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

PLAINTIFFS-APPELLEES' RESPONSE TO MOTION TO STAY INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, Plaintiffs-Appellees Get Loud Arkansas ("GLA"), Vote.org ("VDO"), Nikki Pastor, and Trinity "Blake" Loper make the following disclosure:

1. GLA is a nongovernmental corporate party. No parent corporation or publicly held corporation owns 10% or more of its stock.

2. VDO is a nongovernmental corporate party. No parent corporation or publicly held corporation owns 10% or more of its stock.

3. Nikki Pastor is an individual.

4. Blake Loper is an individual.

Plaintiffs-Appellees, through undersigned counsel, acknowledge a continuing obligation to supplement this disclosure if "the information required under Rule 26.1 changes." Fed. R. App. P. 26.1(d)(3).

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<u>/s/ Uzoma N. Nkwonta</u>
Uzoma N. Nkwonta

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INTRODUCTION

Get Loud Arkansas ("GLA")—a voter-centric civic organization in Arkansas—created and promoted a simple online tool that allows Arkansans to fill out voter registration applications digitally, with electronic signatures. Arkansas's Secretary of State and Attorney General confirmed that electronic signatures comply with Arkansas law—the latter in a formal opinion. But after GLA's tool received public acclaim for its success registering new voters, the Secretary abruptly reversed course and, as chair of the State Board of Election Commissioners ("SBEC"), led SBEC to promulgate a rule effectively banning GLA's tool by requiring that county clerks reject mail voter registration forms without "wet" signatures made with ink on paper. The district court properly enjoined that rule on a preliminary basis because it violates the Civil Rights Act of 1964, which prohibits officials from denying the right to vote based "errors or omissions" on application forms that are not material "in determining whether such individual is qualified … to vote," 52 U.S.C. §10101(a)(2)(B) ("materiality provision").

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SBEC now seeks to stay that order, but its request fails at every step. To start, SBEC roots its motion almost entirely on the so-called *Purcell* principle, Mot.16–23, but it forfeited that argument by failing to raise it at any point below. SBEC's counsel did not even utter the term "*Purcell*" in the nearly four-hour preliminary injunction hearing held by the district court. The *sole* reference to *Purcell* in the

record came from Plaintiffs, who noted SBEC made no *Purcell* argument and never suggested preliminary relief would cause voter confusion. The Supreme Court's order in *Rose v. Raffensperger*, 143 S. Ct. 58 (2022), makes clear that stay applicants cannot sandbag Plaintiffs with tardy *Purcell* theories. With no preserved *Purcell* argument, SBEC's motion evaporates.

SBEC's *Purcell* argument is wrong anyways. It does not explain how the injunction will cause "voter confusion and [any] consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). It does not mention voter confusion *at all*. Nor could it—the court's order *helps* voters, ensuring they may register using GLA's convenient tool. In contrast, staying the order below—under which many Arkansans now have submitted applications that are en route to clerks in dozens of counties across Arkansas——would potentially disenfranchise voters who submitted applications in accordance with the law.

SBEC's motion also gives scant attention to the merits. Mot.23–26. It nowhere engages with the district court's conclusion—based on unrefuted testimony—that Plaintiffs are likely to show that SBEC's wet signature requirement violates the materiality provision. Instead, SBEC regurgitates its failed argument below that a "wet" signature—as compared to electronic or digital—is "material" in the abstract. But it nowhere answers the core inquiry under the materiality provision—how a "wet" signature is "material in determining whether such

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individual is qualified … to vote," 52 U.S.C. §10101(a)(2)(B)—and instead relies solely on out-of-circuit decisions that are readily distinguishable.

Finally, SBEC ignores the equities. It does not even *claim*—never mind show—that it faces irreparable harm without a stay. That alone warrants denying SBEC's motion. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). Its bare assertion that *clerks* will be confused is no substitute—none of the clerk defendants claims any irreparable harm or joins SBEC's motion. And SBEC fails to uncover any error in the district court's finding that Plaintiffs and the public will be harmed by permitting SBEC to enforce its lawless rule. SBEC's motion should be denied.

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SUMMARY OF THE CASE

I. Voter registration in Arkansas.

Arkansans may register to vote by: (1) submitting a mail voter registration application created by the Secretary to their respective county clerk in person or, by mail, *see* Ark. Const. amend. 51, §§6(a), 9(c); (2) submitting an application through a third-party organization authorized to submit an application on the voter's behalf, *id.* §6(a)(2)(G); or (3) registering at certain state agencies, *id.* §5(a).

Arkansas's Constitution requires applicants to provide a "signature or mark made under penalty of perjury that the applicant meets each requirement for voter registration," *id.* §6(a)(3)(F), but *does not* mandate the use of any specific method or instrument in entering that signature or mark, *id.* §6(b)(1). Many Arkansans use

electronic signatures when they register to vote at state agencies, *id*. §5(b)(1)–(4); APP.97–98; R.Doc.46-6 ¶18.

County clerks are responsible for reviewing and approving voter registration applications; they "shall register qualified applicants" if the application is "legible and complete." Ark. Const. amend. 51 §9(c)(1). An applicant is qualified if they are: a U.S. citizen; a resident of Arkansas; at least eighteen 18 years old; and "[l]awfully registered to vote in the election." *Id.* art. 3, §1.

II. Plaintiffs offer innovative tools to help Arkansas register to vote.

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GLA was founded in 2021 to address Arkansas's lowest-in-the-nation voter registration rates. APP.66; R.Doc.46-2 ¶3. GLA initially pursued its mission by distributing paper registration applications but quickly realized that approach's limitations. APP.68; R.Doc.46-2 ¶9. Consequently, it developed an online tool that allows Arkansans to complete and sign a mail voter registration application on their phone, tablet, or computer in minutes. APP.68–71; R.Doc.46-2 ¶¶10–13,19. To use the tool, an applicant provides the information necessary to complete the voter registration application prescribed by the Secretary. APP.69; R.Doc.46-2 ¶14. Applicants then use their finger, stylus, or mouse to sign their name confirming the accuracy of that application under penalty of perjury above the same sworn statement that appears on the Secretary's form. *Id.* The tool fills in the Secretary's form with the applicant's information and allows them to review the completed form

and authorize GLA to print and submit it to their county clerk. *Id.* GLA released this online tool in January 2024, and instantly saw an increase in the rate at which it registered voters. APP.69; R.Doc.46-2 ¶¶13,15. When SBEC effectively banned the application, GLA deactivated this online tool, and relaunched a barebones version that—due to the lack of an electronic signature option—required applicants to find a printer, print the form, sign by hand, and then mail to their clerk. APP.71,73–74; R.Doc.46-2 ¶¶20, 29–30. GLA's ability to register voters—and particularly younger voters—was greatly diminished. APP.74; R.Doc.46-2 ¶31; *see also* APP.86–88; R.Doc.46-3 ¶¶3, 8–10 (describing similar tool offered by Plaintiff Vote.org).

III. State officials confirm electronic signatures comply with Arkansas law.

In early 2024, GLA began promoting its new tool at events across Arkansas. APP.69–70; R.Doc.46-2 ¶¶15–18. GLA had no reason to doubt the tool's legality; it complies with Amendment 51's requirement that the voter provide a "signature or mark" made under penalty of perjury to complete an application. APP.69; R.Doc.46-2 ¶14. GLA nonetheless sought assurances about its tool from the Secretary's office. APP.71; R.Doc.46-2 ¶21. On at least *three occasions*, the Secretary's office told GLA that its tool complies with Arkansas law. APP.71–72, 78–80; R.Doc.46-2 ¶22, Ex. A. It advised that the Secretary's "attorneys looked into this … and came to the same conclusion [as GLA]." *Id.* The office further assured GLA that "the Secretary

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of State does not see how a digital signature should be treated any differently than a wet signature." APP.71–72, 83–84; R.Doc.46-2 ¶22, Ex. B.

The Arkansas Attorney General reached the same conclusion when asked by the Secretary to provide a formal opinion. The Attorney General stated that "an electronic signature or mark is generally valid under Arkansas law," APP.120; R.Doc.46-7 at 1, and that:

> Consequently, given the historical acceptance of signatures produced through a variety of means, the widespread acceptance of electronic signatures, and the fact that Amendment 51 does not contain any restrictions on how a "signature or mark" may be made, I believe that an electronic signature satisfies Amendment 51's "signature or mark" requirement.

APP.122; R.Doc.46-7 at 3 (Ark. Att'y Gen. Op. No. 2024-049 at 3 (Apr. 10, 2024)).

IV. The Secretary and SBEC reverse course.

The Secretary abruptly reversed course on February 28, issuing a letter—with no analysis or explanation—instructing clerks to reject applications "executed by electronic signature." APP.116; R.Doc.46-7, Ex. B. The letter came just two days after a news report touting the success of GLA's new tool. APP.42; R.Doc.46-1 at 6 n.3.

The Attorney General issued his formal opinion several weeks later, rejecting the Secretary's newfound view. APP.120–123; R.Doc.46-7, Ex. D. Nevertheless, SBEC—chaired by the Secretary—proceeded with emergency rulemaking to prohibit electronic signatures on mail registration applications. APP.138–39;

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R.Doc.46-7, Ex. E. The emergency rule took effect on May 4 and was scheduled to expire on September 1. APP.20; R.Doc.2 ¶61; Appellees' Appx. ("SAPP") at SAPP.169; R.Doc.44 ¶61.

Plaintiffs—GLA, Vote.org, and two individuals whose applications were rejected for lack of "wet" signatures—sued SBEC and the clerks for Pulaski, Benton, and Washington Counties for prospective relief under the materiality provision of the Civil Rights Act of 1964 on June 5. *See* APP.3–27; R.Doc.2.

V. Plaintiffs obtained a preliminary injunction after SBEC announced it would make the wet signature requirement permanent.

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On June 11, SBEC initiated the process to make the emergency rule permanent, effective September 2. SAPP.178; R.Doc.63 ¶6.

Plaintiffs moved for preliminary relief on July 11—the same day SBEC held its public hearing on the rule, laying the groundwork for the permanent rule. *See* APP.28–30; R.Doc.46; *see also* SAPP.178; R.Doc.63 ¶8. The district court shortly thereafter set a hearing for August 29. R.Doc.43 at 1, 5.

At the hearing, no Defendant explained how a wet signature is used to determine whether an applicant is qualified to vote under Arkansas law. *See* SAPP.053–160. One clerk candidly acknowledged that they look only for the "existence" of a signature or mark on voter application forms—not *how* the signature is made. SAPP.138:15–22. This acknowledgment confirmed the uncontested evidence in the record that Arkansas election officials have not considered the type

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of instrument used in signing or marking a voter registration application as a factor in determining whether the applicant is qualified to vote. APP.97–98; R.Doc.46-6, ¶¶ 15-20.

SBEC primarily argued that Plaintiffs had sued *prematurely*, before enactment of the permanent rule. SAPP.090:10–092:4. It did not suggest that, under *Purcell*, Plaintiffs had filed suit *too late*. The only mention of *Purcell* was by *Plaintiffs*, who observed "there was no argument in the briefing here on *Purcell*, nor was there any suggestion that an injunction here would confuse voters or election officials." SAPP.135:19–136:15.

After argument, the district court granted a preliminary injunction from the bench and later issued a written decision on September 9. SAPP.147:25–148:6 (citing *Dataphase Sys. v. CL Sys.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)); SAPP.001–052; R.Doc.72.[1] The court found Plaintiffs likely to prevail on each element of their materiality provision claim, concluding "the use of a digital signature and thus the omission of a wet signature is not material to determining whether a person is qualified to vote under Arkansas law," SAPP.148:22–149:5; *see also* SAPP.148:14–21 (finding other elements not disputed by SBEC likely satisfied); SAPP.032–051; R.Doc.72 at 32–51.

[1] The opinion is also available at: *Get Loud Ark. v. Thurston*, No. 5:24-CV-5121, 2024 WL 4142754 (W.D. Ark. Sept. 9, 2024).

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The court also found Plaintiffs would suffer irreparable harm absent relief, including "los[t] opportunities to conduct election-related activities such as voter registration and education." SAPP.149:24–150:13 (quoting *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018)); *see also* SAPP.150:22–151:6 (quoting APP.290; R.Doc.58 at 20); SAPP.049–050; R.Doc.72 at 49–50.

Lastly, SBEC did not even "dispute" the remaining equitable *Dataphase* factors, each of which weighed in Plaintiffs' favor. SAPP.151:7–21; SAPP.050–051; R.Doc.72 at 50–51.

The court ordered that Defendants "be preliminarily enjoined 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." SAPP.155:24–156:5.

SBEC—but none of the clerks—noticed an appeal *six days* later and filed the instant motion *eight days after* the court issued its injunction.

VI. GLA resumes registering Arkansans to vote using its online tool.

With the injunction in hand, GLA reactivated the full version of its tool. SAPP.188 ¶6. In the roughly two weeks since, over 150 people across more than thirty counties have applied to register using the tool. SAPP.189 ¶7. GLA has also allowed several other organizations to use a generic version of the tool for their own

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registration efforts, while other organizations and business have expressed interest in sharing links to the tool with their members and customers. SAPP.189 ¶8. Several of these organizations planned to heavily promote use of the tool up through Arkansas's October 7 deadline to register for the November election, including by holding rallies across the state on September 17—National Voter Registration Day—that feature the tool. SAPP.190 ¶11. Their ability to do so is now unclear in view of the administrative stay entered on September 13.

