

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

**BRYAN NORRIS and
NORRIS FOR ARKANSAS**

PLAINTIFFS

v.

CASE NO. 5:26-CV-05005-SOH

**TIM GRIFFIN, in his official capacity as
Attorney General of Arkansas, and
COLE JESTER, in his official capacity as
Secretary of State of Arkansas**

DEFENDANTS

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS AND
RESPONSE IN OPPOSITION TO PRELIMINARY INJUNCTION MOTION**

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INTRODUCTION

On the eve of the March 3 primary election, Plaintiffs seek extraordinary relief preventing Arkansas from enforcing a constitutionally sound election regulation—a commonplace regulation that has been in place for *five* years—that establishes a 100-foot buffer zone around polling place entrances. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (“all 50 States limit access to the areas in or around polling places”). Plaintiff Bryan Norris, who announced his candidacy for office in June 2025, does not explain his delay in bringing this lawsuit challenging Arkansas’s five-year-old law and he has not shown reasonable diligence. That alone is sufficient to deny preliminary injunctive relief. Moreover, the Supreme Court has already upheld a similar statute, recognizing that the States’ interest in protecting voters at the polling place entrance is compelling and justifies bright-line restrictions on conduct and expressive activity. Because Plaintiffs cannot demonstrate a likelihood of success on the merits, irreparable harm, or that the public interest favors relief, their motion should be denied, and this case should be dismissed.

BACKGROUND

Five years ago, the Arkansas General Assembly enacted Act 728 of 2021, codified at Ark. Code Ann. § 7-1-103(a)(24). It reads: “A person shall not enter or remain in an area within one hundred feet (100’) of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes.”

Plaintiffs are a candidate for state office and his campaign committee, Bryan Norris and Norris for Arkansas. Bryan Norris announced his candidacy for Secretary of State on June 19,

2025.¹ He and his campaign committee allege that they intend to conduct “exit polling” within 10 to 25 feet of polling place entrances, and that they cannot conduct effective exit polling at a distance of 100 feet from the polling place entrance. ECF No. 2 at 5. They note that exit polling is typically conducted by the media but allege that “exit polling is also a tool relied on by political campaigns.” *Id.* at 4. To conduct the exit polling, Norris for Arkansas contracted with a private company called Rasmussen Reports, LLC. ECF No. 2 at 10; ECF No. 2–10. Per the contract attached to the preliminary-injunction motion, Rasmussen Reports will conduct exit polling in seven to ten counties—including at minimum, Benton, Craighead, Faulkner, Pulaski, Saline, Sebastian, and Washington—and will compile and provide the results to Norris for Arkansas within three to five days following election day. ECF No. 2–10 at 1. Per the contract, Rasmussen Reports is prohibited from disclosing “polling results, analyses, or any related information to third parties without [Norris for Arkansas’s] prior written consent, except where disclosure is required by law.” ECF No. 10–2 at 3.

Defendants are Arkansas Attorney General Tim Griffin and Secretary of State Cole Jester, who allegedly enforce Act 728. Plaintiffs assert an as-applied challenge to Act 728 under the First Amendment’s free speech clause. ECF No. 2 at 12–15.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), dismissal is proper where a plaintiff has “fail[ed] to state a claim upon which relief can be granted.” “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is

¹ See <https://www.nwaonline.com/news/2025/jun/19/batesville-republican-norris-announces-bid-for/>; see also <https://www.whiterivernow.com/2025/06/23/bryan-norris-announces-candidacy-for-arkansas-secretary-of-state/>.

plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts must accept factual allegations as true and draw reasonable inferences for the plaintiff, but they need not credit legal conclusions. *Id.* In determining whether a complaint has stated a plausible claim, courts consider “the materials that are necessarily embraced by the pleadings and exhibits attached to the complaint.” *Cox v. Mortg. Elec. Registration Sys., Inc.*, 685 F.3d 663, 668 (8th Cir. 2012) (quotation omitted).

A preliminary injunction is “an extraordinary and drastic remedy” that “should not be granted” unless the plaintiff has, “by a clear showing,” “carrie[d] the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, 129–130 (2d ed. 1995)); see *Sanborn Mfg. Co., Inc. v. Campbell/Hausfield Scott Fetzer Co.*, 997 F.2d 484, 485–96 (8th Cir. 1993) (noting the burden on the movant “is a heavy one”). Thus, a plaintiff must clearly establish that: “[1] he is likely to succeed on the merits, [2] he is likely to suffer irreparable harm in the absence of preliminary relief, [3] the balance of the equities tips in his favor, and [4] an injunction is in the public interest.” *Id.* at 22. But when the government is the nonmoving party, “[t]he balance-of-harms and public-interest factors ‘merge.’” *Eggers v. Evnen*, 48 F.4th 561, 564–65 (8th Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

