No. CV-22-135

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas; and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities as members of the Arkansas State Board of Election Commissioners — APPELLANTS

v.

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



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

**EMERGENCY MOTION FOR IMMEDIATE STAY**

Appellants, John Thurston, Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, James Sharp, and J. Harmon Smith, in their official capacities as Secretary of State and members of the Arkansas State Board of Election Commissioners, respectfully, for their emergency motion for an immediate stay of the Circuit Court's order setting this matter for trial on March 15, 2022, and a stay of all circuit-court proceedings pending appeal, state:

1. Appellees filed suit in Pulaski County Circuit Court challenging Acts 249, 728, 736, and 973 of the 93rd Arkansas General Assembly under the Arkansas Constitution's right to suffrage, Free and Equal Elections Clause, and Equal Protection Clause. Appellees seek injunctive and declaratory relief.

2. Appellants moved for summary judgment and asserted that sovereign immunity bars this action. Appellees have not met proof with proof to establish any of the four challenged acts qualifies as an unconstitutional exception to the doctrine of sovereign immunity.

3. On February 18, 2022, the Honorable Pulaski County Circuit Court Judge Wendell Griffen denied Appellants' motion for summary judgment on the issue of sovereign immunity, and set the underlying action for a bench trial on the merits beginning **March 15, 2022**.



4. Pursuant to Arkansas Rule of Appellate Procedure 2(a)(10), Appellants are entitled to interlocutory appeal on the circuit court's denial of sovereign immunity. Appellants filed their Notice of Appeal on March 2, 2022.

5. Prior to lodging the record in this case, Appellants moved to stay the March 15, 2022, trial date. This motion was denied on March 4, 2022. **Consequently, trial in this matter is set to begin on March 15, 2022**.

**6. Appellants respectfully request this Court enter an order staying trial pending resolution of appeal.**

7. A stay of this matter is warranted for multiple reasons. First, the record in this case is now lodged. Accordingly, the circuit court has been divested of jurisdiction to hold trial. *Myers v. Yingling*, 369 Ark. 87, 89, 251 S.W.3.d 287, 290 (2007) ("Once the record is lodged in the appellate court, the circuit court no longer exercises jurisdiction over the parties and the subject matter in controversy.")

8. Second, it is well-established that sovereign immunity is not just immunity from liability, but immunity from suit, and therefore should be resolved **before trial.** *Ark. Tech Univ. v. Link*, 341 Ark. 495, 501, 17 S.W.3d 809, 813 (2000). **Forcing Appellants to go to trial before this Court considers the merits of Appellants' sovereign immunity defense effectively deprives Appellants of sovereign immunity.**



9. This is especially egregious where, as here, Appellees have not met their substantial burden to overcome Appellants' sovereign immunity defense by proving each of the challenged acts is unconstitutional. *Gentry v. Robinson*, 2009 Ark. 634, 11 (On an appeal of a denial for motion for summary judgment based on sovereign immunity, the Court considers whether the evidentiary items presented by the moving party leave a material fact unanswered. In other words, to uphold a denial of sovereign immunity, the Court must determine whether the plaintiff met proof with proof to raise a fact question regarding a constitutional violation.)

10. Briefly, each of Appellees' challenges fails as a matter of law.

11. First, Act 249 properly amended Section 13 of Amendment 51 of the Arkansas Constitution. Section 13 of Amendment 51, entitled "Fail-safe voting—Verification of voter registration," governs the manner in which individuals unable to verify their voter registration through one of the eight identified forms may vote provisionally until their registration can be verified. Previously, section 13 of Amendment 51 permitted individuals who could not affirm their registration as required by law to cast a provisional ballot and "cure" the ballot in two ways. The individual could either submit a sworn statement under penalty of perjury stating he or she is registered to vote in the State of Arkansas and is the person registered to vote, or alternatively, go to the county board of election commissioners' office or the county clerk's office by noon on the Monday following the election and present an acceptable form of identification. Act 249 amended section 13 to remove the sworn statement provision, but it left in place the option of verifying a provisional ballot with the county clerk or county board of election commissioners. Act 249 made a similar change for those casting provisional ballots absentee who failed to include proper absentee ballot documentation.



12. Act 249 does not impose a severe burden on Appellees. First, each of the Appellees possesses a state-issued photographic identification card, so the fail-safe provision is inapplicable to Appellees, and cannot therefore cause any burden

to them. Importantly, this Court has previously upheld the in-person fail-safe provision as constitutional. *Martin v. Haas*, 2018 Ark. 283, at 9, 556 S.W.3d 509, 515. Appellees failed to explain how the removal of the affidavit provision somehow turns the in-person fail-safe provision into an unconstitutional one. Thus, Act 249 does not create a severe burden because it still permits voters without acceptable identification to vote provisionally in a constitutionally permissible way.

13. Second, Act 728 amended Ark. Code Ann. § 7-1-103 to establish a 100-foot perimeter around polling places. Individuals may be within 100-feet of the polling place if they are entering for a lawful purpose. Appellees argue this forces voters to choose between basic sustenance or the right to vote, by denying volunteers, such as Appellees, from handing out food and water to voters. As an initial matter, there is no constitutional right to water or a snack while voting. Moreover, on its face, Act 728 only limits any *unlawful* acts within the one hundred foot (100') zone. Nothing prohibits anyone from leaving an ice chest with water or snacks in that zone, nor does anything in the Act prevent Appellees from bringing their own water or food with them while they wait in line within the 100-foot zone. Likewise, the Act does not prohibit any organization or individual from positioning themselves outside of the 100-foot zone with water and snacks. Finally, Act 728 does not prevent a voter with a disability from bringing a caretaker into

that zone *nor could it*, as such activity is expressly permitted by Ark. Code Ann. § 7-5-310, which explicitly authorizes a voter to choose an assistor to accompany them.

