by Arkansas's verification requirement, namely, "how many voters attempted to [comply with the requirement] but were unable to do so with reasonable effort." *Brakebill v. Jaeger*, 932 F.3d 671, 679 (8th Cir. 2019). That is undoubtedly because, for voters who choose to vote absentee, any burden imposed by the absentee-ballot-verification requirement is trivially low. To satisfy it, voters need only return, at any time between September 17 and November 3, a voter statement containing a signature, name, birth date, and address that compares with those on their recent absentee-ballot application. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *see id.* 7-5-407(a)(1), 7-5-411(a), 7-5-211(c); *see also Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *18 ("Substantively, that's really it: they must provide a signature and suffer it to be compared with a former signature."). Addressing the burden imposed by a similar signature-verification requirement, the Ninth Circuit found that the burden was minimal. *Lemons*, 538 F.3d at 1104; *see Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *7 (D. Ariz. Sept. 10, 2020) (finding a "minimal" burden because "there is nothing generally or inherently difficult about signing an envelope by Election Day").

Just as voters who fail to request an absentee ballot by the October 27 deadline cannot fault Arkansas for their inability to vote absentee, those who fail to provide a voter statement with a signature, name, birth date, and address that compare to their application cannot do so. *See Mays*, 951 F.3d at 792 ("[E]lectors who fail to vote early cannot blame Ohio law for their inability to vote; they must blame their own failure.").

Further, unlike in many other States, a voter-statement signature is not required to be notarized or witnessed by any other person. Ark. Code Ann. 7-5-409(b)(4)(C); "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," *National Conference of State Legislatures* (September 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#officials; *see* "Table 14: How States Verify Voted Absentee Ballots," *National Conference of State Legislatures* (April 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx. Courts have deemed more rigorous signature requirements as less than severe. In *Miller*, for example, the Eighth Circuit held that, in this COVID-19 era, Arkansas's in-person signature requirement for initiative petitions posed a "less than severe" burden and that its in-person petition notarization requirement imposed *no* burden cognizable under the First Amendment. 967 F.3d 727, 738, 740 (8th Cir. 2020); *see Kendall v. Balcerzak*, 650 F.3d 515 (4th Cir. 2011) (upholding stringent signature and notarization requirements on referendum petitions).

Whatever scintilla of plausibility Plaintiffs' burden allegations may have derives from their mischaracterization of the vanishingly slight burden on the right to vote (i.e., signing and providing one's name, birth date, and address) with the consequences for noncompliance (i.e., rejection of an absentee ballot). But the mere fact that the absentee-ballot-verification requirement might result in a person's ballot being rejected in particular cases does not translate into a severe burden on the right to vote. For example, the plaintiffs in *Crawford* challenged a state law that could have resulted in a person's exclusion from voting for inability to provide government-issued photo identification. 553 U.S. 181 (op. of Stevens, J.). Yet Justice Stevens, joined by two other justices, concluded that the law imposed "only a limited burden on voters'

rights." *Id.* at 203. The concurring opinion of Justice Scalia, joined by two additional justices, agreed that "the burden at issue is minimal and justified." *Id.* at 204 (Scalia, J., concurring in the judgment). So a clear majority of the Court found no severe burden even where a requirement might result in a person being excluded from voting.

Plainly, the mere fact that Plaintiffs must *do something* in order make their vote count does not mean that their right to vote is unconstitutionally burdened if they fail to do it. There is no right to cast an effective vote in violation of state laws that can be complied with through reasonable effort. *See id.* at 198 (op. of Stevens, J.) (finding "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote").

The infirmity of Plaintiffs' claim is further underscored by their inability to satisfy the high standard for a facial challenge to Arkansas's absentee-ballot-verification requirement. Facial challenges "are disfavored for several reasons," including that they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Washington State Grange*, 552 U.S. at 450-51. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891 (8th Cir. 2017) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "To succeed challengers [must] establish that no set of circumstances exists under which [the Act] would be valid, or that the statute lacks any plainly legitimate sweep." *Id.* at 891-92 (quotation and citation omitted). Plaintiffs cannot hope to satisfy that high standard.