“When seeking to enjoin the implementation of a state statute, the plaintiff must show ‘more than just a “fair chance” that it will succeed on the merits.’” *Bio Gen LLC v. Sanders*, 142 F.4th 591, 600 (8th Cir. 2025) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008) (en banc)). Instead, “[i]t must show that it ‘is likely to prevail on the merits.’” *Id.* (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). This is “a more rigorous

standard,” which “reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.” *Rounds*, 530 F.3d at 732 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). Therefore, courts “considering requests to preliminarily enjoin duly enacted state or federal laws . . . should proceed with the greatest caution, greatest humility, and greatest respect for the democratic process.” *Roth v. Jones*, No. 4:25-cv-733, 2025 WL 2414160, at *1 (E.D. Ark. Aug. 20, 2025) (citing *Rounds*, 530 F.3d at 732).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM, AND NORRIS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS.

Norris has failed to state a claim that “is plausible on its face,” *Iqbal*, 556 U.S. at 678, because Act 728 does not implicate the First Amendment, much less violate it. And even if it did implicate the First Amendment it is either a constitutional restriction on non-expressive content or a constitutional time, place, and manner restriction. Norris’s complaint should therefore be dismissed for failure to state a claim. At the very least, Norris cannot show entitlement to a preliminary injunction because he cannot make a “clear showing” that he is likely to succeed on the merits of his claims for the same reasons. *See Armstrong*, 520 U.S. at 972.

Arkansas’s Act 728 of 2021 is an “anti-influence prohibition” that “promote[s] the purpose of” the Arkansas Constitution’s “free and equal election clause.” *Thurston v. League of Women Voters of Arkansas*, 687 S.W.3d 805, 814 (Ark. 2024). It aims to prevent unlawful conduct near polling places by establishing a 100-foot buffer zone around the primary exterior entrance to a building where voting is taking place. It reads:

A person shall not enter or remain in an area within one hundred feet (100’) of the primary exterior entrance to a building where voting is taking place except for a

person entering or leaving a building where voting is taking place for lawful purposes.

Act 728 of 2021, codified at Ark. Code Ann. § 7-1-103(a)(24).

By prohibiting a person from “enter[ing]” or “remain[ing]” within 100 feet of a polling place, Act 728 regulates non-expressive *conduct*, not *speech*. So Plaintiffs’ First Amendment challenge to Act 728 necessarily fails because Arkansas’s law does not implicate the First Amendment. But even if it did regulate expressive conduct, it would readily survive the *U.S. v. O’Brien* standard because Act 728 promotes a substantial government interest that would be achieved less effectively absent the regulation. After all, Arkansas has a substantial interest in protecting the integrity and reliability of its elections, and laws that target conduct “are generally constitutional even when they incidentally affect speech.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 757 (8th Cir. 2019). Finally, if the Court concludes that Arkansas’s law regulates speech, it nonetheless would be a reasonable time-place-manner restriction under *Burson v. Freeman*.

A. Act 728 regulates conduct, not speech, so it does not implicate the First Amendment.

The complaint and preliminary-injunction motion wrongly characterize Act 728 as a speech regulation; however, it simply regulates conduct. Accordingly, it does not implicate or violate the First Amendment.

A preliminary question in First Amendment cases is often whether a statute “regulates speech, conduct, or both,” and Supreme Court precedents have “long drawn that line.” *Brandt v. Griffin*, 147 F.4th 867, 888 (8th Cir. 2025) (en banc). A statute “regulates conduct, not speech,” “when [i]t effects what” a person “must *do* . . . not what they may or may not *say*.” *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006). “[T]he First Amendment ‘does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on

speech.’” *Brandt*, 147 F.4th at 888 (quoting *NIFLA v. Becerra*, 585 U.S. 755, 769 (2018)); see *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 757 (8th Cir. 2019) (explaining that laws targeting conduct “are generally constitutional even when they incidentally affect speech”). “To decide whether conduct is sufficiently imbued with communicative elements to be protected, courts ask whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it.” *Redlich v. City of St. Louis*, 51 F.4th 283, 287 (8th Cir. 2022) (citation modified). In other words, whether the regulated conduct is “inherently expressive.” *Ark. Times LP v. Waldrip as Tr. of Univ. of Ark. Bd. of Trs.*, 37 F.4th 1386, 1394 (8th Cir. 2022) (en banc).

Applying these principles here, Act 728 regulates conduct that is not inherently expressive. It prohibits a person from “enter[ing]” or “remain[ing]” within 100 feet of the primary exterior entrance to a building where voting is taking place. Ark. Code Ann. § 7-1-103(a)(24). In other words, it regulates what a person must not *do*—“enter” or “remain” within 100 feet of a polling location—it does not regulate what a person may or may not *say*. Act 728 therefore does not implicate the First Amendment. See *Rumsfeld*, 547 U.S. at 60 (rejecting First Amendment challenge to a law that “neither limits what law schools may say nor requires them to say anything”). Moreover, entering or remaining within the 100-foot zone is not “inherently expressive,” even if some people may intend “to express an idea” through their decision to enter or remain within the 100-foot zone, *Redlich*, 51 F.4th at 287, because that idea can only be understood “by the speech that accompanies” their decision, *Rumsfeld*, 547 U.S. at 66.

