No. CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS and ARKANSAS UNITED, *et al.* APPELLEES

EMERGENCY MOTION FOR STAY OF INJUNCTION, AND REQUEST FOR EXPEDITED CONSIDERATION

Appellants submit this Emergency Motion for Stay of the Pulaski County Circuit Court's injunction order and request for expedited consideration of this motion.

This is an election case. It involves four acts modifying Arkansas's election regulations that are designed to protect the integrity of the electoral process. Plaintiffs sued before those acts took effect but did not ask for preliminary relief. As a result, those laws have been in effect for nearly a year, and local officials have complied with them. Indeed, multiple local elections have occurred, without the harms Plaintiffs allege, since those laws went into effect. Yet on the eve of the May 2022 primary, Judge Wendell Griffen—applying strict scrutiny to ordinary election rules—permanently enjoined all four acts.

Absent an immediate stay, that decision threatens electoral chaos and confusion. Absentee ballots are finalized and ready to be mailed—and, indeed, *must* be mailed by next week—and in-person voting begins in mere weeks. It is common

sense that courts ought not change the rules on the eve of an election due to the ensuing chaos and confusion. Yet Judge Griffen did just that.

As explained below, Appellants are likely to succeed on the merits of their appeal of the injunction, and they will be irreparably harmed absent relief from this Court because they are enjoined from enforcing state law while that injunction is in force—not to mention the harm to every Arkansas voter. A stay is thus warranted.

Given the urgency of this matter, Appellants respectfully request that this Court consider this Motion on an emergency basis. Because the primary election is imminent, Appellants respectfully request that the Court **immediately and without waiting for any response** enter "temporary relief staying the circuit court['s]" injunction "pending the consideration of the merits" under Rule 6-1(c). Appellants request that the Court order briefing on a stay pending appeal only after granting Appellants the emergency relief they seek here.

Alternatively, if this Court declines to enter immediate temporary relief staying Judge Griffen's order, Appellants request this Court require Appellees to respond by noon on April 1, 2022, so that this Court may resolve this Motion expeditiously.

I. Background

Appellees filed suit in Pulaski County Circuit Court seeking injunctive and declaratory relief against Acts 249, 728, 736, and 973 of the 93rd General Assembly. Appellees raised challenges under the Arkansas Free and Equal Elections Clause, Equal Protection Clause, Voter Qualifications Clause, Right to Assembly and Speech Clause, and Amendment 51's germaneness requirement. 1RP pp. 107-118.

Act 249 amended section 13 of Amendment 51 of the Arkansas Constitution. The process for that sort of amendment is discussed in *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, and Act 249 amended the very provision related to voter identification that was challenged and upheld in *Martin*. Amendment 51 established Arkansas's voter registration system, and Act 633 amended section 13 of Amendment 51 to "provide[] a method of ensuring that no person is permitted to vote who is not registered," *i.e.*, "verification of voter identity by photo identification or by affirmation . . . ." *Martin*, 2018 Ark. at, 12, 556 S.W.3d at 517. Act 633 required a voter to present (if voting in person) or submit a copy of (if voting absentee) a valid identification document. If a voter failed to do so, they could present their identification document to a county election official by noon on the Monday following election day, or they could submit a sworn statement confirming their identity and voter registration. Act 249 amended section 13 to remove the sworn statement option.

Arkansas law has long prohibited electioneering within 100 feet of the entrance to a polling place. Ark. Code Ann. 7-1-103(a)(8)(B)(ii). To prevent voter confusion and illicit electioneering near polling places, Act 728 limits the 100-foot perimeter around polling places to persons "entering or leaving a building where voting is taking place for lawful purpose." Ark. Code Ann. 7-1-103(a)(24).

Act 736 amended various provisions of Arkansas law concerning absentee ballots. As relevant here, Arkansas law requires county clerks to examine and verify signatures on absentee ballot applications. Previously, the clerk was required to verify that a voter's signature was "similar" to those on "voter registration records"

generally. Act 736 clarified that county clerks should verify that a signature is "similar" to that on the voter's registration application. If a county clerk rejects an application due to a dissimilar signature, the clerk is required by law to notify the voter by any means available and allow the voter to satisfy the signature requirement. Ark. Code Ann. 7-5-404(a)(2)(B)(i); *id.* at 7-5-404(a)(2)(B)(ii), 7-5-404(a)(2)(C)(i).

Act 973 modified the deadline for the in-person submission of absentee ballots. Previously, the deadline was the Monday before election day; Act 973 moved it back to the Friday before election day.

