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Arkansas Supreme Court
Kyle E. Burton, Clerk of the Courts
2023-Sep-21 16:18:49
CV-22-190
19 Pages

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' Reply Brief

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Plaintiffs challenge four laws that made modest changes to Arkansas's election regulations. The circuit court applied strict scrutiny to invalidate them, departing from this Court's election-law precedents and instead pioneering its own.

Plaintiffs' attempts to rehabilitate the circuit court's order are unpersuasive. They ask this Court to depart from nearly 150 years of history and place this Court in the position of policing the General Assembly's policymaking decisions regarding elections. That would render nearly every election regulation on the books unconstitutional because every procedure, deadline, and requirement burdens some voters, and a Plaintiff could always show that some change in the law would make voting marginally more convenient for some portion of voters.

But that's not this Court's role, and the Court should decline Plaintiffs' invitation. The Constitution gives the General Assembly—not the courts—the authority to decide how elections are conducted. The regulations challenged here do not implicate the right to vote as this Court has long interpreted that right. Nor do they add additional qualifications beyond those contained in the Constitution. They are a valid exercise of the legislature's authority, and contrary to the circuit court's conclusion, they are subject only to rational-basis review. And they easily survive that standard. The Court should reverse.

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

The centerpiece of Plaintiffs' lawsuit is their effort to have this Court hold—for the first time—that ordinary election regulations are subject to strict scrutiny and thus presumptively unconstitutional. They first attempt, as the circuit court did, to shoehorn challenges to ordinary election laws into the strict-scrutiny framework announced in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). But this Court has never held that the nearly 150-year-old constitutional provisions they cite impose such a requirement, and Plaintiffs' arguments that it should do so now are unpersuasive. Second, they ask this Court to rewrite its equal-protection jurisprudence, dump the established intentional discrimination standard, and adopt a disparate-impact standard that has no basis in text, history, or precedent. That approach would have far-reaching implications and upend more than a century of precedent.

This Court should decline Plaintiffs' extraordinary invitation. Instead, consistent with precedent, this Court should apply rational-basis review to the ordinary election regulations challenged here. Courts are not charged with reviewing the General Assembly's policymaking choices when it comes to the business of running elections. The circuit court's contrary conclusions should be reversed.

A. The Circuit Court Incorrectly Applied Strict Scrutiny.

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

Plaintiffs spend most of their response brief arguing that ordinary election laws like those challenged here are subject to strict scrutiny. *See* Pls.' Br. 10-29. But Plaintiffs' fail to address the most fundamental obstacle to their claim: In the century-and-a-half since Arkansas adopted its current constitution, this Court has never held that any election regulation is subject to strict scrutiny. And Plaintiffs don't provide any valid reason it should do so now.

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." This Court has interpreted this section narrowly as a protection against "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 126 (1883). Modern cases have limited its scope generally to election contests. *See, e.g., Whitley v. Cranford*, 354 Ark. 253, 263, 119 S.W.3d 28, 34 (2003). And a century ago this Court rejected the notion that the Constitution places more specific restrictions on the General Assembly's authority to regulate elections. It held that "[t]he Constitution does not specify the method of conducting an election," with a few exceptions. *Jones v. Smith*, 165 Ark. 425, 264 S.W. 950, 951 (1924). Those were "that the election shall be by ballot, that the election officers shall be sworn not to disclose how any elector shall have voted except when required to do so in a judicial

proceeding, and that each ballot" be numbered in accordance with then-existing Article 3, section 3. *Id.*[1]

Indeed, in *Davidson v. Rhea*, this Court directly considered "what provision is there in the constitution inhibiting the lawmaking power from providing when, how, and under what regulations and conditions the elector may exercise the right of suffrage?" 221 Ark. 885, 889, 256 S.W.2d 744, 746 (1953) (quoting *Chamberlin v. Wood*, 15 S.D. 216 (1901)). And it answered that "[t]he constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right; nor has it inhibited the legislature from prescribing such rules, regulations, and conditions as it might deem proper and for the public interests." *Id.* While an election regulation may "may occasion the elector some inconvenience and labor, . . . these constitute no objection to the law." *Id.*

Where this Court has struck down election laws, it has done so because they constituted an additional qualification in violation of Article 3, section 1—not because they supposedly burdened voting. *See, e.g.*, *Martin v. Kohls*, 2014 Ark. 427, at 13-14, S.W.3d 844, 851-52 (collecting cases). Where a law doesn't run afoul of

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[1] Section 3 was repealed in 1962. It was replaced with Amendment 50, titled "Conduct of Elections," which provides that either ballots or voting machines may be used. Ark. Const. Amend. 50.

that qualification provision, it is subject to the usual rational-basis review. *See, e.g.*, *McDaniel v. Spencer*, 2015 Ark. 94, at 9, 457 S.W.3d 641, 650.

