IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.*, APPELLANTS

v. No. CV-22-190

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

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, HON. WENDELL GRIFFEN, RETIRED PULASKI COUNTY CIRCUIT COURT CASE NO. 60CV-21-3138

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STATEMENT OF THE CASE AND FACTS

Plaintiffs sought to enjoin the Challenged Acts because each will burden lawful, eligible voters in the exercise of fundamental rights under the Arkansas Constitution. Defendants, the Secretary of State, and members of the State Board of Election Commissioners, in their official capacities (together, the "State"), agreed at trial that voting is a fundamental right. (**RT 792**).

The Circuit Court accordingly applied strict scrutiny review. In its 86-page statement of findings of fact and conclusions of law, the Circuit Court found as fact that the Challenged Acts infringe on fundamental rights of the Arkansas Constitution and permanently enjoined their enforcement. (**RP 1568-2653**).

The State largely ignores these findings of fact, except for two statements describing them as "overflowing with vitriol…and references to Hitler and fascism," Br. 8-9, and as "citing Adolf Hitler's *Mein Kampf*," "arguing that the four challenged laws were consistent with Hitler's claim" in that book, and "assert[ing] that somehow meant" the Challenged Acts were based on conjecture. Br. 18-19. In truth, the Circuit Court cited and quoted a book by Dr. Martin Luther King, Jr., and the findings were based on the evidence. (**RP 1651-1652**).

ARGUMENT

Standard of Review

Legal conclusions are reviewed *de novo*. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc*., 2014 Ark. 517, at 4, 451 S.W.3d 584, 586. Findings of fact are reviewed for clear error, "and shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses." Ark. R. Civ. P. 52(a). In this appeal, the State does not challenge the Circuit Court's findings of fact.

I. Strict scrutiny applies to Plaintiffs' right-to-vote claims.

This Court has long held that laws that infringe upon fundamental rights protected by the Arkansas Constitution are reviewed using strict scrutiny. The State admitted below that the right to vote is fundamental. It has waived any contrary argument. Because the right to vote is fundamental, when the facts establish that the Challenged Acts impede that right, they are subject to strict scrutiny. Here, the Circuit Court's factual findings were well supported by the record, and the State provides no basis to find otherwise. This Court should affirm.

A. Laws that infringe on fundamental rights protected by the Arkansas Constitution are reviewed under strict scrutiny.

"When a statute infringes upon a fundamental right" protected by the Arkansas Constitution, it is subject to strict scrutiny and "cannot survive unless 'a

compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley v. Picado*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350 (2002) (quoting *Thompson v. Ark. Soc. Servs*., 282 Ark. 369, at 374, 669 S.W.2d 878, 880 (1984)). Voting is a fundamental right broadly protected by the Arkansas Constitution.

The State takes the extraordinary position that the right to vote is *not* a fundamental right protected by the Constitution and that the Free and Equal Elections Clause applies—at most—to election contests. Br. 23-24. These are questions of law reviewed *de novo*, but the State's argument fails for several reasons.

1. The State waived the argument that the right to vote is not a fundamental right under the Arkansas Constitution.

Below, the State conceded that the right to vote is fundamental. *See* (**RT 792**) (Counsel for the State saying in closing "I would like to start by being clear that no one disputes that voting is a fundamental right"). The State is bound by the arguments that it made at trial. *Brown v. Lee*, 2012 Ark. 417, at 8, 424 S.W.3d 817, 821. Accordingly, this Court need not—and should not—proceed any further. Because this is the central tenet of the State's appeal, affirmance is proper. *See, e.g.*, *Schnick v. Russell*, 2022 Ark. App. 212, at 10, 645 S.W.3d 345, 350-51 ("It is well established that appellants were precluded from raising arguments on appeal that were not first brought to the attention of the circuit court.").

2. The Free and Equal Elections Clause broadly protects the right to vote.

Even if the Court reaches the argument, the State's contention that the Free and Equal Elections Clause applies only to election contests, Br. 23-24, finds no support in the law.

In fact, *Patton v. Coates*, 41 Ark. 111 (1883)—which the State cites, Br. 23—requires finding the opposite. *Patton* was decided only nine years after the adoption of the 1874 Arkansas Constitution in which the Free and Equal Elections Clause first appears. The Court held that the natural reading of the Clause requires the prevention of voter intimidation and fraud: if it did not prevent such things, the Court found, it would be "dead letter." *Patton*, 41 Ark. 111, at 126-27. As such, *Patton* clearly shows the Court's expansive view of the Clause shortly after its enactment—including in contexts other than election contests. *Id.* at 126.

Nor do the other cases the State cites support its view. *Jones v. Glidewell* finds that the constitutional guarantee of ballot secrecy is rooted in the Clause. 53 Ark. 161, 13 S.W. 723 (1890). It does not limit the Clause's reach. *Whitley v. Cranford* explains that when the Clause *is* invoked in an election contest, the results of an election should be vacated when its outcome is proven uncertain. 354 Ark. 253, at 260, 265, 119 S.W.3d 28, 32, 35 (2003). This is the voter-friendly conclusion: invalidating an election disenfranchises everyone who participated in it. And, again, *Whitley* does not limit the Clause's application to election contests.

A broad reading of the Clause is the only one that makes textual sense. Its plain terms guarantee that:

> Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof.

Ark. Const., art. 3, § 2. To accept the State's reading, the Court would need to read out nearly all these words and replace them with limitations found nowhere in the text. This includes the mandate that "*no* power," including *civil* power—e.g., power wielded by lawmakers—may "*ever* interfere to prevent the free exercise" of the right to vote. *Id.* (emphases added). If that were not clear enough, the Clause mandates that no "law" may "be enacted" that "*impair[s] or forfeit[s]*" "such right." *Id.* (emphasis added). Of course, the body that "enacts" laws in Arkansas is the General Assembly. Ark. Const., art. 5, § 1.

"Language of a Constitutional provision that is plain and unambiguous must be given its obvious and common meaning." *Ark. Hotels & Ent., Inc. v. Martin*, 2012 Ark. 335, at 8, 423 S.W.3d 49, 54. The State's argument that the Clause does not apply when the General Assembly enacts laws that impair or forfeit that right, *see* Br. 23-24, makes no sense. In fact, of all the states with some variation of a free and equal elections clause in their state constitutions, Arkansas's stands out as the most textually robust. It is the only Constitution to include the language: "nor shall *any*

law be enacted whereby such right shall be impaired or forfeited . . . ." Ark. Const., art. 3, § 2 (emphasis added).

