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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

On Appeal from the Circuit Court of Pulaski County, Fifth Division
No. 60CV-21-3138 (Hon. Wendell Griffen, retired)

Appellants' Brief

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)
Solicitor General

DYLAN L. JACOBS (2016167)
Deputy Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-3661
dylan.jacobs@arkansasag.gov

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this appeal from a final judgment. Ark. R. App. P.—Civ. 2(a)(1). The circuit court entered its injunction on March 24, 2022 (RP 1655), and the State filed its notice of appeal the same day. (RP 1661). The court reporter failed to transcribe the underlying proceedings in a timely manner, and as a result, the circuit court extended the deadline to lodge the record by the maximum seven months. Because the court reporter continued to fail to transcribe the proceedings in this matter, Defendant-Appellants timely sought and received a writ of certiorari to complete the record. *See* Order, December 1, 2022. Once the court reporter completed the trial transcript, Appellants timely lodged the record. *See* Order, April 6, 2023.

As between this Court and the Court of Appeals, jurisdiction lies here under, variously: Arkansas Supreme Court Rule 1-2(a)(1) because this case involves the interpretation or construction of the Arkansas Constitution; Rule 1-2(a)(4) because it involves election procedures; Rule 1-2(b)(1) because it involves issues of first impression; Rule 1-2(b)(4) because it involves issues of substantial public interest; Rule 1-2(b)(5) because it involves significant issues needing clarification and development of the law; and Rule 1-2(b)(6) because it involves substantial questions of law concerning the construction or interpretation of an act of the General Assembly.

STATEMENT OF THE CASE AND THE FACTS

American elections have "always been a decentralized activity" with rules set by state legislators and administered by local officials. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *cf.* U.S. Const. art. 1, sec. 2, cl. 1. These voting rules balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, States balanced the interests in promoting voting and preventing fraud by requiring voters to cast ballots in person on Election Day. Arkansas strikes this balance by providing voters a variety of ways to cast a ballot safely and securely. These include early in-person voting, Ark. Code Ann. 7-5-418, in-person voting on Election Day, *id.* 7-5-102, and absentee voting with delivery in person, by mail, or by third party. *id.* 7-5-401 *et seq.*

In this case, Plaintiffs challenge how the General Assembly struck that balance. Former Circuit Court Judge Wendell Griffen agreed with Plaintiffs and—in an order overflowing with vitriol, outlandish assertions, and references to Adolf

Hitler and fascism—enjoined four state election laws. This Court should reverse that order and hold that the challenged regulations are constitutional.

A. Plaintiffs' Claims Concerning the Challenged Laws

Plaintiffs' lawsuit alleges that four commonsense election-integrity regulations enacted during the 93rd Arkansas General Assembly violate the Arkansas Constitution. And the circuit court agreed, enjoining all four regulations.

1. Act 736 – Absentee Application-Verification Requirement

Arkansas law has long required county clerks to verify that signatures on absentee-ballot applications are "similar" to signatures on voter registrations. Ark. Code Ann. 7-5-404(a)(2)(A); *see* 1999 Ark. Act 1111, 82d General Assembly, Reg. Sess., sec. 1 (Apr. 5, 1999) (voter's "name, address, date of birth and signature" must be verified). Plaintiffs haven't challenged that requirement. *See* (RT 671 (recognizing "[t]here was a similarity requirement before Act 736")).

Instead, they challenge Act 736, which merely clarifies that clerks must use a voter's "registration application," as opposed to the voter's "registration records," to conduct that verification. 2021 Ark. Act 736, 93rd Gen. Assembly, Reg. Sess., secs. 2, 3 (Apr. 15, 2021). That provision imposes a uniform standard across all 75 Arkansas counties for verifying absentee-application signatures (RT 733), and it relieves uncertainty about what is used for comparison. (RT 571-572, 734). Moreover, if a voter is concerned that his or her signature has changed over time,

that provision allows the voter to update his or her registration at the same time he or she requests an absentee ballot. (RT 572-573, 650). And to ensure an absentee application isn't wrongly rejected, the law requires clerks to "[p]rovide notice promptly to the voter" using "the most efficient means available" and allow resubmission. Ark. Code Ann. 7-5-404(a)(2).

