No. 24-2810

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GET LOUD ARKANSAS, et al.,
Plaintiffs-Appellees,

v.

JOHN THURSTON et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Arkansas
No. 5:24-CV-5121 (Hon. Timothy L. Brooks)

MOTION TO STAY INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants John Thurston, Sharon Brooks, Jamie Clemmer, Bilenda Harris-Ritter, William Luther, James Harmon Smith, III, and Johnathan Williams (collectively, the "SBEC") serve as appointed Commissioners on the Arkansas State Board of Election Commissioners, an agency constitutionally tasked with, among other things, adopting the rules necessary to ensure a uniform and secure voter registration process in Arkansas.

In advance of the November 2024 general election, the SBEC learned that the county clerks charged with processing voter registration applications were treating applications bearing electronic or digital signatures differently. Some accepted them; others did not. Given the disparate treatment, the SBEC passed an emergency rule, effective May 4, 2024, and a permanent rule, effective September 2, 2024, requiring that voter registration applications bear a handwritten "signature or mark," rather than an electronic or digital one.

Four Plaintiffs on June 5, 2024 sued the SBEC and the clerks of Benton, Pulaski, and Washington Counties, alleging that the "signature or mark" requirement violated the Materiality Provision codified at 52 U.S.C. § 10101(a)(2)(B). More than five weeks after filing their Complaint, Plaintiffs on July 11, 2024 moved for a preliminary injunction, which the District Court granted from the bench on August

29, 2024, just thirty-nine days before voters must register in advance of the November 2024 general election.

With the status quo now upended, the SBEC seeks a stay of the District Court's injunction. Absent a stay, the non-uniform treatment of voter registration applications which occurred prior to May 4, 2024 will recur, as only three of Arkansas's seventy-five county clerks were enjoined by the District Court's ruling. Moreover, the District Court's compelled changes to Arkansas's voter registration system occurred just over one month prior to the close of voter registration.

This ruling offends the *Purcell* principle, which generally disfavors last-minute changes to election rules. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). *Purcell*, as well as traditional stay factors, weigh strongly in favor of a stay pending a full appeal of the District Court's injunction, chief among them the likelihood that this Court will find—as others have in cases filed by Appellee Vote.org ("VDO")—that a signature requirement like the one adopted by the SBEC does not violate the Materiality Provision. *See Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023) (holding a similar signature requirement was material and therefore did not violate the Materiality Provision); *Vote.org v. Byrd*, 700 F. Supp. 3d 1047 (N.D. Fla. 2023) (dismissing a similar challenge to a Florida signature requirement because the plaintiffs failed to allege plausibly a violation of the Materiality Provision).

With the voter registration deadline looming on October 7, 2024, the confusion the District Court's injunction threatens to create is ongoing. Accordingly, the SBEC asks this Court to issue a stay of the order on September 9, 2024 (four weeks before registration closes, a period during which county clerks receive the greatest number of new registration applications) and enter an expedited briefing schedule requiring any response to this motion be filed by 12:00 PM on September 9, 2024. The SBEC further asks this Court in the interim to enter any administrative stay it deems appropriate.

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STATEMENT OF THE CASE

Like all states, Arkansas imposes certain requirements before an individual may vote in elections. A prospective voter must be a United States citizen, reside in the State of Arkansas, and have reached the age of eighteen. Ark. Const. art. III, § 1(a)(1)-(3). She must also be "[l]awfully registered to vote in the election." *Id.*, § 1(a)(4).

I. Voters Passed Amendment 51 to Guide the Voter Registration Process in Arkansas.

Arkansans in 1964 passed a "comprehensive regulatory scheme governing the registration of voters." *Martin v. Kohls*, 444 S.W.3d 844, 854 (Ark. 2014) (Goodson, J., concurring). This "comprehensive regulatory scheme," Amendment 51 to the Arkansas Constitution, was designed for the express purpose of ensuring that all persons who vote in Arkansas elections are "legally qualified" to do so. Ark. Const. amend. 51, § 1; *see also id.*, § 3 ("No person shall vote or be permitted to vote in any election unless registered in a manner provided for by this amendment.").