Third, and finally, the absentee-ballot-verification requirement is generally applicable and nondiscriminatory. It applies to all voters equally, regardless of race, sex, age, disability, or

party. *See Dudum v. Arntz*, 640 F.3d 1089, 1106 (9th Cir. 2011) ("We have repeatedly upheld as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process." (quotation and citation omitted)). And Plaintiffs have not even alleged otherwise. For these reasons, any burden posed by Arkansas's absentee-ballot-verification requirement would be minimal.

b. As explained above, however, Plaintiffs' burden discussion does not truly focus on the requirement per se. Instead, Plaintiffs focus exclusively on their allegations that Arkansas's signature-verification *process* is "prone to error" and allows no cure. DE 13 at 34; *see id.* at 33-36. Those allegations concern the risk of an erroneous deprivation that would sound in procedural due process if the right to vote were recognized as a liberty interest (which, as explained above, it is not). *See Memphis A. Phillip Randolph Inst.*, 2020 WL 5095459, at *20. As already explained, this alleged process-based burden is not cognizable under *Anderson-Burdick* or any other constitutional standard. Regardless, even if *Anderson-Burdick* applied, the process's alleged burden would be minimal as well.

The fraction of voters whose ballots are rejected as a result of the absentee-ballot-verification process is miniscule. Plaintiffs allege that in each of 2016 and 2018, only a fraction of one percent of returned absentee ballots were rejected either for a missing or mismatched signature. DE 11 at 17-18 ¶ 39; *see Arizona Democratic Party*, 2020 WL 5423898, at *7 (finding a "minimal" burden where "over 99% of voters timely comply" and explaining that if the regulation "imposed significant burdens, it is reasonable to expect that more voters would fail

to overcome" them). The data are worth examining.[10] In 2016, a total of 27,625[11] absentee ballots were submitted, with only 179 (or 0.6%) rejected for missing a signature and only 94 (or 0.3%) rejected for a mismatched signature. Likewise, in 2018, a total of 15,208 absentee ballots were submitted, with only 85 (or 0.5%) rejected for a "voter signature problem" and only 21 (or 0.1%) rejected for a mismatched signature.[12] That means that in both years, more than 99% of absentee ballots were determined to be compliant with the absentee-ballot-verification requirement.

Compared to other cases that have found nonsevere burdens on the right to vote, any burden here is infinitesimal. In *Brakebill*, the Eighth Circuit vacated a facial injunction of North Dakota's voter-identification requirement where 88% of the eligible voters were unaffected by the law. 932 F.3d 671, 681 (8th Cir. 2019). The court rejected the plaintiffs' contention that a facial injunction should issue mere because *some* voters were severely burdened. The court

[10] Defendants' Exhibit H and I are PDFs converted from Excel spreadsheets that isolate the relevant Arkansas data for 2016 and 2018. This data is comes from the website of the U.S. Election Assistance Commission, https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys.

Data for 2016 is contained in the Excel version of the 2016 dataset on the Commission's website at the link above. It can be located under the tab at the bottom of the spreadsheet labeled "SECTION C." The 2016 Data Codebook PDF document contains explanations for each column. Accordingly, column C1a shows absentee ballots transmitted to voters. C1b shows absentee ballots returned. Column C5b shows absentee ballots rejected for a missing signature. And column C5d shows absentee ballots rejected for a mismatched signature.

Data for 2018 is contained in the Excel version of the "EAVS Datasets Version 1.3" on the Commission's website at the link above. The 2018 EAVS Data Codebook Excel document contains explanations for each column. Accordingly, column C1a shows absentee ballots transmitted by mail to voters. C1b shows absentee ballots returned. Column C4c shows absentee ballots rejected because of a "voter signature" problem. And column C4e shows absentee ballots rejected for a mismatched signature.

[11] Plaintiffs misreport this number as 27,525. DE 11 at 17 ¶ 39.

[12] For 2018 data, it is not clear whether "voter signature problem" is inclusive of the reported mismatched signatures. So there may have been even fewer rejections than Plaintiffs allege in 2018.

explained that, "even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters." *Id.* at 678 (quoting *Crawford*, 553 U.S. at 202); *see also Obama for Am.*, 697 F.3d at 433 (holding that a burden is not severe even where "approximately 100,000 voters" would be precluded from early voting the three days before the election).

There is no allegation that any Plaintiff was in any of these tiny groups of persons with deficient absentee ballots. And, tellingly, Plaintiffs do not argue that the percentage of rejected Arkansas absentee ballots is higher than that of other States.