Many of GLA's applications are presently in transit to clerks across Arkansas. SAPP.189–190 ¶9. A stay would disrupt this process, potentially leading to rejection of applicants who applied to vote under the injunction's protection. Contrary to SBEC's unadorned claims, no reports of either voter or election official confusion have emerged. SAPP.191 ¶13.

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LEGAL STANDARD

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). The movant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. It must show the following factors support a stay:

> (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.

Brady v. NFL, 640 F.3d 785, 789 (8th Cir. 2011) (citation omitted). "The most important factor is the appellant's likelihood of success on the merits," but "[t]he movant must show that it will suffer irreparable injury unless a stay is granted." *Id.* (citations omitted).

ARGUMENT

I. SBEC is not likely to succeed on the merits.

SBEC must show the injunction was based on "clearly erroneous factual determinations, an error of law, or an abuse of discretion." *Emerson Elec. Co. v. Rogers*, 418 F.3d 841, 844 (8th Cir. 2005). Far from meeting that high bar, SBEC sweeps the merits aside and ignores the district court's analysis and findings entirely.

SBEC asserts only that a wet signature is "material" in an abstract sense, Mot.23–26, yet persistently fails to answer the core question under the materiality provision: whether the wet signature requirement is material "*in determining whether such individual is qualified ... to vote*." 52 U.S.C. §10101(a)(2)(B) (emphasis added). SBEC insists, for instance, that wet signatures are "material" because they serve the state's interests in "uniform and efficient procedures" and "prevent[ing] voter fraud." Mot.24. But neither of those purported policy rationales has anything to do with whether a wet signature is "material in determining" a

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person's qualification to vote under Arkansas law. That is why the court below found that "the state's interests are not a relevant consideration in analyzing a violation under the materiality provision,"—a finding SBEC ignores. SAPP.149:11–18; SAPP.039–045; R.Doc.72 at 39–45. At no point—including before this Court—has SBEC explained how a *wet* signature, as compared to any other type of signature or mark, is material in determining whether an applicant meets the qualifications to vote in Arkansas.

Critically, SBEC ignores that clerks do not consider the type of instrument used in signing or marking a voter registration application as a factor in determining whether the applicant is qualified to vote in Arkansas. *See* SAPP.038; R.Doc.72 at 38; SAPP.138:15–22 (clerk admitting that clerks look solely for the "existence" of a signature or mark on application). "Based on th[at] evidence," the court concluded clerks do not "use the wetness of a signature to determine whether an applicant is qualified to vote under Arkansas law." SAPP.038; R.Doc.72 at 38. SBEC does not assert this finding was clearly erroneous, and this Court has no reason to conclude otherwise.

SBEC also asserts—for the first time and only in background—that wet signatures have some "practical utility" in assisting clerks' comparison of signatures on absentee ballot applications and voter registration forms. Mot.13. The evidence before the district court showed otherwise. SAPP.038; R.Doc.72 at 38; APP.97–98;

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R.Doc.46-6 ¶¶18–19; SAPP.122:23–123:3. Indeed, one clerk *admitted* at the hearing that her office digitizes signatures on paper forms before engaging in signature matching, meaning the comparator signature in that clerk's office is nearly *always* an electronic or digital signature. SAPP.122:23–123:3. SBEC also does not say that this comparison is material in determining voters' qualifications. Mot.24–26. Nor could they. The materiality provision demands that a requirement be "more than useful or minimally relevant" to survive scrutiny. *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *37 (D. Ariz. Feb. 29, 2024).

Rather than grapple with the text of the materiality provision, the record evidence, or the district court's findings, SBEC relies almost entirely on two out-of-circuit decisions to argue that the wet signature requirement is "material." Mot.23–24. In doing so, SBEC obscures a critical difference between this case and those two. The wet signature requirements in those cases were enacted into statute by the legislatures of those states—a "legislative judgment" the majority in *Callanen* found determinative. *Vote.org v. Callanen*, 89 F.4th 459, 468 (5th Cir. 2023).

Arkansas's wet signature requirement is unsupported by any similar legislative judgment; it was adopted by unelected agency officials, not the Legislature. And the Arkansas Attorney General has confirmed that the Arkansas Constitution *permits* electronic signatures—the exact opposite scenario as in *Callanen* and *Byrd*. To the extent any "legislative judgment" exists here, it is that

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"an electronic signature satisfies Amendment 51's 'signature or mark' requirement," as the Attorney General confirmed. APP.122; R.Doc.46-7 at 3. SBEC is wrong that a legislative subcommittee's mere assent to the rule reflects the sort of legislative judgment that was critical in *Callanen*. Consent from a subcommittee is not the same as the ordinary lawmaking process, nor should it be afforded any similar deference. *See* Ark. Const. art. V, §22; *cf. INS v. Chadha*, 462 U.S. 919, 955 (1983).

The cases relied upon by SBEC are also flawed. As the district court explained, SAPP.149:14–17, the majority in *Callanen* improperly construed the term "material" by "invoking a line of constitutional vote-denial cases … for the proposition that states have considerable discretion in establishing rules for their own elections," but ignored that the plain text of the materiality provision "expressly limits states' purported 'considerable discretion.'" *Callanen*, 89 F.4th at 491–92 (Higginson, J., dissenting) (cleaned up). "The considerable deference to be given to state election procedures thus has no place in a materiality analysis." *Id.* at 492 (cleaned up). Most importantly, the *Callanen* majority disregarded the undisputed fact that election officials *did not use* the wet signature in any capacity to determine a voter's qualifications, which should have "slam[med] the door shut on any argument that [a wet signature] is material." *Id.* at 493 (citation omitted).[2] The Fifth

[2] *Byrd* simply followed *Callanen* in a case regarding Florida's legislatively-enacted wet signature requirement, shifting the analysis away from whether a wet signature

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Circuit's "rather strained test" is not "persuasive" and ignores "the statutory text of the Materiality Provision." SAPP.040–041; R.Doc.72 at 40–41.

II. *Purcell* does not support a stay.

SBEC dedicates most of its brief to *Purcell*. Mot.16–23. That argument was forfeited below and fails on its own terms.

A. SBEC forfeited any *Purcell* argument.

SBEC did not *once* raise *Purcell*—or concerns about voter confusion or hardship—before the district court. Not in its answer. Not in its motion to dismiss. Not in its opposition to Plaintiffs' preliminary injunction motion. And not at the preliminary injunction hearing. The *only* reference to *Purcell* in the record below is when Plaintiffs noted at argument that it had not been raised. SAPP.135:19–25; *see also* SAPP.050; R.Doc.72 at 50 n.24 (observing SBEC did not brief *Purcell* but concluding such concerns are "not at play here").[3]

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SBEC's failure to raise *Purcell* below bars its invocation here, as the Supreme Court has made clear. In *Rose v. Raffensperger*, the Georgia Secretary of State declined to raise *Purcell* arguments before a district court which—as here—granted

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is material to whether "a copied, faxed, or otherwise non-original signature is equal in stature to an original, wet signature." *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1055–56 (N.D. Fla. 2023). The materiality provision grants no safe harbor to immaterial requirements that have some other purported justification.

[3] SBEC also failed to argue below that an injunction would harm it or the public. These equitable factors "are [not] really in dispute or the subject of the defendants' contentions." SAPP.151:7–17.

an injunction in August ahead of a November election. A divided panel of the Eleventh Circuit nonetheless stayed the injunction on *Purcell* grounds, over a dissent noting the Secretary had forfeited the argument. *See Rose v. Sec'y, State of Ga.*, No. 22-12593, 2022 WL 3572823, at *2 (11th Cir. Aug. 12, 2022); *see also id.* at *13 (Rosenbaum, J., dissenting). The Supreme Court vacated the stay. It noted the majority improperly "applied a version of the *Purcell* principle" because the Secretary failed to argue to the trial court that there was "[in]sufficient" time "to enable effectual relief" ahead of the November election. 143 S. Ct. at 59. The same is true here—SBEC *never* suggested to the district court that it lacked time to grant effective relief. In fact, it argued the *opposite*, insisting that Plaintiffs filed suit prematurely. SAPP.090:14–091:14. The Supreme Court's order in *Rose* forecloses this motion.

Ordinary rules of appellate procedure demand the same result. "[T]his Court's role [is] as a court of review." *Ritchie Cap. Mgmt., L.L.C. v. JP Morgan Chase & Co.*, 960 F.3d 1037, 1056 (8th Cir. 2020) (Shepherd, J., concurring) (citing *Solomon v. Petray*, 795 F.3d 777, 791 (8th Cir. 2015)). It is "not a court of first instance, and will not consider arguments … not presented for consideration to the district court." *Solomon*, 795 F.3d at 791. If SBEC believed preliminary relief posed a risk of confusion, it was obliged to raise that concern so that the district court could weigh it before granting relief. *But SBEC failed to do so at every turn.*

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Purcell creates no special exception to these foundational rules. *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1034 (W.D. Wis. 2022) (concluding Defendants "forfeited" *Purcell* argument by not raising it before district court (citing *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1042 (7th Cir. 2020))). The district court could not have abused its discretion by failing to consider arguments SBEC never bothered to make. *Robinson v. Terex Corp.*, 439 F.3d 465, 467 (8th Cir. 2006).[4]

B. *Purcell* does not apply because there is no risk of confusion.

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SBEC's reliance on *Purcell* is misplaced regardless. *Purcell* does not dissolve a court's equitable authority simply because an election is months away. *E.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (rejecting that *Purcell* is an "absolute" bar on injunctive relief and instead describing it as a "sensible refinement of ordinary stay principles for the election context"); *League of Women Voters of Fla.*, 32 F.4th at 1372 (same); SAPP.050; R.Doc.72 at 50 n.24. *Purcell* requires a case-specific inquiry to determine whether injunctive relief could "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5; *Merrill*, 142 S. Ct. at 881 (suggesting *Purcell*

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[4] The Eleventh Circuit, prior to *Rose*, suggested it was "doubtful" that *Purcell* arguments could be forfeited. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370 n.4 (11th Cir. 2022); *but see Carey*, 624 F. Supp. 3d at 1034. That suggestion is itself now doubtful in view of *Rose*.

turns on whether relief is "feasible before the election without significant cost, confusion, or hardship").

The record here shows there is no risk of confusion to either voters or election officials. SBEC does not even contend the injunction will confuse *voters* or cause them to "remain away from the polls"—the heartland concern under *Purcell.* 549 U.S. at 5. The district court's order simply ensures Arkansans have access to an *additional* mode of completing the Secretary's form and still requires them to satisfy each of the registration requirements set forth in Amendment 51.

As to election officials, the practical impact of the district court's order is limited: Arkansas's county clerks are enjoined 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. That does nothing more than restore the status quo set by Arkansas's Constitution and Legislature, requiring that clerks "register qualified applicants" if their application—including the necessary "signature or mark" made under penalty of perjury—is "legible and complete." Ark. Const. amend. 51 §9(c)(1). If anything, the injunction *streamlines* review of applications, relieving clerks of the obligation to determine whether a signature is "wet." No clerk has suggested this poses a burden.

Indeed, clerks have long reviewed applications in a manner consistent with the injunction. Testimony established clerks are trained to "accept voter registration

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applications with *any* type of signature or mark," even if the applicant "just makes a mark." APP.97; R.Doc.46-6 ¶16 (emphasis added); *see also id.* ¶15 (similar). And "many voter registration applications already include electronic signatures" made at state agencies. APP.97–98; R.Doc.46-6 ¶18. Clerks look solely for the "existence" of a signature or mark when reviewing an application—not to whether it is "wet" or not. SAPP.138:15–23. SBEC could have introduced competing testimony; but it did not (and likely cannot).

SBEC also barely tries to explain how the injunction causes confusion, citing *zero* record evidence. Mot.21–22. It contends SBEC's emergency rule created a "status quo" that the district court disturbed. *Id.* But this Court has stressed that it is "the state legislature" that "sets the status quo"—not unelected agency bureaucrats or "other state officials" like SBEC. *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020). The Arkansas Legislature did not impose the wet signature requirement here; SBEC spun it from whole cloth despite the Attorney General's formal opinion that a wet signature is not required under state law. The injunction *restores* the status quo set by the Legislature and reflected in the text of Arkansas's Constitution.

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SBEC's only other argument is to suggest the injunction disrupts the uniform practices of Arkansas clerks. Mot.22. But any lack of uniformity is a problem of SBEC's own making. SBEC can ensure uniformity by complying with the injunction and instructing clerks that they should respect the order of a federal court (as they

are likely to do anyways). SBEC also enjoys broad authority to ensure clerks adhere to federal election laws, its contrary claim notwithstanding. Ark. Code §§7-1-109, 7-4-101(f)(9); 7-4-120.

SBEC also wrongly suggests the factors set forth by Justice Kavanaugh's *concurrence* displace the traditional stay factors—particularly given SBEC's clear forfeiture of any *Purcell* argument. Even so, those factors are satisfied.

First, the merits are clearcut in Plaintiffs' favor—indeed, SBEC barely contests them. Nowhere does SBEC even *try* to explain how the *wetness* of a signature is material in determining voter qualifications. SAPP.036–038; R.Doc.72 at 36–38. The evidence below uniformly showed it is not material and SBEC does not suggest the court committed clear error.

Second, the district court did not clearly err in finding "plaintiffs are likely to suffer irreparable harm from the continued enforcement of the wet signature rule." SAPP.150:1–3. SBEC does not dispute this finding.