Amendment 51 included a host of important features, including a requirement that any "mail voter registration application" bear "[a] signature or mark made under penalty of perjury that the applicant meets each requirement for voter registration." *Id.*, § 6(a)(3)(F). When voters passed this requirement six decades ago, they made clear that a "signature or mark" is part and parcel of the "identifying information . . . necessary to assess the applicant's eligibility and to administer voter registration

and other parts of the election process." *See id.*, § 6(a)(1) ("The mail voter registration application form may only require *identifying information, including signature or mark*, and other information, including data relating to previous registration by the applicant, as is necessary to assess the applicant's eligibility and to administer voter registration and other parts of the election process." (emphasis added)).

II. The SBEC Has a Constitutional Responsibility Under Amendment 51 "to Secure Uniform and Efficient" Voter Registration Procedures in Arkansas.

While Amendment 51 did not constitutionally define the phrase "signature or mark" when enacted in 1964, voters tasked the SBEC[1] with the responsibility to "prescribe, adopt, publish and distribute" the "Rules and Regulations supplementary to . . . and consistent with [Amendment 51] and other laws of Arkansas as are necessary to secure uniform and efficient procedures in the administration of [Amendment 51] throughout the State." *Id.*, § 5(e)(1). In addition, the SBEC has a constitutional obligation to "prescribe, adopt, publish and distribute" the "detailed specifications of the registration record files, the voter registration application forms and other registration forms, including voter registration list maintenance forms, all

[1] The SBEC is a seven-member board comprised of the Arkansas Secretary of State, two members appointed by the Governor, and one member each appointed by the chair of the state Democratic party, the chair of the state Republican party, the President Pro Tempore of the Arkansas Senate, and the Speaker of the Arkansas House of Representatives.

of which shall be consistent with [Amendment 51] and uniform throughout the State." *Id.*

III. County Clerks Throughout Arkansas Unevenly Applied the "Signature or Mark" Requirement, Necessitating Intervention by the SBEC.

For nearly sixty years, Arkansas has registered voters—seemingly with little or no controversy—using the system voters approved in Amendment 51. Appellee Get Loud Arkansas ("GLA"), a nonprofit organization formed to increase civic participation and mobilize voters, utilized the existing system to register several thousand voters from 2021 to 2023. *See* APP 67-68, R. Doc. 46-2 ¶ 8 (noting GLA registered 1179 voters in 2021 and 3731 voters in 2023). At some point in 2023, GLA rolled out a "digital online tool," where a voter registration applicant could sign her voter registration form using "an electronic signature." *See id.*, ¶ 12.

Appellee Nikki Pastor on February 24, 2024 used GLA's system to complete a voter registration application. *See* APP 90, R. Doc. 46-4 ¶¶ 7, 9. Pastor signed the application with an electronic signature, and GLA submitted the application to the Washington County clerk. *Id.*, ¶ 9. The clerk rejected the application and notified Pastor. *Id.*, ¶ 11.

Appellee Trinity Loper similarly attempted to register using GLA's "online tool." *See* APP 91, R. Doc. 46-5 ¶ 5. Loper completed an application using an electronic signature, which GLA submitted to the Pope County clerk on December 11, 2023. APP 92, R. Doc. 46-5 ¶ 7. The clerk rejected the application. *Id.*, ¶ 8.

Unlike Pastor, however, Loper also submitted an application bearing a traditional handwritten signature. *Id.*, ¶ 9. This application "appears to have been accepted," though a scrivener's error caused Loper's name to be incorrectly identified on voter rolls as "Trinity Lopez." *Id.* Accordingly, Loper appears to have successfully registered to vote.

The SBEC eventually learned of this uniformity problem. "[I]n some counties, the clerk was accepting electronically signed voter registration applications," and in others (like Pope and Washington Counties), the clerk rejected "electronically signed applications." APP 245, R. Doc. 53-1 at 3. The problem necessitated emergency rulemaking because it "created an unfair and non-uniform application process." APP 245-46, R. Doc. 53-1 at 3-4. In the SBEC's view, "[w]hether the applicant could apply using an electronic signature was dependent on the county [in] which the applicant resided." APP 246, R. Doc. 53-1 at 4.