Plaintiffs provide absolutely no evidence that Arkansas's signature-verification process disenfranchises voters. They have not, for example, come forward with even a single example of an absentee ballot that has been *wrongly* rejected. Instead, Plaintiffs allege that Arkansas's signature-verification process is "prone to error" because, as they claim, "[l]aypersons—as compared to Forensic Document Examiners (FDEs)—have a significantly higher rate of error in determining whether signatures are *genuine*." DE 11 at 14-15 ¶ 31 (emphasis added). But that is entirely beside the point because Arkansas election officers are *not* tasked with determining whether signatures are "genuine." Rather, their task is merely to identify cases where there is a "distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1. That task falls into a whole other category. Further reducing the risk of any possible error is the fact that the comparison of signatures is *not* between the voter statement and the voter registration—in between which several years may have elapsed. Rather, it is between the voter statement and the absentee-ballot application, which are completed within a shorter timeframe, generally only a matter of weeks.

Election officers know they "are not handwriting experts," Ex. C at 1, and there is a strong presumption in favor of counting absentee ballots. "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1; *see* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson Decl. "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1. An absentee ballot is rejected only if the bipartisan county board determines that the ballot should be rejected after a second round of review. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *id.* 7-4-102(a)(2). The processing and counting of absentee ballots is open to the public, and "candidates and authorized poll watchers may be present in person or by a representative . . . during the opening, processing, canvassing, and counting of the absentee ballots." Ark. Code Ann. 7-5-416(a)(4). Poll watchers may "[c]all to the attention of the election sheriff any occurrence believed to be an irregularity or violation of election law," and may also "inspect any or all ballots at the time the ballots are being counted." Ark. Code Ann. 7-5-312(e) (Poll Watcher Rights and Responsibilities).

Because of these voter protections, this case is like *Lemons*, where the Ninth Circuit held that the Oregon Secretary of State's signature-comparison process for verifying referendum petition signatures did not violate voters' procedural-due-process rights. 538 F.3d at 1104-05. Like here, the verification process was "already weighted in favor of accepting questionable signatures, in part because only rejected signatures are subject to more than one level of review by county elections officials." *Id.* at 1105. Further, as here, the procedures allowed members of the public to observe the signature-verification process and challenge decisions by county

elections officials. *Id.* The court found that requiring the State to provide individual notice that voters' signatures had been rejected and to afford them an opportunity to cure would impose a "significant burden" on election officials, while "the burden on plaintiffs' interests from the state's failure to adopt their proposed procedures is *slight at most*." *Id.* (emphasis added). Therefore, "[w]hen viewed in context, the absence of notice and an opportunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights." *Id.* at 1104.

By contrast, this case is plainly distinguishable from the cases Plaintiffs rely on to support their claim that Arkansas's requirement imposes a substantial burden. Arkansas law requires all election officials at a polling place to have completed training coordinated by the State Board within twelve months before the election. Ark. Code Ann. 7-4-107(b)(2)(C)(i), 7-4-109(e)(1). That includes training on the uniform statewide standard for verifying signatures and other information contained on voter statements returned with absentee ballots. Ex. J, Davidson Decl. That sets this case apart from, for example, *Democratic Executive Committee of Florida v. Lee*, in which the Court found a "serious" burden where Florida required signature verification but had neither uniform standards for matching signatures nor required any qualifications or training for those verifying the signatures. 915 F.3d 1312, 1319 (11th Cir. 2019). Florida "allow[ed] each county to apply its own standards and procedures for executing the signature-match requirement, virtually guaranteeing a crazy quilt of enforcement of the requirement from county to county." *Id.* at 1320. The record contained sworn declarations from eligible voters whose ballots were wrongly rejected for a signature mismatch. *Id.* at 1321. The record here

contains no such evidence, and Arkansas's statewide procedures are much different. Plaintiffs' other cases are similarly distinguishable.[13]

Plaintiffs concede that county boards provide persons whose votes were not counted "written notification that states the reasons the vote was not counted." DE 13 at 6 (citing Ark. Code Ann. 7-5-902). They recognize that "[t]his is done to prevent the voter from making the same mistake when filling out the absentee ballot voter statement in a future election." DE 13 at 7. Thus, if a hypothetical person's absentee ballot were rejected during the primary election, the notice would prevent them from making the same mistake during the general election. Moreover, counties provide absentee voters with notice of the requirements for casting an effective absentee vote, including notice that missing or mismatched signatures will result in a ballot's rejection. State law requires county clerks to provide absentee voters with "[i]nstructions for voting and returning the official absentee ballot to the county clerk." Ark. Code Ann. 7-5-409(b)(2). And Plaintiffs, in particular, make no allegation that they lack notice that a missing signature would cause any absentee ballot they may submit to be rejected. Even though in-depth notice of election officials' signature-verification procedures would not be