Under Act 728, the target is the conduct, not protected expression, so the Act is a regulation of non-expressive conduct that does not “implicate the First Amendment.” See *Virginia*

v. Hicks, 539 U.S. 113, 123 (2003) (concluding that a trespass policy has nothing “to do with the First Amendment” and that “[p]unishing its violation by a person who wishes to engage in free speech” is punishing “nonexpressive conduct”); *Gary v. City of Warner Robins*, 311 F.3d 1334, 1340 (11th Cir. 2002) (explaining a prohibition on “nude dancing in alcohol-licensed establishments” “does not restrict [plaintiff’s] right to observe or engage in nude dancing” as plaintiff is free to do so elsewhere); *Ben’s Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 726 (7th Cir. 2003) (similar).

At bottom, “[t]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 918 (8th Cir. 2017) (quoting *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640,647 (1981)); see *Lichtenstein*, 83 F.4th at 587 (that a law may “reduce[] [a plaintiff’s] ability to spotlight” his views does not “transform” “conduct into speech subject to strict scrutiny”). Norris’s First Amendment challenge therefore fails because Act 728 does not implicate the First Amendment.

B. Alternatively, Act 728 regulates expressive conduct and does not violate the First Amendment.

In the alternative, Act 728 regulates expressive conduct, and Norris fails to show that it violates the First Amendment. When “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct” that is being regulated, courts apply the “relatively lenient standard” from *United States v. O’Brien*, 391 U.S. 367 (1968), to determine whether the regulation violates the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *O’Brien*, 391 U.S. at

376).² Under *O'Brien*, a regulation does not violate the First Amendment as long as (1) “it is within the constitutional power of the Government,” (2) “it furthers an important or substantial governmental interest,” (3) “the governmental interest is unrelated to the suppression of free expression,” and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U.S. at 377.

Here, there is no question that regulating the area around polling places is within the constitutional power of Arkansas. It not only falls within States’ general police powers, but also within their power under the Elections Clause. *See Burson v. Freeman*, 504 U.S. 191, 193 (1992) (plurality) (noting States have the authority to regulate conduct near polls); *id.* at 213–14 (Kennedy, J., concurring) (explaining that States can “act[] to protect the integrity of the polling place where citizens exercise the right to vote” as [v]oting is one of the most fundamental and cherished liberties in our democratic system of government”). Norris does not contend otherwise, as he concedes that Arkansas has the authority to ban electioneering near polling places. *See* ECF No. 6 at 5, 10–11.

There is also no question that regulating who enters and remains within 100 feet of a polling place serves an important and substantial governmental interest that is unrelated to the suppression of free expression. Act 728 is an “anti-influence prohibition” that “promote[s] the purpose of” the Arkansas Constitution’s “free and equal election clause,” which is to “ensure[] the ability to exercise the right to vote free from outside influence,” *League of Women Voters of Arkansas*, 687 S.W.3d at 814—free from “intimidation, threat, improper influence, or coercion,”

² A government regulation must be content-neutral for the *O'Brien* standard to apply, *see Holder v. Humanitarian L. Project*, 561 U.S. 1, 27 (2010), but Norris has conceded that Act 728 is content-neutral, *see* ECF No. 6 at 9 (“Act 728 . . . may appropriately be evaluated as a content-neutral (not a content-based) restriction on speech.”).

Id. (quoting *Davidson v. Rhea*, 256 S.W.2d 744, 746 (1953)). And the Supreme Court has held that these interests are important, concluding that “a State has a compelling interest in protecting voters from confusion and undue influence.” *Burson*, 504 U.S. at 199 (plurality). Like regulations that prohibit electioneering within 100 feet (or 300 feet) of a polling place that have been held constitutional, Act 728 is unrelated to suppressing free expression and serves Arkansas’s compelling interest in protecting “the right to vote in an election conducted with integrity and reliability.” *See id.* (upholding ban on electioneering within 100 feet of polling place); *Frank v. Lee*, 84 F.4th 1119, 1141 (10th Cir. 2023) (upholding ban on electioneering within 300 feet of polling place).

