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

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

Plaintiffs,

v.

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

Case No. 5:20-cv-05174-PKH

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The crux of Plaintiffs' claims, as alleged in the Amended Complaint, is that Arkansas's failure to provide notice and cure to absentee voters whose ballots are rejected for signature deficiencies leaves those voters with *absolutely no recourse* against erroneous disenfranchisement, and as a result, unconstitutionally deprives them of their right to vote without due process and unconstitutionally burdens their fundamental right to vote. Once the voter submits an absentee ballot, all other aspects of the voting regime are irrelevant: even if that ballot is erroneously rejected for signature issues, the voter is prohibited from casting a valid in-person ballot or from applying for a second absentee ballot. The deprivation is final and there is no possible recourse for the voter. Hundreds of absentee ballots cast by absentee voters were rejected in past elections due to this lack of notice and cure, and a "shockingly high" number of legitimate ballots will continue to be rejected in future elections. *See* Dkt. 34, Op. at 7.

Defendants' Motion to Dismiss fails to grasp this basic issue, and instead attempts to cast Plaintiffs' claims as deficient by mischaracterizing the clear allegations set forth in the Amended Complaint and relying on arguments at odds with the heavy weight of prior decisions. Defendants further argue that Plaintiffs lack standing—a position this Court already rejected—and alternatively that their claims must be dismissed on grounds of sovereign immunity, failure to join the county boards, or laches. Finally, Defendants argue that *Purcell* counsels dismissal of Plaintiffs' claims—despite the fact that *Purcell* is simply irrelevant to Plaintiffs' claims, which seek relief for future elections beyond the November 2020 election. Each of these arguments is meritless, and Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss and proceed to hear the case on the merits.

STANDARD OF REVIEW

"To survive a motion to dismiss" pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must allege facts sufficient 'to state a claim to relief that is plausible on its face.'" *Ulrich v. Pope County*, 715 F.3d 1054, 1061 (8th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In considering a motion to dismiss under Rule 12(b)(6), the Court must "accept[] as true all factual allegations" and construe them "in the light most favorable to the nonmoving party." *Glick v. Western Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019) (citing *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014)). Generally "dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ulrich*, 715 F.3d at 1058 (quoting *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996)) (internal quotation marks and citation omitted). While the Court "generally must ignore materials outside the pleadings" on a Rule 12(b)(6) motion, "it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Smithrud*, 746 F.3d at 395 (internal citation omitted).[1]

Similarly, in considering a motion to dismiss under Rule 12(b)(1), "the Court must accept as true allegations of fact in the amended complaint and reasonable factual inferences drawn therefrom." *See, e.g.*, *Bielema v. Razorback Found., Inc.*, No. 5:20-CV-05104, 2020 WL 4906054, at *1 (W.D. Ark. Aug. 20, 2020) (holding that for state sovereign immunity defenses,

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[1] Although Defendants cite their expert's testimony when asserting Plaintiffs' failure to state a claim, Dkt. 28, Defs.' Br. at 35, 46-47, 50, consideration of such evidence is not permitted in the context of a Rule 12(b)(6) motion to dismiss.

"[w]hether ruling on a motion to dismiss under Rule 12(b)(1) raising a facial challenge to subject matter jurisdiction or a motion to dismiss under Rule 12(b)(6)[,] . . . the Court must accept as true allegations of fact in the amended complaint and reasonable factual inferences drawn therefrom"); *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017) ("[A]t the pleading stage," where "defendants facially attacked plaintiffs' standing, we . . . accept[] the material allegations in the complaint as true and draw[] all inferences in plaintiffs' favor.").

The same standard applies on a motion to dismiss for failure to join an indispensable party.[2] *See Fochtman v. Darp, Inc.*, No. 5:18-CV-5047, 2018 WL 3148113, at *2, *6–*7 (W.D. Ark. June 27, 2018) (denying Rule 12(b)(7) challenge under standard requiring "[t]he Court [to] accept all of a complaint's factual allegations as true, and construe them in the light most favorable to the plaintiff, drawing all reasonable inferences in the plaintiff's favor"), *appeal on unrelated grounds filed* May 28, 2020, No. 20-2068 (8th Cir. 2020); *Shields v. Spencer Wilkinson, Jr.*, No. 4:12-CV-160, 2013 WL 11320222, at *2 (D.N.D. Nov. 26, 2013) ("In analyzing a Rule 12(b)(7) [challenge for failure to join a party], courts accept as true all the well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party."). Further, in ruling on a challenge for failure to join a required party, "the proper procedure under Rule 19(a) is to give the parties an opportunity to bring in such a party, not to dismiss the action." *Ranger Transp., Inc. v. Wal-Mart Stores*, 903 F.2d 1185, 1187 (8th Cir. 1990) (per curiam).

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[2] Defendants do not specifically cite Rule 12(b)(7), but argue that "the Court should dismiss this action under Rule 19 of the Federal Rules of Civil Procedure." Dkt. 28, Defs.' Br. at 21.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

Defendants' sovereign immunity defense fails because Plaintiffs' claims against the Secretary and members of the State Board of Election Commissioners fall squarely within the exception to state sovereign immunity articulated in *Ex Parte Young*, 209 U.S. 123 (1908). Under that exception, as Defendants recognize, Dkt. 28, Defs.' Br. at 12, a party may sue a state official in her official capacity for prospective injunctive relief against an ongoing violation of federal law so long as the official has "some connection with the enforcement of the act." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (citing *Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145–46 (8th Cir. 2005); *see also* Dkt. 11, Am. Compl. ¶ 17 (stating that Defendants "are sued only in their official capacities as officials of the State of Arkansas").

Defendants do not contest that Plaintiffs' requested relief qualifies as prospective injunctive relief. Defendants' authority over statewide election procedures—which this Court has already recognized, *see* Dkt. 34, Op. at 5—is further clearly sufficient to constitute "some connection" to enforcement of Section 7-5-416(b)(1)(F)(ii) under the Eighth Circuit's precedent, and again, Defendants do not argue otherwise. *See 281 Care Comm.*, 638 F.3d at 632 (a state official "does not need to be primary authority to enforce the challenged law" for purposes of the *Ex Parte Young* exception); Dkt. 28, Defs.' Br. at 12; *see also Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (holding Missouri Secretary of State had sufficient connection to enforcement of law restricting voting rights of persons under guardianship—even though "broad authority to . . . administer voting and elections is delegated to local 'election authorities'"—because the Secretary was required to "send local election authorities the names of persons who are adjudged incapacitated" and "oversee[] . . . the voter

registration process"); Dkt. 11, Am. Compl. ¶¶ 12–13, 17 (describing Defendants' authority over statewide election procedures).