Third, SBEC mischaracterizes the facts in suggesting Plaintiffs did not promptly seek relief. Plaintiffs filed their motion *the same day* SBEC held its public hearing, making clear that approval of the permanent rule was imminent. And SBEC in turn argued that Plaintiffs' lawsuit was *premature*.

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Finally, SBEC fails to explain how it is not "feasible" for clerks to adapt to the modest impact of the injunction, which simply requires clerks to return to their longstanding practices and to adhere to Amendment 51 of the Arkansas Constitution.

III. SBEC does not dispute the remaining factors.

A. SBEC will not suffer irreparable harm absent a stay.

"In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). Failure to show such harm is an independently sufficient reason to deny a stay. *Watkins*, 346 F.3d at 844. SBEC does not even *claim* it will suffer irreparable harm absent a stay—that alone requires denying its motion. *Id.*

B. Plaintiffs, in contrast, will be irreparably harmed by a stay.

Conversely, if a stay is entered, Plaintiffs will suffer the very irreparable harm that the district court found to warrant relief. SAPP.048–050; R.Doc.72 at 48–50; SAPP.150:1–151:6. SBEC does not dispute these findings. A stay now would make that harm even more severe. GLA and many of its partner organizations are now using the tool for their own registration efforts. A stay would disrupt these efforts at a time when many voters—particularly new voters—are most keenly interested in registering. And these organizations plan to heavily promote the tool in the weeks ahead, including on September 17—National Voter Registration Day. Staying the injunction now would severely disrupt those efforts.

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C. The public interest weighs against a stay.

Denying a stay will promote voter registration and ensure that qualified Arkansans do not have applications rejected based on the immaterial fact that they use an electronic signature. SBEC does not suggest the district court clearly erred in finding the public interest supported an injunction. SAPP.151:7–21. Nor could it: "[E]nsuring qualified voters exercise their right to vote is always in the public interest." *Ashcroft*, 336 F. Supp. 3d at 1006 (citation omitted). Likewise, SBEC nowhere addresses the disruption a stay would cause to voters at this juncture.

That disruption is severe—many Arkansans who applied using GLA's tool now have applications in transit to clerks or awaiting processing by a clerk. SAPP.189–190 ¶9. A stay would harm these would-be voters, unfairly causing their applications to be rejected despite applying under the protection of a well-reasoned federal court order, which SBEC did not seek to stay until more than a week after the district court entered the injunction. The Court should deny SBEC's effort to leave these Arkansans in limbo.

CONCLUSION

Plaintiffs respectfully request that the Court deny the Motion to Stay.

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Dated: September 14, 2024

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 5,196 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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I hereby certify that on September 14, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GET LOUD ARKANSAS; VOTE.ORG;
NIKKI PASTOR; and TRINITY BLAKE LOPER **PLAINTIFFS**

V. **CASE NO. 5:24-CV-5121**

JOHN THURSTON; SHARON BROOKS;
JAMIE CLEMMER; BILENDA HARRIS-RITTER;
WILLIAM LUTHER; JAMES HARMON SMITH, III;
and JONATHAN WILLIAMS, in their official
capacities as Commissioners of the Arkansas
State Board of Election Commissioners; BETSY
HARRELL, in her official capacity as Benton
County Clerk; BECKY LEWALLEN, in her official
capacity as Washington County Clerk; and
TERRI HOLLINGSWORTH, in her official capacity
as Pulaski County Clerk **DEFENDANTS**

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MEMORANDUM OPINION AND ORDER

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I. INTRODUCTION

Plaintiffs challenge a rule promulgated by the Arkansas State Board of Election Commissioners ("SBEC") that requires voter registration applications in Arkansas to be signed with a handwritten, wet signature ("Wet Signature Rule" or "Rule").[1] Under the Rule, a voter registration application must include a "signature or mark" that consists of

> . . . 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 . . . .

(Doc. 46-7, p. 63). However, this requirement is not imposed on all voter registration applications. For example, where a person registers to vote at a state agency, such as the Department of Motor Vehicles, no wet signature is required. But the Rule does bar individuals and third-party voter registration organizations from submitting voter registration applications with digital signatures. *Id.* at pp. 62–63.

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Plaintiffs Get Loud Arkansas ("GLA") and Vote.org are nonprofit third-party voter registration organizations. GLA is an Arkansas-based organization founded in 2021 to address low voter registration and turnout in Arkansas. According to the U.S. Census Bureau, in 2020, only 62% of Arkansas citizens were registered to vote and only 54%

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[1] At the time the suit was filed, the Rule had not formally been approved by the Legislative Council, but formal approval occurred on August 23, making the Rule permanent, effective on or around September 2. With leave of Court, Plaintiffs filed a Supplement (Doc. 63) to their Complaint on August 30 under Federal Rule of Civil Procedure 15(d) to acknowledge this development, and Defendants filed an Answer to the Supplement on September 6 (Doc. 70). In granting leave to file this Supplement, the Court made clear that it did not believe it necessary for relief considering the Plaintiffs' Complaint seeks relief against the Wet Signature Rule and "any other requirement that applicants sign their voter registration applications by hand or with a wet signature," thus encompassing the Wet Signature Rule—whether temporary or permanent. *See* Doc. 2, p. 24.

voted—the lowest rates nationwide. *See id.* at p. 5. GLA works to encourage and facilitate civic engagement by registering new voters; organizing get-out-the-vote campaigns; assisting voters in finding their polling location; identifying and helping voters who have been purged from Arkansas's voter rolls in reestablishing their registration status; monitoring and documenting changes to local election rules; along with other education and engagement campaigns. Vote.org is a nationwide 501(c)(3) nonprofit, nonpartisan voter registration and get-out-the-vote technology platform that works to simplify political engagement and increase voter turnout. Both GLA and Vote.org have developed tools that allow Arkansas voters to register online, which aim to increase the organizations' overall reach and efficacy. Plaintiffs Nikki Pastor and Trinity "Blake" Loper (together "Individual Plaintiffs") are Arkansans who applied to register to vote with the help of GLA and were rejected because their applications included digital signatures rather than wet signatures. There is no dispute that both Pastor and Loper are otherwise qualified to vote under Arkansas law.

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Defendants John Thurston, Sharon Brooks, Jamie Clemmer, Bilenda Harris-Ritter, William Luther, James Harmon Smith, III, and Jonathan Williams serve on the SBEC. Specifically, John Thurston is the Arkansas Secretary of State ("Secretary") and the *ex officio* chairman of the SBEC, and the other individuals are Commissioners, all of whom are sued in their official capacities for implementing the Wet Signature Rule. Defendants Betsy Harrell, Becky Lewallen, and Terri Hollingsworth are the county clerks and permanent registrars for Benton County, Washington County, and Pulaski County, respectively. They are sued in their official capacities as the enforcers of the Rule.

Plaintiffs bring a singular claim: that the Wet Signature Rule violates the Materiality Provision of the Civil Rights Act of 1964 ("CRA"), now codified at 52 U.S.C. § 10101(a)(2)(B), which provides:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

The CRA was enacted "to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States," including by reducing "obstacles to the exercise of the right to vote and provid[ing] means of expediting the vindication of that right." H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391, 2393.

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The Materiality Provision of the CRA addresses the long history of county clerks rejecting Black Americans' registration applications "on the basis of purported 'errors' . . . that were hyper-technical, or entirely invented." Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. 83, 148 (2012) (citations omitted). For example, applications were rejected for arbitrary mistakes like an applicant underlining "Mr." instead of circling it or misspelling his state as "Louiseana." *Id.* (citations omitted). Other applications were rejected because the applicant "identified [their] skin color as 'Negro' instead of 'brown' or 'brown' instead of 'Negro.'" *Id.* (citations omitted). In one of the more notorious examples, a woman's application was rejected "because the would-be registrant, required to account for her age in years, months, and days, missed the mark by one day because the day had not yet ended." *Id.* (citations omitted).

Plaintiffs seek declaratory and injunctive relief on the basis that the use of a digital signature—as opposed to a wet signature—is immaterial to determining whether an applicant is qualified to vote under Arkansas law and, thus, cannot serve as grounds for the rejection of a registration application. Defendants reject this and maintain that the Wet Signature Rule does not violate the Materiality Provision.

Now before the Court are Plaintiffs' Motion for Preliminary Injunction (Doc. 46) and Defendants Betsy Harrell and Terri Hollingsworth's Motions to Dismiss (Docs. 39 & 41). The Motions have been fully briefed and are ripe for review. On August 29, 2024, the Court held a hearing, at which the Court received oral argument on all three motions and ruled from the bench. For the reasons stated from the bench and herein, the Motion for Preliminary Injunction (Doc. 46) is **GRANTED**, and the Motions to Dismiss (Docs. 39 & 41) are **DENIED**. To the extent this written Order contradicts any of the Court's statements from the bench, this Order controls.

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To roadmap, the Court will first provide background on the laws and facts at play. Then, the Court will address two threshold questions raised by Defendants: whether there is a private right of action under the Materiality Provision and whether Plaintiffs have standing. Lastly, the Court will address whether a preliminary injunction is proper.

II. BACKGROUND

> Th[e] right to vote [is] . . . the foundation of our representative form of government. It is the sole means by which the principle of consent of the governed as the source of governmental authority is made a living thing.

H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1977 (capitalization revised).

A. Registering to Vote in Arkansas

Under Arkansas law, any person may vote in an election provided they: (1) are a United States citizen; (2) are an Arkansas resident; (3) are at least eighteen years old; (4) are lawfully registered to vote; (5) have not been convicted of a felony; and (6) have not been adjudged mentally incompetent by a court. Ark. Const. art. 3, § 1(a)(1)–(4); *id.* amend. 51, § 11(a)(4), (5).

To vote, a person must first submit a registration application per the requirements of Amendment 51 to the Arkansas Constitution. *Id.* amend. 51, § 3. A person may register by submitting their application themselves, submitting through a third-party registration organization, or by registering at a state "Registration Agency," such as the DMV. *See id.* amend. 51, § 6(a)(2)(G) (contemplating submission by third-party registration organizations); *id.* amend. 51, § 5(a) (designating Registration Agencies).

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Section 6 of Amendment 51 specifies certain requirements for *mail voter registration applications*—i.e., those submitted by individuals and third-party organizations—and certain requirements for applications submitted by Registration Agencies. Relevant here, both processes require the applicant to make a "signature or mark" on the application, affirming under penalty of perjury that the applicant meets the voter registration requirements. *Id.* amend. 51, §§ 6(a)(3)(F), (b)(1)(G), (b)(2).

The Arkansas Constitution does not define "signature or mark." And though Amendment 51 explicitly discusses the use of a "computer process" by Registration Agencies in registering new voters, the text makes no such mention regarding *mail voter registration applications*. *See id.* amend. 51 § 5(b)(2)–(4). However, section 6 explicitly

excludes "any requirement for notarization or other formal identification" or "authorization" for registration applications. *Id.* amend. 51, §§ 6(a)(5), (b)(2).

Under Amendment 51, county clerks serve as the permanent registrars and are tasked with processing registration applications. *See id.* amend. 51, §§ 2, 9(c). The Amendment instructs, "The permanent registrar shall register qualified applicants when a legible and complete voter registration application is received and acknowledged by the permanent registrar." *Id.* amend. 51, § 9(c)(1), (3).

Historically, county clerks in Arkansas have been "advised to accept voter registration applications with any type of signature or mark," including where "a person signs their name in an illegible fashion—or even just makes a mark." (Doc. 46-6, ¶ 16). While the signature or mark may be used for later comparisons against a voter's absentee ballot, *id.* at ¶ 19,[2] at the registration stage the signature or mark's "purpose . . . is to affirm under penalty of perjury that the information in the application is true and correct to the best of the applicant's knowledge." *Id.* at ¶ 16.

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B. GLA and Vote.org's Online Tools

In its early years, GLA relied on paper applications to register new voters, but it soon learned that this method—which required disseminating and tracking the physical applications—was resource-intensive and of limited efficacy. (Doc. 46-2, ¶ 9). Further, this method was not fully accessible to many Arkansans within GLA's target demographic,

[2] Even when comparing absentee ballot signature to registration signatures, Plaintiffs' evidence shows that county clerks often use PDF scans of the registration application or—where the voter registered through a Registration Agency—digital signatures. (Doc. 46-6, ¶¶ 18, 19). Counsel for Ms. Lewallen conceded at the hearing that "[i]n Washington County," the clerk uses "a scan of the paper copy" of the registration to make this comparison. (Doc. 64, pp. 70–71).

such as young people and those living in rural areas who "do not have the means to easily print and submit paper applications." *Id.*

To address these limitations, GLA developed an online tool in early 2023 that allowed applicants to fill out the registration application using a mobile device or computer. *Id.* at ¶¶ 10, 11. The first iteration of this tool allowed applicants to digitally fill out the information on the form promulgated by the Secretary, which GLA would then print and mail to the applicant for the applicant to hand-sign the application. *Id.* at ¶ 11. Then, the applicant could either mail the application to the appropriate county clerk themselves or send it back to GLA and authorize GLA to forward the application to the county clerk. *Id.* at ¶ 11. Though this process was more efficient than the paper-only method, it still posed accessibility issues for many voters and imposed financial and time costs on GLA. *Id.*

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By mid-2023, GLA piloted an option to digitally sign the online form. *Id.* at ¶ 12. GLA then launched an entirely digital tool in January 2024. *Id.* at ¶ 13. This newest tool would allow all applicants to complete *and sign* the voter registration application digitally. *Id.* Like the 2023 tool, an applicant first fills out the information required by Amendment 51, which then populates the form created by the Secretary. *Id.* at ¶ 14. The applicant then uses either their finger, a stylus, or a mouse to digitally sign their name, under penalty of perjury, above a sworn statement as it appears on the Secretary's form. *Id.* Once the form is completed and signed, the applicant authorizes GLA to print and submit the form to the appropriate county clerk on the applicant's behalf. *Id.*

On February 5, 2024, GLA's Executive Director contacted the Secretary's office to confirm her understanding that Arkansas law does not require wet signatures on voter registration applications. *Id.* at p. 15. The Secretary's office promptly responded, stating

that its "attorneys looked into this last week and came to the same conclusion" that Arkansas law does not require a wet signature; the office noted "another concern," however, with the accuracy of a digital signature made with one's finger if it later needed to be compared against an absentee ballot. *Id.* at pp. 14–15. GLA's Deputy Director replied once again to clarify that "the registrations [that GLA] submit[s] right now are not going to be rejected based on the [use of a digital] signature," acknowledging that she understood the separate possibility of later issues when comparing signatures on absentee ballots. *Id.* at p. 14. The Secretary's office emailed back that while they could not "officially speak on the acceptance or rejection of applications"—which lies within the province of the county clerks—the office's "unofficial, non-attorney[ ] advice to the county clerks would be to err on the side of the voter and accept the registrations." *Id.* at p. 13.