Plaintiffs argue that provision somehow violates the right to vote, equal protection, and provisions governing voting qualifications in Article 3, section 1 of the Arkansas Constitution. But they don't explain how.

2. Act 973 – In-Person Absentee-Ballot Delivery Deadline

Arkansas is one of only a handful of States that issue absentee ballots to voters more than 45 days before an election, giving voters a larger-than-usual window of time to submit their ballots. *See* "Voting Outside the Polling Place, Table 7: When States Mail Out Absentee/Mail Ballots," *National Conference of State Legislatures* (July 18, 2023), https://www.ncsl.org/elections-and-campaigns/table-7-when-states-mail-out-absentee-mail-ballots. To maximize voter convenience, absentee ballots may be mailed or delivered in-person to the county clerk's office until shortly before Election Day. Ark. Code Ann. 7-5-411; *see id.* 7-5-411(a) (ballots can be delivered by mail until "7:30 p.m. on election day").

The 2020 election saw a dramatic increase in absentee voting, and Act 973 responded to concerns that a dramatic increase in in-person ballot deliveries on

Election Day-eve could unduly burden election workers as they are preparing for in-person voting on election day. (RT 564-565, 576, 673, 677-680, 711, 735-736). It did so by moving the deadline for in-person ballot delivery back one business day—from the Monday before Election Day to the preceding Friday. Ark. Code Ann. 7-5-404(a)(3)(A) (codifying 2021 Ark. Act 973, 93rd Gen. Assembly, Reg. Sess., sec. 1 (Apr. 27, 2021)). Ballots may still be mailed to the clerk's office, and if it is too late for a voter to deliver an absentee ballot in-person, the voter may cast an early vote. *See* (RT 577).

Plaintiffs claim the one-day change in the in-person delivery deadline somehow violates the right to vote, equal protection, and Article 3, section 1's voter qualification provisions. Yet, they don't even attempt to explain how that deadline—especially paired with other opportunities to cast a vote—hampers voting.

3. Act 249 – Photo-Identification Requirement

The Arkansas Constitution requires a voter to present photo identification to cast a ballot, Ark. Const. amend. 99, and Arkansas law provides that virtually any U.S.- or State-issued photo identification qualifies. Ark. Const. amend. 51, sec. 13(b). State law likewise provides that any voter who does not possess valid photo identification may obtain a qualifying voter-verification card from the county clerk's office "without the payment of a fee or charge." Ark. Code Ann. 7-5-324(b), (c); *see* (RT 544-545).

Act 249 tweaked the process for verifying absentee ballots cast by voters who failed to present photo identification. It repealed a provision allowing those voters to complete a sworn statement indicating that they are registered when casting a vote, 2021 Ark. Act 249, 93rd Gen. Assembly, Reg. Sess. (March 3, 2021), while—consistent with Amendment 99—making mandatory the that such voters provide photo identification to the county board or clerk by noon on the Monday following Election Day. Ark. Const. amend. 51, sec. 13(b)(4), (5).

Plaintiffs say that change violates the right to vote and equal protection and isn't germane or consistent with Amendment 51, section 19. Yet they don't grapple with *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509 (2018), or explain how the law denies anyone equal protection or an opportunity to cast their vote.

4. Act 728 – Anti-Influence Provision

Act 728 bars "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 except for a person entering or leaving a building where voting is taking place for lawful purposes." Ark. Code Ann. 7-1-103(a)(24) (codifying 2021 Ark. Act 728, 93rd Gen. Assembly, Reg. Sess. (April 15, 2021)); *see* Ark. Code Ann. 7-5-310(a)(3) (non-exhaustive list of lawful purposes). Act 728 responded to complaints about organized election-related activities immediately outside polling places. (RT 494-497).

Plaintiffs assert that provision violates the right to vote, equal protection, and the right to speak and assemble. In particular, Plaintiffs bizarrely claim that provision deprives voters standing in line of water and snacks, despite the fact that nothing prevents voters from bringing their own food or water. (RT 561-562). Nor are Plaintiffs' claims about caretakers and children being barred within 100 feet of a polling station any more credible. *See* Ark. Code Ann. 7-5-310(a)(3)(D), (E). And they don't grapple with countless cases upholding similar restrictions against speech and assembly challenges.