Defendants' sole argument, that Plaintiffs do not allege an "ongoing" violation of federal law, Dkt. 28, Defs.' Br. at 12, is entirely circular: Defendants argue that there is no "ongoing" violation because, in their view, there is no constitutional violation at all. The only case they cite in support, *Park v. Forest Service of U.S.*, does not even relate to sovereign immunity, but relates to a plaintiff's injury-in-fact for purposes of standing. *See id.* (citing *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000)). That Plaintiffs' allegation relates to "ongoing" violations is evident on the face of the complaint. *See* Dkt. 11, Am. Compl. ¶¶ 9–11, 59, 63. Contrary to Defendants' argument, the *Ex Parte Young* exception is clearly satisfied here, where the Defendants have the authority to implement the challenged statutes through their direction of county elections officials, have done so in past elections, and will do so again in future elections. *See McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018) (holding that the *Ex Parte Young* exception is satisfied where the state official "has authority to implement the [challenged law], and she has implemented or is likely to implement the statute").

Finally, to the extent that Defendants rely on *Richardson v. Texas Secretary of State* for the proposition that state sovereign immunity bars injunctive relief here, *see* Dkt. 33 at 2, that reliance is misplaced. *See* --- F. 3d ---, No. 20-50774, 2020 WL 6127721, at *2 (5th Cir. Oct. 19, 2020). Contrary to *Richardson*, the Eighth Circuit's longstanding precedent confirms that sovereign immunity does not bar the Court from granting the relief sought to enjoin defendants' unconstitutional conduct. *See, e.g., McDaniel v. Precythe*, 897 F.3d 946, 953 (8th Cir. 2018) (finding that "a lawsuit seeking injunctive relief to bring [defendant's] witness-selection process

into compliance with the Constitution falls within the scope of *Ex parte Young* and may proceed in federal court").

II. PLAINTIFFS HAVE STANDING

In order to meet the requirements for standing under Article III of the Constitution, Plaintiffs must demonstrate they have suffered an injury-in-fact that is (*1*) concrete and particularized and actual or imminent; (*2*) fairly traceable to Defendant's challenged conduct; and (3*)* likely to be redressed by a favorable judgment. *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017) (relying on *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560) (1992)). As Defendants recognize, "'a credible threat' that the [challenged] provision will be enforced against the plaintiff" may comprise the requisite injury under Article III. Dkt. 28, Defs.' Br. at 13 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014)). Further, as the Court noted in its Opinion and Order on Plaintiffs' Motion for a Preliminary Injunction, "at the pleading stage a petitioner can move forward with general factual allegations of injury." Dkt. 34, Op. at 4 (citing *Miller v. Thurston*, 967 F.3d 727, 734–35 (8th Cir. 2020) (quoting *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013)); *see also Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) ("[G]eneral factual allegations of injury resulting from [Defendants'] conduct will suffice to establish Article III standing at the pleading stage.") (citing *Lujan*, 504 U.S. at 561) (internal quotation marks omitted).

In its Opinion and Order on Plaintiffs' Motion for a Preliminary Injunction, this Court found that Plaintiffs have alleged sufficient facts to meet this standard, Dkt. 34, Op. at 4–5, rejecting each of the arguments Defendants raise in their Motion to Dismiss. *Compare* Dkt. 28, Defs.' Br. at 12–21, *with* Dkt. 26, PI Opp. at 14–23. In particular, the Court found that the individual Plaintiffs "are currently voting by absentee ballot and are concerned their absentee

ballots will be rejected by county election officials due to signature mismatch caused by medical conditions or slight name variations." Dkt. 34, Op. at 4; *see also* Dkt. 11, Am. Compl. ¶¶ 9–11. The Court further found that "LWVAR alleges facts that show its organization's resources and voter outreach efforts are 'perceptibly impaired' by the need to educate the public regarding signature requirements." Dkt. 34, Op. at 4 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 365 (1982)); *see also* Dkt. 11, Am. Compl. ¶¶ 7–8. Finally, the Court concluded that "the injuries Plaintiffs allege are also fairly traceable to Defendants" and that "the State Board of Election Commissioners, chaired by the Secretary of State, has the authority to redress Plaintiffs' injuries." Dkt. 34, Op. at 5; *see also* Dkt. 11, Am. Compl. ¶¶ 12–13, 17, 34, 36–37, 42.

Plaintiffs therefore respectfully request that the Court deny Defendants' Motion to Dismiss based on Plaintiffs' lack of standing, consistent with the Court's Opinion and Order.

III. THE COUNTY BOARDS ARE NOT NECESSARY PARTIES

Contrary to Defendants' argument, the fact that county boards of elections are also involved in enforcement of the challenged statutory provisions does not require their joinder under Rule 19.

First, the Court has already determined that it can accord complete relief among existing parties because Defendants exercise authority to train and ultimately guide county election officials in exercising their duties. *See* Dkt. 34, Op. at 5 ("[T]he State Board of Election Commissioners, chaired by the Secretary of State, has the authority to redress Plaintiffs' injuries."); *see also* Fed. R. Civ. P. 19(a)(1)(A). Indeed, as the Arkansas Supreme Court noted in *Martin v. Kohls*, a case challenging Arkansas's 2013 voter ID legislation, because Defendants can "train and direct the county clerks and the county election commissioners across this state," they can effectuate Plaintiffs' requested relief and are thus the only necessary parties to this

dispute. *See Martin v. Kohls*, 2014 Ark. 427, 9, 444 S.W. 3d 844, 849–50. Defendants' argument that "the State Board has no authority to create *new absentee-voting procedures*," Dkt. 28, Defs.' Br. at 20 (emphasis in original), is inapposite: as this Court has already confirmed, "if election procedures allowing notice and an opportunity to cure absentee ballot signature deficiencies are required by the United States Constitution, it is no impediment to relief that Arkansas law does not allow the State Board to create that procedure." Dkt. 30, Op. at 5.

Second, Defendants' argument that disposing of the case in the county boards' absence may "impair" the individual counties' ability to protect their interests because "[t]he county boards unquestionably have an interest in whether this Court orders them to refrain from performing this statutory duty" is illogical. *See* Dkt. 28, Defs.' Br. at 22. If the law is unconstitutional, then county boards surely have no protected interest in applying it. Moreover, the Defendants are statutorily *required* to direct county operations, Dkt. 11, Am. Compl. ¶¶ 12–13 (citing Ark. Code Ann. § 7-4-101(f)); thus an order requiring them to do so in accordance with the Constitution cannot "impair" the counties' ability to protect their interests. For the same reasons, Defendants' speculation that there may be "county-specific reasons" why disposing of this action might "impede [county boards'] ability to administer the election or protect their interests" or "leave them subject to inconsistent obligations," because Defendants "cannot adequately represent their peculiar interests," Dkt. 28, Defs.' Br. at 22, is simply irrelevant.