Because the language of the Clause is clear, the Court need go no further. *See Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, at 720, 120 S.W.3d 525, 537 (2003). But, as the concurrence in *Martin v. Kohls* noted, history supports this reading as well: "With the adoption of the Arkansas Constitution in 1874, the people of Arkansas reserved all powers relating to voting and elections to themselves" with the Free and Fair Elections Clause, making "clear that the people of Arkansas jealously guarded the right of suffrage and restricted the General Assembly from enacting any law impairing such right." 2014 Ark. 427, at 17, 444 S.W.3d 844, 854 (Baker, Goodson, and Hart, JJ., concurring).

The State's view of the Clause would also yield an "absurd result." *Citizens to Establish a Reform Party v. Priest*, 325 Ark. 257, 264-65, 926 S.W.3d 432, 436-37 (1996) ("We will not adopt an interpretation of the law which leads to an absurd result"). It would mean that the General Assembly could mandate that all voting in the state take place at one polling place open for one hour and face no recourse under the Clause, even though such laws would disenfranchise almost all voters. The Clause cannot be read to support such a conclusion.

3. This Court applies strict scrutiny to laws that burden fundamental rights.

This Court reviews laws that burden fundamental rights protected by the Constitution using strict scrutiny. At trial, the State argued that, if the Challenged Acts do impede the right to vote, the Circuit Court should treat the right to vote differently than other fundamental rights and apply the federal *Anderson-Burdick* test instead. (**RP 327, 1482, 1579**). Now, having to contend with the extensive record of burden below, the State changes its approach, abandoning its advocacy for the *Anderson-Burdick* test, to instead argue that rational basis review applies. Br. 22-27. The State failed to make this argument at trial, and it is waived. *See supra* at 12-13. The argument is also meritless.

Anderson-Burdick is based on federalism concerns that are not at issue when a state considers its *own* voting laws under its *own* constitution. *See, e.g.*, *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018); *Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. 2006) (en banc). It first asks, as a matter of fact, whether and to what extent the law imposes a burden on voting rights. Strict scrutiny applies when the burden is severe, and less demanding scrutiny applies as it becomes less significant. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). However, even where a law imposes a lesser burden, the State *still* must show that it furthers "specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio State*

Conf. of NAACP v. Husted, 768 F.3d 524, 545 (6th Cir. 2014), *vacated on other grounds*, *Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). This is true even when the burdens are "minimal." *Id.* at 538 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)).

The State's new argument for straight rational basis review would afford *less* protection to voting rights than under the federal constitution, despite the significant difference in language between the Arkansas Constitution—which expressly protects that right—and the federal constitution, in which the right has been found to be implicit. *Compare Reynolds v. Sims*, 377 U.S. 533, 554 (1964), *with* Ark. Const. art. 3, § 2. Yet this Court has made clear that, when evaluating challenges under the Arkansas Constitution, it must "begin by looking to the language of [Arkansas's] constitutional provisions." *Jegley*, 349 Ark. 600, at 626, 80 S.W.3d at 346.

The State likely pivots away from *Anderson-Burdick*, because, if applied, the test would require affirmance based on the Circuit Court's extensive factual findings—none of which the State challenges on appeal. Even under *Anderson-Burdick*'s sliding test, those findings of fact would preclude reversal.

B. The Circuit Court correctly found that the Challenged Acts infringe on the right to vote.

The Circuit Court applied strict scrutiny only after concluding that each of the Challenged Acts infringes upon the right to vote. The State fails to show that any of

the Circuit Court's extensive factual findings regarding the burdens imposed on voting rights were clearly erroneous. This Court has repeatedly treated the question of whether a challenged law infringes a fundamental right as a question of fact. *See e.g.*, *Ark. Dep't of Hum. Servs. v. Cole*, 2011 Ark. 145, at 19, 380 S.W.3d 429, 439 (explaining that the question of whether a fundamental right is implicated is a factual one by relying on case where United State Supreme Court "held that no fundamental right was involved *under these facts* and that heightened scrutiny did not apply") (emphasis added) (citing *Lyng v. Castillo*, 477 U.S. 635 (1986)); *see also Worsham v. State*, 2019 Ark. App. 65, at 6, 572 S.W.3d 1, 4; *Linder v. Linder*, 348 Ark. 322, at 347, 72 S.W.3d 841, 855 (2002). This Court should affirm.

C. The evidence established that the Challenged Acts impose burdens on fundamental rights.

The Circuit Court issued a lengthy decision in which it carefully considered the evidence to conclude: (1) the Challenged Acts impede the right to vote, (**RP 1643**), (2) the right to vote is a fundamental right protected by the Arkansas Constitution, (**RP 1581**), (3) when a law is found to impede on such a right, it is subject to strict scrutiny, (**RP 1582**), (4) Act 728 infringes the rights to speak and assemble, (**RP 1648**) (5) Act 973 and Act 736 impermissibly impose new qualifications on the right to vote (**RP 1655**); (6) Act 249 violates Amendment 51, Section 19 (**RP 1655**); and (7) the Challenged Acts violate the Arkansas

Constitution's equal protection guarantees. (**RP 1647**). It accordingly permanently enjoined the Challenged Acts. (**RP 1655**). The relevant evidence regarding each Challenged Act is summarized below.

1. Act 736: The One-to-One Signature Comparison Requirement

Act 736 makes one critically important change to the law governing what election officials may consult when comparing signatures on absentee ballot applications to determine whether they are similar enough to issue a ballot. Previously, they could look at every signature from a voter on file—from their original application form, and every signature since (e.g., from poll books or recent absentee ballots). Act 736 strictly limits them to *one* comparator—from the voter's registration application—requiring they ignore more recent signatures. (**RP 1570-1571**; **1611**).

In finding that Act 736 will result in the erroneous rejection of lawful voters' applications, the Circuit Court credited unrebutted expert testimony from Dr. Linton Mohammed, a forensic document examiner with more than 35 years of experience, who has authored 18 peer-reviewed papers and two books on forensic signature examination and been accepted as an expert in more than 200 cases. (**RP 1623-1624**). As Dr. Mohammed testified, accurate signature comparison requires multiple comparators, (**RT 396**), but Act 736 nonsensically impedes officials' ability to make an informed determination by prohibiting looking beyond a single comparator,

which may be years or even decades old, made under different conditions, or otherwise vary (sometimes extremely) from the voter's signature on the ballot application. (**RT 392-396**).

Voters of advanced age are particularly susceptible to having applications rejected under Act 736, (**RP 1625**), as are those with conditions that can cause signature variability, including Plaintiffs Ms. Matthews Mock (**RP 1611-1612**); Ms. Dunlap (**RP 1630**); Dr. Watkins (**RP 1615-1616**); Mr. Rust, whose signature varies so significantly he has had a traveler's check rejected (**RP 1614-1615**); and many of the League's members, including Ms. Miller, the League's president, who testified as the League's representative at trial. (**RP 1616-1617**). Many of these voters registered decades ago. (**RP 1573-1574, 1615**). Thus, the only permissible comparator is now drastically different from their signatures today. (**RP 1612, 1614-1615, 1630**). Ms. Matthews Mock is even worse off, as Pulaski County cannot locate her registration signature at all—the only comparator permitted under Act 736. (**RP 1613**). Voters of national origins in which multiple surnames are common, including Arkansas United's many Latino members, are also at heightened risk of having their applications erroneously rejected. (**RT 278**).