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One week later on February 12, GLA contacted the Secretary's office to ask if there were any differences between digital and wet signatures that they should take into account when registering potential voters. *Id.* at pp. 17–20. The Secretary's office responded: "While this is a sensitive issue that is not clear in the law, the Secretary of State does not see how a digital signature should be treated any differently than a wet signature. Again, this is a grey area in the law, so this should not be taken as an official legal opinion." *Id.* at p. 19.

GLA's fully online tool was a near-instant success, with the *Arkansas Times* reporting on February 26, 2024, that GLA had registered 358 voters using the new tool, 78% of whom were under twenty years old—GLA's target demographic. *Id.* at ¶ 15.[3] The

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[3] *See also* Mary Hennigan, *Get Loud Arkansas Sees Success in New Voter Registration Strategy*, Ark. Times (Feb. 26, 2024), https://arktimes.com/news/2024/02/26/get-loud-

tool expanded GLA's capacity and success in reaching voters by making its "outreach efforts more cost-effective and scalable." *Id.* at ¶ 16. For example, where GLA would previously register five to ten students at a high school visit using paper applications, it was now able to register forty to sixty students per visit using the online tool. *Id.* at ¶ 17. GLA extended its reach beyond the fifteen counties it previously focused on and started registering voters in all seventy-five Arkansas counties. *Id.* at ¶ 18. The organization also noticed an exponential increase in the percentage of completed applications—from 33% when using the semi-online tool in 2023 to nearly 100% using the fully-online tool. *Id.* at ¶ 20. And, when compared to paper applications, the online applications were consistently more legible, *id.*, increasing the likelihood that they would be accepted and that all information would be accurately recorded by the clerk.

As to Vote.org, it has developed a digital signature function that it intends to launch in Arkansas like it has in various other states. (Doc. 46-3, ¶¶ 8, 9). Logistically distinct from GLA's digital signature tool, Vote.org's form has applicants upload an image of their original signature, which is then affixed to the form. *Id*. at ¶ 8. Once the signature is affixed, the applicant reviews the signed application, and Vote.org submits it to the appropriate county clerk thereby saving the applicant the time, trouble, and expense of printing and mailing the application. *Id.* Due to the Wet Signature Rule, Vote.org has yet to launch its digital signature function in Arkansas and continues to use an online tool that allows applicants to fill out the registration form but still requires the applicant to print, sign, and mail the application to the clerk. *Id.* at ¶ 7.[4]

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arkansas-sees-success-in-new-voter-registration-strategy [https://perma.cc/5RT8-7QCP].

[4] Vote.org has operated in Arkansas through other means for many years, registering tens of thousands of Arkansans to vote between 2018 and 2022. *See* Doc. 46-3, ¶ 5.

C. The Wet Signature Rule

1. Implementation of the Rule

On February 28, 2024—two days after the *Arkansas Times* reported on the success of GLA's online tool—Secretary Thurston sent notice to all county clerks in Arkansas, "strongly recommend[ing] that counties do not accept voter registration applications executed by electronic signature" and remarking on the need to "maintain [ ] strong election integrity." (Doc. 46-7, p. 17).

Soon after, on March 12, Secretary Thurston contacted Arkansas Attorney General Tim Griffin's office requesting a "formal opinion" on the legality of digital signatures on voter registration applications that are "created by a third-party non-governmental agency." *Id.* at p. 19; *see* Ark. Code Ann. § 7-4-101(g) ("The Attorney General shall provide legal assistance to the State Board of Election Commissioners in answering questions regarding election laws."). In April, Attorney General Griffin issued his formal opinion that "an electronic signature or mark is generally valid under Arkansas law," provided the "registration form [is] created and distributed by the Secretary of State." (Doc. 46-7, p. 21). In reaching this conclusion, Attorney General Griffin stated,

> given the historical acceptance of signatures produced through a variety of means, the widespread acceptance of electronic signatures, and the fact that Amendment 51 does not contain any restrictions on how a "signature or mark" may be made, I believe that an electronic signature satisfies Amendment 51's "signature or mark" requirement.

Id. at p. 23.

Disregarding the Attorney General's opinion, the SBEC swiftly adopted an emergency rule that prohibited county clerks from accepting voter registration applications with digital signatures from individuals and third-party organizations. *Id.* at

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pp. 61–63, 66, 73; *see* Ark. Const. amend. 51, § 5(e) (authorizing and directing the SBEC to make rules that "are necessary to secure uniform and efficient procedures in the administration" of Amendment 51); Ark. Code Ann. § 7-4-101(f)(5) (similar). The emergency rule went into effect on May 4, a comment period was held mid-summer, and the Legislative Council approved the rule—thereby making it permanent—on August 23. *See* Doc. 63, ¶ 4 (Supplement to Complaint); Ark. Code Ann. § 10-3-309(c) (providing the process for the Legislative Council's approval of agency rules).

2. The Rule

In short, the Wet Signature Rule grafts SBEC-created definitions onto certain parts of Amendment 51 and alters the requirements for when a county clerk should accept a registration application.

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Most pertinent here, the Rule narrows the definition of "signature or mark" only as applied to *mail voter registration applications*, but not as applied to Registration Agencies. (Doc. 46-7, pp. 62, 63). Under the Rule,

> "Signature or Mark"—means 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.

Id. at p. 63. Notably, this definition of "signature or mark" does not apply to applications submitted by a Registration Agency under section 6(b)(1)(G).

Amendment 51 instructs that clerks "shall accept legible and complete voter registration applications." Ark. Const. amend. 51, § 9(c)(1), (3). While the Rule leaves this directive substantively untouched for applications submitted by Registration Agencies, it

slightly alters it as applied to *mail voter registration applications*, tacking on the requirement that the application be "executed with a Signature or Mark made by the voter registration applicant," as defined by the Rule, in order to be accepted. (Doc. 46-7, p. 63).

3. Effect on GLA, Vote.org, and Individual Plaintiffs

i. GLA and Vote.org

Without the ability to offer digital signatures, "the pace at which [GLA was] able to register new voters declined precipitously." (Doc. 46-2, ¶ 29). After the Rule went into effect on an emergency basis, GLA was "forced to fully disable [its] online voter registration tool." *Id.* While GLA eventually relaunched its online tool, it had to remove the digital signature feature, meaning applicants now were required to fill out the application online, print it out, apply a handwritten wet signature, and then mail or deliver the application to their county clerk without the help of GLA. *Id.* at ¶ 30. Rather than sending out texts or asking large groups to register simultaneously using the online tool at events, GLA has had to retrain and hire additional staff to attend public events and register people using paper applications. *Id.* at ¶¶ 19, 32. Additionally, the use of paper applications makes it far more difficult for GLA to track applicants' registration status "[b]ecause information on rejected applicants is only available at the county level and each county clerk tracks applicants differently," so "there is typically no way to tell whether an applicant's absence from the statewide voter file is because their application has been rejected or because it was never completed and submitted by the applicant." *Id.* at ¶ 32. By comparison, "[w]hen the online tool utilized electronic signatures, GLA could eliminate the latter scenario because [it] knew when applications were submitted to county clerks by GLA staff." *Id.*

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This shift in resources has compromised GLA's ability to engage in its other activities, including organizing its get-out-the-vote campaign, *id.* at ¶ 33, assisting voters who have been purged from voter rolls to reestablish their registration status, and monitoring changes to local election rules. *Id.* at ¶ 34. These efforts have been nearly—if not entirely—abandoned by GLA in order to meet the demands of the Wet Signature Rule, making it all the more difficult for GLA to address the low voter registration rates in Arkansas. *See id.* at ¶¶ 33, 34.

As for Vote.org, it had invested significant resources to develop its own digital signature tool which it has implemented in many states. (Doc. 46-3, ¶¶ 8–9). However, due to the Wet Signature Rule, Vote.org is barred from deploying that tool in Arkansas, which has "impair[ed] the organization's ability to accomplish its mission" of registering Arkansans to vote, increasing the likelihood that Arkansas will continue to have the lowest registration rate in the nation. *Id.* at ¶¶ 9, 10. Without the digital signature function, voters will have to print and mail their own applications—short of Vote.org printing nearly-completed, unsigned applications and mailing them to applicants to be signed by hand—which will present an obstacle for the many applicants who do not have access to a printer. *See id.* at ¶¶ 7, 8, 10.

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ii. Individual Plaintiffs

Nikki Pastor registered to vote on February 24, 2024, using a QR code that GLA provided to her at a community event in Fayetteville, Arkansas. (Doc. 46-4, ¶¶ 7–9). Once Pastor returned home, she opened the saved link, completed and signed the form, and gave GLA approval to print and submit the application to the Washington County Clerk on her behalf. *Id.* Approximately one month later, Pastor's application was rejected by the

Washington County Clerk for having a digital signature. *Id.* at ¶ 11. Pastor remains unregistered to vote. *Id.* at ¶ 12.

Blake Loper received a link to the online tool from a GLA staff member and used it to update Loper's registration from Yell County to Pope County in December 2023, completing and signing the form digitally. (Doc. 46-5, ¶¶ 4–5). Like Pastor, Loper granted GLA permission to print and submit the application to the Pope County Clerk on Loper's behalf. *Id.* at ¶ 5. GLA submitted Loper's application on December 11, 2023; and, when Loper did not receive confirmation of the registration status, GLA resubmitted a copy of the application on May 1. *Id.* at ¶¶ 7–8. Then, on May 2, Loper received notice from the Pope County Clerk that the application had been rejected due to the digital signature. *Id.* at p. 4. Plaintiffs assert that Loper remains unregistered to vote.[5]

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III. PRIVATE RIGHT OF ACTION UNDER THE MATERIALITY PROVISION

The SBEC contests whether the Materiality Provision creates a private right of action enforceable through § 1983. "To seek redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002) (cleaned up). This requires a two-step process. At step one, the Court must determine whether Congress "unambiguously conferred federal individual rights." *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166,

[5] Plaintiffs' explains that Loper submitted a hand-signed application in early 2024, which appears to have been accepted, but Loper's last name was incorrectly entered into the voter registration record as "Lopez." (Doc. 46-5, ¶ 9). Plaintiffs' understanding is that Loper will not be able to vote until properly registered under the correct legal name. *See id.* at ¶ 10. The Court notes that, at oral arguments, Defendants contended that this misspelling will not prevent Loper from voting in November. (Doc. 64, pp. 47–48). It is not necessary to the Court's resolution of the pending motions to determine whether Loper will indeed be permitted to vote while the registration record reflects the name "Lopez."

172 (2023); *Gonzaga*, 536 U.S. at 283.[6] If Congress did intend to create such a right, then the plaintiff is afforded the rebuttable presumption that the statute is enforceable under § 1983. Accordingly, the second step assesses whether the defendants have rebutted the presumption.

Four circuits have spoken on this exact question: the Third, Fifth, and Eleventh Circuits have held that there is a private right of action under the Materiality Provision enforceable via § 1983, while the Sixth Circuit has held to the contrary. *Compare Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022),[7] *and Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023) [hereinafter *Callanen II*], *and Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) [hereinafter *Schwier I*], *with McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000). Additionally, Judge P.K. Holmes, III in this District has held in accord with the Third, Fifth, and Eleventh Circuits. *See League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021).

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[6] *Cf. Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1208–09 (8th Cir. 2023). Though *Arkansas State Conference NAACP* was analyzing whether § 2 of the Voting Rights Act had an implied right of action—rather than a right enforceable under § 1983—*Gonzaga* made explicit that step one of the test is the same whether under § 1983 or under the statute itself. *Gonzaga*, 536 U.S. at 283.

[7] "The Supreme Court vacated *Migliori* and remanded to the Third Circuit with instructions to dismiss the case as moot. . . . One explanation for mootness is that after the Third Circuit ordered that the disputed ballots be counted, the election was certified. Then, essentially because plaintiffs had won, the Supreme Court vacated the Third Circuit's decision." *Callanen II*, 89 F.4th at 479 nn.6 & 7 (citations and quotation marks omitted). The Third Circuit remains consistent on this issue. *See Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 129 n.5 (3d Cir. 2024) (citing *Migliori*, 36 F.4th at 159–62 and *Callanen II*, 89 F.4th at 475–78) (assuming private plaintiffs can sue to enforce the Materiality Provision); *id.* at 140 n.3 (Shwartz, J., dissenting) (applying *Gonzaga* and *Talevski*).