Nor do the sole circuit cases on which Defendants rely—a Ninth Circuit case from 1934 and a Third Circuit case from 1960, Dkt. 28, Defs.' Br. at 21—provide any assistance. In *Chicago, Milwaukee, & St. Paul Railroad Co. v. Adams County*, the Ninth Circuit found that Washington state county treasurers were indispensable parties to the action because the state statutory provisions at issue "emphasiz[ed] the treasurer's tax-collecting duties," a conclusion the

court found to be "in accordance with *suggestions repeatedly made by the Supreme Court of the state of Washington*." 72 F.2d 816, 820–21 (9th Cir. 1934). Here, no analogous line of state cases exists and in fact, the statutory framework here recognizes the general authority of Defendants to effectuate the requested relief. The Third Circuit decision in *Adamietz v. Smith* is also inapposite because, as the court there held, the relief sought was not even within the realm of the defendant's powers. *Adamietz v. Smith*, 273 F.2d 385, 387–88 (3d Cir. 1960).

Finally, Defendants' assertion that they are "prejudiced by an inability to mount a complete defense to Plaintiffs' claims," Dkt. 28, Defs.' Br. at 23, is unsupported and falls outside Rule 19(a)(1)(B)(i), which relates to the interest of the third party, not an existing party to the litigation. *See* F.R.C.P. Rule 19(a)(1)((B)(i); *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 308 (8th Cir. 2009) (holding third-parties were "not required because their absence would not impair the court's ability to accord complete relief between [existing parties], and neither [third party] ha[d] claimed an interest relating to the subject of the action"). Any "county-specific instructions," Dkt. 28, Defs.' Br. at 23, are further not necessary for Defendants to respond to Plaintiffs' claims, which challenge the statewide lack of notice and cure provisions. Moreover, even if relevant, Defendants have made no showing as to why they are prevented from requesting or compelling any particular information from county boards, particularly given their statutory authority to monitor election-law legislation, "[f]ormulate, adopt, and promulgate *all necessary rules* to assure even and consistent application of voter registration laws and fair and orderly election procedures," appoint election monitors to counties, assist counties in administration of elections should the State Board deem it appropriate, investigate alleged violations of election laws, and conduct post-election audits, among other powers. *See* Ark. Code Ann. § 7-4-101(f) (emphasis added).

IV. THE COURT SHOULD DENY DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. The Doctrine of Laches Does Not Bar Plaintiffs' Claims

As a preliminary matter, courts have been hesitant to bar claims based on laches at a preliminary stage "where there is limited factual information available." *Espino v. Ocean Cargo Line, Ltd.*, 382 F.2d 67, 70 (9th Cir. 1967) ("the factual issues involved in a laches defense can rarely be resolved without some preliminary evidentiary inquiry"). Moreover, Defendants' invocation of laches does not warrant dismissal because the timing of Plaintiffs' filing is entirely reasonable and the suit does not prejudice Defendants.

First, for the avoidance of any doubt, Plaintiffs allege that the current regime is unconstitutional in *all* elections, not only those that will be affected by COVID-19. *See* Dkt. 11, Am. Compl. ¶¶ 59, 63. An unconstitutional statute is not immunized from judicial review simply because it has been on the books for a while.

Second, as Defendants recognize, Dkt. 28, Defs.' Br. at 5, COVID-19 created changed circumstances, including the vast expansion of absentee voting in Arkansas, making the filing of this lawsuit particularly timely. *See Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 245 (8th Cir. 1987); *see also Martin v. Kemp*, 341 F.Supp.3d 1326, 1336 (N.D. Ga. 2018) (holding that a "surge" in absentee ballot applications was a "patently reasonable explanation[]" for filing complaint challenging signature verification requirement less than three weeks before the 2018 election).

Third, in any event, "[d]espite COVID-19's disruption of daily life since mid-March [2020]," Dkt. 28, Defs.' Br. at 24, the Governor of Arkansas did not issue an Executive Order directing changes to Arkansas's absentee voting procedures until August 7, 2020. Dkt. 11, Am. Compl. ¶ 20. Further, the individual Plaintiffs only recently became aware that their ballots

could be rejected for signature issues, Dkt. 11, Am. Compl. ¶¶ 6–7, and LWVAR only began receiving a significant uptick in voter inquiries concerned about these issues and further diverting resources in response after a September 5, 2020 article in the Arkansas Times reported pressure on election officials to reject absentee ballot applications due to signature mismatch. Dkt. 11, Am. Compl. ¶¶ 8, 50. In this context, there is no indication whatsoever of the kind of inequity necessary for laches to apply. *See, e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 689 (1995); *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1207 (11th Cir. 2008)).

Finally, this suit also does not prejudice Defendants because, rather than requiring "boards to implement entirely new procedures," Dkt. 28, Defs. Br. at 25, Plaintiffs request targeted relief that would allow the State to make use of existing procedures and provisions of Arkansas law. Dkt. 11, Am. Compl. ¶¶ 59, 63. Any "administrative burden inherent in such relief" is not sufficient to establish prejudice. *Martin*, 341 F.Supp.3d at 1336 n.6 (collecting cases). Nor does the timing of the suit affect Defendants ability to "mount a full defense," as their extensive submissions make clear.

B. Plaintiffs Have Plausibly Pleaded Their Procedural Due Process Claim

Plaintiffs allege that the challenged provisions deprive them of their liberty interest in the fundamental right to vote without due process of law in violation of the Fourteenth Amendment. Dkt. 11, Am. Compl. ¶¶ 52–59. Defendants' various arguments that Plaintiffs fail to state a claim for relief on this ground rely on inapposite or outlier cases and misconstrue Plaintiffs' claims and the requested relief.

1. The Right to Vote is a Cognizable Liberty Interest Entitled to Due Process Protections

Defendants' argument that Plaintiffs' procedural due process claim is precluded as a matter of law because it does not involve a cognizable "liberty interest" does not withstand scrutiny.

First, Defendants' claim that courts "regularly apply *McDonald* [*v. Board of Election Commissioners of Chicago*] to hold that 'the right to vote is fundamental, but is not a 'liberty' interest for purposes of procedural due process" is at odds with the decisions of courts within and beyond this Circuit. Dkt. 28, Defs.' Br. at 18 (citing *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969)). Defendants wrongly cast as an outlier the district court decision in *Jaeger*, Dkt. 28, Defs.' Br. at 27, where the court found that "[b]eyond debate, the right to vote is a constitutionally protected liberty interest" and that "a state that creates a system for absentee voting must administer it in accordance with the Constitution." *Self Advocacy Sols., N.D. v. Jaeger*, --- F. Supp. 3d ---, No. 3:20-CV-00071, 2020 WL 2951012, at *8 (D.N.D. June 3, 2020) (quoting *Martin*, 341 F.Supp.3d at 1338). Far from being an "unanalyzed assertion" as Defendants contend, Dkt. 28, Defs.' Br. at 27, *Jaeger* stands firmly in line with myriad decisions that have recognized that the right to vote is a cognizable "liberty" interest, and that when a state creates a right to absentee voting, it must conduct that process in according with the Constitution, and accordingly must not deprive absentee voters of their fundamental right to vote without due process. *See Jaeger*, 2020 WL 2951012, at *8 (citing, *e.g.*, *Martin*, 341 F. Supp. 3d at 1338; *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006), *vacated as moot on appeal sub. nom Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008); *see also, e.g.*, *Democracy N.C. v. N.C. State Bd. Of Elections*, --- F. Supp. 3d ---, No. 1:20-cv-457, 2020 WL 4484063, at *53 (M.D.N.C. Aug. 4, 2020); *Raetzel v. Parks/Bellemont Absentee Election Bd.*,

