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-TLB**

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 FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

This case presents a straightforward question: whether Arkansas may protect the integrity of its polling places by establishing a neutral, 100-foot buffer zone around voting locations. Binding precedent answers that question in the affirmative. Plaintiffs' as-applied First Amendment challenge to Act 728 fails as a matter of law, and judgment on the pleadings is warranted.

Act 728 does not regulate speech. It regulates conduct—whether a person may enter or remain within a defined physical space immediately surrounding a polling place. That distinction is dispositive. The First Amendment does not convert every restriction on where a person may stand into a restriction on what that person may say. Because Act 728 governs non-expressive conduct, Plaintiffs' claim fails at the threshold.

Even if the Court were to assume that Act 728 implicates expressive activity, the result would be the same. The State's authority to safeguard the voting process is at its apex at polling places. The Supreme Court has long recognized that States may enact prophylactic measures to prevent voter intimidation, undue influence, and election fraud in the immediate vicinity of the ballot box. A modest, content-neutral buffer zone—like the one challenged here—fits comfortably within that tradition. Indeed, such measures reflect a "time-tested consensus" that some restricted zone is necessary to ensure that voters may cast their ballots free from interference.

Plaintiffs' theory would invert that settled law. They seek a constitutional entitlement to approach voters not just within feet but within inches of the polling-place entrance to exit poll for a political campaign. But the First Amendment does not guarantee the right to engage voters at the precise time and place of one's choosing—least of all in the narrow zone where the State's interest in protecting voters is strongest. Nor does it require Arkansas to carve out exceptions that would undermine the very protections the statute was enacted to secure.

The pleadings confirm that Plaintiffs cannot state a plausible claim for relief. Act 728 neither targets speech nor discriminates based on content or viewpoint. It applies uniformly to all persons and activities within the 100-foot zone. And it leaves open ample alternative channels for communication, including exit polling conducted outside that boundary.

Because Plaintiffs' First Amendment challenge fails under any applicable standard of review, no material factual dispute precludes resolution at this stage. The Court should therefore grant Defendants' motion and enter judgment on the pleadings.

Background

In 2021, the Arkansas General Assembly enacted Act 728, 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. ECF No. 44 at 1. Bryan Norris announced his candidacy for Secretary of State on June 19, 2025. *See* ECF No. 19 at 1–2, 2 n.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 while complying with Act 728's 100-foot zone. ECF No. 44 at 6. They note that exit polling is often conducted by the media but allege that "exit polling is also a tool relied on by political campaigns." *Id.* at 5. To conduct the exit polling in connection with the March 3, 2026 primary election, Norris for Arkansas contracted with a private company called Rasmussen Reports, LLC. ECF No. 44 at 11; ECF No. 44-10. The contract was contingent on a "binding court ruling invalidating [Act 728] as applied to exit polling" by February 17, 2026, or

two weeks before the primary election. ECF No. 44–10 at ¶ 2.2. Although the contingency did not occur and the company did not conduct exit polling, Norris's First Amendment Complaint indicates that he is "currently in the process of attempting to secure the agreement of a well-established, nationally prominent polling and survey firm to conduct in-person exit polling during the runoff election"—an agreement that he has apparently not yet secured. ECF No. 44 at 1. Indeed, Norris acknowledges that he will be "unable to obtain" such agreement unless Defendants are enjoined from enforcing Act 728. *Id.* at 2.

Defendants are Arkansas Attorney General Tim Griffin and Secretary of State Cole Jester, who Plaintiffs allege enforce Act 728. Plaintiffs assert an as-applied challenge to Act 728 under the First Amendment's free speech clause. ECF No. 44 at 15–18.

On February 26, 2026, the Court held an evidentiary hearing on Norris's preliminary-injunction motion and entered an order the next day denying that motion. *See* Mem. Op. and Order, ECF No. 39. The Court assumed without deciding that Act 728 regulates speech in a public forum but found that "even under the stricter standard applicable to regulations of speech in public forums, Act 728 is constitutional." *Id.* at 4. The Court also found that Act 728 "likely meets" the requirements of a reasonable time-place-manner restriction. *Id.* at 5. As to the first of the time-place-manner requirements, the Court came to the "easy decision that the statute is content neutral." *Id.* Second, the Court found that "Act 728 is also narrowly tailored to serve a significant government interest," *id.* at 6, and "and leaves open ample alternatives for communication," *id.* at 9. In connection with the tailoring requirement, the Court found that "both history and common sense suggest Arkansas has sufficiently tailored its Act to protect speech rights." *Id.* at 10. As to the alternatives for communication left open by Act 728, the Court noted that "[e]xit pollers,

refreshment purveyors, and any other speakers remain free to influence voters beyond the one hundred foot mark." *Id.* Accordingly, the Court concluded that, at least at the preliminary injunction stage, Act 728 "passes constitutional muster." *Id.* at 12.