Finally, any “incidental restriction on alleged First Amendment freedoms” that Act 728 may impose “is no greater than is essential” to further Arkansas’s compelling interests. *O’Brien*, 391 U.S. at 377. “To satisfy the *O’Brien* standard ‘a regulation need not be the least speech-restrictive means of advancing the Government’s interests. Rather, the requirement of narrow tailoring is satisfied, so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Redlich*, 51 F.4th at 288–89 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (cleaned up)). As noted previously, Act 728 is an anti-influence prohibition that prohibits a person from entering or remaining within 100 feet of the primary exterior entrance of a building where voting is taking place. And it was enacted, in part, to respond to the problem created by persons and groups handing out free water and food to influence voters (under the guise of voter support) within 100 feet of a polling place. A 100-foot buffer zone prevents this type of influence at the ballot box and other attempts to influence or intimidate voters, so it is narrowly tailored to Arkansas’s legitimate interests. *See, e.g., Frank*, 84

F.4th at 1142–44 (concluding that, “contrary to the district court’s ruling,” the state defendants were “not required . . . to produce any empirical evidence justifying the size” of their “election-day buffer zone” because, even when applying strict-scrutiny review to a content-based regulation, “*Burson* did not require Tennessee to put forth empirical evidence justifying the size of its buffer zones,” nor have sister circuits required it, “relying on *Burson*”).

Norris cannot plausibly contend that Act 728 is unnecessary to further Arkansas’s compelling interests because the laws it had on the books before Act 728 were insufficient to prevent this type of influencing activity. Specifically, Arkansas had a law that prevented electioneering within 100 feet of the primary exterior entrance of a building where voting is taking place. *See* Ark. Code Ann. § 7-1-103(a)(8)(B)(ii). But many attempts to improperly influence or intimidate voters can fall outside the definition of electioneering. *See* § 7-1-103(a)(8)(C)(i) (“‘electioneering’ means the display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot”).³ Indeed, the same day as the Senate Floor Debate for what would become Act 728, the Arkansas Democrat-Gazette ran an editorial piece noting Georgia’s enactment of a similar law in response to electioneering disguised as “voter support.” Op.-Ed., *Details, Details, Is This 1910 All Over Again?*, Ark. Democrat-Gaz. (Apr. 1, 2021)⁴ (“There are a lot of jots and tittles to this new Georgia law. Including the infamous detail about not being able to bring water to voters in line, although that was apparently added to prevent electioneering by folks holding signs and bullhorns who would get around the poll distance

³ *See also* ECF No. 2–7 at 4 (testimony of Senator Hammer noting the legislature’s finding that certain people were setting up tables within the 100-foot zone “under the pretense of goodwill, but in reality, they were affiliated with groups that were there maybe for other reasons”); *id.* at 7 (testimony of Senator Garner that “this last election, I saw ‘nonpartisan’ people, campaigning directly in line, multiple times, under the guise of doing it for voter reasons.”).

⁴ Available at <https://www.arkansasonline.com/news/2021/apr/01/details-details/>.

requirements by carrying around water bottles. Water can be provided by the precinct itself.”). And notably, a federal district court has concluded that similar provision of Georgia’s law “is reasonable and does not significantly impinge on Plaintiffs’ constitutional rights,” even though Georgia’s buffer zone is 50 feet larger than Arkansas’s. *See In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312, 1338 (N.D. Ga. 2022) (“Although the 150-foot Buffer Zone in this case is larger than the 100-foot zones in *Burson* and *Browning*, the extra area represents just a few extra seconds-walk from the entrance of the polling station. Drawing the line at this point does not impose an unreasonable restriction on the exercise of First Amendment rights.”).

To protect voters from undue influence, the General Assembly enacted Act 728 to prohibit any person from entering or remaining within 100 feet of the primary exterior entrance of a building where voting is taking place. Without this provision, Arkansas’s goal of preventing undue influence “would be achieved less effectively.” *Redlich*, 51 F.4th at 290. Norris and others remain free to engage in all sorts of expressive conduct and exit polling as long as they are outside of the 100-foot buffer where risks of voter intimidation, harassment, and fraud are heightened and where Arkansas “has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible.” *Burson*, 504 U.S. at 210. And while Norris argues that exit polling should be carved out from Act 728’s prohibition, that ignores that doing so would substantially undermine Arkansas’s interests. Voters often enter and exit through the same doors, so allowing persons to be within that 100-foot zone would interfere with voters’ right to be free from outside influence in the “last 15 seconds before its citizens enter the polling place.” *Id.*; *see In re Georgia Senate Bill 202*, 622 F. Supp. 3d at 1336 (discussing “commotion at the polls” and how activities near a polling location can “interfere with the serenity of the polling place and

diminish voters' confidence in the election process"). Indeed, if exit polling were excluded, then as voters are preparing to vote, they would potentially hear those leaving the polls explain to persons conducting the polling who they voted for and why. And it would be easy for persons to pretend to be conducting only exiting polling while also approaching voters as they enter the polling location in an improper attempt to influence them.

Act 728 therefore satisfies the *O'Brien* standard as explained above (and for the reasons explained below, *see infra* Part I.C.). Accordingly, Norris has not only failed to show a likelihood of success on the merits, but he has also failed to state a claim.