Accordingly, the SBEC acted. Pursuant to its constitutional mandate, *see* Ark. Const. amend. 51, § 5(e)(1), the SBEC adopted an emergency rule defining what constituted an acceptable "signature or mark" for purposes of Amendment 51:

> a handwritten wet signature or handwritten wet mark made on a Registration Application Form with a pen or other writing device that is physically moved across the form and that forms the applicant's signature or mark on the paper form. A Signature or Mark that utilizes a computer to generate or recreate the applicant's signature or mark is

> not an acceptable signature or mark of the applicant for purposes of Amendment 51 §§ 6(a)(1) & (a)(3)(F) Registration Application Form.

Code Ark. R. 108.00.14-1400(7).

The SBEC passed the rule for several reasons. A uniform "signature or mark" requirement furthers "the interests of 'uniform and efficient procedures'" and "does not change the current and historical means of registration in the State." APP 248, R. Doc. 53-1 at 6. It also serves as "a necessary component for the verification of the voter's identity." APP 260-61, R. Doc. 53-2 at 6-7. Moreover, because Ark. Code Ann. § 7-5-404(a)(2) requires a clerk to compare an absentee ballot application (which must be signed) with the voter's "registration application," the "signature or mark" requirement has practical utility—a handwritten signature on the registration application is the superior means of comparing an absentee request bearing a written or facsimile signature. APP 261, R. Doc. 52-2 at 7. And finally, physically signing or marking documents deters voter fraud, as Arkansas criminalizes the forgery of signatures on voter registration applications. *See id.* (citing Ark. Code Ann. § 7-1-105(a)(19)).

After receiving legislative approval, *see* Ark. Const. art. 5, § 42, the emergency rule took effect on May 4, 2024. It expired September 1, 2024, and was replaced by an identical permanent rule, which took effect September 2, 2024.

IV. Plaintiffs Waited to Seek Judicial Intervention on the Emergency Rule.

More than a month after the emergency rule took effect, GLA, VDO (which had filed similar challenges to signature requirements in Florida, Georgia, and Texas), Pastor, and Loper (collectively, "Plaintiffs") sued the SBEC and the clerks of Benton, Pulaski, and Washington Counties in the United States District Court for the Western District of Arkansas. Alleging a violation of the Materiality Provision codified at 52 U.S.C. § 10101(a)(2)(B), Plaintiffs sought both declaratory and injunctive relief concerning any so-called "wet signature rule," which Plaintiffs defined as the "emergency rule [passed by the SBEC], and any other regulations or procedures that county clerks have applied to reject applications with electronic or digital signatures." APP 4, R. Doc. 2 at 2 n.1. More than five weeks then passed before Plaintiffs moved for a preliminary injunction. APP 28, R. Doc. 46 (filed July 11, 2024). The SBEC filed its response in opposition on July 25, 2024. Plaintiffs did not request a hearing or expedited review.

V. The District Court Enjoined the Emergency Rule and Permanent Rule, Upending the Process for Voter Registration Thirty-Nine Days Before the Registration Deadline on October 7, 2024.

Plaintiffs' request to halt the "signature or mark" rule finally came before the District Court during its customary case management hearing on August 29, 2024, just thirty-nine days prior to the close of voter registration. Ruling from the bench, the District Court granted Plaintiffs' motion and enjoined the SBEC and others from

"enforcing the wet signature rule AND from rejecting or refusing to accept any voter registration application on the ground that it was signed with a digital or electronic signature." APP 294, R. Doc. 65, at 2. Minutes from the bench ruling were filed of record at 5:58 PM on Friday, August 30. *See id.*

The SBEC's request to stay the injunction was denied. *Id.*; *see also* Fed R. App. P. 8(a)(1). Thus, the District Court's ruling went immediately into effect thirty-nine days before the voter registration deadline, fifty-three days prior to the start of early voting, and sixty-eight days before election day.

The District Court announced that it planned to "file a more fulsome memorandum opinion to further explain its findings and rulings by no later than September 10," 2024, a date which falls within thirty days of the close of voter registration. *Id.* While the parties wait for this memorandum opinion, the injunction remains in effect.

This appeal followed.

ARGUMENT

Traditionally, courts consider four factors when assessing a stay request: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[2] The analysis, however, differs in elections cases, as "the Supreme Court has 'repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.'" *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020)).