B. Trial Testimony and Bench Ruling

The circuit court held a four-day bench trial at which both Plaintiffs and Defendants presented witness testimony. And on the last day of trial, former Judge Griffen gave on the record an extraneous "history lesson" concerning discrimination and violence in other States between 1831 and 1974. (RT 702-705).

1. Plaintiffs' Witnesses

Plaintiffs called multiple witnesses who testified to their generalized objections to the challenged laws—each claiming variously that the challenged provisions would make it difficult to vote, that they believed the new requirements for absentee voting were burdensome and unnecessary, and that they were afraid their votes might not count. *See* (RT 37-81 (Dortha Jeffus Dunlap)); (RT 81-108 (Patsy Watkins)); (RT 108-181 (Bonnie Miller, President of Plaintiff League of Women

Voters of Arkansas)); (RT 181-218 (Jeffrey Rust)); (RT 218-263 (Nell Matthews Mock)); (RT 263-309 (Lesley Mireya Reith, Director of Plaintiff Arkansas United)). Plaintiffs called Pulaski County Election Commissioner Susan Inman as both a fact and expert witness concerning election procedures. She testified that she thought that: 1) voter fraud wasn't a problem under the previous regime; 2) repealing the option to submit an affidavit in lieu of photo identification would impose burdens; 3) the 100-foot restriction wasn't necessary because of previous electioneering laws; 4) comparing absentee application signatures to the voter's registration application will make it more likely that ballots are rejected; 5) the training on signature comparison provided by the State Board of Election Commissioners was inadequate; and 6) changing the deadline for in-person delivery of absentee ballot limits opportunities for those voters who want to wait until the last minute to cast their ballots. (RT 309-377).

Plaintiffs also called Dr. Linton Mohammed, a forensic document examiner, who asserted that signature matching is unreliable and that the verification requirement makes it more likely that clerks will improperly reject absentee applications. (RT 377-402). And Plaintiffs called Dr. Kenneth Maye, a political science professor, who asserted that minority, poor, and elderly voters are less likely to vote when voter identification is required, and that such requirements are unnecessary. (RT 402-486).

2. Defendants' Witnesses

The State presented testimony from two witnesses, Daniel Shults, Director of Defendant State Board of Election Commissioners, and Joshua Bridges, representative of Defendant Secretary of State John Thurston.

Shults discussed the State Board's work training county election officials and how it updated that training in response to the laws at issue here. (RT 508-510). He stressed that—contrary to Plaintiffs' claims—nothing requires voters' signatures to "match," and he described in detail the training on the comparability standard election workers use. (RT 510-532). And he discussed the many acceptable forms of voter identification that can be used to vote, how photo identification is freely available, and how voters lacking identification may cast a provision ballot and later verify their identity. (RT 538, 544-545).

Shults also discussed the signature verification process itself. He explained that absentee ballot applications require a signature so that the clerk can verify that the applicant is actually the registered person. (RT 568, 574). If the application is sufficient, the clerk will issue the ballot; otherwise, the clerk will immediately reach out to the voter in the most expeditious way possible. (RT 569). All Act 736 did was clarify that the clerk should compare the signature on an application to the voter registration card; that, Shults explained, ensures the voter knows what

signature will be used for comparison. (RT 569-572). Voters can update their registration signature using a form on the Secretary of State's website. (RT 572).

He also discussed why absentee ballots require more work to process than in-person ballots. (RT 565-566). Absentee ballots can be returned in-person, through a third party, or through the mail, (RT 574-575, 709), but he stressed that in-person third-party ballots are the most complicated to process. (RT 679-680, 709-711). And that's why, he explained, it made sense to move the in-person absentee ballot-delivery deadline from the Monday before the election to the Friday before the election. He explained that change gives local election workers additional time to process those ballots—as the law has long required— before the end of Election Day. (RT 575-576, 673, 676-678). He also added that a voter who misses the Friday in-person deadline can still mail an absentee ballot or vote in person. (RT 576-577).