The Circuit Court also heard from Pulaski County Election Commissioner Susan Inman, who the Circuit Court "recognized . . . as an expert witness concerning election procedures in Arkansas, election administration, and election integrity." (**RP**

1590). Commissioner Inman testified Act 736 "will disenfranchise voters" because, among other things, the State fails to adequately train on signature comparison, with any training skewed to encourage disqualification of signatures. (**RP 1621-1622**).

In fact, as the State corroborated, the county clerks do not receive *any mandatory* training in signature comparison. (**RT 385, 586**, **656-657, 663**) (Director Shults admitting Board does not train clerks on signature comparison; the process hinges on clerks' "judgment," not uniform statewide standards). And Mr. Bridges testified that the Secretary's Office trains election officials *not* to examine signatures on petition, initiative, and referendum forms, instead directing they use name, date of birth, and residential address to validate a voter's identity. (**RT 760**). He acknowledged that all this information is also included on any absentee ballot application. (**RT 760-761**).

The State's witnesses also admitted that signatures can vary—sometimes daily—and that signatures made closer in time may vary less. (**RT 650, 758-759, 887**). And, while Director Shults claimed that some of the hardships the Act imposes could be mitigated by re-registering every election, (**RT 572-573**), he conceded re-registering is a hardship. (**RT 651-652**). Even Act 736's sponsor admitted that signature comparison on absentee ballot envelopes often results in disenfranchisement, noting that "the main reason that . . . many ballots get rejected are because of signatures." (**RT 1038**).

Neither Director Shults nor Mr. Bridges was aware of a single instance of absentee ballot application fraud in a prior election. (**RT 667, 761**). And Dr. Mayer, a political scientist who is an expert in the statistical and quantitative analysis of voting, voter behavior, turnout, and election administration, who has been extensively published and repeatedly accepted as an expert by courts across the country, (**RP 1602-1603**), offered unrebutted testimony that election fraud is "vanishingly rare." (**RP 1610**). This is particularly true in Arkansas, which has had *only four known instances* of voter fraud since 2002—out of nearly 14 million votes cast. (**RT 453**). None would have been caught or prevented by Act 736. (**RT 454**).

2. Act 973: The Shortened In-Person Absentee Return Deadline.

Act 973 shortens the deadline for returning absentee ballots in person by three full days, from the Monday before election day to the Friday before. Ark. Code Ann. § 7-5-411(a)(3), (4) (2021). Absentee ballots returned by mail are timely if received by 7:30 p.m. on election day. *Id*. § 7-5-411(a)(1)(A). Act 973 thus (a) reduces the time a voter has to return their ballot in person and (b) creates separate and arbitrary deadlines based on how a ballot is returned. (**RP 1571**).

The State claimed this was to alleviate administrative burdens (**RT 735**), but the trial evidence was to the contrary. Absentee canvassers are not the same people who staff polling places. (**RP 1633**). And, as Director Shults admitted, no matter how or when a ballot is delivered, officials cannot canvass ballots until election day.

(**RT 673, 676**). Director Shults further admitted he did not know of *any* clerks who complained about the Monday deadline. (**RP 1639**). Mr. Bridges similarly testified he had no knowledge of "administrative burden" associated with the Monday deadline. (**RT 761-62**).

Governor Hutchinson refused to sign Act 973, concerned it "unnecessarily limits the opportunities for voters to cast their ballots prior to the election." (**RP 1632**). Commissioner Inman offered similar testimony that it deprives voters of crucial time to gather information they need before voting, and that the arbitrary revision to a deadline that had been in place for over thirty years was likely to confuse voters. (**RP 1608-1609**, **329-330)**; *see also* (**RP 1631-1632**). Those voters include Plaintiffs Ms. Dunlap, Ms. Matthews Mock, and Mr. Rust who rely almost exclusively on absentee voting due to health or mobility issues. (**RP 1629-1632**). Each hand-returns their ballots out of fear of mail delays. (**RP 1629-1632**). They have used the window of time that Act 973 eliminates to inform their voting. (**RP 1631-1632**). And for voters like Ms. Dunlap and Mr. Rust who depend on others for transportation, the Act makes it harder to obtain that help. (**RP 1631-1632**).

Dr. Mayer found that, previously, as many as 20.1 to 30.3% of absentee voters who returned their ballots in person did so during the three-day window that Act 973 eliminates. (**RT 1329**). Act 973 also creates an "informational burden" for all Arkansans "who now have to contend with three [] different deadlines" for absentee

ballots, making it harder "to understand what they need to do in order to vote." (**RT 442**).

3. Act 249: The Strict ID Requirement

Act 249 eliminates a vital failsafe for voters who lack a qualifying photo ID or cannot provide a photocopy of it with their absentee ballots. Under prior law, they could vote with an affidavit swearing to their identity under penalty of perjury. (**RP 1571-1572**). But under Act 249, any voter who does not present a compliant ID must travel in person to the county board within six days of the election to present one, or their ballot is rejected. (**RP 1572**).

Neither the Board nor the Commissioner of Arkansas's largest county is aware of a single instance of fraud arising because of the affidavit failsafe. (**RP 1636**, **1590-1591**). Its elimination, moreover, will disproportionately impact minority, poor, and elderly voters. (**RP 1591**). But even beyond that, 14% of Arkansas households lack a computer and likely also lack a photocopier or printer, making including a copy of compliant ID with an absentee ballot exceedingly difficult. (**RP 1608**); *see also* (**RT 291**) (Arkansas United testifying "Most immigrant families" like its members "don't have a computer let alone a printer, a copier."). Director Shults testified at least one voter mailed their physical ID with their ballot, likely due to lack of a photocopier. (**RT 612**).

Among the voters likely to be negatively impacted are Ms. Dunlap, an 85-year-old cancer survivor with very limited mobility, who no longer needs a license. Hers will expire in August 2025, and she would face great difficulty in attempting to obtain a free ID. (**RP 1588**). Similarly, many of the League's older members and Arkansas United's members lack acceptable ID, and even more lack computers and/or photocopiers. (**RP 1589**).

The State did not rebut any of this. And Director Shults admitted that for those voters who must vote absentee because they are unable to get to the polling place due to disability or infirmity, requiring them to travel to the county board's office to show compliant ID "would defeat the purpose of them voting absentee." (**RT 608-609**).