Legal Standard

Federal Rule of Civil Procedure 12 provides that a party may seek judgment on the pleadings. Fed. R. Civ. P. 12(c). When "no material issue of fact" needs to be resolved and the movant "is entitled to judgment as a matter of law," a motion for judgment on the pleadings should be granted. *Waldron v. Boeing Co.*, 388 F.3d 591, 593 (8th Cir. 2004) (citations omitted).

A Rule 12(c) motion is governed by the same standards as a Rule 12(b)(6) motion to dismiss: "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009) (citing *Ashley County v. Pfizer*, 552 F.3d 659, 665 (8th Cir. 2009)). Further, the court "view[s] all facts pleaded by the nonmoving party as true and grants all reasonable inferences in favor of that party." *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008) (citing *Syverson v. FirePond, Inc.*, 383 F.3d 745, 749 (8th Cir. 2004)). While the court's review is generally limited to the pleadings in this context, the court may properly consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1357, at 299 (1990)). And courts may properly consider such materials "without converting the motion into one for summary judgment." *Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012).

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM.

Norris's First Amended Complaint fails to state a claim that "is plausible on its face," *Clemons*, 585 F.3d at 1124, 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. The Court should therefore grant judgment on the pleadings.

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. Thus, no one may "enter or remain" within 100 feet of a polling place's "primary exterior entrance," unless the "person [is] entering or leaving [the] building … for lawful purposes." 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 standard in *United States v. O'Brien*, 391 U.S. 367 (1968), 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*, 504 U.S. 191 (1992).

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

The First Amended Complaint wrongly characterizes Act 728 as a speech regulation; however, it simply regulates conduct. Accordingly, Act 728 does not implicate and cannot 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 polling place's entrance. Ark. Code Ann. § 7-1-103(a)(24). In other words, it regulates what a person must not *do*—"enter" or "remain"—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 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). After all, "[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).[1] 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

[1] 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). Act 728 is content neutral, and Norris has conceded that . *See* ECF No. 6 at 9 ("Act 728 . . . may appropriately be evaluated as a content-neutral (not a content-based) restriction on speech.").

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 Ark.*, 687 S.W.3d at 814—free from "intimidation, threat, improper influence, or coercion," *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. FCC*, 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 people 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. Although Arkansas's law prohibited electioneering within 100 feet of the primary exterior entrance of a building where voting is taking place, Ark. Code Ann. § 7-1-103(a)(8)(B)(ii), 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").[2] And notably, a federal district court has concluded that a 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 Ga. 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—indeed, the "primary" 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 Ga. Senate Bill 202*, 622 F. Supp. 3d at 1336

[2] *See also* ECF No. 44–7 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").

(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 people conducting the polling who they voted for and why. And it would be easy for people 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 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." U.S. Const. amend. I. 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. But as this Court previously concluded, "even under the stricter standard

applicable to regulations of speech in public forums, Act 728 is constitutional." Mem. Op. and Order, ECF No. 39 at 4.

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. 44 (First Amended 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 "compelling," not just significant, government interest. *Burson*, 504 U.S. at 206 (plurality).

That's because "voter intimidation and election fraud" are "two evils" that are "a persistent battle" that must be fought against. *Id.* So to "secure[]" the virtues of "a secret ballot," the "widespread and time-tested consensus demonstrates that some restricted zone is necessary." *Id.* 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 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—people who claim that they are conducting "exit polling" but are actually attempting to influence voters—as referenced in Plaintiffs' complaint. *See* ECF No. 44-9 (Arkansas Attorney General Press Release). Indeed, the press release that Plaintiffs attach to their complaint cites 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. 44-9, 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*, 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.

In sum, 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. *See 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, 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." 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.

Conclusion

The Court should grant judgment on the pleadings for Defendants pursuant to Rule 12(c).

Respectfully submitted,

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