C. Alternatively, Act 728 is a constitutional time-place-manner restriction.

In the alternative, even assuming *arguendo* that Act 728 regulates speech or expressive conduct, Act 728 is a constitutional time, place, and manner restriction.

The First Amendment prohibits laws “abridging the freedom of speech.” But “expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used.” *Burson*, 504 U.S. at 197. Thus, the “[Supreme] Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Id.*

Because Act 728 “applies only in a specific location” —within 100 feet of polling places— it implicates the Supreme Court’s “‘forum based’ approach for assessing restrictions that the government seeks to place on the use of its property.” *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (quoting *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)). A polling place, “at least on Election day,” is “a nonpublic forum;” it “is a special enclave, subject to greater restriction.” *Id.* at 12.

Norris does not allege what kind of forum is implicated by Act 728. Norris engages in no forum-based analysis at all. *See* ECF Nos. 2 (complaint), 5 (PI motion), and 6 (PI brief). While the *Burson* plurality and “Justice Scalia’s concurrence in the judgment parted ways over whether the public sidewalks and streets surrounding a polling place qualify as a nonpublic forum,” *Mansky*, 585 U.S. at 12, Defendants maintain that “streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate” and thus are “not public forums,” *Burson*, 504 U.S. at 216 (Scalia, J., concurring in the judgment). Regardless, even in “a traditional public forum, . . . the government may impose reasonable time, place, and manner restrictions on private speech.” *Mansky*, 585 U.S. at 11. While “restrictions based on content must satisfy strict scrutiny” and viewpoint-based restrictions “are prohibited,” *id.*, Norris (correctly) does not allege that Act 728 is either, *see* ECF No. 6 at 9 (“Act 728 . . . may appropriately be evaluated as a content-neutral (not a content-based) restriction on speech.”). So the question then is whether Arkansas’s law is a reasonable time-place-manner restriction. It is.

As stated above, Arkansas may regulate the time, place, and manner of expressive activity, so long as such restriction is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternatives for communication. Act 728 checks each of those boxes.

Act 728 is undisputedly content-neutral. It is also narrowly tailored to serve a significant government interest. The Supreme Court in *Burson* explained that buffer-zone laws like Act 728 serve a significant government interest:

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret

ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Burson, 504 U.S. at 206 (plurality).

Arkansas thus has a significant interest in preventing voter intimidation and election fraud. Moreover, Act 728 is narrowly tailored to achieve that interest. As noted above, Arkansas's pre-existing electioneering prohibition was insufficient to protect voters from undue influence and interference. So to more effectively protect voters from undue influence, the General Assembly enacted Act 728 to prohibit any person from entering or remaining within 100 feet of the primary exterior entrance of a building where voting is taking place. *See Burson*, 504 U.S. at 207 (noting the Court's holding in another case that the "existence of bribery statute does not preclude need for limits on contributions to political campaigns"). Moreover, *Burson* specifically recognized that blanket prohibitions on conduct and speech in the vicinity of polling places can be necessary because "many acts of interference [may] go undetected," and "[t]hese undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.*

Finally, Plaintiffs allege that Act 728 is overinclusive because in addition to prohibiting the distribution of food and water in an effort to influence voters, it prohibits exit polling within the 100-foot zone. But that merely demonstrates that the law is content-neutral and that it should be reviewed under a *lower* standard of scrutiny, not a *higher* one. Indeed, "distinguishing among types of speech requires that the statute be subjected to strict scrutiny," *Burson*, 504 U.S. at 207, which Act 728 does not do and thus means that it is not subject to strict scrutiny.

Plaintiffs also point to the Supreme Court's statement in *Burson* that "there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit

such electoral abuses.” *Id.*; *see* ECF No. 6 at 10. But that statement was made merely to reiterate that Tennessee did not need to craft its law to address a problem that did not exist at that time, which is why the Court also observed that “States adopt laws to address the problems that confront them.” *Burson*, 504 U.S. at 207. And Arkansas is currently confronting just such a problem—persons who claim that they are conducting “exit polling” but are actually attempting to influence voters—as referenced in Plaintiffs’ complaint. *See* ECF No. 2-9 (Arkansas Attorney General Press Releases). Indeed, the press release that Plaintiffs attach to their complaint cites to arrest affidavits, which note that the individuals who were arrested—and who claimed that they were conducting exit polling—were arrested for *both* entering or remaining within the 100-foot zone *and* for electioneering within the 100-foot zone, *see* ECF No. 2-9, meaning that those individuals who were ostensibly engaged in “exit polling” were also alleged to be engaged in “the display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot.” Ark. Code Ann. § 7-1-103(a)(8)(C)(i).