Plaintiffs' arguments for abandoning this century-and-a-half long understanding are unavailing. First, they argue that the State "waived" the issue of whether ordinary election regulations are subject to strict scrutiny because trial counsel below "conceded that the right to vote is fundamental." Pls.' Br. at 11. Plaintiffs' waiver claim is unsupported by the record. The State has never conceded that strict scrutiny ought to apply here, and not even the circuit court took that position. Instead, counsel for the State below argued that while "no one disputes that voting is a fundamental right," it is "unlike other fundamental rights such as the right to privacy that the Arkansas Supreme Court has recognized in *Jegley v. Picado*" and that heightened scrutiny didn't apply here. (RT 792). And the State certainly doesn't dispute that the right to vote is fundamental to a democracy; all the rights enshrined in the Constitution could be described as fundamental in some sense.

But that doesn't mean that strict scrutiny applies to every regulation that burdens voting. To the contrary, strict scrutiny remains the exception in constitutional litigation, not the rule. And this Court has never held that *Jegley*'s fundamental-rights framework—and correspondingly strict scrutiny—applies whenever a plaintiff claims that a regulation burdens voting. Nor would that make sense, as a

plaintiff could always allege that a regulation imposes some burden—flooding the courts with challenges. So Plaintiffs' arguments fails and this Court should reverse the circuit court.

Moreover, Plaintiffs' remaining arguments fare no better. They offer a superficial appeal to Article 3, section 2's text, which provides that no law shall be enacted "whereby" the right to vote "shall be impaired or forfeited." They argue without authority that this Court should interpret "impair" to mean "burden" in even the most minimal manner. Pls.' Br. 13-14.

This Court's precedent interpreting Article 3 hold the opposite. Indeed, this Court has recognized that election regulations may cause voters "some inconvenience and labor," but that is not a valid "objection" under the Constitution. *Davidson*, 221 Ark. at 889, 256 S.W.2d at 746 (quotation omitted). Instead, this Court has held that absent specific restrictions in the Constitution, "the Legislature has power to devise the method for conducting an election." *Jones*, 165 Ark. 425, 264 S.W. at 951. The General Assembly exercised that power in enacting the laws at issue here, and its decisions are not subject to strict scrutiny. The circuit court's contrary decision should be reversed.

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 Arkansas

Constitution's equal-protection provisions prohibit only "intentional discrimination." *McClelland v. Paris Pub. Sch.*, 294 Ark. 292, 298, 742 S.W.2d 907, 910 (1988). Otherwise, rational basis applies. *See McDaniel*, 2015 Ark. 94, at 9-10, 457 S.W.3d at 650. The circuit court applied strict scrutiny not because it thought the challenged provisions facially discriminated based on any protected classification—indeed, it made no such finding—but because it thought those provisions might have a disparate impact on certain groups. *See* (RP 1608, 1647). That approach is contrary to this Court's binding precedent and should be reversed.

Plaintiffs do not seriously defend the circuit court's reasoning. *See* Pls.' Br. 43-45. Instead, they argue that strict scrutiny should apply because the challenged provisions "are intended to make it harder for Arkansans to exercise their fundamental rights," "including voters who are members of a suspect class." Pls.' Br. 43. The circuit court made no finding about the legislature's intent. But even if it had, Plaintiffs' argument is that the Court should adopt a disparate-impact regime for equal-protection challenges. They cite no authority for this request, and that's not surprising because adopting Plaintiffs' approach would radically alter this Court's equal-protection jurisprudence. This Court should reject Plaintiffs' request and apply rational basis.

B. The Challenged Acts Easily Survive Rational-Basis Review.

Applying rational-basis review, 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 to promote efficiency, preserve election integrity, and prevent fraud. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197-98 (2008). Plaintiffs make no serious argument that the challenged acts fail rational-basis review, nor could they. Whatever complaints the circuit court and Plaintiffs have about the propriety of legislating to protect against fraud, the State undoubtedly has an interest in doing so.[2]

[2] Indeed, it bears mentioning that since the circuit court's decision an investigation has been opened as to absentee-ballot fraud during the 2022 Preferential Primary. Will Langhorne, *State election panel referred investigation into Phillips County candidate to* prosecutors, Ark. Democrat Gazette (July 1, 2023), https://perma.cc/TFM6-YYVE.

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

The circuit court's order says that Act 249 violates Amendment 51, yet it never says why. (RP 1577). Act 633 of 2017 required voters to either provide photo identification when voting or provide a sworn statement attesting to their identity. *See* 2017 Ark. Act 633, 91st General Assembly, Reg. Sess. (March 24, 2017). This Court upheld that requirement as being germane to "establishing a system of voter registration" and consistent with Amendment 51's purpose of "ensur[ing] that all who cast ballots in elections are legally qualified to vote." *Martin v. Haas*, 2018 Ark. 283, at 13, 556 S.W.3d 509, 517. Act 249 removed the sworn-statement option. The Act 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.