Under the "*Purcell* principle," *see Purcell v. Gonzalez*, 549 U.S. 1 (2006), the "traditional test for a stay" does not apply "in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Rather, courts considering whether to stay an injunction pending appeal are required to weigh "considerations specific to election cases." *Purcell*, 549 U.S. at 4-5. Most important is the state's "extraordinarily strong interest in avoiding late, judicially

[2] Because the SBEC is a government defendant, the balance-of-harms and public-interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). "[T]he *Purcell* principle" has thus become "a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled," *id.* at 880-81, and courts routinely stay injunctions while "express[ing] no opinion" on the merits. *Purcell*, 549 U.S. at 5. The principle makes sense, too, because "a stay preserves the status quo and promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules." *Org. for Black Struggle*, 978 F.3d at 609 (quoting *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020)).

I. *Purcell* Mandates a Stay of the District Court's Injunction.

Purcell reflects the Supreme Court's belief that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 589 U.S. at 424. Beyond this "on-the-eve-of-an-election" factor, courts have recently evaluated stay requests through the lens of a "relaxed" test articulated in Justice Kavanaugh's concurring opinion in *Merrill*,

> in which he suggested that the bar on eleventh-hour election injunctions "might be overcome . . . if a plaintiff establishes at least the following": (1) "the underlying merits are entirely clearcut in favor of the plaintiff"; (2) "the plaintiff would suffer irreparable harm absent the injunction"; (3) "the plaintiff has not unduly delayed bringing the complaint to court"; and (4) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship."

Walen v. Burgum, No. 1:22-CV-31, 2022 WL 1688746, at *5 (D.N.D. May 26, 2022) (quoting *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)).

Under this "relaxed" standard, and indeed even under the traditional standard, a stay of the District Court's injunction is appropriate here.

A. The District Court Issued the Injunction "on the Eve of an Election."

There is no bright line on what constitutes "on the eve of an election" for purposes of the *Purcell* analysis. In *Purcell*, the district court issued the injunction under review "just weeks before the election." *Purcell*, 549 U.S. at 4. In subsequent cases, stays were entered by the Supreme Court when issued thirty-three days prior to an election, *North Carolina v. League of Women Voters*, 574 U.S. 927 (2014), sixty days before election day. *Husted v. Ohio State Conf. of N.A.A.C.P.*, 573 U.S. 988 (2014), and, in *Merrill*, with an election "about four months away." *Merrill*, 142 S. Ct. at 888 (Kagan, J., dissenting). In recent election cycles, federal district courts have charted a course in which the *Purcell* "on-the-eve-of-an-election" window opens in the *months* leading up to an election. *See League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (holding that "[w]hatever *Purcell*'s outer bounds," it included times where "voting in the next statewide election was set to begin in *less* than four months"); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (a stay was warranted despite election being "months away").

The District Court's injunction unquestionably falls within the period in which *Purcell* applies. Arkansans must register to vote thirty days before a general election; here, the deadline falls on October 7, 2024. The District Court enjoined the "signature or mark" requirement on August 29, 2024, thereby altering the system used to register voters, thirty-nine days before this deadline. *See* APP 293, R. Doc. 65 at 1 (noting the District Court granted the preliminary injunction from the bench on August 29, 2024). This ruling came on the "eve" of the relevant election-related deadline. *Purcell* applies.

B. The Merits Are Not "Entirely Clear Cut" in Plaintiffs' Favor.

While this Court may stay the injunction for November 2024 general election without "express[ing] [an] opinion" on the merits, *Purcell*, 549 U.S. at 5, courts have considered whether "the underlying merits are entirely clearcut in favor of the plaintiff." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also League of Women Voters*, 32 F.4th at 1372 (noting the "entirely clearcut" standard and holding that "[w]hatever the precise standard, we think it clear that, for cases controlled by *Purcell*'s analysis, the party seeking injunctive relief has a 'heightened' burden").