In *McKay*, the Sixth Circuit stated, "Section 1971"—now 52 U.S.C. § 10101—"is enforceable by the Attorney General, not by private citizens." 226 F.3d at 756. The court, however, did not engage with the text of the statute or any binding precedent. As both the Fifth and Eleventh Circuits have described, the court in *McKay* "relied entirely" on two district court decisions, and "[n]either the Sixth Circuit nor these two district courts wrestled with the considerations for implying a private right." *Schwier I*, 340 F.3d at 1294; *Callanen II*, 89 F.4th at 478. This Court is not persuaded by *McKay*.

In contrast, the Third, Fifth, and Eleventh Circuits—each of which thoroughly engaged with *Gonzaga*, the statutory language, and the legislative history—concluded that the Materiality Provision does contain a private right of action enforceable through § 1983. *See Migliori*, 36 F.4th at 159; *Callanen II*, 89 F.4th at 478; *Schwier I*, 340 F.3d at 1297.

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A. Step One: Congressional Intent to Create a Right

According to the Supreme Court:

> the *Gonzaga* test is satisfied where the provision in question is phrased in terms of the persons benefitted and contains rights-creating, individual centric language with an unmistakable focus on the benefited class. Conversely, we have rejected § 1983 enforceability where the statutory provision contained no rights-creating language; had an aggregate, not individual focus; and served primarily to direct the Federal Government's distribution of public funds.

Talevski, 599 U.S. at 183–84 (cleaned up); *see also Gonzaga*, 536 U.S. at 284, 287, 290. The Supreme Court's analyses in *Gonzaga* and *Talevski* are instructive here.

In *Gonzaga*, the Court held that the Family Education Rights and Privacy Act's ("FERPA") nondisclosure provisions did not provide a private right of action under § 1983 because they did not contain rights-creating language, had an aggregate focus, and

mostly served to direct the Secretary of Education's distribution of funds. 536 U.S. at 290. In so holding, the Court distinguished FERPA's nondisclosure provision from rights-creating statutes, such as Titles VI and IX. *Id.* at 284 & n.3, 287. While these statutes include "individually focused terminology," such as, "[n]o person . . . shall . . . be subjected to discrimination," FERPA's provisions "speak only to the Secretary of Education." *Id.* at 287 (quoting statutory language). The Court concluded that FERPA's language is "two steps removed from the interests of [the] individual," likening it to if Title IX had been written "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690–93 (1979)).

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More recently, in *Talevski*, the Court analyzed two provisions of the Federal Nursing Home Reform Act ("FNHRA"), found at 42 U.S.C. § 1396r(c), under *Gonzaga* and held that the two provisions of the FNHRA unambiguously conferred private federal rights because they "use clear 'rights-creating language,' speak 'in terms of the persons benefited,' and have an 'unmistakable focus on the benefited class.'" 599 U.S. at 186 (quoting *Gonzaga*, 536 U.S. at 284, 287, 290). Looking to the specific language of the statute, one of the provisions "requires nursing homes to 'protect and promote *the right* to be free from [restraints that are] not required to treat *the resident's* medical symptoms.'" *Id.* at 184 (cleaned up) (quoting statutory language). The other provision, the Court noted, was "[n]estled in a paragraph concerning 'transfer and discharge *rights*.'" *Id.* at 184–85 (quoting statutory language). The Court further observed that even the exceptions to the provisions "sustain the focus on individual residents," using language like "to ensure the

physical *safety of the resident or other residents*" and by referencing "*the resident's* welfare." *Id.* (quoting statutory language). Importantly, *Talevski* explained that, although there is some focus on the regulated party within the provisions, this is "not a material diversion from the necessary focus on the nursing-home residents," as "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held)." *Id.* at 185.

Turning now to the question here: did Congress unambiguously intend to create a right within the Materiality Provision? This Court finds that it did.

The Materiality Provision itself states, "No person acting under color of law *shall* . . . deny the *right* of any *individual* to vote in any election because of an error or omission" that is "not material in determining whether such *individual* is qualified" to vote. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). To start, "[t]his language is clearly analogous to the right-creating language [of Titles VI and IX] cited by the Supreme Court in *Gonzaga*." *Schwier I*, 340 F.3d at 1296; *see Callanen II*, 89 F.4th at 474 ("The phrasing of the Materiality Provision is similar to language the Court has held to confer a private right." (citing *Gonzaga*, 536 U.S. at 284 & n.3)). Further, the language creates a "mandatory rather than precatory" prohibition on denying a person the right to vote in violation of the Provision. *Schwier I*, 340 F.3d at 1290, 1297 (relying on *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) for the proposition that "mandatory" language is more likely to evince an intent to establish a right). And despite the subject of the sentence being the person proscribed, "the focus of the text is nonetheless the protection of each individual's right to vote," which the statute clearly and specifically provides. *Id.* at 1296;

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Callanen II, 89 F.4th at 474. No part of the Materiality Provision speaks of an "aggregate focus," "institutional policy," or the direction of government funds, making "the Materiality Provision's language [ ] decidedly more rights-focused than language the [Supreme] Court has held *not* to confer a private right." *Callanen II*, 89 F.4th at 474–75; *see Talevski*, 599 U.S. at 183–84; *Gonzaga*, 536 U.S. at 279; *see also Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

Admittedly, neither § 10101 nor the Materiality Provision itself focus exclusively on the rights-bearer; they also discuss the regulated parties. At first blush, this could create pause under Eighth Circuit precedent. *See Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1210 (8th Cir. 2023) (analyzing § 2 of the Voting Rights Act and stating, "It is unclear what to do when a statute focuses on both [the benefitted and regulated parties]."). However, as the Fifth Circuit aptly notes, *Talevski* is right on point here: "[I]t would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights . . . ." *Talevski*, 599 U.S. at 185; *see also Callanen II*, 89 F.4th at 474–75. Under *Talevski*, this Court sees no problem with the fact that the Materiality Provision focuses both on the persons benefited and the persons regulated as it otherwise contains unambiguous rights-creating language.

The Materiality Provision does not exist in a vacuum but "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Talevski*, 599 U.S. at 184 (quoting *West Virginia v. EPA*, 597 U.S. 697, 721 (2022)). The surrounding provisions' focus on an individual's right to vote provides "framing" that is "indicative of an individual 'rights-creating' focus." *Id.* (citing *Gonzaga*, 536 U.S. at 284). Most notably, the

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preceding provision states, "*All citizens* of the United States . . . *shall be entitled and allowed to vote* at all such elections . . . ." 52 U.S.C. § 10101(a)(1) (emphasis added). Subsection (a)(1) speaks in terms of the rights holder, granting a mandatory entitlement to vote in all elections. *See Callanen II*, 89 F.4th at 474 (describing subsection (a)(1) as bearing "strong 'rights-creating' language"); *Migliori*, 36 F.4th at 159 (agreeing that "the Materiality Provision unambiguously confers a personal right because it places all citizens qualified to vote at the center of its import and provides that they 'shall be entitled and allowed' to vote" (cleaned up)). Additionally, the statute itself characterizes subsection (a) as "secur[ing]" a "right" and "privilege," stating as much three times within § 10101. *See* 52 U.S.C. §§ 10101(c), (e). Lastly, these subsections—along with the Materiality Provision—all "reside" in § 10101, which is titled "Voting Rights." *See Talevski*, 599 U.S. at 184 (observing that both provisions "reside in 42 U.S.C. § 1397r(c), which expressly concerns 'requirements *relating to residents' rights*'" (cleaned up)).

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Accordingly, the Court concludes that the Materiality Provision "unambiguously confer[s] federal individual rights" because it "use[s] clear 'rights-creating language,' speak[s] 'in terms of the persons benefited,' and ha[s] an 'unmistakable focus on the benefited class.'" *Talevski*, 599 U.S. at 172, 186 (quoting *Gonzaga*, 536 U.S. at 284, 287, 290). Thus, the Materiality Provision is presumptively enforceable under § 1983.

B. Step Two: Rebuttable Presumption of Enforceability Under § 1983

"Even if a statutory provision unambiguously secures rights, a defendant 'may defeat t[he] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights." *Talevski*, 599 U.S. at 186 (alterations in original) (quoting *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120 (2005)). Put

differently, to rebut the presumption, one must "show[ ] that Congress specifically foreclosed a remedy under § 1983." *Gonzaga*, 536 U.S. at 284 n.4 (citations and quotation marks omitted). Such a prohibition may be explicitly contained within the statute, but "[a]bsent such a sign, a defendant must show that Congress issued the same command implicitly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Talevski*, 599 U.S. at 186 (citations and quotation marks omitted). There is no language in § 10101 that "expressly forbid[s] § 1983's use," therefore the Court must look to whether the statute implicitly precludes bringing suit through § 1983. *Id.* The key inquiry, then, is whether a private right of action under § 1983 is *incompatible* with the enforcement scheme created by Congress. *Id.* (citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009)). This "inquiry boils down to what Congress intended, as divined from text and context." *Id.* at 187.

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The text may so indicate where a statute contains its own private remedy that is more restrictive than an action under § 1983 or provides for a "comprehensive remedial scheme" that is revealed—through statutory interpretative tools—to be incompatible with a § 1983 suit. *Id.* at 188–89. The Supreme Court has only found implicit preclusion in three cases. *Id.* at 189 (citing *Rancho Palos Verdes*, 544 U.S. at 120–23; *Smith v. Robinson*, 468 U.S. 992, 1008–13 (1984); and *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 6‒7 (1981)). And each of these cases "concerned statutes with self-contained enforcement schemes that included statute-specific rights of action" that "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies under the statute's enforcement scheme before suing

under its dedicated right of action." *Id.* (citations omitted). And each right "offered fewer benefits than those available under § 1983." *Id.* (citations omitted). Thus, the statutes in those three cases were "incompatible with individual enforcement under § 1983." *Id.* at 189–90 (citations omitted).

"Section 10101 lacks any specific 'private judicial right of action' or 'private federal administrative remedy' that requires plaintiffs to comply with particular procedures"—let alone one that offers fewer benefits than § 1983. *Callanen II*, 89 F.4th at 476 (quoting *Talevski*, 599 U.S. at 190). Therefore, "this exception to using Section 1983 is inapplicable." *Id.* Moreover, the statute's enforcement scheme, which grants enforcement authority to the United States Attorney General, *see* 52 U.S.C. §§ 10101(c)–(e), is not incompatible with a private right of action under § 1983. Rather, the legislative history shows that the Attorney General's enforcement power "augment[ed] the implied but established private right to sue." *Callanen II*, 89 F.4th at 476.

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The most relevant history here revolves around the 1957 amendment to the Civil Rights Act. This amendment both granted the Attorney General enforcement authority—under what is now § 10101(c)—and "added what is now 52 U.S.C. § 10101(d), which provides that all actions brought 'pursuant to this section' can be exercised 'without regard to whether the party aggrieved shall have exhausted administrative or other remedies that may be provided by law.'" *Id.* at 475 (citing Civil Rights Act of 1957, Pub. L. No. 85-315 § 131, 71 Stat. 634, 637 (1957)). This supports a private right of action for two reasons.

First, the reference to the "party aggrieved" in subsection (d) very likely refers to private parties, not the Attorney General. *Callanen II*, 89 F.4th at 475; *Migliori*, 36 F.4th at

160 ("[T]his section specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court."). This interpretation is supported by House Report 291, which recognized the long history of individuals using § 1983 to enforce the substantive rights of § 10101(a). *Schwier I*, 340 F.3d at 1295 (citing H.R. Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977); *Callanen II,* 89 F.4th at 475–76 (citing the same and noting its reference to court opinions in which "exhaustion of remedies had been required for *private* plaintiffs"); *Migliori*, 36 F.4th at 162 ("When Congress added a provision for civil enforcement by the Attorney General, it acknowledged that private individuals had enforced the substantive rights in § 10101(a) via § 1983 for nearly a century."). Further, "the Committee first stated that the bill's purpose was 'to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States,'" indicating that the addition of enforcement through the Attorney General was not intended to supplant already-existing avenues. *Schwier I*, 340 F.3d at 1295 (citing H.R. Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1966).

Second, Congress's removal of any exhaustion requirement for private plaintiffs in subsection (d) makes sense only if "there were a corresponding private right." *Callanen II*, 89 F.4th at 476 (citing *Schwier I*, 340 F.3d at 1296). Lastly, the Committee's "intense focus on protecting the right to vote" in House Report 291 would be inconsistent with the conclusion that "Congress meant merely to substitute one form of protection for another." *Schwier I*, 340 F.3d at 1295.

For these reasons, the Court finds that the Materiality Provision's presumptive enforcement found at Step One has not been rebutted at Step Two as the statute neither explicitly nor implicitly forecloses a private right of action under § 1983.

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IV. STANDING

The SBEC challenges GLA and Vote.org's standing as organizations. And in her Motion to Dismiss, Benton County Clerk Betsy Harrell challenges Individual Plaintiffs' standing because neither of them attempted to register in Benton County, which is addressed *infra*. *See* Part VI. This Section addresses the organizational standing of GLA.