4. Act 728: The Voter Assistance Ban

Act 728 criminalizes going within 100 feet of a polling place unless there for "lawful purposes." Ark. Code Ann. § 7-1-103(a)(24) (2021). Violations are a class A misdemeanor, punishable by a fine of up to $2,500 and up to one year in county jail. Ark. Code Ann. §§ 5-4-201(b)(1) (2009), 5-4-401(b)(1) (2019); *id.*at § 7-1-103(b)(1).

The State justified the Ban as preventing electioneering, but its witnesses admitted electioneering was already criminalized. (**RP 1595**). Commissioner Inman testified the Ban was unnecessary for this exact reason—officials already enforced

pre-existing criminal prohibitions against electioneering in a 100-foot zone around polling places. (**RP 1602**). Director Shults expressly admitted the Ban does not "add much" to pre-existing prohibitions and does not mention electioneering, voter intimidation, or even loitering, in part because all were already prohibited. (**RP 1637-1638**).

The State's witnesses were not aligned on what the Ban means by "lawful purpose." Director Shults interprets it to prevent anyone from entering the 100-foot zone *except* for "ingressing or egressing" a polling place, (**RT 633-634**), while Mr. Bridges was unable to offer a definition. (**RP 1642**). Similarly, Ms. Matthews Mock, Dr. Watkins, and Mr. Rust testified that standing for long periods is difficult for them, but they are now unsure whether someone may wait with and assist them within the 100-foot perimeter. (**RP 1596-1601**).

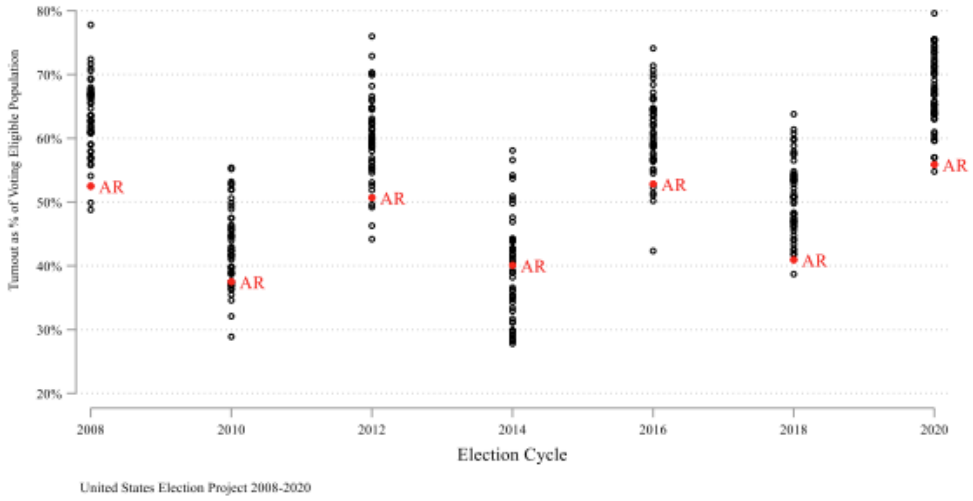
Regardless, the State conceded the Ban prohibits line-warming activity—i.e., the provision of snacks or water to voters waiting in long lines. (**RT 561**). Plaintiffs previously engaged in line-warming but are now unwilling to risk criminal prosecution. (**RT 131, 129-130, 286-289**); *see also* (**RT 287**) (Arkansas United's election assisters who "stand alongside voters" now risk criminal charges under the Ban, which "will have a huge impact" on the organization's ability to recruit volunteers). And, like other Challenged Acts, Act 728 will disproportionately impact

minority voters, who are more likely to wait in long lines. (**RP 1609**); *see also* (**RT 446**).

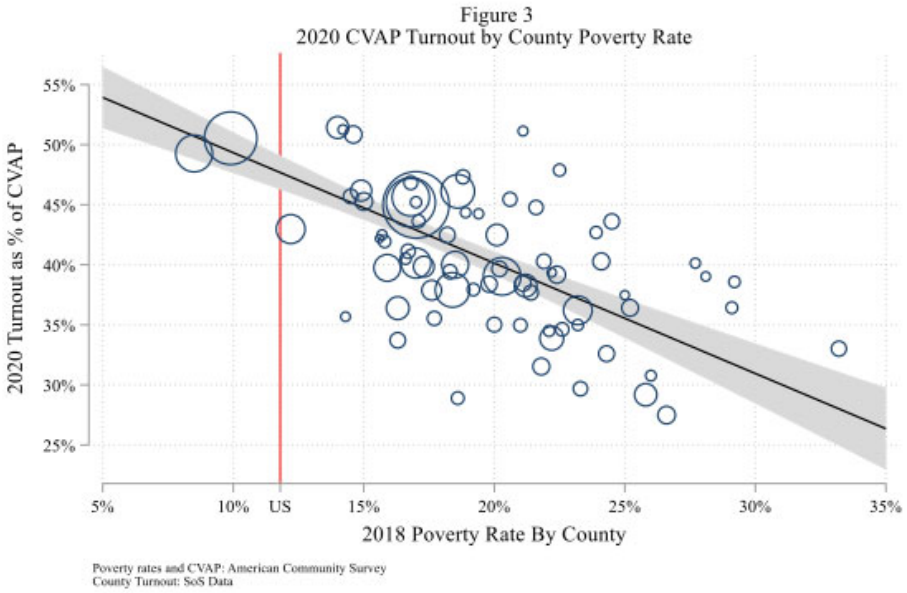
D. The evidence established that the State's interests are not furthered by the Challenged Acts.

Arkansas has a history of unusually low voter turnout, resulting from the State's uniquely restrictive election laws. (**RP 1591-1592**); (**RT 421, 436-437, 1315-1316**). This is reflected in Dr. Mayer's Figure 1:

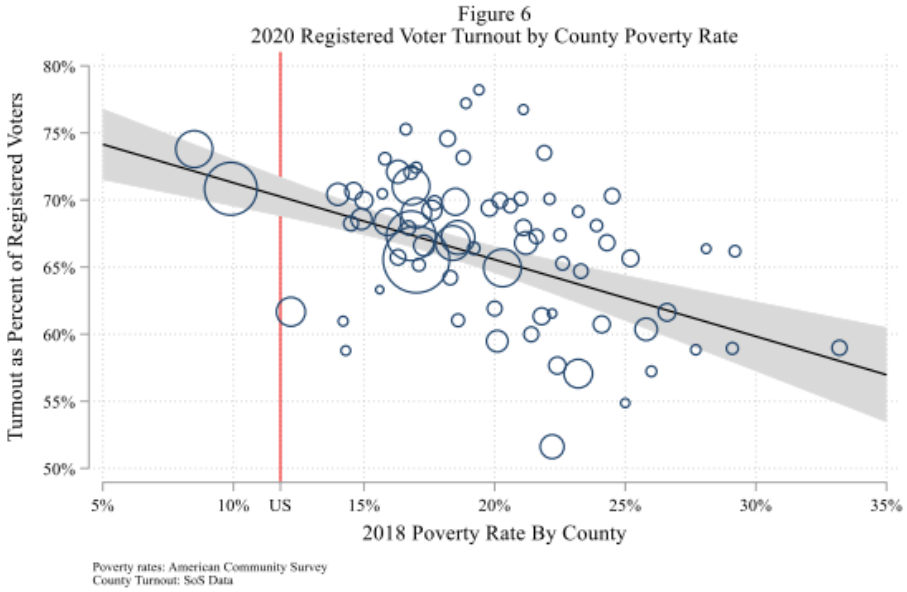
Figure 1
State Level VEP Turnout 2008-2020