14. Third, Act 736 amended various provisions of Arkansas law concerning absentee ballots. Of relevance, Act 736 requires the signature on a voter's absentee ballot application be "similar" to that on the individual's voter registration application to receive an absentee ballot. This was not a material change from the previous version which required signature "records" to bear a "reasonable likeness" to each other. In their challenge, Appellees mischaracterize Act 736. Act 736 only requires that signatures be similar; it does not require an exact match. Furthermore, Act 736 is not a severe or substantial burden on the right to vote because voters may update their registration signature at any time. Finally, the clarifications of Act 736 actually *improve* the procedures for obtaining an absentee ballot. The previous version of Ark. Code Ann. § 7-5-404 did not contain any instructions or information about what to do if an absentee ballot was rejected. As amended by Act 736, Ark. Code Ann. § 7-5-404 now requires the county clerk to provide prompt notice to the voter of the rejection, including by phone or email, and allow the voter to resubmit the request. Ark. Code Ann. § 7-5-404(a)(2)(B)(i); *Id*. at § 7-5-404(a)(2)(B)(ii); *Id*. at § 7-5-404(a)(2)(C)(i). Thus, Act

736 actually adds additional procedural safeguards to alert voters as to when their request for an absentee ballot has been rejected.

15. Fourth, Act 973 also amended regulations regarding absentee ballots by requiring individuals dropping off absentee ballots in person to turn them in by close of business the Friday before election day. Previously, the deadline to submit absentee ballots in person was the Monday before election day. The addition of one business is not a severe burden on the right to vote, especially considering that Arkansas voters have 45 days to obtain an absentee ballot—one of the longest periods in the country. Furthermore, Appellees may still mail their ballot in by 7:30 p.m. on Election Day.

16. In sum, Appellees are challenging statutes regarding *election mechanics*—not statutes concerning the right to suffrage itself. Such regulations are entitled only to rational basis review, and this test is more than satisfied by the State's compelling interests in preventing voter fraud and intimidation, and holding elections that are organized and allow a timely counting of ballots.

17. Finally, Appellees challenged each of the four Acts under Arkansas's Equal Protection Clause. Contrary to Appellees' claims, Article 2, section 3 of the Arkansas Constitution does not preclude all statutory classifications. *Cook v. State*, 906 S.W.2d 681. Each Appellee failed to prove that he or she was treated differently than others who were similarly situated to him or her. *Brown v. State*,

2015 Ark.16, at 6–7, 454 S.W.3d 226, 231. Nor did Appellees prove that any alleged classification rested on feigned differences or that the distinctions had no relevance to the State's explained purpose. *Graves v. Greene County*, 2013 Ark. 493, at 7, 430 S.W.3d 722, 727. Consequently, Appellees woefully failed to overcome the State's sovereign immunity defense.

18. Finally, a stay of this matter is warranted given the circuit court's order expressing uncertainty about the correct legal standard of review in this case—whether it is rational basis, strict scrutiny, application of the *Anderson-Burdick* test, or something else entirely. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). In resolving the issue of Sovereign Immunity on appeal, the appellate court can determine the legal standard applicable to each of the challenged Acts.



19. Rule 8 of the Arkansas Rules of Appellate Procedure—Civil grants this Court the discretion to stay a lower-court order pending appeal. *Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). This Court's consideration of a request for a stay includes preservation of the status quo ante, if possible, and the prejudicial effect of the passage of time necessary to consider the appeal. *Id*. The Court is also guided by four factors: (1) the appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm to the appellant absent a stay; (3)

whether the grant of the stay will substantially injure the other parties interested in the proceeding; and (4) the public interest. *See id*.

20. Each of the four *Pavan* factors weigh in favor of Appellants. First, as explained above, Appellees are unlikely to succeed on the merits of their claim because they have not proven that any of the four acts are unconstitutional. Such a showing is required to overcome Appellants' sovereign immunity defense. Ark. Const. art. 5, § 20; *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

21. Second, Appellants will suffer irreparable harm absent a stay, as forcing Appellants to participate in a trial on these matters effectively waives Appellants' defense of sovereign immunity. *Ark. Tech Univ. v. Link*, 341 Ark. 495, 501, 17 S.W.3d 809, 813 (2000).

22. Third, the grant of a stay will not substantially injure Appellees. Instead, granting a stay promotes judicial efficiency and economy. Without a stay, both parties will participate in a four-day long trial while the very same issues are considered by this Court on appeal. This could result in a complete waste of judicial resources and party resources, should the circuit court's final order conflict with the opinion of this Court. Or, alternatively, it may result in the matter needing to be re-tried under the correct standard of review, as set forth in any order on remand by this Court.

23. Finally, the public interest weighs in favor of conserving state resources pending appeal.

24. Based on the foregoing, Appellants respectfully request an emergency stay of the Circuit Court's March 4 Order setting this matter for trial, as well as a stay of all proceedings in the Circuit Court pending the final disposition of this appeal or, in the alternative, a temporary stay until the Court decides this motion.

WHEREFORE, Appellants pray that their Emergency Motion for Immediate Stay is granted or, in the alternative, for a temporary stay and for all other relief to which they may be entitled.



Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: Brittany Edwards
Ark. Bar No. 2016235
Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-3997
Fax: (501) 682-2591
Email: brittany.edwards@arkansasag.gov

*Attorneys for Appellants*

## CERTIFICATE OF SERVICE

I, Brittany Edwards, hereby certify that on March 7, 2022, I electronically filed the foregoing with the Clerk of the Court using the e-*Flex* system, which shall send notice to all Counsel of Record.

/s/ *Brittany Edwards*
Brittany Edwards