To establish Article III standing, a plaintiff must show that: (1) they have "suffered or likely will suffer an injury in fact"; (2) "the injury likely was caused or will be caused by the defendant"; and (3) "the injury likely would be redressed by the requested judicial relief." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) [hereinafter *Alliance*] (citations omitted). Where multiple plaintiffs seek identical relief, only one plaintiff need satisfy Article III standing requirements. *Horne v. Flores*, 557 U.S. 433, 446–47 (2009). At the preliminary injunction stage, a plaintiff need only show that they are likely to have standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

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An injury in fact must be (a) concrete and particularized, and (b) actual or imminent. *Alliance*, 602 U.S. at 381. A concrete injury is one that is "real and not abstract." *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021)). An injury is particularized when it affects the plaintiff personally and individually, rather than being a "generalized grievance." *Id.* (citing *Lujan*, 504 U.S. at 560). Further, an injury in fact must be actual or imminent, "not speculative—meaning that the injury must have already occurred or be likely to occur soon." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). "[W]hen a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury." *Id.* (citing *Clapper*, 568 U.S. at 401). These requirements "screen[ ] out plaintiffs who might have only a general legal, moral,

ideological, or policy objection to a particular government action." *Id.* Generally, the injury-in-fact requirement will be easily met where a government regulation "require[s] or forbid[s] some action by the plaintiff." *Id.* at 382.

A. Organizational Standing of GLA

To obtain preliminary injunctive relief at least one plaintiff must have standing. Organizations, like individuals, must establish the three constitutional requirements for standing. *Id.* at 393–94 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982)). No matter how strong the organization's interest, it "must show 'far more than simply a setback to the organization's abstract social interests.'" *Id.* at 394 (first citing *Valley Forge Christian Coll. V. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982), then quoting *Havens*, 455 U.S. at 379). As detailed below, the Court finds that GLA has established that it is likely to have standing as to all Defendants.

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1. Injury in Fact

Where a defendant's actions "perceptibly impair[ ]" the plaintiff's "ability to provide [organizational] services," there is "no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379. "Such concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*; *see also Nat'l Fed'n of Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) ("Standing may be found when there is a concrete and demonstrable injury to an

organization's activities which drains its resources and is more than simply a setback to its abstract social interests." (citing *Havens*, 455 U.S. at 379).[8]

The Supreme Court recently clarified that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." *Alliance*, 602 U.S. at 394.[9] The Court made explicit that its decision in *Havens* did not stand for the "expansive" proposition that "standing exists when an organization diverts its resources in response to a defendant's action." *Id.* at 395. If that were the case, "all organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* The Court factually distinguished *Alliance* and *Havens*, noting that the plaintiff in *Havens* was "not only [ ] an issue-advocacy organization, but also operated a housing counseling service" and when the defendant gave the plaintiff "false information about apartment availability" it "perceptibly impaired [the plaintiff's] ability to provide counseling and referral services" to their target demographic. *Id.* (quoting *Havens*, 455 U.S. at 379).

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[8] *Cf. New York Ctr. for Foreign Pol'y Affs. v. U.S. Dep't of State*, 2024 WL 3400122, at *9 (D.D.C. July 12, 2024) (explaining the D.C. Circuit's two-step test for organizational standing: (1) that the organization's activities, not merely its mission, were impeded; and (2) that it used its resources to counteract that harm).

[9] In *Alliance*, an organization called the Alliance for Hippocratic Medicine challenged the FDA's approval of mifepristone. The organization asserted it had standing because it had expended time and resources in challenging the FDA's approval and on educating communities about mifepristone. 602 U.S. at 394.

GLA contends that the Wet Signature Rule *requires* third-party registration organizations to collect hand-written signatures and *prohibits* them from utilizing online digital signature technology, which severely limits their ability to register new voters. Indeed, the Wet Signature Rule and supplementary materials from the SBEC specify that applications submitted by third-party organizations must include a wet signature, whereas those submitted by Registration Agencies, such as the DMV, may include digital signatures. *See, e.g.*, Doc. 46-7, p. 72. It follows that, in implementing the Wet Signature Rule—from which Registration Agencies are essentially exempt—the SBEC was specifically targeting GLA's activity of registering voters through its online tool.[10] *See Callanen II*, 89 F.4th at 493 (Higginson, J., dissenting) ("The record contains a simple explanation for Texas's singular interest in a wet signature in the context of registration applications submitted by fax machine: Texas officials explicitly drafted [the requirement] to prevent the use of Vote.org's e-sign tool."). This is underscored here by the fact that the Secretary's about-face occurred two days after the *Arkansas Times* reported on GLA's success. (Doc. 46-2, ¶ 15; Doc. 46-7, p. 17).

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The Rule's direct effect and interference with GLA's organizational activities has "perceptibly impaired" GLA's ability to provide voter registration services to Arkansans, as

[10] *See also* Doc. 46-7, p. 31 (identifying GLA as an organization that they expect pushback from); *id.* at p. 19 (Secretary writing Attorney General specifically seeking guidance on digital signatures used on applications by "a third-party non-governmental agency"); *id.* at p. 27 (the SBEC stating, "the Board is seeking to provide uniform processes for all county clerks, pending the adoption of a permanent rule regarding voter registration application processes and electronic signatures submitted *by third-party registration organizations*." (emphasis added)); *id.* at pp. 29–30 (noting the rule is meant to resolve conflict between clerks who are "accepting voter registration applications *from third-party organizations* that are signed by the applicant electronically" and those who are not (emphasis added)).

evidenced by the precipitous decline in registrations through GLA since the Rule was put into place. *See Havens*, 455 U.S. at 379; *Alliance*, 602 U.S. at 395; Doc. 46-2, ¶ 29. This has caused a "concrete and demonstrable injury to the organization's activities." *See Havens*, 455 U.S. at 379. GLA has also shown a "consequent drain on the organization's resources" because of the costs of complying with the Rule. *Id.* GLA has had to expend additional time, labor, and money in adapting to the new rule, including redesigning its tool and retraining and hiring additional staff to register people using paper applications. (Doc. 46-2, ¶ 32). It has also shown that these compliance costs have severely compromised its ability to engage in other organizational activities, such as assisting voters who have been purged from voter rolls and organizing campaigns. *Id.* at ¶¶ 33, 34. Put simply, GLA did not merely spend its way into standing—as the plaintiff in *Alliance* attempted to—rather it used its resources to comply with the Rule that proscribed the use of its digital signature tool, markedly limiting its ability to carry out its organizational activities.

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GLA has shown a likelihood of more than an "indirect 'pocketbook' harm" from the Wet Signature Rule.[11] It has shown that it has likely suffered a concrete and particularized

[11] *Cf. Tennessee Conf. of the NAACP v. Lee*, 105 F.4th 888, 902–05 (6th Cir. 2024) (explaining that—in a case where an organization alleged harm based on a policy that made its voter registration efforts more costly but did not actually require or forbid any action of the organization—*Alliance* "creates uncertainty over when a plaintiff's own choice to spend money can give it standing to challenge a government action that allegedly caused the expenditure"); *North Carolina All. for Retired Ams. v. Hirsch*, 2024 WL 3507677, at *5 (E.D.N.C. July 19, 2024) (relying on *Alliance* in rejecting an organization's argument that it had standing to challenge a 30-day residency requirement on the basis that it "undermine[d]" the organization's "get-out-the-vote work" and "advocacy work" by "systematically preventing many of [its] members from voting . . . , making [it] less effective in furthering its mission" because the requirement did not "directly affect and interfere with [the organization's] ability to advocate issues of importance to [its

injury to its organizational activities through the requirements and proscriptions imposed by the Rule. *See League of Women Voters of Ohio v. LaRose*, 2024 WL 3495332, at *5 n.3 (N.D. Ohio July 22, 2024) (distinguishing *Alliance* from a case where a voting rights organization challenged an Ohio law that "forbid[ ] [organization] members from assisting disabled voters" because the injury was direct and not merely based on a diversion of funds). GLA has already been, and will continue to be, required to undertake certain actions by the Rule and forbidden to take others, thus the injury is actual. Under *Alliance*, where the regulation or law in question "require[s] or forbid[s] some action by the plaintiff," standing is "usually easy to establish." 602 U.S. at 382. Such is the case here.

2. Causation and Redressability

As the Court has found that GLA likely sustained an injury in fact due to the Rule, as discussed above, it reasonably follows that such injury was caused by the actions of the SBEC in enacting the Rule, will continue to be caused by the enforcement of the Rule by the county clerks, and could be remedied by this Court enjoining the Rule. Thus, causation and redressability are established. Therefore, it is likely that at least one plaintiff, GLA, has standing to sue as to all Defendants.[12]

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target audience]," and there was no showing of activities, such as voter registration, beyond advocacy (cleaned up) (citations omitted)).

[12] Though the parties do not raise the issue of prudential standing, generally, litigants are "bar[red] . . . from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). This is referred to as third-party standing and has generally been termed a "prudential" consideration. There is currently no clear answer whether prudential standing is jurisdictional—like Article III standing—or, as its name would suggest, merely prudential.

In *Lucas v. Jerusalem Cafe*, LLC, the Eighth Circuit identified a circuit split on this question, noted that its own opinions had gone both ways, and reserved its decision on the issue for another day. 721 F.3d 927, 938–39 (8th Cir. 2013) (collecting cases).

V. PRELIMINARY INJUNCTION DISCUSSION

In determining whether to grant a motion for preliminary injunction, the Court must weigh the following four considerations: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). "While no single factor is determinative, the probability of success

However, not all the circuits involved in the identified circuit split were addressing third-party standing. For example, the D.C. Circuit—the singular circuit identified by *Lucas* to hold prudential standing was jurisdictional—was considering the "zone of interests," not third-party standing. *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 179 (D.C. Cir. 2012). This is a significant distinction because, just two years later, the Supreme Court held that labelling the "zone of interests" question "prudential" was a "misnomer," and it was, in fact, an Article III consideration. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 & n.3 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring). Further, Judge Silberman's concurring opinion in *Association of Battery Recyclers*—quoted in *Lexmark*—acknowledged that third-party standing, as opposed to "zone of interests," "spring[s] from concepts of jurisdictional prudence" and "really is a judge-made concept." *See Ass'n of Battery Recyclers*, 716 F.3d at 675‑77. Most recently, in *Carson v. Simon*, the Eighth Circuit discussed the *Lexmark* decision, and specifically noted that "the Supreme Court recognized the concept of third-party standing may still fit within the prudential standing analysis." 978 F.3d 1051, 1058 (8th Cir. 2020) (citing *Lexmark*, 572 U.S. at 127 n.3).

This Court believes that it is likely that third-party standing is truly a prudential—and not jurisdictional—issue. However, even if this Court were to conclude otherwise and address third-party standing *sua sponte*, it would still find that third-party standing is appropriate here because "enforcement of the challenged restriction *against the litigant*," i.e., GLA, "would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth*, 422 U.S. at 510 and collecting cases). Due to the relationship between the parties, GLA's active participation in helping voters exercise their rights, and the fact that individual voters are also plaintiffs here, the traditional concerns with third-party standing—e.g., whether there is "concrete adverseness which sharpens the presentation of issues"—are not at issue. *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *10 (W.D. Ark. Aug. 31, 2023) (quoting *United States v. Windsor*, 570 U.S. 744, 760 (2013)).

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factor is the most significant." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (citations and quotation marks omitted).

A. Likelihood of Success on Merits

The SBEC argues Plaintiffs are unlikely to succeed on the merits because they cannot establish that requiring a wet signature is immaterial to determining a voter's qualifications under Arkansas law. Whether the Rule violates the Materiality Provision depends on whether its enforcement: (a) denies an individual the right to vote (b) based on an error or omission on a record or paper (c) that is immaterial in determining the individual's qualifications to vote. The Court will begin its analysis by discussing how the enforcement of the Rule constitutes a denial of the right to vote due to an error or omission.[13] The Court will then turn to the contested issue of whether such an error or omission is material in determining one's qualifications to vote under Arkansas law.

1. Denial of the Right to Vote Based on an Error or Omission

In answering whether enforcement of the Rule constitutes a denial of the right to vote under the Materiality Provision, the Court starts with the statutory definition, which it must follow even if it differs from the term's usual meaning. *Van Buren v. United States*, 593 U.S. 374, 387 (2021) (citations omitted). Section 10101 explicitly defines "vote" as "all action necessary to make a vote effective including, but not limited to, registration." *See* 52 U.S.C. §§ 10101(a)(3)(A), (e). Therefore, interference with the voter registration process in violation of this Provision constitutes an impermissible denial of the right to

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[13] Though Defendants do not challenge these elements head on, the SBEC does challenge irreparable harm, which dovetails with the denial of the right to vote, and argues that the Rule does not frustrate the registration process because people can still register through traditional methods (i.e., paper applications). (Doc. 53, pp. 11, 15–16).

vote. To suggest otherwise would—as Plaintiffs put it—"conflate the opportunity to register to vote in the abstract with the opportunity to register to vote consistent with the guarantees of federal law." (Doc. 58, p. 25).

Here, the SBEC intimates that the opportunity to resubmit in accordance with the Rule cures any statutory violation. But the "[d]enial of the statutory right to vote under Section 101 is complete when a particular application . . . is rejected"—"an opportunity to cure the rejection[or] submit another application . . . does not negate the denial of the statutory right to vote." *La Unión del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 760 (W.D. Tex. 2023) [hereinafter *LUPE*] (citations omitted).