The merits here are not "entirely clearcut" in Plaintiffs' favor. Far from it. As explained, *infra*, signature requirements like the one passed by SBEC and approved by the Arkansas legislature are "material" and thus withstand review under

the Materiality Provision. *See Callanen*, 89 F.4th at 489 (upholding a similar signature requirement because "an original signature advances voter integrity" and "makes such a signature a material requirement"); *Byrd*, 2023 WL 7169095, at *7 (similar). The District Court's ruling is the outlier—both merits decisions on these types of signature requirements support the SBEC's position. *See, e.g.*, *Byrd*, 2023 WL 7169095, at *6 ("[T]he question is whether Plaintiffs' allegations here plausibly show that the wet-signature requirement is immaterial, and I conclude they do not."). Given this authority, it is evident that Plaintiffs cannot show "the underlying merits are entirely clearcut in [their] favor." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

C. Plaintiffs Needlessly Waited for Over Two Months Before Seeking to Enjoin the SBEC's Emergency Rule.

Though this Court need not engage in further analysis, the next factor articled by Justice Kavanaugh—whether the plaintiff "unduly delayed bringing the complaint to court"—weighs heavily in favor of a stay under *Purcell*. *Id.* Here, Plaintiffs let thirty-two days (May 4, 2024 to June 5, 2024) pass before bringing suit to enjoin the SBEC's emergency rule. Another thirty-six days (June 5, 2024 to July 11, 2024) elapsed before Plaintiffs moved for a preliminary injunction. Federal district courts, when analyzing this issue under the *Merrill* concurring opinion, have found undue delay on more compressed timelines. In *Pierce v. North Carolina State Board of Elections*, the court noted the plaintiffs' delay in its ruling, "[P]laintiffs

unduly delayed bringing this case by waiting 26 days after the General Assembly enacted [the challenged law] to file suit and waiting 28 days after the General Assembly enacted [the challenged law] to seek a preliminary injunction." No. 4:23-CV-193-D, 2024 WL 307643, at *33 (E.D.N.C. Jan. 26, 2024). Here, the delay was not twenty-six or twenty-eight days; it was nearly seventy. And by waiting almost ten weeks to seek injunctive relief, Plaintiffs allowed the machinery of the voter registration process to ramp up in advance of the October 7, 2024 deadline, only to have it upended by an eleventh-hour change to how voters may register in Arkansas. A stay of the District Court's ruling is appropriate on such facts.

D. Plaintiffs Cannot Carry Their Burden of Demonstrating the Injunction Will Not Result in Significant "Confusion" or "Hardship."

A stay is also warranted because Plaintiffs cannot show the changes to Arkansas's voter registration system will not come "without significant . . . confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). This requirement reinforces the principle that "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 880-81.

Prior to May 4, 2024, county clerks across Arkansas unevenly applied Amendment 51 "signature or mark" requirement. Some allowed voters to sign using electronic or digital means; others required a handwritten signature. But the

SBEC—through the "signature or mark" requirement approved by the state legislature—brought certainty to the process. And this was the status quo for nearly four of the five months leading up to the October 7, 2024 voter registration deadline.

For its part, GLA seems to acknowledge that District Court's ruling creates a period of uncertainty. Since the ruling was announced from the bench, GLA has unilaterally contacted at least one county clerk and urged her to adapt promptly to the ruling and conduct training and communication with staff without delay. And to make matters more complicated, the District Court's injunction binds only three of Arkansas's seventy-five county clerks. How the other seventy-two will handle voter registration applications in the busiest time for registration, the month immediately preceding the deadline, remains unknown, as the SBEC does not supervise the conduct of these popularly elected officials. Because the injunction, if not stayed, will foster confusion, hardship, and non-uniform practices for the registration of voters on the eve of the October 7, 2024 registration deadline, the injunction should be stayed. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) ("Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences.").

II. The SBEC Is Likely to Succeed on the Merits Because the "Signature or Mark" Requirement Is "Material."

While *Purcell* provides the framework for this Court, traditional stay principles—principally, the SBEC's likelihood of prevailing on appeal—also weigh in favor of a temporary pause on the District Court's ruling.