Shults additionally testified about the 100-foot exclusion provision. He explained that in 2020 the State Board received complaints concerning activity within 100 feet of a polling place, including that of a mayor who posted a video of herself near the polling place. (RT 494-497). He also explained that Arkansas law allows voters with a disability to skip the line and vote immediately, parents to bring their children with them to vote, and voters to bring their own food and water. (RT 557-

558, 561). Thus, he stressed, the only thing Act 728 does is prevent surreptitious electioneering within 100 feet of the polling place's entrance. (RT 562).

Bridges testified about the importance of protecting the integrity of the electoral process and how failing to protect the process can lower voter turnout and facilitate misinformation. (RT 723). On Act 249, Bridges explained that law implements a true voter identification standard consistent with Amendment 99, which established a voter identification requirement, and was approved by 79% of Arkansas voters in 2018. (RT 732). Under Arkansas law, he explained, voters may use a driver's license, a non-driver's license photo ID issued by the DMV, a concealed carry handgun license, a passport, a photo ID issued by an Arkansas post-secondary educational institution, a free voter ID issued by the clerk's office, a federal or state government employee ID, and many other forms of identification to vote. (RT 780-781).

He also testified about signature verification, explaining that the signature on an absentee application is used to confirm a voter's identity and that Act 736 established a uniform standard for conducting that review across Arkansas. (RT 733). Indeed, he explained, that Act provides voters and clerks with needed clarity, so they know what will be used for verification. (RT 733-734). He emphasized that voters who are concerned can request a copy of their voter registration application. (RT 734).

Bridges also explained that Act 973 gives election officials critically needed time to prepare for Election Day. (RT 735). He stressed that in-person third-party ballot deliveries are more complex and can create additional work; for instance, with in-person delivery, paperwork must be completed, the agent must be identified by the clerk, and the bearer log must be signed—all of which take time that might be devoted to the clerk's many other duties on the unusually busy eve of Election Day. (RT 736).

Finally, Bridges testified that Act 728 not only protects voters but also protects organizations from being accused of electioneering within the 100-foot zone. (RT 740). He explained how that law proactively closes a loophole that might otherwise have allowed people to influence voters in an area that no election official is specifically tasked to monitor. (RT 770, 775).

3. Motion for Directed Verdict and Bench Ruling

Defendants moved for a directed verdict as to all claims, arguing in detail that Plaintiffs' evidence failed to establish a violation of the Arkansas Constitution. (RT 786-813, 829-838). The circuit court denied that motion. (RT 839-840, 850).

C. The Circuit Court's Written Order

On March 24, 2022, the circuit court issued a written order citing Adolf Hitler's *Mein Kampf* and arguing that the four challenged laws were consistent with Hitler's claim that "[b]y means of shrewd lies, unremittingly repeated, it is possible

to make people believe that heaven is hell—and hell, heaven." (RP 1652 (quotation omitted)). It then declared that "soft-minded embrace of . . . legions of half-truths, prejudices, and false facts is a recipe for fascism" and asserted that somehow meant "Acts 249, 728, 736, and 973 [were] based entirely on conjecture, speculation, surmise, misinformation, and fear-mongering about allegations of voter fraud and election insecurity." (RP 1651-1652).

To the extent it discussed the law, the circuit court rejected the State's arguments that an ordinary standard of review should apply here and instead—relying on inapposite language from *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)—applied strict scrutiny. (RP 1582). Employing that erroneous standard and the citations above, it permanently enjoined the four challenged provisions. (RP 1652). Indeed, the circuit court's order overlooked preexisting legal requirements, dismissed entirely the State's interest in combating misinformation and protecting electoral integrity, ignored witness testimony about the complexity of processing in-person absentee ballots, and simply dismissed available alternative means of voting. (RP 1583, 1594, 1645-1649).

D. Appeal and Stay

The State appealed and sought an emergency stay of the circuit court's injunction from this Court. This Court granted that stay, *Thurston v. League of Women Voters of Ark.*, No. CV-22-190 (April 1, 2022), and the 2022 elections

were successfully conducted using the laws challenged here. The State now urges this Court to reverse the circuit court's order.

STANDARD OF REVIEW

This case involves only controlling questions of law. The circuit court's legal conclusions are reviewed *de novo*. *See United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 2014 Ark. 517, at 4, 451 S.W.3d 584, 586.