(**RT 1316**). Decades of political science research confirm that restrictive laws like Arkansas's suppress participation of eligible voters. (**RT 1313-1314**). Poorer voters are most burdened:

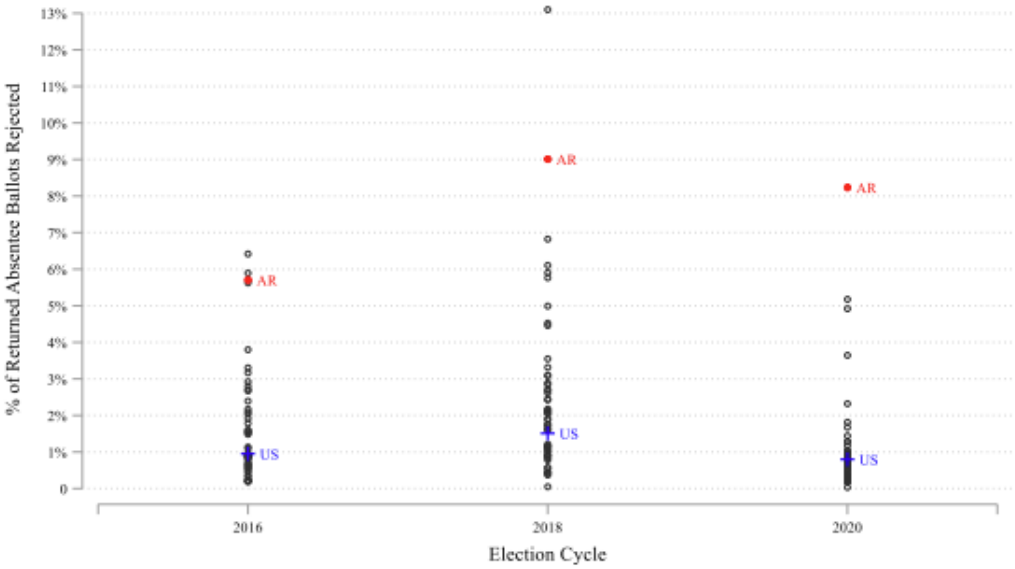


(**RT 1318**); *see also* (**RT 430, 473, 1330-1332**). This is true even among Arkansas's already-registered voters:



The impact of Arkansas's restrictive voting regime on absentee voters has been even starker. In recent elections, Arkansas has had, by far, the most significant rate of rejection for absentee ballots in *any* state:

Figure 7
Absentee Ballot Rejection Rates 2016-2020



Election Administration and Voting Survey 2016, 2018, and 2020

(**RT 1322**). There was *no* evidence that these ballots were fraudulent. Yet, Arkansas has been disenfranchising large numbers of these lawful, eligible voters, election after election.

The unrebutted evidence was that each of the Challenged Acts will increase rejection rates and further dampen turnout and participation among eligible Arkansas citizens. (**RT 420, 435-436, 441-442, 444, 446, 449**). The record further established that there was no justifiable reason for these changes. The State's witnesses admitted the Challenged Acts were enacted, not to solve actual issues, but in response to the

false impression of election insecurity based on *misinformation* and *unfounded allegations* about fraud following the 2020 election. (**RP 1637**).

Secretary Thurston declared the November 2020 general election the most successful in history, and his Office is confident that the results were accurate. (**RP 1639-1640**). Repeatedly, the State's witnesses took pains to dispel misinformation and disinformation about claims of fraud, despite pointing to those same falsehoods in support of the laws. (**RP 1637, 1639-1640);** (**RT 620, 667, 721-723, 744, 961**). Other explanations given by the State for the laws were repeatedly proven untrue at trial.

E. The Circuit Court did not clearly err in finding the Challenged Acts infringe on the right to vote.

The Circuit Court only applied strict scrutiny after concluding that each of the Challenged Acts infringes upon the right to vote. The State fails to show that any of the Circuit Court's extensive factual findings regarding the burdens the Challenged Acts impose on voting rights were clearly erroneous. The decision below should be affirmed.

II. The Strict ID Requirement (Act 249) violates Amendment 51, Section 19.

The General Assembly does not have unchecked authority to enact any voter ID law, without regard to whether it will disenfranchise lawfully registered voters. It is limited to legislation that is germane to and in furtherance of the policy and

purpose of Amendment 51. Here, the evidence proved Act 249 goes too far. This Court should affirm.

A. Act 249 makes it impossible for some qualified, registered voters to vote, while failing to advance any sufficiently weighty state interests.

Act 249 eliminates the safeguard previously in place to ensure that registered voters who, for whatever reason, could not produce acceptable ID, would still be able to exercise their right to vote. (**RP 869-871**). There is *no* evidence that the affidavit failsafe resulted in any fraud. But the unrebutted evidence established that Act 249 burdens qualified, registered voters in exercising their right to vote. The State does not contend that *any* of these factual findings were clearly erroneous.

1. The Circuit Court correctly found as fact that Act 249 significantly burdens lawfully registered voters.

The State does not dispute that Act 249 disenfranchises voters who lack acceptable identification or the means to obtain it. Its witnesses admitted that requiring absentee voters who cannot enclose a copy of their ID with their ballots to travel to present their ID "defeats the purpose" of voting absentee. (**RT 608-609**). Nor does the State dispute that the Court's finding that Act 249 imposes significant and severe burdens on voters was supported by the evidence. (**RP 1587-1588**; **1644**). It was.

In the 2020 general election, 1,600 eligible voters *in Pulaski County alone* voted using the affidavit failsafe, (**RT 1327**), and Director Shults testified that "tens

of thousands of voters" had relied on it in prior elections. (**RT 613**). The unrebutted evidence further showed that, since free voter ID became available in 2017, hardly any have issued, and there are serious hurdles to obtaining one, including traveling to the county election office during business hours and producing two underlying identifying documents. (**RT 742, 882-883**); *see also* (**RT 752-753, 1404-1406**) (showing only 88 known free voter IDs have been issued statewide).