762 F. Supp. 1354, 1357–58 (D. Ariz. 1990); *see also Paul v. Davis*, 424 U.S. 693, 710–12 (1976) (explaining that liberty or property interests can "attain [] constitutional status by virtue of the fact that they have been initially recognized and protected by state law" and observing that the Supreme Court has "repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status").

Instead, it is the Fifth Circuit's recent decision in *Richardson v. Texas Secretary of State*, in which a motions panel rejected the notion that the right to vote constitutes a cognizable liberty interest for procedural due process purposes, that is an outlier. --- F. 3d ---, No. 20-50774, 2020 WL 6127721, at *2 (5th Cir. Oct. 19, 2020). *Richardson* is not controlling on this Court, and as "a decision by [a] motions panel granting a stay" it has "no precedential force." *Id.* at *19 (Higginbotham, J., concurring). Moreover, the Fifth Circuit relied on a questionable interpretation of the Sixth Circuit's decision in *League of Women Voters of Ohio v. Brunner*—the "only circuit to squarely address the issue"—as *rejecting* a cognizable liberty interest in voting. *Id.* at *7 (citing *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008)).

However, the Sixth Circuit has itself *rejected* this interpretation, noting in *Memphis A. Phillip Randolph Inst. v. Hargett* that the "Sixth Circuit has not clearly answered 'whether procedural due process claims are viable in voting rights cases,'" --- F. 3d ---, No. 20-6046, 2020 WL 6074331, at *8 (6th Cir. Oct. 15, 2020), and expressly declining to adopt the lower court's ruling to this effect — a decision that Defendants incidentally rely on here. *See* Dkt. 28, Defs.' Br. at 27. Other district courts have rejected arguments that *Brunner* precluded procedural due process claims in right to vote cases, and the only Sixth Circuit judge to express a direct opinion

on the issue in *Hargett* strongly rejected this approach. *League of Women Voters of Ohio v. LaRose,* --- F. Supp. 3d ---, No. 2:20-cv-3843, 2020 WL 5757453, at *12 n.25 (S.D. Ohio Sept. 27, 2020) ("*Brunner* did not categorically bar procedural due process claims for voting rights cases" but rather "found that the procedural due process claim as alleged in the plaintiffs' complaint failed"); *see also Hargett*, 2020 WL 6074331, at *21 (Moore, J., dissenting) ("*Brunner* does not address the circumstances in which state law can create a liberty interest, let alone a liberty interest in voting absentee by mail under [state] law"); *id.* at *22 ("Tennessee law creates a protected liberty interest in voting absentee by mail").

The other cases cited by Defendants to contest the existence of a liberty interest are plainly inapposite. Dkt. 28, Defs.' Br. at 27–28. *Texas League of United Latin American Citizens v. Hughs* involved the availability of more than one absentee ballot drop-off location where voters could return their ballots, vote early, or vote on Election Day. --- F. 3d ---, No. 20-50867, 2020 WL 6023310, at *5–*9 (5th Cir. Oct. 12, 2020). *New Georgia Project v. Raffensperger* involved the deadline for returning ballots. --- F.3d ---, No. 20-13360-D, 2020 WL 5877588 (11th Cir. Oct. 2, 2020). *Dobrovolny v. Moore* involved a requirement for placing initiatives on ballots. 126 F.3d 1111, 1113 (8th Cir. 1997). None of these cases involved the facts presently in dispute—notice and cure opportunities for absentee ballots that are rejected for purported deficiencies—and none stands for the general proposition that the fundamental right to vote is not a protected liberty interest.

Second, Defendants' attempt to preclude Plaintiffs' procedural due process claim because Plaintiffs allegedly invoke only a "right to vote *by absentee ballot,*" Dkt. 28, Defs.' Br. at 38 (emphasis in original), is inapposite. Plaintiffs' claims do not involve whether a particular voter or group of voters is entitled to vote by absentee ballot. Rather, they relate to the rights of voters

not to be deprived of their fundamental right to vote without due process simply because they have elected to cast absentee ballots as they are entitled to do under state law. As Plaintiffs explain in the Amended Complaint, "[a]lthough there is no constitutional right to vote by absentee ballot, once the state creates an absentee voting regime, its citizens retain a liberty interest in voting by absentee ballot, and any state laws governing that regime must comply with the Due Process Clause. Dkt. 11, Am. Compl. ¶ 53; *see, e.g.*, *Jaeger*, 2020 WL 2951012, at *8 ("[A] state that creates a system for absentee voting 'must administer it in accordance with the Constitution.") (citing *Martin*, 341 F. Supp. 3d at 1338); *Raetzel*, 762 F. Supp. at 1358 ("While the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection.").

Third, Defendants are wrong as a matter of law when they argue that "[b]ecause 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." Dkt. 28, Defs.' Br. at 30. Courts across the country have found that procedural due process applies with respect to the right to vote even where a legislative act of the State is implicated. *See, e.g.*, *Jaeger*, 2020 WL 2951012, at *8; *Martin*, 341 F. Supp. 3d at 1338; *Saucedo*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018). None of the cases cited by Defendants contradict this well-established principle. In fact, none involves the failure to provide notice and cure opportunities for absentee ballots that are rejected—let alone absentee ballots rejected for purported signature deficiencies. *Gattis v. Gravett*, *Collier v. City of Springdale*, and *Bi-Metallic Inv. Co. v. State Bd. of Equalization* involve property rather than liberty interests, and *Jones v. Governor of Florida* involved felons' voting rights and the threshold question of who is entitled to the right to vote. 806 F.2d 778 (8th Cir. 1986); 733 F.2d

1311 (8th Cir. 1984); 239 U.S. 441 (1915); --- F.3d ---, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020) (en banc); Dkt. 28, Defs.' Br. at 29-30.

2. Plaintiffs have Plausibly Alleged That Defendants Failed to Provide Due Process

Having demonstrated that they have a liberty interest entitled to due process, none of Defendants' other arguments demonstrate that "Plaintiffs' due-process claim *cannot succeed* under *Mathews* [*v. Eldridge*]." Dkt. 28, Defs.' Br. at 50. To the contrary, Plaintiffs' due process claim is "plausible on its face." *See Bell Atl. Corp.*, 550 U.S. at 570.