As at least two courts have found, a signature requirement like the one validly adopted by the SBEC, and approved by the Arkansas legislature, does not run afoul of the Materiality Provision. Arkansas "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4. And a state regulation enacted to protect the integrity of a state's election instills public confidence in the electoral process because it "encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

Purcell makes clear that Arkansas has an important interest in verifying a prospective voter's identity during the registration process in order to promote integrity in its elections. The Fifth Circuit so found in a recent decision in which VDO and others challenged a similar Texas signature requirement. There, the court ultimately ruled the requirement did not violate the Materiality Provision, as "requiring an original signature meaningfully, even if quite imperfectly, corresponds to the substantial State interest of assuring that those applying to vote are who they

say they are." *Callanen*, 89 F.4th at 489. To reach this conclusion, the Fifth Circuit appropriately framed the issue against this important state interest:

> [F]irst, . . . Texas's interest in voter integrity is substantial. Second, that interest relates to the qualifications to vote—are the registrants who they claim to be? Finally, most voter registration forms likely are completed far from any government office or employee. That limits the methods of assuring the identity of the registrant. Though the effect on an applicant of seeing these explanations and warnings above the signature block may not be dramatic, Texas's justification that an original signature advances voter integrity is legitimate, is far more than tenuous, and under the totality of the circumstances, makes such a signature a material requirement.

Id. In a second challenge brought by VDO, this time in Florida, the district court reached the same conclusion in response to the same arguments Plaintiffs make here, namely that a pen and ink signature "bears no relation to the statutory qualifications" and "the act of signing—rather than the method used—affirms the information provided as true and accurate." *Byrd*, 2023 WL 7169095 at *6.

The present case is no different. The SBEC adopted "signature or mark" requirement in order to secure "the interests of 'uniform and efficient procedures.'" APP 248, R. Doc. 53-1 at 6. Moreover, both the emergency and permanent rules include a "signature or mark" requirement to confirm "the verification of the voter's identity," to serve as safeguard during the absentee balloting process, and to prevent voter fraud. APP 260-61, R. Doc. 53-2 at 6-7. These are some of the exact same justifications that led Florida and Texas to adopt materially identical signature requirements, both of which survived judicial review. For these reasons, and

because "original signatures carry different weight than other 'signatures,'" *Byrd*, 2023 WL 7169095 at *6, the SBEC's rules do not offend the Materiality Provision and are likely to hold up on appeal.

Plaintiffs sidestepped these decisions before the District Court, focusing heavily on a pair of points. *First*, Plaintiffs reason any rule proscribing the use of electronic or digital signatures must be immaterial because electronic signatures are customarily used in other contexts, even to register voters through governmental actors such as the Department of Motor Vehicles. But as the *Byrd* court noted, "the acceptance of electronic signatures in certain circumstances does not render the wet signature requirement immaterial in this circumstance." *Byrd*, 2023 WL 7169095, at *6. The Fifth Circuit rejected this argument in *Callanen*, too, where the court noted, "That Texas allows electronic submissions via the Department of Public Safety does not necessarily alter the calculus. Texas exerts more control over and may legitimately have more confidence in that department's systems." *Callanen*, 89 F.4th at 490-91. The same is true here.

Second, Plaintiffs attempt to create some distance between the two merits decisions and the SBEC's rulemaking by arguing that both *Callanen* and *Byrd* involved "legislative judgment" missing from the SBEC's process. This argument, however, ignores a unique feature of Arkansas government—Arkansas voters, through Amendment 92, gave the legislature the final say over all agency rules,

including those passed by the SBEC. Thus, after the SBEC (again, a group comprised of officials appointed by the Governor, legislative leaders, and the two major political parties) passed both the emergency and permanent rules, the rules did "not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules." Ark. Const. art. 5, § 42. There was unquestionably "legislative judgment" during this process. The Arkansas legislature had an opportunity to reject the rules, or to send them back for amendment. The legislature chose to adopt the rules as written. This judgment should receive some measure of deference upon review. *See Callanen*, 89 F.4th at 489 ("We must give weight to a state legislature's judgment when it has created 'evenhanded restrictions that protect the integrity and reliability of the electoral process.'" (quoting *Crawford*, 553 U.S. at 189-90)).

For these reasons, the SBEC is likely to prevail on the merits, as the "signature or mark" requirement does not violate the Materiality Provision.

CONCLUSION

The Court should grant the motion, stay the District Court's injunction pending appeal prior to September 9, 2024, and issue any temporary administrative stay it seems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4825 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman font, using Microsoft Word.

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/s/ Graham Talley
Graham Talley

CERTIFICATE OF SERVICE

I certify that on September 5, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Graham Talley
Graham Talley