The evidence also showed that Act 249 burdens voters with acceptable ID who lose it or forget to bring it to the polls. Voters who find themselves in this predicament—like Governor Hutchinson in 2014 (**RP 1643**)—will be disenfranchised unless they return to the clerk's office on a weekday immediately following the election to present it. (**RT 539**). Voters with inflexible work hours, limited transportation access, significant caregiving responsibilities, or mobility issues may find it extremely difficult, and potentially impossible, to comply. (**RT 364**) (voters who live in remote areas must travel for hours, within a narrow window, or be disenfranchised). Some—including among Plaintiffs' membership and constituencies—will be unable to do so. (**RT 282**). For voters unlucky enough to lose their ID close to an election, they may have no hope of compliance.

Act 249 also burdens the rights of absentee voters, who must include a copy of their ID with their ballot or report to the clerk's office in person on a weekday to present it. As Director Shults admitted, requiring these voters to appear in person

"defeats the purpose" of voting absentee. (**RT 608-609**); (**RT 1058**) (Representative Whitaker stating that people who "voted absentee in the first place" because of limited mobility will be unlikely to travel to submit their ID). And many do not have the means to photocopy their ID. (**RT 283**); (**RP 1608**); (**RT 1328**).

The affidavit failsafe ensured these voters' ballots counted without incurring these burdens. But under Act 249, they now face disenfranchisement.

2. The Circuit Court correctly found that no state interest is served by Act 249 that justifies its burdens.

Since 2002, there have been only four instances of voter fraud in Arkansas, none involving the affidavit failsafe. (**RT 452-453**). And the State makes no argument, nor could it, that Act 249 represents the least restrictive method for ensuring election integrity. As the State's witnesses confirmed, the affidavit failsafe was fully effective at preventing fraud: although "tens of thousands of voters . . . relied on" it, "the board is not aware of a single prosecution for perjury arising out of a false signature on the affidavit fail safe." (**RT 613**). This testimony was echoed by Commissioner Inman, who was similarly unaware of any related instance of fraud. (**RT 364**). And it was further confirmed by the analysis of Dr. Mayer, who found *no* instances of fraud or misconduct associated with the affidavit failsafe. (**RT 452-453**).

The State admitted that Act 249, like each of the Challenged Acts, was enacted to combat the *false impression* of election insecurity, which both Director Shults and

Mr. Bridges testified was based on disinformation and lies. *See supra* at 30, *citing* (**RP 1637, 1639-1640**). An imaginary problem cannot justify the disenfranchisement of so many registered voters. *See Glidewell v. Arkhola Sand & Gravel Co.*, 212 Ark. 838, at 844, 208 S.W.2d 4, 8 (1948) (*quoting Moran v. State*, 179 Ark. 3, 13 S.W.2d 828, 830 (1929)) ("Reasonable inferences may be drawn from positive or circumstantial evidence, but to allow inferences to be drawn from inferences, or presumptions to be indulged from other presumptions, would carry deduction into the realm of speculation and conjecture").

B. Amendment 99 does not permit Act 249.

The State argues that Act 249's disenfranchisement of qualified, lawfully registered voters does not matter, contending that the General Assembly is free to enact *any* ID law without *any* limitation. Br. 29-30. The State bases this argument on Amendment 99 to the Arkansas Constitution, but it goes too far. As this Court held in *Martin v. Haas*, 2018 Ark. 283, at 10, 556 S.W.3d 509, 516, voter ID legislation must be "germane to" and "consistent with the policy and purpose" of Amendment 51—this remains true after the enactment of Amendment 99.

Amendment 51, "abolished the poll tax" and "provide[d] a comprehensive regulatory scheme governing the registration of voters." *Id.* The policy of Amendment 51 is set forth in Section 1 of its text, which states:

> The purpose of this amendment is to establish a system of permanent personal registration as a means of determining that all who cast ballots

> in general, special and primary elections, in this State are legally qualified to vote in such elections, in accordance with the Constitution of Arkansas and the Constitution of the United States.

Ark. Const. amend. 51 § 1; *see also Haas*, 2018 Ark. 283, at 10, 556 S.W.3d 509, 516. This purpose has three critical aspects: (1) "to establish a system of *permanent* personal registration," Ark. Const. amend. 51 § 1 (emphasis added), indicating the intention was to avoid burdening voters with continuous re-registration, which could significantly impact their ability to vote; (2) that system was meant to ensure that the participating voters "are legally qualified to vote in such elections," *id*.; and (3) the system must be "in accordance with" both the federal and state constitution. *Id*.

In 2018, voters approved Amendment 99, "[a] Constitutional Amendment Adding as a Qualification to Vote that a Voter Present Certain Valid Photographic Identification When Casting a Ballot In Person or Casting an Absentee Ballot." Ark. Const. amend. 99, § 2. As even the State admits, for years after the passage of Amendment 99, voters were permitted to use the failsafe in lieu of specific forms of photo ID. (**RT 619**) (Shults testifying "Amendment 99 did not require the General Assembly to pass a strict voter ID law"). In other words, Amendment 99 did not require Act 249's elimination of the failsafe. Nor did Amendment 99 modify the purpose statement found in Amendment 51.

To be clear, Appellees do not argue that Arkansas cannot enact a system of voter ID consistent with Amendment 51's policy and purpose. This Court found it

could in *Haas*, which considered the voter ID law in place before Act 249. However, that law *included* the failsafe. 2018 Ark. 283, at 2, 13, 556 S.W.3d at 512, 517. And, after careful consideration of its requirements, this Court found the law was germane to and furthered the policy and purpose of Amendment 51. *Id*. This is logical. Allowing voters who cannot comply with the prior law's first tier requirements to have their ballot counted based on an affidavit is consistent with each of Amendment 51's purposes. *First*, it ensures that qualified and lawfully registered voters can execute on their registration and cast ballots that will be counted, effectuating a system of permanent personal registration. *Second*, the failsafe and confirmation from the clerk that there is no other reason to reject the ballot ensures the voter is "legally qualified to vote in such elections." Ark. Const. amend. 51 § 1. *Third*, there was no evidence presented in *Haas* that established that the law imposed a burden on qualified Arkansans' right to vote in violation of the federal or state constitutions. 2018 Ark. 283, at 4, 556 S.W.3d at 513.

In contrast, Act 249 violates each of the three components of Amendment 51's policy and purpose. *First*, it effectively converts the registration of voters who are unable to procure or produce acceptable ID to registration in name only—because they cannot cast a ballot—directly undermining the requirement of "a system of *permanent* personal registration." Ark. Const. amend. 51, § 1; (**RP 1644**) (summarizing evidence to conclude that "Act 249 *disqualifies registered voters* . . .

from voting"). *Second*, the evidence established that Act 249 is not necessary to ensure that voters are "legally qualified to vote," because the failsafe was already serving that purpose more than adequately. *See supra* at 33. *Finally*, the significant burdens imposed on voters who are unable to produce one of the limited forms of acceptable ID within the time allotted violate the Arkansas Constitution. *See supra* at 31-33.