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Moreover, the Court "doubt[s]" the "efficacy of an *ability* to cure" because "the *need* to cure an immaterial requirement creates a hurdle for—even if it is not itself a final denial of—the right to vote." *See Callanen II*, 89 F.4th at 487 (setting aside the motion panel's holding that the opportunity to resubmit cures the denial of the right to vote, leaving the issue open for another day, and noting that the court "do[es] not rely today on the fact alternatives exist if the initial registration fails"). Put more plainly, the opportunity to resubmit the application in compliance with the Rule does not negate the denial of the right to vote.

> Section 101 provides that state actors may not deny the right to vote based on errors or omissions that are not material; it does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes.

La Unión del Pueblo Entero v. Abbott, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022). If the only way an applicant can register is by complying with an immaterial requirement—and failure to do so will result in the applicant remaining unregistered—then the applicant is, by definition, being denied the statutory right to vote due to an error or omission that is

immaterial to determining their qualifications to vote under state law, in violation of the Materiality Provision. The Court finds it likely that enforcement of the Rule constitutes a denial of the right to vote based on an error or omission on a record or paper.

Further, the Rule indisputably involves an error or omission on a record or paper. It is simply common sense that a registration form would constitute a "record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B); *see generally Schwier I*, 340 F.3d 1284 (applying Materiality Provision to registration forms). And from the Rule's requirement that the registration form include a wet, handwritten signature, it follows that the failure to include a wet signature (due to the inclusion of a digital signature) would constitute an omission.

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2. *Material in Determining Whether Such Individual is Qualified to Vote*[14]

i. Defining "Material in Determining Whether Such Individual is Qualified Under State Law to Vote"

The Materiality Provision asks whether the error or omission is "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

The first inquiry, then, is to define the meaning of "material." "[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose

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[14] Several of the SBEC's arguments center around the contention that "the Materiality Provision does not prohibit Arkansas from enacting rules important to safeguarding election integrity, as [the provision] does not displace state registration rules" that are permissible under Arkansas law. (Doc. 53, p. 11). The SBEC has not made any argument—let alone any persuasive argument—as to why the Materiality Provision, a federal statutory provision, should bow to state law. "Whether or not an administrative rule comports with the state constitution says nothing about its lawfulness under the Civil Rights Act—a federal statute." (Doc. 58, p. 14).

and context of the statute, and consulting any precedents or authorities that inform the analysis." *Sanzone v. Mercy Health*, 954 F.3d 1031, 1040 (8th Cir. 2020) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)). Courts should "depart from the ordinary meaning only if the words are otherwise defined in the statute itself, or if the context requires a different result." *Id.* at 1040–41 (citations and quotation marks omitted).

Here, the statute does not provide a definition, so the Court looks to the plain meaning. Black's Law Dictionary defines "material" as, "Of such a nature that knowledge of the item would affect a person's decision-making: significant; essential." *See Callanen II*, 89 F.4th at 478 (quoting Material, BLACK'S LAW DICTIONARY (8th ed. 2004)). Oxford English Dictionary offers a similar definition: "Of serious or substantial import; significant, important, of consequence." *Id.* (quoting Material, OXFORD ENGLISH DICTIONARY, III.6.a. (July 2023)). Like the Fifth Circuit in *Callanen II*, this Court does not see "essential" to be an appropriate meaning here, but it otherwise accepts these definitions as reasonable. *See id.* The plain meaning is further bolstered by the historical context and purpose of the statute. *See supra* Part I.

Next, "[t]o determine whether an error or omission is material, the information required"—here, a wet signature—"must be compared to state-law qualifications to vote," meaning "substantive voter attributes." *LUPE*, 705 F. Supp. 3d at 751 (citing, *inter alia*, *Migliori*, 36 F.4th at 162). Therefore, the question this Court must answer is whether the inclusion of a digital signature—and thus the omission of a wet signature—is of such

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Contrary to the SBEC's assertions, the Materiality Provision *may* "prohibit Arkansas from enacting rules important to safeguarding election integrity," where those rules "deny the right of any individual to vote in any election because of an error or omission" that "is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see also* Doc. 53, p. 11.

significance that it would affect the determination of whether the applicant seeking to register: (1) is a U.S. citizen; (2) is an Arkansas resident, (3) is 18 years or older; (4) has not been convicted of a felony; and (5) has not been adjudged mentally incompetent by a court.[15] Ark. Const. art. 3, § 1(a)(1)–(3); *id.* amend. 51, § 11(a)(4), (5); *see also Martin v. Haas*, 2018 Ark. 283, *2–3 (Ark. 2018).

ii. It is Unlikely the Use of a Wet Signature Aids in Determining a Voter's Substantive Qualifications

Defendants do not present argument or evidence as to how a wet signature—as compared to a digital signature—aids in determining whether a person is a U.S. citizen, is an Arkansas resident, is eighteen years or older, has a prior felony, or has been adjudged incompetent. To the extent Defendants argue that the wet signature helps confirm the identity of the applicant, thereby verifying the other qualifications, they present no argument or evidence as to why a wet signature better verifies a would-be registrant's identity than a digital signature or—more to the point—why the use of a wet signature (as

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[15] A person must also be lawfully registered in order to vote. Ark. Const. art. 3, § 1(4). And the SBEC argues that, under the Arkansas Constitution, Arkansans can vote only if they are "registered in a manner provided for by [ ] Amendment [51]." (Doc. 53, p. 10 (citations omitted)). Courts routinely reject arguments that because something is made a requirement to vote or register, that it becomes material by the very nature of being required. *See, e.g.*, *Callanen II*, 89 F.4th at 487 ("We reject that States may circumvent the Materiality Provision by defining all manners of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'"); *cf. United States v. Mississippi*, 380 U.S. 128, 137–38 (1965) (concluding that the phrase "otherwise qualified by law" in § 10101(a)(1) means "qualifications required of all voters by valid state and federal laws"; including invalid laws would "dilute [Congress's] guarantee of the right to vote . . . by saying at the same time that a State was free to disqualify its [Black] citizens by laws which violated the United State Constitution.").

opposed to digital) is of such significance that it would affect the county officials' decision in whether someone is qualified.

In fact, the record evidence shows that the "wetness" of a signature does not affect county officials' determinations of qualifications at all, consistent with the Arkansas Constitution's prohibition of any notary or authentication requirement for applications. Historically, "Arkansas election officials have not considered the type of instrument used in signing or marking a voter registration application as a factor in determining whether the applicant is or is not qualified to vote in Arkansas." (Doc. 46-6, ¶ 15). Rather, county clerks "are advised to accept voter registrations with any type of signature or mark," including even illegible signatures or marks like an "x." *See id.* at ¶ 16. This is because, at the registration stage, the signature or mark serves as an attestation under penalty of perjury to the accuracy of the information provided, *id.*, rather than being used, for example, to verify a person's identity. Once registrations are received, all registration information "is entered into the same voter database," regardless of whether it was submitted with a digital signature through an agency like the DMV or with a handwritten signature by an individual or third-party organization. *Id.* at ¶ 18. Further, clerks are not "told or trained to remove any voter from the rolls or reject any voter-registration applicant because of the quality of signature or mark on a voter registration application or because of the type of instrument the person used to make a signature or mark." *Id.* at ¶ 20.

Based on the evidence and argument presented, the Court does not see how a county clerk would use the wetness of a signature to determine whether an applicant is qualified to vote under Arkansas law.[16]

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[16] The Court would also briefly note that the superimposition of the Wet Signature Rule onto Amendment 51 requires a distorted interpretation of the Arkansas Constitution,

iii. State Interests are Not a Relevant Consideration in Analyzing a Violation Under the Materiality Provision

The SBEC and Defendant Lewallen, to some extent, assert that the SBEC enacted the Rule to ensure a uniform process and "further[ ] Arkansas's interest in preventing fraud, verifying voter identity and eligibility, and promoting the integrity of the voter registration process." Doc. 53, p. 11; *see also* Doc. 51, p. 2. However, the State's interest in the promulgation of the Wet Signature Rule is not a relevant consideration in evaluating whether requiring a wet signature violates the Materiality Provision.

"To the extent that [evidence of the SBEC's intent] bears on the wisdom of the [Wet Signature Rule], it is entirely irrelevant to the Court's analysis of Plaintiffs' Section 101 claims on the merits." *LUPE*, 725 F. Supp. 3d at 744. That is because "[u]nlike many other causes of action in the voting-rights context, the Materiality Provision is not a burden-interest balancing statute." *Id.* Violations of the Materiality Provision "are prohibited no matter their policy aim." *Id.* Though the Court recognizes that Arkansas "undoubtedly has an interest in deterring and preventing voter fraud, that interest must yield to a qualified voter's right" under the Materiality Provision. *Id.* at 745 (citing *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) [hereinafter *Schwier II*]). "[T]he provision is clear that an 'error or omission is not material' unless it serves to 'determine whether such individual is qualified under State law to vote in such election.'" *Migliori*, 36 F.4th at 163 (cleaned up) (quoting 52 U.S.C. § 10101(a)(2)(B)).

To be sure, the SBEC's argument is not completely without merit. Indeed, they ask the Court to follow the Fifth Circuit's decision in *Callanen II*. Admittedly, *Callanen II* is the

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making it even less reasonable that such a requirement serves any purpose in determining voter qualifications.

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most on-point case as it analyzed whether a wet signature requirement in Texas violated the Materiality Provision. The court there held that it did not. In so holding, the court grafted consideration of state interests into its analysis of the Materiality Provision. For the reasons below, this Court rejects the Fifth Circuit's reasoning and, instead, agrees with *LUPE* and Judge Higginson's dissent in *Callanen II* that such considerations are not appropriate under the Materiality Provision.

Despite recognizing that the Materiality Provision "is not a constitutional claim necessitating the application of a balancing test," the court in *Callanen II* used Fourteenth Amendment caselaw to justify consideration of the state's interest in integrity when evaluating the materiality of the rule. 89 F.4th at 480–81. Specifically, the court looked to *Crawford v. Marion County Election Board*, 553 U.S. 181, 189–90 (2008) among other cases, to emphasize the "significance of a State's authority to set its electoral rules and the considerable deference to be given to election procedures so long as they do not constitute invidious discrimination." *Callanen II*, 89 F.4th at 481. The court then looked to various cases applying § 2 of the Voting Rights Act that incorporated the factors from *Thornburg v. Gingles* and determined that "whether the policy underlying" the wet signature requirement was "tenuous"—i.e., lacking a "strong connection between the policy and the requirement"—was "directly applicable in analyzing a State's justifications for the materiality of a practice." *Callanen II*, 89 F.4th at 483 (internal quotation marks omitted) (citing *Veasey v. Abbott*, 830 F.3d 216, 246 (5th Cir. 2016) (en banc)); *see also Gingles*, 478 U.S. 30, 37 (1986).

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After a rather strained discussion, the Fifth Circuit landed on a rather strained test:

> (1) how substantial is the State's interest in the requisite to voting in which some error or omission exists; (2) does that interest relate to determining

> whether such individual is qualified under State law to vote in such election; and (3) under the totality of the circumstances, what is the strength of the connection between the State's interest and the measure, i.e., how well does the measure advance the interest?

Callanen II, 89 F.4th at 485 (cleaned up).[17] Later the court restated,

> Our resolution comes down to whether requiring an original signature meaningfully, even if quite imperfectly, corresponds to the substantial State interest in assuring that those applying to vote are who they say they are. Is there a strong enough connection [between the rule or law and its justification] to overcome the possible denial of registration to some applicants?

Id. at 489.

It is unclear why the creation of such a test was necessary or appropriate where the statutory text of the Materiality Provision itself makes quite clear the relevant question: Is the error or omission material in determining whether an applicant is qualified to vote under state law? The Court does not find *Callanen II*'s "importation of *Crawford* and *Gingles* into the materiality context" persuasive and does not adopt it here.[18] *See id.* at 492 (Higginson, J., dissenting).

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[17] The Fifth Circuit adopted the totality of the circumstances from § 2 of the Voting Rights Act and the Supreme Court's holding in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, 426 (1991), that a "State's interest in a voting measure 'is a legitimate factor to be considered by courts among the totality of the circumstances in determining whether a § 2 violation has occurred.'" *Callanen II*, 89 F.4th at 484 (cleaned up) (citing *Houston Lawyers'*, 501 U.S. at 426; 52 U.S.C. § 10301(b)).

[18] Simply because *Crawford* and *Gingles* were also vote-denial cases does not mean the tests used by the courts for constitutional challenges and challenges under a separate statute are proper. To borrow Judge Rodriguez's metaphor in *LUPE*: Though the Fourteenth Amendment, § 2 of the Voting Rights Act, and the Materiality Provision

> may have been enacted to address a common problem, one should not limit the other where they "play different roles in achieving these broad, common goals." Indeed, as a matter of common sense, it is simply incorrect to assume that tools directed at the same goal must operate by the same means. Umbrellas, goloshes, and raincoats, for example, all work toward the same purpose—protection from the elements—but function in

As Judge Higginson aptly explained in his dissent, the Fifth Circuit had "previously recognized that *Crawford* 'only considered a First and Fourteenth Amendment challenge, which involves a different analytical framework than what we use for [statutory] claims.'" *Id.* at 492 (Higginson, J., dissenting) (alterations in original) (quoting *Veasey*, 830 F.3d at 249). Judge Higginson continued, "the Materiality Provision expressly limits states' purported 'considerable discretion,'" thus, "the 'considerable deference to be given to state election procedures' has no place in a materiality analysis." *Id.* (cleaned up) (quoting majority opinion). Further, Judge Higginson explained,

> The *Gingles* factors are used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination. Unlike a section 2 claim, though—as the majority recognizes—a Materiality Provision claim need not allege any evidence of discrimination. More importantly, nothing in the Materiality Provision's text or existing case law requires plaintiffs to show a "disparate burden" on the right to vote; instead, plaintiffs need only demonstrate that the state's procedural requirement "is not material in determining whether" they are "qualified" to vote. Accordingly, reliance on the *Gingles* factors is inapposite in the materiality context.