[13] *See Richardson v. Texas Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *2 (W.D. Tex. Sept. 8, 2020) (election officials were not required to receive training and had no guidance concerning the appropriate procedure or standard to determine whether voters' signatures "match[ed]," and a local election official stated that whether a ballot was rejected would depend on which person conducted the review); *Frederick v. Lawson*, No. 1:19-CV-01959-SEB-MJD, 2020 WL 4882696, at *3 (S.D. Ind. Aug. 20, 2020) (Indiana provided no standards for election officials to use in determining whether a signature was "genuine" and the plaintiffs were registered voters whose ballots were wrongly rejected because the signatures were not "genuine"); *Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *1 (W.D. Tex. July 28, 2020) (plaintiffs alleged that local election officials were not trained or given uniform standards by the State for signature verification but were left to "use their best judgment" to verify that voters' signatures "match[ed]").

constitutionally required, any burden posed by the requirement that voter statements compare with absentee-ballot applications is mitigated to the extent that voters have such notice.

For these reasons, any burden posed by Arkansas's absentee-ballot-verification process would be minimal.

c. "Because the burdens are less than severe," this Court "review[s] Arkansas's . . . requirement to ensure it is reasonable, nondiscriminatory, and furthers an important regulatory interest." *Miller*, 967 F.3d at 740. Arkansas need not show any compelling interest or tailoring. *Wash. State Grange*, 552 U.S. at 458. And Plaintiffs do not allege that the requirement is discriminatory. As explained above, Arkansas has important interests, variously, in verifying voters' identities in order to combat and deter voter fraud, in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government. Because it reasonably serves these important interests, Arkansas's absentee-ballot-verification regime does not unduly burden the right to vote and therefore satisfies *Anderson-Burdick* scrutiny.

ii. Arkansas's absentee-ballot-verification regime is also narrowly tailored to the compelling interest of preserving election integrity.

Because the absentee-ballot-verification regime is 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. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4 (citation omitted).

Arkansas's verification regime is also narrowly tailored to the interest of preserving election integrity. There is a strong presumption in favor of counting absentee ballots, and doubts are construed in favor of the voter. Election officers "[r]eject a ballot on the basis that the

signatures do not compare *only* if there is a distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1 (emphasis added). "A name on a voter statement that is slightly different from the way the name is stated on the absentee ballot application (John A. Doe on one; John Doe on the other, for instance) 'compares' if all the other information (DOB, address, signature) demonstrates that it is the same person." Ex. C at 1; *see* Ex. E at 2 (Scenario 1 Answer showing acceptable signatures that differ as to the name signed); Ex. J, Davidson Decl. "If there is any doubt about the validity of a ballot," election officials are directed to "set it aside for the election commission to review." Ex. C at 1. An absentee ballot is rejected only if the bipartisan county board determines that the ballot should not be counted after its second round of review. Ark. Code Ann. 7-5-416(b)(1)(F)(ii); *id.* 7-4-102(a)(2).

For these reasons, and others set forth above, the absentee-ballot-verification regime would survive the stricter scrutiny reserved for severely burdensome requirements, and *Anderson-Burdick* is satisfied.

C. Plaintiffs' due-process claim cannot succeed under *Mathews*.

As explained above, the Supreme Court and the Eighth Circuit use a "single standard for evaluating challenges to voting restrictions"—the *Anderson-Burdick* framework. *Obama for Am.*, 697 F.3d at 430; *see Moore*, 854 F.3d at 1026 n.6 (analyzing First Amendment and Due Process claims under a single *Anderson-Burdick* analysis). But Plaintiffs separately analyze a procedural-due-process claim of the sort that the Ninth and Eleventh Circuits have rejected in the past few days, each holding that district courts "erred in accepting the plaintiffs' novel procedural due process argument." *Ariz. Democratic Party*, 2020 WL 5903488, at *7 n.1; *Raffensperger*, 2020 WL 5877588, at *3. Although a separate due-process analysis is not

warranted, Defendants will respond to the arguments in Plaintiffs' brief using the due-process analysis to highlight the deficiency of that claim.

As set forth above, there is no cognizable due-process liberty interest in the right to vote absentee, and even if there were, Plaintiffs would be entitled only to the process inherent in the legislative process. Further, Arkansas's absentee-ballot-verification requirement is subject to rational-basis review because it does not burden Plaintiffs' voting rights. But even if Plaintiffs did have a protectable liberty interest and the other claim-dispositive barriers did not apply, that would only get Plaintiffs to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Under this test, Plaintiffs' claim fails.