Appellees challenged all four acts under the Free and Equal Elections Clause (Ark. Const. art. 3, sec. 2) and the Arkansas Equal Protection Clause (Ark. Const. art. 2, sec. 3); Act 249 under Amendment 51's germaneness and policy requirement (Ark. Const. amend. 51, sec. 19); Act 728 under the Free Speech and Assembly Clause Protection Clauses (Ark. Const. art. 2, sec. 4 & 6) and Act 739 and 973 under the Voter Qualification Clause (Protection Clause (Ark. Const. art. 2, sec. 1). 1RP 107-119; 2RP 1570-72.

Judge Griffen entered judgment for Appellees on every claim they raised against every law they challenged. **2RP 1654-57**. Judge Griffen held that all four acts were subject to strict scrutiny because the right to vote is a "fundamental right" under the Arkansas Constitution. **2RP 1582.** He said that Appellants had failed to muster sufficient proof of voter fraud, voter intimidation, or (in the case of Act 973) the easing of administrative burdens to overcome strict scrutiny. **2RP 1592; 1594; 1638; 1645-1652**.

II. Standard of Review

Although this Court reviews injunctions for abuse of discretion, "the circuit court's interpretation of law is given no deference." *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 2014 Ark. 517, 4, 451 S.W.3d 584, 586 (2014); *see also Seeco, Inc. v. Hales*, 334 Ark. 134, 137, 969 S.W.2d 193, 195 (1998) ("An abuse of discretion may be manifested by an erroneous interpretation of the law."). "[A]n act of the legislature is presumed constitutional and should be so resolved unless it is clearly incompatible with the constitution, and any doubt must be resolved in favor of constitutionality." *Martin*, 2018 Ark. at *9, 556 S.W.3d at 515.

Regarding a stay, this Court considers the movant's likelihood of success on the merits; the likelihood of irreparable harm to the movant absent a stay; whether a stay will substantially injure other parties; and the public interest. *Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). A stay is warranted here.

III. Argument

A. Appellants are likely to succeed on the merits.

Judge Griffen erroneously applied strict scrutiny to enjoin prophylactic measures designed to further Arkansas's compelling interest in election security and integrity. The State undeniably has an interest in preventing voter fraud. *See Crawford, v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *Willis v. Crumbly*, 371 Ark. 517, 529, 268 S.W.3d 288, 296 (2007) (acknowledging "Arkansas's longstanding precedent regarding election contests to purge illegal and fraudulent ballots").

Applying strict scrutiny to any election measure aimed at maintaining ballot integrity means that those measures will almost invariably fail. A plaintiff will almost always be able to argue that a law is not the least restrictive means to achieve the State's interests in security or administrative feasibility by simply pointing to a different policy the State could have adopted that is a little less burdensome. It is thus no surprise that this Court has *never* applied strict scrutiny to election laws designed to protect electoral integrity. *See, e.g.*, *McDaniel v. Spencer*, 2015 Ark. 94, 9, 457 S.W.3d 641, 650 (2015) (applying rational basis to equal protection claim in the initiative and referendum context); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 360 (1994). Under any proper standard, all four acts survive.[1]

1. Act 249, once properly enacted, became a valid constitutional amendment. *See Martin*, 2018 Ark. 283, 556 S.W.3d 509. So long as it satisfies Amendment 51, Section 19's germaneness requirement, it is not subject to challenge under other constitutional provisions. Though Judge Griffen ostensibly concluded Act 249 violated this requirement, **2RP 1655**, he never even attempted to explain—in his entire 86-page order—why that could possibly be the case.

That's not surprising because any assertion that Act 249 is not germane to Amendment 51 is frivolous. This Court held in *Martin* that Act 633 of 2017, which enacted the voter verification requirement, including the sworn-statement option,

---

[1] Judge Griffen's ruling states that he concluded that Acts 739 and 973 violate the Voter Qualification Clause, **2RP 1643-52**, but he never analyzes those claims. And for brevity's sake, neither does this Motion.

was germane to Amendment 51 because it provided an enforcement mechanism for ensuring voters are registered. 2018 Ark. 283, at *12, 556 S.W.3d at 517. Act 249 strengthens that enforcement mechanism by removing the sworn-statement provision. That change may be contrary to Judge Griffen's policy preferences, but it is obviously germane to Amendment 51. And Judge Griffen's opinion doesn't even attempt to explain how it isn't. Because Act 249 is a "valid constitutional amendment," it is therefore "unnecessary to address" any constitutional challenges to it; an amendment cannot be unconstitutional. 2018 Ark. 283, at *13, 556 S.W.3d at 517.