As a preliminary matter, in considering what process is due—the goal of the *Mathews v. Eldridge* inquiry—the complete and total lack of notice and opportunity to respond "all but ends the inquiry." *See Jaeger,* 2020 WL 2951012, at *9. As the district court noted in *Jaeger*, "'The essential requirements of due process . . . are notice and an opportunity to respond.'" *Id.* (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)); *see also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.") (internal citations and quotation marks omitted). Further, with respect to deprivation of the fundamental right to vote in particular, "[b]ecause there is no possibility of meaningful postdeprivation process when a voter's ballot is rejected (there is no way to vote after an election is over, after all), sufficient predeprivation process is the constitutional imperative." *Jaeger,* 2020 WL 2951012, at *9 (citing *Winegar v. Des Moines Indep. Sch. Dist.*, 20 F.3d 895, 901 (8th Cir. 1994)).

With respect to the three *Mathews v. Eldridge* factors, *first*, Defendants' argument that the private interest is "quite weak" because there is no fundamental right to vote by absentee ballot, Dkt. 28, Defs.' Br. at 51, is entirely duplicative of their argument that there is no protected

liberty interest at stake and fails for the same reasons. As noted, the liberty interest at stake is in absentee voters' *fundamental right to vote*—a right in which the private interest is "substantial." Dkt. 11, Am. Compl. ¶¶ 55–57. Defendants' statement that Plaintiffs "surely have no right to cast two absentee ballots (one defective and a second after a cure)," Dkt. 28, Defs.' Br. at 51, belies their fundamental misunderstanding of Plaintiffs' factual allegations and requested relief. Plaintiffs have not alleged a right to "cast two absentee ballots"; rather, they seek to ensure that their votes will be *counted*—or more specifically, that they will not be discarded without providing Plaintiffs with notice and the opportunity to cure a purported signature-related deficiency. *See* Dkt. 11, Am. Compl. ¶¶ 55–57. Defendants' assertion that "registered voters could still safely and securely vote in person during the state's early-voting window" similarly ignores the fact that under the present absentee voting framework, Plaintiffs and other affected absentee voters would be unaware that their ballots were rejected until *after* any voting window—and even if they were aware, would be prevented from voting by any other means, having already cast an absentee ballot.

Second, Defendants' argument that the "risk of an erroneous rejection is miniscule, so additional process is unwarranted," cannot overcome Plaintiffs' factual allegations otherwise. Indeed, Plaintiffs have plausibly alleged that the signature matching and verification procedures by layperson election officials is inherently error prone and leads to arbitrary disenfranchisement. Dkt. 11, Am. Compl. ¶¶ 4, 28–37, 57. This Court has already recognized that "[s]ome [Arkansas] counties have rejection rates that appear abnormally high, bolstering arguments that Defendants' guidance to county election officials is vague and leads to arbitrary application of a subjective standard." Dkt. 34, Op. at 8 n.2 (taking judicial notice of county rejection statistics from 2016 and 2018). Defendants' argument that the review standard is

"forgiving," Dkt. 28, Defs.' Br. at 52, has no bearing on this point: there is simply no official guidance for the county officials actually conducting signature matching to determine what a "distinct and easily recognizable difference" entails. *See* Dkt. 34, Op. at 7.

Further, Defendants' argument that the layperson election officials are tasked with matching signatures but not with "determining whether signatures are 'genuine,'" Dkt. 28, Defs.' Br. at 52, is illogical: the purpose of matching signatures is ostensibly to determine whether the absentee ballot was in fact signed by the voter who submitted it—i.e., whether the signature is genuine—otherwise, there is simply no purpose to the requirement. Defendants also do not contest that features of Arkansas's voter statements increase the likelihood of an eligible voter being disenfranchised for a *missing* signature, including that ballots signed on the optional statement signature line instead of the actual signature line will be rejected. *See* Dkt. 11, Am. Compl. ¶¶ 4, 36. Finally, Defendants do not even address that the additional procedures identified by Plaintiffs—notice and the opportunity to cure—would greatly reduce if not eliminate the risk of eligible voters being erroneously disenfranchised as a result of a missing or mismatched signature.

Third, Arkansas's interest in "preserving the integrity of its election process," Dkt. 28, Defs.' Br. at 53, in fact bolsters Plaintiffs' claims since the requested notice and cure for ballots with signature deficiencies will "demonstrably advance[]—rather than hinder[]" that interest. *Jaeger*, 2020 WL 2951012, at *10; *see also* Dkt. 28, Defs.' Br. at 54. It is the state's present failure to provide absentee voters with notice and opportunity to cure that poses a threat to election integrity in Arkansas. Dkt. 11, Am. Compl. ¶¶ 5, 58. Contrary to Defendants' baseless assertions otherwise, Plaintiffs' requested relief imposes only a minimal administrative burden on election officials—especially since Arkansas already provides a notice and cure process for

multiple absentee ballot deficiencies, including missing voter ID and incorrect bearer/agent information, Dkt. 11, Am. Compl. ¶¶ 27, 59; County Board of Election Commissioners Procedures Manual, pp. 82–83—all while enhancing the state's interest in preventing voter fraud and "protecting public confidence in the integrity and legitimacy of our representative system of government." Dkt. 28, Defs.' Br. at 53.

C. Plaintiffs Have Plausibly Pleaded their Claim that Arkansas Law Unduly Burdens the Fundamental Right to Vote

1. The Court Must Weigh a Burden on the Right to Vote

Defendants also assert that Plaintiffs have failed to state a viable right to vote claim under the First and Fourteenth Amendments.

To begin with, Defendants' are simply wrong that "the casting of absentee ballots subject to the verification requirement certainly does not make it *harder* for voters to cast their ballots." Dkt. 28, Defs.' Br. at 31 (emphasis in original). The challenged statutes burden the right to vote because the automatic rejection of absentee ballots with missing or mismatched signatures, coupled with the complete lack of notice or opportunity for the voter to cure an alleged deficiency, all but ensures that a certain number of eligible voters are going to be disenfranchised in each election. *See* Dkt. 11, Am. Compl. ¶¶ 3–4, 38–44, 60–62.