1. The private interest in casting an absentee ballot is weak.

Here the affected private interest is quite weak. True, as Plaintiffs argue, an interest in the right to vote is profound. *See* DE 13 at 28 (invoking an interest in the "fundamental right to vote"). But "the Supreme Court [has] told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake." *Tully*, 2020 WL 5905325, at *2 (citing *McDonald*, 394 U.S. at 807). Plaintiffs have no right to cast an absentee ballot. Period. Thus they surely have no right to cast *two* absentee ballots (one defective and a second after a cure). As explained above, absentee voting is just one among a variety of ways that Arkansas allows registered voters to cast a ballot. If the laws allowing voting absentee were to disappear

tomorrow, registered voters could still safely and securely vote in person during the state's early-voting window (which begins in less than a week, on October 19) or on Election Day, as explained above. So the private interest is weak.

2. The risk of an erroneous rejection is miniscule, so additional process is unwarranted.

The risk of an erroneous rejection here is extraordinarily low. Given the multiple persons involved in the absentee-ballot-review process and the exceptional simplicity of "is it signed or not" determinations, the erroneous-rejection rate for ballots missing signatures is vanishingly small, if not zero. And as explained above, for mismatched signatures, election officers applying the uniform, statewide standard are *not* tasked with determining whether signatures are "genuine," but only with identifying cases where there is a "distinct and easily recognizable difference between the signature on the absentee ballot application and the voter statement." Ex. C at 1. That is a very forgiving standard that will result in the rejection of only a fraction of counterfeit signatures. So erroneously rejected signatures, if any, will likely be outnumbered by erroneously-accepted signatures.

Further, as also explained above, the data show that in 2016 only 0.3%, and in 2018 only 0.1%, of absentee ballots were rejected *at all* for a signature mismatch. That means that between 99.7% and 99.9% of absentee ballots are unaffected by the verification process. Even assuming that *all* of those mismatched-signature determinations were erroneous rejections—a dubious assumption—that still shows an infinitesimal error rate. The Ninth Circuit has found a risk of potential error 40 times higher to be "low." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1035 (9th Cir. 2012) (finding that "the risk of error was low" where "only 4% of veterans who file benefits claims are affected."). But the true erroneous-rejection rate is almost certainly

much lower. Because the risk of error is already extraordinarily low, the value of any additional process is virtually nil.

3. The State's interest is strong.

Arkansas "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4. As explained more fully above, "[v]oting fraud is a serious problem in U.S. elections . . . , and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31. Arkansas has an especially egregious and well-documented history of absentee-ballot fraud. *See* Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018), https://encyclopediaofarkansas.net/entries/election-fraud-4477/. Arkansas's absentee-ballot-verification regime is a hard-won product of more than half a century of courageous efforts at reform of absentee voting in the State. *See generally* Glaze, *Waiting for the Cemetery Vote*.

Also as explained more fully above, Arkansas's important interests in the orderly administration of elections, in reducing administrative burdens faced by boards of elections with limited time and few volunteers, and in protecting public confidence in the integrity and legitimacy of our representative system of government further demonstrate the importance of the verification requirement.

Given the strength of the State's important interests, the weakness of Plaintiffs' interest, and the vanishingly slight value of additional process, the Due Process Clause simply does not require Arkansas to provide the additional process Plaintiffs seek. So their claim fails.

V. The remaining permanent-injunction factors also warrant dismissal.

Because Plaintiffs' claim fails 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 dismissal as well.

Plaintiffs complain about the entirely speculative possibility that Arkansas's absentee-ballot-verification requirement might conceivably harm them in the coming election. But Plaintiffs have not cast an absentee ballot, and fears about what could happen in some possible future cannot provide a basis for an injunction. *See, e.g.*, *Regan v. Vinick & Young*, 862 F.2d 896, 902 (1st Cir. 1988) ("Speculation or unsubstantiated fears about what may happen in the future" is not a proper basis for an injunction); *NACCO Material Users, Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007) (same).

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 irreparable 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' inexcusable delay in bringing this lawsuit. They might have sued months or even years ago. 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 absentee 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 procedure for curing absentee ballots 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, *considerations 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 grant Defendants' motion.

CONCLUSION

In light of the numerous fatal deficiencies of Plaintiffs' claims, Defendants respectfully request that the Court grant their motion to dismiss.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney 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 Defendants