ARGUMENT

This case involves a challenge to four rather ordinary election regulations. But one would not guess that from the circuit court's decision below. In an opinion ripe with aphorism but barren of analysis, the circuit court described Arkansas's efforts to run efficient and secure elections as "a recipe for fascism." (RP 1652). Eschewing this Court's case law, the circuit court applied strict scrutiny to invalidate the four challenged laws, concluding that even minute changes to election procedures—such as modifying the absentee ballot deadline by *a single business day*—warrant the same level of scrutiny as racial discrimination.

Because this Court stayed that order, the people of Arkansas never had to deal with the wide-ranging chaos it could have caused during the 2022 elections. The Court should reaffirm its longstanding precedent, apply rational basis to the challenged laws, and reverse the circuit court's judgment.

I. The Challenged Acts Do Not Infringe the Right to Vote.

The circuit court applied an incorrect legal standard—wrongly holding that the State was required to show a compelling governmental interest and narrow

tailoring to sustain the four challenged provisions. But this Court has never applied strict scrutiny to ordinary election laws. Instead, this Court's case law makes clear that laws like those challenged here need only survive rational-basis review. And had the circuit court applied that correct legal standard, it could not have concluded the challenged provisions were unconstitutional. This Court should reverse.

A. The Circuit Court Incorrectly Applied Strict Scrutiny.

1. The challenged acts do not implicate a fundamental right warranting strict scrutiny.

Neither this Court nor the United States Supreme Court has ever held that strict scrutiny applies to ordinary election regulations simply because they touch upon voting. The circuit court nevertheless extended inapposite language from this Court's decision in *Jegley*, 349 Ark. 600, 80 S.W.3d 332 (2002), and effectively declared that anytime the General Assembly passes new election regulations or modifies existing ones, the regulation must meet strict scrutiny. That conclusion was erroneous, and this Court should instead apply rational-basis review.

Article 3, section 2 of the Arkansas Constitution provides that "[e]lections shall be free and equal" and protects "the free exercise of the right of suffrage." The circuit court held that provision recognizing a generalized right to suffrage creates a fundamental right and that under *Jegley* regulations that touch that right are subject to strict scrutiny. (RP 1581). But the circuit court tellingly didn't cite any case where this Court has taken a similar approach. Nor did it cite any United

States Supreme Court case applying strict scrutiny to similarly, non-burdensome election regulations. That is because there is none; the circuit court fashioned its rule out of whole cloth, ignoring this Court's cases interpreting Article 3, section 2.

This Court has construed the Free and Equal Elections clause narrowly and solely as a protection against "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 126 (1883). In fact, less than ten years after the Arkansas Constitution's adoption in 1874, this Court held that clause is designed to protect against "fraudulent combinations for illegal voting" that would otherwise "override honest votes," as well as attempts to "deter[] [voters] from the exercise of free will" through "fear." *Id.* at 124. Consistent with that narrow purpose, the Court has held that provision protects the secrecy of the ballot. *Jones v. Glidewell*, 13 S.W. 723, 725-26 (Ark. 1890). And more recent cases have similarly limited that clause's reach, holding, for instance, that it allows for the nullification of an election in cases where a "wrong . . . render[s] the result of the election uncertain." *Whitley v. Cranford*, 354 Ark. 253, 263, 119 S.W.3d 28, 34 (2003).

Indeed, this Court's cases applying that provision have consistently involved election contests—not election regulations. *See Willis v. Crumbly*, 371 Ark. 517, 529, S.W.3d 288, 296 (2007) (acknowledging "Arkansas's longstanding precedent regarding election contests to purge illegal and fraudulent ballots"). Thus, that

provision does not create a freestanding, fundamental right that requires basic electoral regulations to survive strict scrutiny.

Rather, this Court has only imposed such constraints under Article 3, section 1's qualifications clause. But critically, cases applying that clause have only overturned election laws that effectively added voting qualification that aren't in our constitution. *See, e.g.*, *Martin v. Kohls*, 2014 Ark. 427, at 13-14, S.W.3d 844, 851-52 (collecting cases). They did not reach that result by applying strict scrutiny to second-guess legislative judgments about how best to regulate elections, as the circuit court did here. Instead, as those cases make clear, the relevant question is whether a regulation determines *how* Arkansans must vote (permissible) or *which* Arkansans may vote (impermissible). *See, e.g.*, *Rison v. Farr*, 24 Ark. 161 (1865) (holding unconstitutional statutory oath requirement).