Plaintiffs' efforts to save the circuit court's analysis-free ruling are meritless. They do not argue that Act 249 is not germane to Amendment 51; they challenge only the consistency prong of Section 19's requirement. Plaintiffs first argue that the possibility of a registered voter being unable to cast a ballot if they do not have identification "undermin[es]" Amendment 51's "requirement of a system of permanent personal registration"—making it "registration in in name only." Pls.' Br. 35 (quotation and emphasis omitted). But voter registration only fulfills its purpose of ensuring only legal voters cast ballots if election officials can verify that a

person is who they claim to be. Moreover, Plaintiffs' argument would apply equally to Act 633's sworn-statement option, or any other condition the legislature could set for verifying voter registration at the polls. Verifying that a voter is registered does not diminish their registration or make it impermanent; rather, it furthers the purpose of requiring voter registration in the first place.

Second, Plaintiffs argue that Act 249 just isn't necessary because Act 633 offered adequate protections against fraud. Pls.' Br. 36. But that isn't their call to make. The people of Arkansas adopted Amendment 99's requirements, and the General Assembly voted overwhelmingly to adopt Act 249 to strengthen Arkansas's photo identification requirement. Plaintiffs' disagreement with that decision doesn't make it unconstitutional. Indeed, Amendment 51 "contemplates a method of ensuring that no person is permitted to vote who is not registered," and Act 249 is no less consistent with that requirement than Act 633 was. *Martin*, 2018 Ark. at 12, 556 S.W.3d at 517.

Third, Plaintiffs argue that Act 249 "burdens" voters who cannot acquire acceptable identification—even though the State provides that identification at no cost. Pls.' Br. at 36. But Section 19 requires only that amendments are germane to Amendment 51 and are consistent with its policy and purposes. It says nothing about burdensomeness, and Plaintiffs offer no support for reading such a restriction into the text. Act 249 is constitutional, and the circuit court 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. Act 973 moves the deadline to turn in absentee ballots by one business day. Act 736 requires comparing absentee-ballot signatures to voter-registration-application signatures. Neither set a voting qualification, and Plaintiffs' contrary arguments miss the mark.

Plaintiffs claim that Act 736 grafts a "penmanship requirement" onto the Constitution. Pls.' 38. But no one is required to vote absentee. Nor does anyone have a constitutional right to do so. Indeed, this Court has noted that voting absentee is a "privilege." *Jones*, 165 Ark. 425, 264 S.W. at 951. This Court has refused to wade into the sort of policy disputes Plaintiffs suggest. *Id.* ("We have nothing to do with the question of wisdom or policy of granting this privilege to absent voters[.]"). And it should decline Plaintiffs' invitation to do so here.

Plaintiffs argue that Act 973 "imposes a disparate temporal qualification on absentee voters" not found in the Constitution. Again, there is no right to vote absentee. *Id.* Any qualified voter may vote, so long as they follow the law, including meeting the absentee-ballot deadline. *See* Ark. Const. Art. 3, sec. 1(f). This Court has never micromanaged the minutiae of election deadlines, and Plaintiffs provide no compelling reason to start now.

IV. Act 728 Does Not Impermissibly Burden Speech or Assembly.[3]

Act 728 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 violates "the right of Arkansans to assemble and offer expressive non-electioneering speech, conduct, [and] comfort within 100 feet of the primary exterior entrance of a polling place." (RP 1652). It does not.

To the extent that Act 728 can be read to bar handing out food and water to those waiting in line, that does not implicate the First Amendment. There is nothing inherently expressive about giving away food and water. Even if Plaintiffs intended to convey some message by doing so, "the Supreme Court held that First Amendment protection does not extend to non-expressive conduct intended to convey a political message." *Arkansas Times LP v. Waldrip as Tr. of Univ. of Arkansas Bd. of Trustees*, 37 F.4th 1386, 1391 (8th Cir. 2022) (en banc). Plaintiffs' conduct does not get First Amendment protection.

Further, even if the First Amendment applied, the challenged provision would, at most, be the kind of time-place-and-manner restriction that is subject to

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[3] Plaintiffs claim that Act 728 is unconstitutionally vague, Pls.' Br. 40, but the circuit court did not rule on that issue so it is unpreserved. *See Dowty v. State*, 363 Ark. 1, 9, 210 S.W.3d 850, 855 (2005).

less exacting review. *See, e.g., Hodges v. Gray*, 321 Ark. 7, 17, 901 S.W.2d 1, 6 (1995) ("In general it may be said that the State may place reasonable time, place, and manner restrictions on speech that takes place in a public forum."). And even if strict scrutiny applied, the Supreme Court has long upheld anti-electioneering perimeters. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992).

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,

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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 brief contains 2,801 words.

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

CERTIFICATE OF SERVICE

I certify that on September 21, 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*
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