In any event, Arkansas is “not required to present ‘elaborate, empirical verification of the weightiness of [their] asserted justifications’” and “can ‘respond to potential deficiencies in the electoral process with foresight.’” *Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)); *see Brnovich v. DNC*, 594 U.S. 647, 685-86 (2021) (legislatures can take proactive, prophylactic measures to deter fraud and increase voter confidence); *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 194-95 (plurality) (a substantial interest in fraud prevention and election integrity is furthered by addressing “in-person voter impersonation at polling places,” even without “evidence of any such fraud actually occurring”). Here, Arkansas took the commonsense step of prohibiting people from lingering

within the 100-foot buffer zone where risks of undue influence, voter intimidation, harassment, and fraud are heightened and where even the appearance of such things happening can erode public confidence in the election. Without Act 728 or with a carve-out for exit polling, these heightened risks remain and it is harder to detect and prosecute improper influence. *See Burson*, 504 U.S. at 207 (plurality) (“the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense”); *id.* at 208 (“Voter intimidation and election fraud are successful precisely because they are difficult to detect.”). And these concerns are only heightened when candidates and their campaigns are the ones seeking to enter the restricted area, like Plaintiffs here. Act 728 thus is narrowly tailored to ensure that “in the last 100 feet leading to the polling place, a voter” will not “have to run, or walk, a gauntlet of hawkers, hustlers, and protesters, or even pollsters shooting questions and voting-rights advocates handing out cards.” *In re Att’y Gen.’s “Directive on Exit Polling: Media & Non-Partisan Pub. Int. Groups,”* issued July 18, 2007, 200 N.J. 283, 302–03, 981 A.2d 64, 75 (2009) (rejecting First Amendment challenge and upholding New Jersey’s 100-foot zone around polling places).

Thus, “some restricted zone around the voting area is necessary to secure [Arkansas]’s compelling interest.” *Id.* at 208. “The real question then is *how large* a restricted zone is permissible or sufficiently tailored.” *Id.* In *Burson*, the Supreme Court upheld Tennessee’s 100-foot zone, describing it as a “minor geographic limitation.” 504 U.S. at 210. The Court also concluded that “[r]educing the boundary to 25 feet . . . is a difference only in degree, not a less restrictive alternative in kind.” *Id.* So too here. Reducing Act 728’s boundary to 25 or 10 feet, as Plaintiffs suggest, *see* ECF No. 6 at 4, would thus not be a less restrictive alternative and it would substantially undermine Arkansas’s interests in preventing undue influence and interference as

voters enter the polls. Moreover, Plaintiffs are free to conduct exit polling outside the 100-foot zone, leaving ample alternatives for communication. See *In re Georgia Senate Bill 202*, 622 F. Supp. 3d at 1338.

To sum up, Act 728 is content neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternatives for communication. Accordingly, Norris has not shown a likelihood of success on the merits and has failed to state a claim regardless of what standard of review applies.

D. Norris’s arguments rely on non-binding, distinguishable cases and Attorney General opinions about a different law.

Neither the cases nor the Attorney General opinions on which Norris relies demonstrate that the complaint states a claim or that Norris is entitled to a preliminary injunction. The non-binding cases on which Norris relies are distinguishable. Unlike Act 728, the Washington statute at issue in *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), was content based. It specifically prohibited exit polling. *Id.* at 382 (prohibiting any person from “[c]onduct[ing] any exit poll or public opinion poll with voters”), 385 (“[t]he statute is content-based because it regulates a specific subject matter, the discussion of voting, and a certain category of speakers, exit pollsters” (internal citations omitted)). *Munro* is also distinguishable because, unlike Act 728’s 100-foot zone, the Washington statute maintained a much larger 300-foot zone. *Id.* at 382 (“Before 1983, the statute prohibited certain activities within 100 feet of the polling place. In 1983, the Washington Legislature amended the statute by . . . extending the area to 300 feet[.]”). And the Ninth Circuit reasoned that a “less restrictive means of advancing” Washington’s interest included “reducing the size of the restricted area.” *Id.* at 385. And *Munro* predates *Burson* by four years, casting its continued vitality into doubt.

Likewise, unlike Act 728, the Nevada statute at issue in *ABC, Inc. v. Heller*, 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365 (D. Nev. Nov. 1, 2006), was content based. *Id.* at *12. (“The pertinent provision of the statute does not prevent polling within the 100-foot buffer zone regarding political or other subjects unrelated to how a person marked their ballot.”). So too was the “oral directive” at issue in *ABC v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006); it barred “exit polls within the 100 foot zone,” *id.* at 738.

In *ABC v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009), the court preliminarily enjoined enforcement of New Jersey’s law but emphasized the importance of “the press’s first amendment right to gather news,” *id.* at 490, an interest that isn’t implicated in this case. Plaintiffs are not the press; they are a candidate and his campaign committee. Indeed, the court in *Wells* noted that “[t]he press has a significant interest in reporting the news to the public,” and it agreed that “the ‘presence of the press at polling places would likely serve as a deterrent to fraud and intimidation,’” *id.* at 490 (quoting *ABC v. Blackwell*, 479 F. Supp. 2d at 738), which isn’t the case here. Plaintiffs are a candidate and campaign committee, not the press, so their presence at polling places is unlikely to serve as a deterrent to fraud or intimidation. And unlike the press, Norris has an indisputable incentive to influence voters because the success of his campaign depends on it.