The circuit court didn't apply that framework. Instead, it invoked *Jegley* and wrongly declared strict scrutiny applies to regulations governing how Arkansans vote. *Jegley* recognized a "fundamental right to privacy implicit in our law [that] protects all private, consensual, noncommercial acts of sexual intimacy between adults." 349 Ark. at 632, 80 S.W.3d at 350. It applied strict scrutiny and held unconstitutional Arkansas's sodomy statute that had not been enforced for the prior half-century. That case had nothing to do with voting, and this Court has not

extended its approach to any area of the law since it was decided. And it should not do so here.

Rather, this Court should reaffirm that ordinary election regulations warrant only rational-basis review. *See, e.g.*, *McDaniel v. Spencer*, 2015 Ark. 94, at 9, 457 S.W.3d 641, 650 (applying rational basis in the initiative-and-referendum context); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 360 (1994). And this Court should reverse the circuit court's contrary approach.

2. The challenged acts do not warrant heightened scrutiny under equal-protection principles.

The circuit court also wrongly concluded that the Arkansas Constitution's equal protection clause required applying strict scrutiny here. The circuit court didn't cite any case from this Court supporting that approach, which would—as the circuit court acknowledged—upend equal protection principles and create new suspect categories that do not exist in Arkansas law. Instead, to resolve Plaintiffs' equal protection claims, the circuit court was required to apply rational basis. And the challenged provisions easily survive that standard. This Court should reverse.

Article 2, section 3 of the Arkansas Constitution provides that "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." This Court has long interpreted that provision—and similar language in Article 2,

section 2 and section 18—coextensively with the federal equal protection clause. *See Maiden v. State*, 2014 Ark. 294, at 17, 438 S.W.3d 263, 275 (noting that only "[o]n occasion" has this Court "provide[d] more protection under the Arkansas Constitution than that provided by the federal courts under the United States Constitution"); *Talbert v. State*, 367 Ark. 262, 271, 239 S.W.3d 504, 512 ("The analysis under [Article 2, section 18] is the same as that under the Equal Protection Clause of the United States Constitution."); *Staggs v. Staggs*, 277 Ark. 315, 317, 641 S.W.2d 29, 31 (1982) (holding that the statute at issue "is not violative of Article II, §§ 3 and 18 of the Constitution of Arkansas, nor is it contrary to similar provisions of the Constitution of the United States").

Like the federal provision, Article 2, section 3 prohibits only "intentional discrimination." *McClelland v. Paris Pub. Sch.*, 294 Ark. 292, 298, 742 S.W.2d 907, 910 (1988). Statutes that do not contain classifications based on a suspect category are reviewed only for a rational basis. *See McDaniel*, 2015 Ark. 94, at 9-10, 457 S.W.3d at 650 ("The equal-protection clause permits classifications that have a rational basis and are reasonably related to a legitimate government purpose.").

Here, none of the challenged acts facially discriminate based on any classification, let alone one giving rise to any kind of heightened scrutiny. And the circuit court did not conclude otherwise. Instead, it predicted the challenged provisions

would disparately impact certain groups. *See* (RP 1647) (opining Act 736 would affect voters differently "based on age, physical condition, whether they are able to write, and the quality of their penmanship"); (RP 1608) (positing that "Act 249 will have an especially adverse impact on lower socioeconomic, minority, elderly, and younger voters"). But even if that were true—and the State certainly doesn't concede any such impact—it means that under the circuit court's own analysis, the challenged laws aren't subject to heightened scrutiny. *McClelland*, 294 Ark. at 296-98, 742 S.W.2d at 910. So the circuit court's invocation of heightened scrutiny to invalidate the challenged provisions was erroneous and this Court should reverse.