2. Judge Griffen's equal protection analysis turns that doctrine on its head. He did not find any discriminatory purpose behind any of the acts. Nor could he because all four acts are facially neutral; they do not discriminate against or make classifications between anyone. In concluding the acts violate equal protection, Judge Griffen simply declared that these neutral provisions have unequal *effects* on some voters. For instance, he announced, signature verification has a greater impact on voters with handwriting issues, **2RP1612; 1647**, and moving the absentee deadline back one business day impacts those particular voters who fail to meet that deadline, **2RP 1633**. But that isn't an equal protection problem. As this Court's case law explains, that doctrine requires only that where a "classification is made," the "treatment be not so disparate as to be arbitrary." *Graves v. Greene Cnty.*, 2013 Ark. 493, at 7, 430 S.W.3d 722, 727. Thus, put differently, the equal protection clause applies to disparate treatment, not disparate impact. Judge Griffen's contrary conclusion won't survive review, and a stay is warranted.

3. Judge Griffen held that "Act 728 violates the right of Arkansans to assemble and offer expressive non-electioneering speech, conduct, and comfort within 100 feet of the primary exterior entrance of a polling place." **2RP 1652**. That finding refutes itself. This Court has held that "Article 2, Section 6 "is Arkansas's equivalent to the First Amendment." *Kelley v. Johnson*, 2016 Ark. 268, 25, 496 S.W.3d 346, 362 (2016). And the U.S. Supreme Court has upheld 100-foot electioneering perimeters around polling places—even though such restrictions are content-based restrictions (that are actually) subject to strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992). If those restrictions don't violate the First Amendment, then time-place-and-manner restrictions barring people from hanging around to hand out food and water closer than 101 feet away likewise don't violate our constitution. Act 728 is likely to be upheld on appeal, and an immediate stay is warranted.

4. Judge Griffen held that Act 736 violates the right to vote because some absentee-ballot applications may be denied if signatures don't match. But Arkansas law provides *numerous* safeguards to ensure that every voter who wants an absentee ballot can get one, including notification and curing provisions, Ark. Code Ann. 7-5-404(a)(2)(B)(i), as well as the ability to update voter registration application signatures, **2RP 1478 at ¶57**, and clarifying the single signature source that county clerks will use, **2RP 1478 at ¶¶55; 62**. And voting absentee is a privilege, not a right. *See, e.g.*, *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (absentee voting is not a right but rather is a mere privilege).

5. Judge Griffen held that Act 973's one-business-day reduction to the in-person absentee ballot deadline doesn't meet strict scrutiny because, in his view, it

didn't really change the administrative burden. But no voter has a right to vote absentee in the first place. And critically, it's hard to see how moving the deadline could adversely impact anyone since any voter who misses the Friday deadline, or who accidentally arrives on Monday to turn in an absentee ballot, can still vote by voting early *at the same place the voter would be present attempting to drop off the ballot*, mailing in the ballot, or voting on election day. 2RP 1480 at ¶74. Thus, Judge Griffen's order is unlikely to survive this Court's review and a stay is warranted.

B. The other *Pavan* factors support a stay.

Absent an immediate stay (and review), Appellees will suffer irreparable harm because they are prevented from enforcing state law. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (holding that "judicial tinkering" close to an election "can lead to disruption and to unanticipated and unfair consequences"); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (holding that a State's inability to enforce its laws "clearly inflicts irreparable harm on the State").

Granting a stay will not injure Appellees. It is pure speculation that persons will be negatively impacted by the four acts. Moreover, the organizational Appellees testified they were unsure of whether they would even be present at a polling place during primary elections; so it's hard to see how they could suffer any harm from a stay. And any injury to Appellees would not originate from a grant of a stay, but from Appellees' own failure to seek an injunction at the initial stage of litigation, prior to multiple local elections. Finally, the public interest weighs in favor of a stay. The issuance of an injunction at this stage, on the eve of the election, is likely to lead to substantial confusion over election regulations.

Conclusion

For the foregoing reasons, Appellants respectfully request that the Court issue an immediate temporary stay of the circuit court's injunction before ordering any briefing necessary to consider the matter fully, or alternatively to order that Appellees respond by April 1, 2022 at noon.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

/s/ Dylan L. Jacobs
Dylan L. Jacobs (2016167)
Deputy Solicitor General
Brittany Edwards (2016235)
Assistant Attorney General
Kesia Morrison (2015244)
Assistant Attorney General
Trey Cooper (2007294)
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-3661
Fax: (501) 682-2591
Dylan.jacobs@arkansasag.gov
Brittany.edwards@arkansasag.gov
Kesia.morrison@arkansasag.gov
Trey.cooper@arkansasag.gov

Counsel for Appellants

CERTIFICATE OF SERVICE

I, Dylan Jacobs, hereby certify that on March 31, 2022, I electronically filed the foregoing with the Clerk of the Court using the e-*Flex* system, which shall send notice to all Counsel of Record. Pursuant to Ark. R. Sup. Ct. 6(1)(c), I also certify that a copy of the foregoing document was served to the Honorable Wendell Griffen at wgriffen@pulaskimail.net.

/s/ *Dylan Jacobs*
Dylan Jacobs