Moreover, when *Wells* was decided, the New Jersey Supreme Court had already upheld a First Amendment challenge to New Jersey’s 100-foot zone. That court observed that: “By the broad language of our election laws, the Legislature did not intend that, in the last 100 feet leading to the polling place, a voter would have to run, or walk, a gauntlet of hawkers, hustlers, and protesters, or even pollsters shooting questions and voting-rights advocates handing out cards.” *In re Att’y Gen.’s “Directive on Exit Polling: Media & Non-Partisan Pub. Int. Groups,”* issued July 18,

2007, 200 N.J. 283, 302–03, 981 A.2d 64, 75 (2009). And in upholding the law, the court noted that New Jersey’s 100-foot zone was “the most effective and manageable means for election officials to insulate voters from tactics that might influence them or even dissuade them from coming to the polls, and takes those officials out of the business of acting as censors, determining what forms of speech would be acceptable outside of a polling precinct.” 200 N.J. at 306, 981 A.2d at 77–78. So too here. Act 728 is the most effective means for election officials to insulate voters from influence in the 100-foot zone around polling places.

Norris next relies on two opinions of the Arkansas Attorney General to support his arguments in this case. Both predate the enactment of Act 728. In Op. Ark. Att’y Gen. No. 99-330 (2000), Attorney General Pryor opined that a statute that prohibited any person from being within six feet of voting booths “would obviously restrict anyone wishing to conduct exit polling from the area within six feet of the voting booths.” The Attorney General then opined that “‘exit polling’ does not fit within the definition of ‘electioneering,’ and therefore is not prohibited within the [100-foot] area described in A.C.A. § 7-3-103(a)(9).” *Id.* Thus, all that Opinion No. 99-330 establishes is that exit polling is prohibited within six feet of voting booths, and that the term “exit polling” is not coextensive with “electioneering.” In Op. Ark. Att’y Gen. No. 2004-268 (2004), Attorney General Beebe opined that “the one-hundred foot limitation of A.C.A. § 7-1-103(a)(9)A does not apply to exit polling activities” because exit polling was not coextensive with electioneering. Neither of these opinions advance Norris’s arguments. Each merely demonstrates the state of the law prior to the enactment of Act 728. Neither speaks to the constitutionality of Act 728. Norris has therefore failed to state a claim and, at the very least, he has failed to establish likelihood of success on the merits.

II. THE REMAINING PRELIMINARY-INJUNCTION FACTORS WEIGH IN FAVOR OF DEFENDANTS.

Not only has Norris failed to show likely success on the merits, but he has also failed to make a “clear showing” that the remaining preliminary-injunction factors weigh in his favor. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008).

Because Norris is “unlikely to succeed in showing his First Amendment rights” will be violated, he has “not shown a threat of irreparable harm that warrants preliminary injunctive relief.” *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015). What’s more, his delay in bringing this lawsuit and in seeking injunctive relief undermines his claims of irreparable harm. Act 728 was enacted five years ago in 2021. Bryan Norris announced his candidacy for Secretary of State over six months ago on June 19, 2025.⁵ Plaintiffs, however, waited until January 8, 2026 to file this lawsuit, and they insist that the Court enter an injunction before the March 3 primary election. Indeed, they request an injunction “no later than February 17, 2026.” ECF No. 2 at 1 (emphasis added). Plaintiffs do not explain their delay in bringing this lawsuit and their lack of diligence demonstrates that they will suffer no irreparable harm absent injunctive relief. That is because “a party requesting a preliminary injunction *must* generally show reasonable diligence.” *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (emphasis added). “That is as true in election law cases as elsewhere.” *Id.* And “[w]ithout question, ‘[a] long delay by plaintiff after learning of the threatened harm . . . may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.’” *Adventist Health Sys./SunBelt, Inc. v. United States Dep’t of*

⁵ See <https://www.nwaonline.com/news/2025/jun/19/batesville-republican-norris-announces-bid-for/>; see also <https://www.whiterivernow.com/2025/06/23/bryan-norris-announces-candidacy-for-arkansas-secretary-of-state/>.

Health & Hum. Servs., 17 F.4th 793, 805 (8th Cir. 2021) (quoting Wright & Miller, 11A Fed. Prac. & Proc., § 2948.1 & n.13 (3d ed. 2013)).

Norris also cannot show that the balance-of-equities and public-interest factors, which “merge when the Government is the opposing party,” *Nken v. Holder*, 556 U.S. 418, 435 (2009), weigh in favor of injunctive relief. When balancing the equities and public interest, courts consider the alleged “harm against the ‘serious[] and irreparabl[e] harm’ that an injunction would inflict on the State [and the public] by ‘barring the State from’” implementing a validly enacted law. *Eggers v. Evnen*, 48 F.4th 561, 567 (8th Cir. 2022) (quoting *Abbott v. Perez*, 585 U.S. 579, 602 (2018)).