This case is accordingly starkly different than *Haas*, where the Court did not have to grapple with the question of whether a voter ID regime that did not contain a failsafe could be consistent with the Constitution and Amendment 51. 2018 Ark. 283, at 4, 556 S.W.3d at 513 (explaining a voter without ID would have their provisional ballot counted). Moreover, here, unlike in *Haas*, the Circuit Court was confronted with unrebutted evidence showing that that the elimination of the affidavit failsafe burdens the right to vote, without justification. For all these reasons, the Circuit Court's conclusion that the Act violates Amendment 51 and decision to permanently enjoin it should be affirmed.

III. Act 736 and Act 973 impose new qualifications on the right to vote in violation of Art. 3, § 1 of the Arkansas Constitution.

The Arkansas Constitution guarantees that, "except as otherwise provided" in the state constitution itself, "any person may vote" if they are (1) a U.S. citizen, (2) an Arkansas resident, (3) at least 18 years old, and (4) lawfully registered to vote. Ark. Const., art. 3, § 1 (the "Qualifications Clause"). As this Court noted in *Martin*

v. Kohls, "[f]or approximately 150 years," it "has remained steadfast in its adherence to the strict interpretation of the" Qualifications Clause. 2014 Ark. 427, at 13, 444 S.W.3d at 851.

In arguing this Court did not mean "strict" when it said "strict," the State mischaracterizes the precedent, arguing that the only time a regulation may be invalid under the Qualifications Clause is when it dictates who can vote, not when it burdens that right. Br. 24. But in *Martin v. Kohls*, this Court *did* strike down a law that imposed a burden upon the exercise of that right by otherwise qualified voters, rather than a total prohibition on certain categories of voters. *See* 2014 Ark. 427, at 13-14, 444 S.W.3d at 851-52.

Even before the current 1874 Constitution was adopted, the rule has been simple: "[T]he right of those having the constitutional qualifications to vote, is founded in the fundamental law of the land, and cannot be legislated away." *Rison v. Farr*, 24 Ark. 161, at 171 (1865). This includes legislation that "restrain[s] . . . the exercise of that right," and "any law infringing upon that right as vested by the constitution is null and void." However, even if a *lesser* standard applied, the Circuit Court's conclusion that Acts 736 and 973 violate the Qualifications Clause should be affirmed. This is because not only did the evidence show they both infringe on the right to vote of voters possessing all the qualifications required by the

Constitution, but because the State proffered *no* legitimate interest that could justify either new restriction.

First, the Arkansas Constitution includes no penmanship requirement, yet Act 736 denies voters who cannot vote in person the ability to vote at all based on an unreliable signature verification process. The unrebutted evidence was that even experts need multiple exemplars to conduct signature verification reliably. The State did not deny this. Instead, it defended the Act by claiming that it helps the *voters* because they supposedly know which exemplar will be used. (**RT 733-734**). But no evidence supported this claim: e.g., there was no evidence that voters know which exemplar officials are using, know they can update it (or how to), have a copy of that record, or know that they can request it. And the State admitted that some voters' signatures constantly vary, (**RT 887, 650, 758-759**), undermining the contention that voters' knowledge even matters. Nor did the State explain how it can justify the law considering qualified voters like Ms. Matthews Mock will likely be disenfranchised because her voter registration signature cannot be located, leaving the County without the only permissible signature comparator under the Act. (**RP 1613**). It is not clear that she can vote absentee at all. The Circuit Court correctly found that Act 736 infringes upon the right to vote of voters who possess all qualifications the Constitution requires. (**RP 1646**).

Second, Act 973 imposes a disparate temporal qualification on absentee voters

unrelated to their eligibility established by the Constitution. (**RP 1630-1632, 1571**). The Circuit Court correctly found that this requirement, too, infringes on the right to vote of voters with all necessary qualifications. (**RP 1646-1648**). Moreover, the State's contention that administrative efficiency justifies the Act was refuted by the evidence. (**RP 1633**) (Commissioner Inman testifying Act 973 does nothing to lighten administrative load); (**RT 673, 676**) (Director Shults admitting he was not aware of any issues) (**RT 761-762**) (Mr. Bridges admitting same). Given recent issues with timely mail delivery, *see* (**RT 70**) (Ms. Dunlap testifying it took *two months* for a Christmas card mailed in 2020 to arrive), restricting voters from hand-delivering their ballots in the final days of the election, and instead simply hoping the postal service delivers them in time, is not rational and cannot withstand any standard of review.

IV. The Voter Assistance Ban (Act 728) violates the rights to free speech and assembly under Article 2, §§ 4 and 6 of the Arkansas Constitution.

Act 728 violates the rights to speech and assembly under the Arkansas Constitution. *See* Ark. Const. art. 2 § 4; *id.* art. 2 § 6. At minimum, Arkansas's Constitution provides as much protection as the First Amendment. *See McDaniel v. Spencer*, 2015 Ark. 94, at 8, 457 S.W.3d 641, 649. Accordingly, this Court has treated First Amendment cases as instructive. *See id.*

The legislative record was clear that the purpose of Act 728 was to prohibit voting support groups from "handing out bottled waters and other things" to voters

waiting in line to vote. (**RT 1099**) (Sponsor, Senator Hammer); (**RT 1330**) (Representative Karilyn Brown). Notably, there were no concerns articulated that these interactions were unwelcome or harmful to voters. In fact, in public testimony against the bill, advocates explained how organizations were acting as "good Samaritans to just say . . . happy voting, thank you for voting." (**RT 1103**).

This voter-support activity (often referred to as "line warming") is communicative speech and activity, "celebrating civic engagement" and voters who withstand long lines to vote. (**RT 1103**). At trial, the Court heard testimony about the importance of the messaging conveyed by non-partisan line-warming activity, including how it increases voter confidence and helps stop misinformation about election integrity. (**RT 228, 367-368, 1103**). The undisputed evidence further established that minority voters are more likely to encounter long lines and on average wait nearly 30% longer than non-white voters. (**RT 1330-1331**).

The Ban accomplishes its goal of banning line-warming by prohibiting any person except voters from "enter[ing] or remain[ing] in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place." (**RT 868**). As the evidence established, this prohibition is unconstitutionally vague, its precise reach not readily discernable by persons of ordinary intelligence, and highly susceptible to arbitrary enforcement. It can and should be struck down on those grounds alone. *See Abraham v. Beck*, 2015 Ark. 80, at 13, 456 S.W.3d 744,

753 (citing *Craft v. City of Fort Smith*, 335 Ark. 417, 424, 984 S.W.2d 22, 26 (1998)). The State's own witnesses' testimony supported this conclusion, including Mr. Bridges, who could not say what "lawful purpose" means. (**RP 1642)**. This invites arbitrary enforcement. *See also* (**RT 1331**) (unequal exercise of discretion by election officials is well-documented). When laws risk arbitrary enforcement against persons exercising their fundamental speech rights, they must be struck down as unconstitutionally vague. *Craft*, 335 Ark. 417, at 424, 984 S.W.2d at 26.