B. The Challenged Acts Are Constitutional Under Rational-basis Review.

As explained above, rational basis is the appropriate level of scrutiny here. Thus, this Court need only consider "whether there is any rational basis which demonstrates the possibility of a deliberate nexus with state objectives so that legislation is not the product of arbitrary and capricious government purposes." *Smith v. State*, 354 Ark. 226, 236, 118 S.W.3d 542, 547 (2003). Applying that standard, the challenged acts easily survive because the State has an interest in regulating elections for efficiency, to preserve election integrity, and to prevent fraud. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197-98 (2008) (noting that "public confidence in the integrity of the electoral process has independent

significance, because it encourages citizen participation in the democratic process."). And the testimony demonstrated the challenged provision are consistent with those goals. (RT 508, 546-547, 562, 723, 732-733, 770, 775). Indeed, the circuit court's only suggestion otherwise consisted only of a conclusory assertion that this Court's case law was wrong and that the State has no interest in preventing fraud or preserving voter integrity. *See* (RP 1651). But that's not the case, and this Court should reverse and dismiss this case.

II. Act 249 Satisfied Amendment 51's Requirement to Amend the Arkansas Constitution.

The circuit court concluded—sans analysis or explanation—that Act 249 violated Section 19 of Amendment 51. But Act 249 is germane to Amendment 51 and consistent with its policy and purposes. This Court should reverse the circuit court's unreasoned conclusion to the contrary.

"Amendment 51 abolished the poll tax, and it provides a comprehensive regulatory scheme governing the registration of voters." *Martin*, 2018 Ark. 283, at 10, 556 S.W.3d 509, 516. Section 19 of Amendment 51 permits the General Assembly to amend that Amendment's sections 5 through 15 by a two-thirds vote of both houses, "so long as such amendments are germane to this amendment, and consistent with its policy and purposes." Ark. Const. amend. 51, sec. 19.

Invoking that power, Act 633 of 2017 previously amended Amendment 51 to "provid[e] a system of verifying that a person attempting to cast a ballot is

registered to vote." *Martin*, 2018 Ark. 283, at 11, 556 S.W.3d at 516. As relevant here, that earlier amendment required a voter to either provide a form of photo identification or sign a sworn statement attesting that he or she is the registered voter casting a ballot. *See* 2017 Ark. Act 633, 91st General Assembly, Reg. Sess. (March 24, 2017). This Court held that earlier provision satisfied Amendment 51's germaneness requirement because establishing a system for verifying a voter's identity through photo identification "is relevant and pertinent, or has a close relationship, to an amendment establishing a system of voter registration." *Martin*, 2018 Ark. 283, at 11, 556 S.W.3d at 516. And this Court likewise concluded that it was consistent with Amendment 51's purpose of "ensur[ing] that all who cast ballots in elections are legally qualified to vote." *Id.* at 13, 556 S.W.3d at 517. That's because Amendment 51 "itself contemplates some enforcement mechanism, and Act 633 provide[d] a method of ensuring that no person is permitted to vote who is not registered." *Id.* at 12, 556 S.W.3d at 517.

Act 249 is similarly germane and consistent. It dropped the sworn statement option and brought existing regulations in alignment with Amendment 99's requirement that voters present photo identification to cast a ballot. *See* Ark. Const. amend. 99. Hence, Act 249 merely modifies the system for verifying a voter's identity through photo identification and ensures that everyone who casts a ballot is registered. And under *Martin* that means that just like Act 633, it is germane to

and consistent with Amendment 51. It is constitutional, and this Court should reverse the circuit court's contrary conclusion.

Indeed, the circuit court's contrary conclusion doesn't rest on any legal analysis. It simply, cursorily, declared that Act 249 failed to satisfy Amendment 51 and never even attempted to explain why or how its conclusion was consistent with *Martin*. *See* (RP 1586, 1594, 1643-1646, 1655). Instead, like much of its opinion, the circuit court's dismissal of that Act appears to rest on little more than its disagreement with the General Assembly's decision about how best to regulate elections. *Id.*; *see also* (RP 1651-1652). But that's not a basis for finding Act 249 wasn't germane and consistent, and the circuit court's order should be reversed.

III. Acts 736 and 973 Do Not Violate Article 3, Section 1 of the Arkansas Constitution.

The circuit court concluded—again, with no analysis, explanation, or reasoning—that Acts 736 and 973 violate Article 3, section 1's voter qualifications clause. They don't, and this Court should reverse.