Defendants' argument that the Court "should dispose of Plaintiffs'" *Anderson-Burdick* fundamental right to vote claim "[w]ithout examining any burden" on the right to vote, *see* Dkt. 28, Defs.' Br. at 26, is meritless and contravenes well-established precedent that is binding on this Court. The Eighth Circuit recently affirmed that, when adjudicating fundamental right to vote claims, courts must "apply the so-called *Anderson/Burdick* standard." *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907–08 (8th Cir. 2020); *see also Miller*, 967 F.3d at 739 (applying the *Anderson-Burdick* test). The *Pavek* court continued that "[u]nder this standard, [a]

court . . . must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Pavek*, 967 F.3d at 908 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Defendants' sole citation to the contrary is again the district court decision in *Hargett*, which was not followed by the Sixth Circuit on this point either. *Compare* Dkt. 28, Defs.' Br. at 26 (citing *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 2020 WL 509459, at *15–*20 (M.D. Tenn. Aug. 28, 2020)), *with Memphis A. Phillip Randolph Inst. v. Hargett*, --- F.3d ---, No. 20-6046, 2020 WL 6074331 (6th Cir. Oct. 15, 2020). Defendants' proposed standard contradicts clear Supreme Court precedent. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (the "rigorousness of [the court's] inquiry" increases with the severity of the burden); *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (where the burden is significant, the State must show that its "interest [is] sufficiently weighty to justify the limitation").

2. Heightened Scrutiny, Not Rational Basis, Is Appropriate

Plaintiffs submit that Defendants' arguments regarding the level of scrutiny to be applied *see* Dkt. 28 at 30-31, 36, are not appropriate at the motion to dismiss stage, where Plaintiffs' allegations about the significant burdens imposed by the signature matching regime must be accepted as true. *See* Dkt. 34 at 4 (citing *Miller v. Thurston*, 967 F.3d 727, 734 (8th Cir. 2020) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Plaintiffs have plausibly alleged substantial burdens on their right to vote, making a presumption of rational basis review at this early stage inappropriate. *See*, *e.g.*, Dkt. 11, First Amended Compl., ¶ 62.

Applying the *Anderson-Burdick* test in similar circumstances, courts have repeatedly applied heightened scrutiny to analogous signature matching and verification requirements,

finding that they impose a serious burden on the right to vote. *See*, *e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) ("hav[ing] no trouble finding that Florida's [error-prone signature matching] scheme imposes at least a serious burden on the right to vote" and denying motion to stay the district court's preliminary injunction requiring pre-rejection opportunity to cure absentee ballot rejections); *Frederick v. Lawson*, --- F. Supp. 3d ---, No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696, at *16–*17 (S.D. Ind. Aug. 20, 2020) (rejecting the defendants' *McDonald* defense in the course of holding Indiana's absentee ballot signature match requirement "is a significant burden" that violates the Equal Protection Clause); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1029–31 (N.D. Fla. 2018) (holding plaintiffs had shown a likelihood of success in establishing that Florida's signature verification requirement for absentee ballots violated the Equal Protection Clause); *see also Hoblock v. Albany Cty. Bd of Elections*, 341 F. Supp. 2d 169, 177–78 (N.D.N.Y. 2004) (right to vote burdened where only 27 absentee ballots invalidated).

Defendants' argument that this Court must apply rational basis review to Arkansas's signature-match requirement in light of *McDonald*, *see* Dkt. 28, Defs.' Br. at 30–31, contravenes this well-settled jurisprudence. As discussed above, *McDonald* is inapplicable, and it is well-settled that once a state authorizes the use of absentee ballots, any restrictions it imposes on their use must comply with the Constitution and is therefore subject to *Anderson-Burdick* review. *See*, *e.g.*, *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) (concluding that "where a state has authorized the use of absentee ballots, any restriction it imposes on the use of those absentee ballots" is subject to scrutiny under *Anderson-Burdick*). Not only was *McDonald* decided decades before both *Anderson* and *Burdick*, but *McDonald* has been construed narrowly by the Supreme Court in subsequent cases. *See*, *e.g.*, *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974)

(holding "[e]ssentially the Court's disposition of the claims in *McDonald* rested on failure of proof"); *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1974) (explaining that, in *McDonald*, "there was nothing in the record to indicate that the challenged Illinois statute had any impact" on the right to vote, but that the case had acknowledged that "[a]ny classification actually restraining the fundamental right to vote . . . would be subject to close scrutiny").

The cases that Defendants cite to argue for the application of *McDonald* and rational basis review instead involve very different facts—most of which do not even involve voting issues. Specifically, *Bullock v. Carter*, *Miller v. Thurston*, and *Biener v. Calio* involved candidate filing fees and petitioning rules, *not* voting. *See Bullock v. Carter*, 405 U.S. 134, 135 (1972); *Miller*, 967 F.3d at 734; *Biener v. Calio*, 361 F.3d 206, 209 (3d Cir. 2004). Moreover, the fundamental distinction that Defendants elide completely is that in *McDonald*—and *Tully v. Okeson*, --- F.3d ---, No. 20-2605, 2020 WL 5905325 (7th Cir. Oct. 6, 2020)—the dispute centered on whether voters had a right to vote absentee *at all*. But this case is not about the threshold question whether the individual voter Plaintiffs have the right to vote absentee. Rather, here the Court is being asked to adjudicate whether, *having already established* that Arkansas authorizes absentee voting, the voting procedures must comply with the Constitution, including First and Fourteenth Amendment protections, which is assessed under heightened scrutiny.

3. Plaintiffs Have Demonstrated that Arkansas's Signature Requirements Are Burdensome

Taking Plaintiffs' factual allegations as true, as this Court must at this stage of the litigation, Plaintiffs have demonstrated that Arkansas's imposition of signature requirements without notice and cure imposes a substantial burden on voters' rights.

First, Defendants' argument that voting regulations can only be considered restrictive if they impact huge numbers of voters, *see* Dkt. 28, Defs.' Br. at 40, 43–45, is meritless. Courts

routinely hold that fundamental right to vote analysis focuses on the burdened population, not the voter population as a whole. *See*, *e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling opinion) (in assessing severity of burdens imposed by voter ID law, the relevant burdens "are those imposed on persons who are eligible to vote but do not possess a current photo identification" and "indigent voters"); *Anderson*, 460 U.S. at 793–94 (ballot access burden "that falls unequally on new or small political parties or on independent candidates . . . discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (holding that poll taxes, even if not burdensome for the average voter, violate the Fourteenth Amendment because of burdens imposed on poor voters).

As the Sixth Circuit recently observed in *Mays v. LaRose*, a case applying the *Anderson-Burdick* framework, "[a]ll binding authority to consider the burdensome effects of disparate treatment on the right to vote has done so from the perspective of only affected electors—not the perspective of the electorate as a whole." 951 F.3d 775, 785 (6th Cir. 2020) (citing *O'Brien v. Skinner*, 414 U.S. 524, 529–30 (1974)). Even where disputed laws affect a relatively small number of voters in comparison to the entire voter count, the system may nevertheless impose a serious burden on the protected right. *See* Dkt. 13, MPI Br. at 35; *see also Ga. Coal. for the People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1255, 1264, 1269 (N.D. Ga. 2018) (holding exact match process is burdensome where 3,141 registrants were affected); *Hoblock*, 341 F. Supp. 2d at 177–78 (right to vote burdened where only 27 absentee ballots invalidated). And in any event, as this Court noted, the projected 600 potential ballots that may be rejected in the November election on the basis of purported signature deficiencies is "shockingly high."