The State's witnesses agreed that, at the very least, the Ban prohibits what the General Assembly intended—specifically, non-partisan groups providing water and food to voters within 100-feet of a polling place. (**RT 561**). As a result, like other laws passed elsewhere to the same purpose or effect, the Ban criminalizes protected speech and expression. *See, e.g.*, *In re Ga. S. B. 202*, No. 1:21-CV-55555-JPB, 2023 WL 5334617, at *14 (N.D. Ga. Aug. 18, 2023) (preliminarily enjoining law prohibiting distribution of food and drinks to voters waiting in line on First Amendment grounds); *Brooklyn Branch of Nat'l Ass'n for Advancement of Colored People v. Kosinski*, No. 21 CIV. 7667, 2023 WL 2185901, at *10 (S.D.N.Y. Feb. 23, 2023) (finding "[a]t least two courts have determined that line warming is expressive conduct protected by the First Amendment").

As in those cases, the Circuit Court properly applied strict (or "exacting") scrutiny. *See In re Ga. S. B. 202*, 622 F. Supp. 3d 1312, 1330, 1333 ("As a baseline,

a statute that regulates expressive conduct is subject to 'the most exacting scrutiny.'") (quoting *Texas v. Johnson*, 491 U.S. 397, 412 (1989)). Accordingly, after finding, based on unrebutted testimony, that the Act burdens Plaintiffs' ability to communicate support to voters when they need it most, (**RT 288**, **130-131**), the burden properly shifted to the State to show it was narrowly tailored to further a compelling interest. The State failed to carry this burden.

The only justification the State offered was that the Ban was meant to target electioneering, voter intimidation, or loitering. (**RP 1595**). But as the legislative sponsors and the State's witnesses acknowledged, Arkansas already prohibited loitering, voter intimidation, and electioneering activities with 100 feet of polling places. (**RP 1637-1638**). There was no evidence that these pre-existing laws were insufficient. Voter support organizations also testified before the General Assembly that the electioneering law is effectively and aggressively enforced, and that there are some polling places where—because of their configuration—organizations *have* to set up within 100 feet to provide voter support. (**RT 1100-1102**).

On appeal, the State's only defense is to claim that the Act is lawful because the Supreme Court has previously upheld an electioneering ban as constitutional. *See* Br. 33 (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). The first problem is that the State has admitted that the Act is *not* a mere electioneering ban: not only was electioneering already illegal, the State conceded that the Act prohibits *non-*

partisan line-warming activity, which—by definition—is *not* electioneering. *Id*. *Burson* simply holds that a law restricting *electioneering* within 100 feet of a polling place can withstand strict scrutiny *if* it is narrowly tailored to serve a compelling state interest. 504 U.S. at 198. It is no bar to relief here. Indeed, just a few weeks ago, a federal court in Georgia found that a ban intended to reach line warming violates the First Amendment. *In re Ga. S. B. 202*, 2023 WL 5334617, at *14.

Finally, it is well established that a restriction on speech cannot be supported by a putative interest in preventing conduct that is *already* prohibited under state law and "generic criminal statutes." *McCullen v. Coakley*, 573 U.S. 464, 490–92 (2014). The Circuit Court should be affirmed.

V. The Circuit Court correctly found that the Challenged Acts violate equal protection.

In finding in favor of Plaintiffs on their equal protection claims, the Circuit Court relied on unrebutted evidence establishing that the Challenged Acts were intended to make it harder for lawful voters to vote, and that they will further depress Arkansas's abysmally low turnout rates, especially among African-Americans living in poverty, and less-educated people. (**RP 1602-1611**); *see supra* at 27-29. Because the unrebutted evidence established that the Challenged Acts are intended to make it harder for Arkansans to exercise their fundamental rights—including voters who are members of a suspect class—the Circuit Court rightly applied strict scrutiny. *Howton v. Arkansas*, 2021 Ark. App. 86, at 7, 619 S.W.3d 29, 35 (setting forth the

legal standard for an equal protection challenge but finding that the plaintiff's claim did not warrant strict scrutiny because it did not implicate a suspect class or a fundamental right).

As Dr. Mayer explained, the negative effects of the Voter Assistance Ban are likely to be greatest in areas with large minority populations, because "minority voters were much more likely to wait at least 30 minutes to vote, and on average waited nearly 30% longer to vote than white voters." (**RT 1330**). In addition, "[a] lack of clarity about what constitutes a 'lawful purpose' and who is responsible for making that determination . . . creates additional risks for the unequal application of poll worker discretion." *Id.* "And prohibiting the practice of offering water to voters who may be waiting in long lines with significant waiting times will have the effect of imposing disproportionate burdens on poor and minority voters." *Id.*

Arkansas United also testified that: (1) Act 736 "targets" immigrant voters for disenfranchisement because they typically have multiple surnames and exhibit more variation than other voters based on which surnames they use when signing; (2) Act 728 imposes more severe burdens on immigrants and non-English speaking voters who are more likely to require assistance to translate election materials; and (3) Act 249 imposes even more severe burdens on immigrant voters whose surnames are often rearranged or changed, causing the DMV to get their names wrong and making

them more likely to have their ID rejected by poll workers. (**RT 277-279, 283-284, 287-288**).

REQUEST FOR RELIEF

For the reasons stated herein, Plaintiff-Appellees respectfully request that this Court affirm the Circuit Court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, I electronically filed this brief using the Court's electronic filing system, which shall send notification of such filing to all counsel of record pursuant to Administrative Order No. 21, § 7(a).

I further certify that I have served the foregoing by first class mail on the following:

Honorable LaTonya Austin-Honorable
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CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

I hereby certify that this brief complied with Administrative Order No. 19's requirements concerning confidential information and that the brief conforms to the word-count limitations set forth in pilot Rule 4-2(d). Specifically, the jurisdictional statement, the statement of the case and the facts, argument, and request for relief altogether contain 8,299 words according to the word-count feature of Microsoft 365 Apps (Word) for enterprise.

The Brief also complies with Administrative Order No. 21, Section 9 in that it does not contain hyperlinks.

Identification of paper documents not in PDF format:

There are no original paper documents not in PDF format included in the PDF document.

/s/ Jess Askew III
(Signature of filing party)

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KUTAK ROCK LLP
(Firm)

August 30, 2023
(Date)