An injunction here would immediately inflict irreparable harm on the State. That is because “[a]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people” — like the law challenged here — the State “suffers a form of irreparable injury.” *Trump v. CASA, Inc.*, 606 U.S. 831, 839 (2025) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). This is a significant harm, especially in comparison to Plaintiffs’ “fail[ure] to show any irreparable harm.” *MPAY Inc. v. Erie Custom Computer Apps., Inc.*, 970 F.3d 1010, 1020 (8th Cir. 2020). Indeed, the State and public will be harmed if Defendants are enjoined from enforcing Act 728 for myriad reasons, including the possibility of disruption and harassment that voters would face in the 100-foot zone around polling places.

The *Purcell* principle also demonstrates that the equities weigh against granting a preliminary injunction. The *Purcell* principle “reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled.” *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in stay). “The *Purcell* principle is a presumption against disturbing the status quo” and is “animate[d]” by “concerns over voter confusion, election

administration issues, and public confidence in the election.” *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020). These concerns will exist here if the Court grants a preliminary injunction. That is because a preliminary injunction would disrupt the status quo that has existed for five years; will create confusion for election officials and voters about who is allowed within the 100-foot buffer zone; and it will undermine public confidence in the fairness and integrity of the election process.

Accordingly, the remaining preliminary-injunction factors weigh in favor of Defendants.

III. A PRELIMINARY INJUNCTION IS NOT WARRANTED, BUT EVEN IF IT WERE, THE SCOPE OF RELIEF MUST BE PROPERLY TAILORED.

The Supreme Court has made clear in recent years that federal courts cannot enter “universal” injunctions—meaning injunctions that “universally enjoin the enforcement of an executive or legislative policy” and thus run to the benefit of persons or entities that are not parties to the case. *Trump*, 606 U.S. at 839. “Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions.” *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 44 (2021). “But under traditional equitable principles, no court may ‘lawfully enjoin the world at large,’ or purport to enjoin challenged ‘laws themselves.’” *Id.* (citation modified).

Nonetheless, Plaintiffs assert that “[t]his Court’s intervention is sought to vindicate the ability not just of candidates, but also of media outlets, researchers, and the general public.” ECF No. 2 at 2 ¶ 3. Plaintiffs are not entitled to injunctive relief at all as explained above. And they are certainly not entitled to injunction that prohibits Defendants from enforcing Act 728 against persons and entities that are not parties to this case, such as “media outlets, researchers,” or “the general public.” *Id.* Nor are Plaintiffs entitled to an injunction against Act 728 itself because courts cannot enjoin “laws themselves.” *See Jackson*, 595 U.S. at 44.

Courts cannot grant such overbroad relief. This Court, at most, could only prohibit Defendants from enforcing Act 728 against Plaintiffs for exit polling. It could not enjoin Defendants from enforcing Act 728 against anyone else. It also could not enjoin Defendants from enforcing Arkansas's electioneering prohibition, Ark. Code Ann. § 7-1-103(a)(8)(B)(ii), against Plaintiffs (or anyone else) because Plaintiffs have not challenged that law and that law is unquestionably constitutional. Accordingly, if this Court enjoins Defendants from enforcing Act 728—which it should not—then it can only enjoin the Attorney General and the Secretary of State from enforcing Act 728 against Bryan Norris and Norris for Arkansas.

IV. PLAINTIFFS ARE NOT ENTITLED TO HAVE THEIR PRELIMINARY-INJUNCTION MOTION TREATED AS A SUMMARY-JUDGMENT MOTION.

Norris makes the unusual request that this Court convert the preliminary-injunction motion into a summary-judgment motion and enter “final declaratory and permanent injunctive relief holding Act 728 unconstitutional as applied to exit polling.” ECF No. 6 at 19. But Norris has forfeited any argument that this request is proper by not citing any authority to support his request. *See Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 341 (8th Cir. 2018).

While Defendants do not oppose this Court granting summary judgment *against* Norris, it would be improper for the Court to grant summary judgment against Defendants when they have not had any time for discovery. *See Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) (“Although discovery does not have to be completed before a district court can grant summary judgment, ‘summary judgment is proper only after the nonmovant has had adequate time for discovery.’” (quoting *In re TMJ Litig.*, 113 F.3d 1484, 1490 (8th Cir. 1997))). Summary judgment cannot be granted against Defendants without giving them the opportunity to engage in discovery

and produce evidence to further support Arkansas's compelling interests here (although such evidence is not required as explained above).

CONCLUSION

Plaintiffs' preliminary-injunction motion should be denied, and this case should be dismissed for failure to state a claim.

Respectfully submitted,

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