Dkt. 34, Op. at 7. Elections in Arkansas have previously been decided by fewer votes than the number of absentee ballots rejected for signature deficiencies. Dkt. 11, Am. Compl. ¶ 51.

Defendants' reliance on the recent Fifth Circuit decision in *Richardson* in support of their position is misplaced. Aside from the fact that the decision does not bind this Court, the Fifth Circuit also relied on Justice Scalia's concurrence in *Crawford* in defining the severity of the burden on voters—but the *Crawford* plurality in fact focused on the burden *on the affected group*, not the absolute number of voters affected. *Compare Richardson*, 2020 WL 6127721, at *9, with *Crawford*, 553 U.S. at 198.

None of the other cases Defendants cite, Dkt. 28, Defs.' Br. at 40, 43-46, advances their cause. In *Brakebill v. Jaeger*, 932 F.3d 671, 678–79 (8th Cir. 2019), the Eighth Circuit did not consider the percentage of voters who are affected to be dispositive; instead, it was the fact that the plaintiffs failed to proffer evidence of an actual burden on voters that would justify the broad relief sought—there, changing the ID requirements for every in-person voter in North Dakota. *See* 932 F.3d at 677. In this case, there is no dispute that Arkansas absentee voters are disenfranchised in every election. *Compare Brakebill*, 932 F.3d at 678–79, *with* Dkt. 34, Op. at 7–8, n.2. Moreover, the *Brakebill* court found that plaintiffs may bring "as-applied challenges based on their individual circumstances." 932 F.3d at 681. Defendants also mischaracterize the Sixth Circuit's holding in *Obama for America v. Husted*, neglecting to mention that the court found that "[t]he burden on Plaintiffs' voting rights is surely real" and did not justify the burden placed on nonmilitary Ohio voters by limiting in-person early voting. 697 F.3d 423, 433 (6th Cir. 2012).

Defendants' reliance on *Lemons v. Bradbury* for the proposition that the burden is "minimal," *see* Dkt. 28, Defs.' Br. at 40, 46–47, is also misplaced because that case involved

signature-matching requirements for petition signatures, not absentee ballots. 538 F.3d 1098, 1103 (9th Cir. 2008) (explaining that there is no notice and cure process in Oregon for petition signatures but that Oregon provides a ten-day notice and cure opportunity for vote-by-mail signature rejections). A lack of notice-and-cure in the petition signature context presents far different concerns from signatures on vote-by-mail ballots; the former results in a voter being disenfranchised while the latter does not. *See id*. at 1104.

Defendants' invocation of a "system-wide analysis" hinders, rather than helps their case. Dkt. 28, Defs.' Br. at 38. None of so-called "procedural safeguards" that Defendants present in their Motion to Dismiss—namely, early in-person voting, in-person voting, in-person assistance to voters with disabilities, Dkt. 28, Defs.' Br. at 38—is available to voters who have already submitted an absentee ballot and whose ballot is or may be rejected due to alleged signature deficiencies. This is why the courts in *Lee* and *Frederick* found significant burdens on voting imposed by an absentee ballot signature-match regime that did not provide notice or an opportunity to cure ballot deficiencies. *See Lee*, 915 F.3d at 1321; *Frederick*, 2020 WL 4882696, at *16. The facts at issue here involve voters like the individual Plaintiffs who have already elected to vote by absentee ballot—as permitted by the State. Defendants cannot deny that should these absentee ballots be rejected for signature-related deficiencies, these voters will have no notice of a rejection until after disenfranchisement. That absentee voters could have opted to vote in person—which is disputed with respect to the individual Plaintiffs—does nothing to lessen the burden posed by the challenged system, because those options are simply no longer available to a voter who has already submitted an absentee ballot and, unbeknownst to her, had her ballot rejected. For similar reasons, the existence of guidelines for voting in person is irrelevant. Dkt. 28, Defs.' Br. at 38–39. Defendants' attempts to deflect responsibility and

play up the COVID-19 pandemic similarly do nothing to mitigate the burden posed under *Anderson-Burdick*. These rules unconstitutionally burden the fundamental right to vote in *all* elections. The COVID-19 pandemic merely increases the urgency.

In fact, a contextual analysis militates in Plaintiffs' favor because the Court must consider the various Arkansas provisions that combine to disenfranchise voters—the (1) signature requirement, (2) signature review process, (3) absence of notice and cure, and (4) state laws permitting election officials to delay the canvass until Election Day—together instead of in isolation. Where plaintiffs challenge voting restrictions with multiple, simultaneously-imposed components, the effects must be measured cumulatively and in the context of the state's statutory regime, and those impacts must be justified by correspondingly weighty interests. *See*, *e.g.*, *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 400 (6th Cir. 2016); *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014); *Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411, 420–21 (2d Cir. 2004).

Arkansas's signature scheme imposes a serious burden on the fundamental right to vote, due to, *inter alia*, the lack of uniform standards, insufficient training, the inherently error-prone nature of signature matching, and the clear risk of eligible voters being disenfranchised by simple error. *See* Dkt. 11, Am. Compl. ¶¶ 38–43, 62; *cf. Lee*, 915 F.3d at 1321 (characterizing disenfranchisement by signature mismatch rules as imposing "at least a serious burden on the right to vote"). Defendants do not contest Plaintiffs' allegations that there is simply no pre-rejection notice or opportunity to cure, meaning that there are no existing "mechanisms in place to protect against arbitrary and unreasonable decisions." *Detzner*, 347 F. Supp. 3d. at 1030; Dkt. 11, Am. Compl. ¶¶ 33–34, 40–42. As a result, "[w]ithout this Court's intervention, these potential voters have no remedy. Rather, they are simply out of luck and deprived of the right to

vote." *Detzner*, 347 F. Supp. 3d. at 1030–31; *see also id.* ("What this case comes down to is that without procedural safeguards, the use of signature matching is not reasonable and may lead to unconstitutional disenfranchisement.").