Article 3, section 1 establishes the qualifications to vote in an election. A person must be a U.S. citizen, an Arkansas resident, at least eighteen years old, and registered to vote. Ark. Const. Art. 3, sec. 1(b). Additionally, Amendment 99 modified that section to require that a voter present photo identification when voting in person or enclose a copy when voting absentee. *Id*. This Court has held that the General Assembly may not add voter qualifications beyond those contained in

Article 3, section 1. *See Kohls*, 2014 Ark. 427, at 13-14, 444 S.W.3d 844, 851-52 (collecting cases).

Act 973. At most, the circuit court declared that moving the deadline to turn in absentee ballots from the Monday before Election Day to the Friday before Election Day constitutes adding a qualification to vote. *See* (RP 1648-1650). That's nonsense. Setting a deadline to turn in an absentee ballot does not change *who* is qualified to vote. Moreover, even if one could construe Act 973 as having some effect on who is eligible to vote absentee, any voter may still vote in person on Election Day, after the in-person absentee ballot deadline has passed. This Court should reverse.

Act 736. The circuit court likewise concluded without analysis that the General Assembly's clarification that a voter's signature on an absentee ballot application must be compared to the voter's signature on his or her voter registration application (rather than voting records generally) violated Article 3, section 1. Again, regulations of the mechanics of absentee voting have nothing to do with *who* is qualified to vote in the first place.

Further, to the extent there was any doubt that regulations of the mechanics of voting do not implicate the voter qualifications clause, Amendment 99 put it to rest. Subsection (f) provides that "[a] voter meeting the requirements of this section"—*i.e.*, one who is qualified to vote—"also shall comply with all additional

laws regulating elections necessary for his or her vote to be counted." Ark. Const. Art. 3, sec. 1(f). In other words, Article 3, section 1 now explicitly recognizes that election regulations, even those with which compliance is necessary for a vote to be counted, are not additional voter qualifications. The circuit court's baseless conclusion to the contrary should be reversed.

IV. Act 728 Does Not Impermissibly Burden Speech or Assembly.

Act 728 is a commonsense electioneering regulation that prohibits anyone from entering a polling place or loitering within 100 feet of one without a lawful purpose. The circuit court wrongly concluded that this disrupts the ability to "hand[] out bottled water, provid[e] comfort to persons who are waiting to enter the polling location, or engag[e] in other lawful conduct" within 100 feet of a polling place, and that Act 728 was therefore unconstitutional. (RP 1648).

This Court has consistently held that Article 2's speech and assembly protections are co-extensive with their federal First Amendment counterparts. *See, e.g.*, *Kelley v. Johnson*, 2016 Ark. 268, at 25, 496 S.W.3d 346, 362 ("Article 2, Section 6 . . . is Arkansas's equivalent to the First Amendment."). Applying First Amendment precedent from which this Court has not deviated, the United States Supreme Court has upheld more restrictive laws than Act 728 (ones that actually burden speech, to boot). Laws establishing 100-foot electioneering perimeters around polling places have been upheld even though they are content-based restrictions

subject to strict scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992). Act 728, on the other hand, is at most a time-place-and-manner restriction subject to less exacting review. If a content-based restriction passes constitutional muster, Act 728's content-neutral requirement does so easily. And in any case, much of what the circuit court identified as being protected, such as handing out food and water near a polling place, is not speech at all.

Act 728 does not impermissibly burden the right to speech or assembly, and the circuit court's contrary conclusion should be reversed.

CONCLUSION

For these reasons, this Court should reverse the circuit court's judgment and remand with instructions to enter judgment in favor of Defendants.

Respectfully submitted,

Tim Griffin
Arkansas Attorney General

NICHOLAS J. BRONNI (2016097)
Solicitor General

DYLAN L. JACOBS (2016167)
Deputy Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-3661
dylan.jacobs@arkansasag.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 and that it conforms to the word-count limitations contained in Rule 4-2(d) of this Court's pilot rules on electronic filings. The jurisdictional statement, the statement of the case and the facts, and the argument sections altogether contain 5,699 words.

/s/ *Dylan L. Jacobs*
Dylan L. Jacobs

CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ *Dylan L. Jacobs*
Dylan L. Jacobs