4. Plaintiffs Have Demonstrated that the Lack of Any Pre-Rejection Notice or Opportunity to Cure Does Not Satisfy Any Level of Scrutiny

In any event, regardless of the extent of the burden on the fundamental right to vote, the present signature matching and verification system does not satisfy *any* level of scrutiny. Defendants' purported history lesson on the risk of absentee ballot fraud in Arkansas, Dkt. 28, Defs.' Br. at 31–33, ignores the simple fact that the requested relief of pre-rejection and opportunity to cure would *advance* the state's interests in preventing voter fraud and ensuring election integrity, as Plaintiffs have alleged. *See* Dkt. 11, Am. Compl. ¶ 64 ("Allowing voters an opportunity to verify their ballots also furthers the state's interest in preventing voter fraud by allowing the state to confirm the identity of voters before their votes are counted."); *see also Lee*, 915 F.3d at 1322; *Jaeger*, 2020 WL 2951012, at *10 (observing that notice and cure procedures ensure the same person that signed the ballot application is the person casting the ballot, "preventing voter fraud and increasing confidence in our electoral system"); *Martin*, 341 F. Supp. 3d at 1340 (concluding that providing a cure for signature match rejection "strengthens" the "integrity of the election process"). Defendants further admit that the existing statutory requirements for absentee ballots "ha[ve] not rooted out absentee-ballot fraud in Arkansas," Dkt. 28, Defs.' Br. at 33, and crucially, do not assert that instituting a notice and cure opportunity would in any way harm their ability to do so. Thus, Defendants' argument that "the electoral system cannot inspire public confidence [in election integrity] if no safeguards exist to deter or detect fraud or to confirm the identity of voters," Dkt. 28, Defs.' Br. at 35 (internal citation omitted), in fact bolsters Plaintiffs' argument in favor of their requested relief.

Defendants' assertions that the requested relief would impose an "intensive and administratively burdensome process," Dkt. 28, Defs.' Br. at 34, is unsupported and contrary to Plaintiffs' well-pleaded allegations, which must be taken as true. As Plaintiffs have alleged, the requested relief may be granted entirely within existing provisions of Arkansas law, rendering any burden minimal. Dkt. 11, Am. Compl. ¶¶ 27, 46–47, 59, 63. At most, Defendants invoke entirely irrelevant facts that have no bearing on Plaintiffs' specific and narrow requested relief. For example, that the procedure for processing absentee ballots is distinct from that for absentee-ballot applications, Dkt. 28, Defs.' Br. at 35, sidesteps the fact that similar procedures to the requested relief already exist for other purported deficiencies in absentee ballots, including missing voter ID and incorrect bearer/agent information, Dkt. 11, Am. Compl. ¶¶ 27, 59. Moreover, Defendants focus on the alleged burden of instituting relief prior to the November 2020 election, *see* Dkt. 28, Defs.' Br. at 35, is misplaced given that Plaintiffs' requested relief applies to *future* elections. Dkt. 11, Am. Compl. at 25–26.

In any event, the relevant jurisprudence clearly establishes that any minimal administrative burden inherent in the requested and targeted relief—which merely expands on the existing procedural infrastructure for absentee voting—cannot outweigh the pleaded burden on the right to vote. *See, e.g.*, *Jaeger*, 2020 WL 2951012, at *10; *Kemp*, 341 F. Supp. 3d at 1340–41.

V. DEFENDANTS' RELIANCE ON *PURCELL* AND ON THE PERMANENT INJUNCTION STANDARD IS MISPLACED AND HAS NO BEARING AT THE MOTION TO DISMISS STAGE

Finally, Defendants' argument that the Court should grant its Motion to Dismiss in light of the remaining factors for a permanent injunction confuses the appropriate standard of review and ignores that Plaintiffs seek relief beyond the November 2020 election. At the pleadings stage, Plaintiffs need only establish that their claims are "plausible on [their] face." *See supra* at

2; *see also Pickering v. Walker*, No. 4:07-CV-4120, 2008 WL 4277674, at *1 (W.D. Ark. Sept. 16, 2008) (applying the 12(b)(6) plausibility standard where Plaintiffs sought, *inter alia*, a permanent injunction). As already demonstrated, Plaintiffs' constitutional claims are plausible on their face, and state claims for which "an injunction is a sound judicial remedy," which is all that is required at this stage. *See James v. City of Dallas*, No. CA 398–CV–0436–R, 2001 WL 586688, at *3 (N.D. Tex. May 22, 2001) ("To survive a motion to dismiss, the Plaintiffs need not provide evidence that meets all the elements required for an injunction to issue. Instead, the Plaintiffs must merely state a cause of action by which an injunction is a sound judicial remedy."); *Bright Harvest Sweet Potato Co. v. Idaho-Frank Associates, Inc.*, No. 2:18-CV-2072, 2018 WL 3594995 (W.D. Ark. July 26, 2018) (finding that plausible claim for injunctive relief requires stating a plausible claim for which injunctive relief is available).

Thus, while the Court must ultimately consider four factors in determining whether to grant permanent injunction relief—namely, "actual success on the merits," "threat of irreparable harm," the balance between the threat and the harm to the state of Arkansas and its citizens; and the "public interest," *see Oglala Sioux Tribe v. C&W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008); Dkt. 28, Defs.' Br. at 10 (citing the same), it cannot definitively determine these factors at the pleading stage, as the "actual success on the merits" factor makes clear. Defendants' suggestion that the Court must, at this stage, decide whether Plaintiffs "are entitled to a permanent injunction," have made "a rigorous showing of success on the merits," have "prov[en] that the balance of equities so favors [them] that justice requires the court to intervene," or that "the public interest is best served by preserving Arkansas's existing election laws," is wrong. *See* Dkt. 28, Defs.' Br. at 10–11, 54–55.

However, in any event, the allegations set forth in the Amended Complaint plausibly set forth a claim to injunctive relief. Each of the individual Plaintiffs has pleaded that they face a threat of irreparable harm due to their higher-than-average risk of disenfranchisement based on signature mismatches due to medical conditions and other factors. Dkt. 11, Am. Compl. ¶¶ 9–11, 28–34, 38–42. They will continue to be at a heightened risk of disenfranchisement for each successive election. *Id*. LWVAR has also pleaded that it must divert resources in order to address issues arising from the challenged provisions, and will continue to have to do so in future electoral cycles. Dkt. 11, Am. Compl. ¶¶ 7–8. Plaintiffs have also alleged that the harm to the State is minimal and clearly outweighed by the harm to plaintiffs, and that the public interest favors granting relief, since it advances rather than hinders the State's interest in election integrity and has a negligible effect on the proper administration of future elections. Dkt. 11, Am. Compl. ¶¶ 56-59, 62-64.

Defendants' only response is to rely on the *Purcell* doctrine and the potential provision of injunctive relief in the lead-up to the upcoming November 2020 general election as warranting dismissal. Dkt. 28, Defs.' Br. at 55–56. But even if this were relevant to the question of whether Plaintiffs have plausibly stated a claim for relief, *Purcell* simply has no bearing on Plaintiffs' requested relief with respect to elections held after November 2020.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied, or in the alternative, that Plaintiffs be given leave to file a Second Amended Complaint, and such other and further relief as the Court deems just and proper. Plaintiffs respectfully request that the Court hold oral argument on Defendants' motion to dismiss.

Dated: October 27, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 27, 2020, I served a copy of Plaintiffs' Memorandum of Law in Opposition to Defendants Motion to Dismiss on all counsel of record through the Court's CM/ECF system.

Dated: October 27, 2020

Respectfully submitted,

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