Id. at 492 (Higginson, J., dissenting) (citations and quotation marks omitted).

Moreover, *Callanen II*'s test is not consistent with the history and purpose of the Materiality Provision. If courts allow voting restrictions because they are non-tenuously related to a legitimate state interest, this will negate the plain language of the Materiality Provision and belie the very purpose of the statute. For example, the state surely has a

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> completely different ways. To suggest that, because an umbrella works by "opening," we should likewise "open" our boots and coats in the face of a storm would be nonsensical and even—with respect to the raincoats—counterproductive.

LUPE, 725 F. Supp. 3d at 763 (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 244–45 (1972)).

strong interest in ensuring that voters are eighteen years or older, and this interest is related to determining whether someone is qualified to vote—indeed, it is a requirement to vote. A rule that requires voters to identify their age in years, months, and days would surely be non-tenuously related to that state interest. Under the Fifth Circuit's test, such a rule would likely pass muster. However, that is precisely the type of immaterial requirement that the Materiality Provision aimed to eliminate. Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. at 148.

Justice Alito's dissent in *Ritter v. Migliori* further calls the Fifth Circuit's reasoning on materiality into question. 142 S. Ct. 1824 (2022) (denying to stay *Migliori*, 36 F.4th 153 pending certiorari). In reaching its conclusion in *Callanen II*, the Fifth Circuit distinguished *Schwier II* and *Migliori*, stating, "[t]he immateriality of the omissions in those [cases] was fairly obvious," unlike in the case of the wet signature requirement. *Callanen II*, 89 F.4th at 480. In *Ritter*, however, Justice Alito—joined by Justice Thomas and Justice Gorsuch—offered a thorough explanation as to why he believed the Third Circuit in *Migliori* was "very likely wrong." *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting). Justice Alito drew a distinction between regulations on the requisite acts of voting as compared to regulations on how ballots are cast, stating:

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> Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, *but they would not be "material in determining whether such individual is qualified under State law to vote in such election*."

Id. at 1826 (Alito, J., dissenting) (emphasis added). This statement not only reflects Justice Alito's disagreement with the Fifth Circuit's statement that *Migliori* involved a "fairly

obvious" immaterial omission, it signals that at least three Justices would find that a defect in one's signature on a ballot, such as typing one's name, "would not be material in determining whether such individual is qualified under State law to vote in such election." *Id.* (internal quotation marks omitted). If typing one's name instead of signing it is not material to determining one's qualifications, it reasonably follows that the inclusion of a digital signature, rather than a wet signature, would not be material either.

Lastly, *Callanen II*'s deference to legislative action further distinguishes the case at bar because, unlike in *Callanen II* where the court was evaluating whether a *statute* passed via the legislative process was a violation of the Materiality Provision, here the Court is evaluating a *rule* promulgated by the seven-member SBEC.

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The Fifth Circuit concluded: "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." *Callanen II*, 89 F.4th at 489. This Court believes the Fifth Circuit's consideration of state interests—based on a test cobbled together from constitutional and § 2 Voting Rights Act case law—strays too far from the plain, unambiguous language of the Materiality Provision. Accordingly, the Court declines to consider the state's interest in analyzing the Materiality Provision.[19] The Rule is likely immaterial to determining whether an individual is qualified to voter under Arkansas law and therefore violates the Materiality Provision; the SBEC cannot make an

[19] The Court is similarly skeptical of the district court's reasoning in *Vote.org v. Byrd*, 700 F. Supp. 3d 1047 (N.D. Fla. 2023), which relies almost entirely on the solemnity of a handwritten signature without much analysis, and certainly no analysis more in depth than what the Fifth Circuit provides in *Callanen II*.

immaterial rule material simply by claiming it satisfies some state interest, however noble the interest.

iv. Even if the Court Took State Interests into Account, the Rule Likely Does Not Advance the Purported Interests

Assume, however, the Court accepted the Fifth Circuit's "importation of *Crawford* and *Gingles* into the materiality context, deference to [Arkansas's] election procedures" still "cannot save the wet-signature requirement." *See Callanen II*, 89 F.4th at 492 (Higginson, J., dissenting). The SBEC focuses on two primary interests to support the Rule: uniformity and integrity. But, according to the evidence presented by Plaintiffs, the Wet Signature Rule does not advance either of these interests.

The SBEC argues that it implemented the Rule to promote uniformity due to discrepancies in clerks' treatment of digital signatures in different counties. However, as noted, the Arkansas Constitution permits digital signatures from Registrations Agencies. The SBEC does not explain how implementing a rule that permits digital signatures in certain contexts and prohibits them in others promotes uniformity, particularly when uniformity could have been better achieved by permitting digital signatures in all contexts.

The SBEC states that "a uniform process furthers Arkansas's interest in preventing fraud, verifying voter identity and eligibility, and promoting the integrity of the voter registration process." (Doc. 53, p. 11). However, the SBEC does not provide an explanation as to how the Rule accomplishes these goals, other than making conclusory statements or relying on the idea that a wet signature is more "solemn" than a digital signature. *Id.* at pp. 11–12 (citing *Callanen II*, 89 F.4th at 489; *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1056 (N.D. Fla. 2023)).

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What the Court struggles to understand is how a handwritten "x" (i.e., a mark) would better protect against fraud than a signature made with a stylus on a tablet. As previously discussed, county clerks "are advised to accept voter registration applications with any type of signature or mark," regardless of legibility or whether the applicant in fact makes a mark rather than a signature. (Doc. 46-6, ¶ 16).

Even in the context of comparing registration signatures with absentee ballot signatures—which was the first, and originally only, concern expressed by the Secretary's office—there is evidence that it still does not make a difference to the clerks' ability to maintain election integrity. To start, "it is made clear to officials reviewing voter registrations for signature matches that they are not signature analysts, and they are taught to err on the side of the voter." *Id.* at ¶ 19. Frequently, the comparable signature on the voter registration application will be a digital signature because many applications come from Registration Agencies like the DMV, meaning that clerks are already regularly comparing digital registration signatures to absentee ballot signatures. *Id.* Even where the application is submitted with a handwritten signature, clerks generally make the comparisons by "viewing PDF scans of the signatures," making it "very difficult to tell the difference between a signature made by pen," "a signature made by a stylus," "or a digital image of a handwritten signature that is then printed and submitted." *Id.* In other words, when a clerk is comparing registration signatures to absentee ballot signatures—the only moment identified in which registration signatures may affect election integrity—it is unlikely that a clerk would be able to distinguish between a wet signature, a signature submitted via GLA's tool, or a signature submitted through Vote.org's tool.

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The SBEC does not explain why the use of digital signatures by third-party organizations threatens election integrity more than use by Registration Agencies. To be sure, the Court can see some common-sense reasoning that, at a location like the DMV, there is likely other confirmation of identity (perhaps the person is obtaining a license at the same time). But this practical distinction only extends to verifying identity. Further, the SBEC focuses more intently on the concept of "solemnity," relying on the holdings in *Callanen II* and *Byrd*. Even if this Court were to grant that "solemnity" is a legitimate interest that should be taken into account under the Materiality Provision—which this Court does *not* grant for the reasons stated in the preceding subsection—it would still fail to be persuasive in this case.

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Importantly, in *Callanen II*, which *Byrd* heavily relied on, the Fifth Circuit's reliance on solemnity "hinge[d] on 'the effect on an applicant of seeing [certain] explanations and warnings above the signature block.'" *Callanen II*, 89 F.4th at 494 (Higginson, J., dissenting) (quoting majority opinion). Indeed, as Judge Higginson pointed out, the Fifth Circuit described Texas's argument on "solemnity" as "signing the form with the warnings in front of the applicant, threatening penalties for perjury and stating the needed qualifications," which had "some prospect of getting the attention of many applicants and dissuading false statements" in a way that "an electronic signature, *without these warnings*, d[id] not." *Id.* at 489. Not only does such reasoning show that "the wet signature itself" is not material in determining qualifications, *see id.* at 494 (Higginson, J., dissenting), it is distinct from the case at bar where a person digitally signing on GLA's

tool will see all the same warnings and perjury language that a person signing on a paper form would see. *See* Doc. 46-2, ¶ 14; Doc. 64, p. 82.[20]

"No evidence in the record supports—or even peripherally suggests—that the wet signature *itself* is material in determining whether a[n] [Arkansan] is qualified to vote." *Callanen II*, 89 F.4th at 494 (Higginson, J., dissenting). Arkansas "officials' admissions that they do not use the wet signature in any capacity to determine a voter's qualifications 'slams the door shut on any argument that [a wet signature] is material.'" *Id.* at 493 (Higginson, J., dissenting) (alterations in original) (quoting *Migliori*, 39 F.4th at 164). Thus, even if the Court were to take the state's interest in uniformity and integrity into account—which this Court explicitly rejects—the wetness of a signature would still be *factually* immaterial. *See id.* at 492–93 (Higginson, J., dissenting).

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B. Likelihood of Irreparable Harm[21]

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Cigna*

[20] The Court has further doubts as to the soundness of the solemnity reasoning. Digital signatures are widely recognized for all types of transactions and commitments. *See* Uniform Electronic Transaction Act ("UETA"), Ark. Code Ann. § 25-32-107(a) ("A record or signature may not be denied legal effect or enforceability solely because it is in electronic form."); Ark. Code Ann. § 25-32-107(d) ("If a law requires a signature, an electronic signature satisfies the law."). This is not to say the UETA applies to voter registration, but it demonstrates the State's acknowledgement of the legitimacy of digital signatures. *See also* Doc. 46-7, p. 23 (Attorney General Griffin noting the "widespread acceptance of electronic signatures").

[21] The SBEC made an argument that Plaintiffs could not show irreparable harm because the "emergency rule adopted by SBEC, which is the subject of this lawsuit, is on the verge of being superseded by a rule recently passed by SBEC, effective on September 1, 2024." (Doc. 53, p. 15 (citations omitted)). The Court disagrees with the SBEC on this point—as counsel for Ms. Harrell stated at the hearing, the rule doesn't "replace," but is "made permanent." Additionally, Plaintiffs brought this suit to enjoin any wet signature requirement, not merely the emergency rule. Nevertheless, out of an abundance of

Corp. v. Bricker, 103 F.4th 1336, 1346 (8th Cir. 2024) (citation omitted). Rather than merely showing a "possibility of irreparable harm," Plaintiffs "must show harm that is certain and great and of such imminence that there is a clear and present need for equitable relief." *Id.* (citations omitted).

Because the Wet Signature Rule likely results in the denial of the right to vote in violation of the Materiality Provision, voters in Arkansas—including Individual Plaintiffs—will suffer irreparable harm if a preliminary injunction is not granted.[22] *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citations omitted) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *LUPE*, 725 F. Supp. 3d at 765 (citations omitted) (same); *see Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote [ ] constitutes irreparable injury.").

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As to the organizations, "[c]ourts routinely recognize that organizations suffer irreparable harm when a defendant's conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education." *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (collecting cases). The election is less than two months away, and once it occurs "there can be no do-over and no redress." *League of Women Voters of N.C.*, 769 F.3d at 247; *see also In*

caution, the Court granted leave for the Plaintiffs to file a Rule 15(d) Supplement to their Complaint, which they filed on August 30, 2024, making clear that their pursuit of injunctive relief includes the now-permanent rule that was approved by the Legislative Council on August 23, 2024.

[22] The Court previously addressed the SBEC's argument on the opportunity to cure in its discussion on the denial of the right to vote. Though the Court does not repeat its reasoning as to why it is unpersuaded that resubmission in compliance with the Rule would cure the Materiality Provision violation, that reasoning applies here as well.

re Georgia Senate Bill 202, 2023 WL 5334582, at *11 (N.D. Ga. Aug. 18, 2023). ("Such mobilization opportunities cannot be remedied once lost." (citations and quotations marks omitted)). In addition, the organizations, and GLA in particular, have and will continue to incur compliance costs and suffer interference with their organizational activities.[23] Thus, absent a preliminary injunction, ongoing enforcement of the Rule, which has now been made permanent, will likely cause GLA and Vote.org irreparable harm.

Therefore, the Court finds the Plaintiffs have established a likelihood of irreparable harm absent a preliminary injunction.

C. Balance of Equities and the Public Interest[24]

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When the government opposes the issuance of a preliminary injunction, the final two factors—the balance of the equities and the public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of equities and public interest here decidedly favor Plaintiffs, given the likelihood that the Rule will deny voters in Arkansas

[23] Whether Vote.org will suffer irreparable harm is not as clear cut as GLA. In particular, the SBEC argues that harm to Vote.org is not imminent because it has not yet launched its online tool. The evidence shows, however, that Vote.org would have launched its tool in Arkansas—as it has done in various other states—but for the Wet Signature Rule and that the inability to do so has resulted in ongoing costs and resources.

[24] Though neither party briefed the *Purcell* principle, the Court notes its agreement with Plaintiffs' statement at the hearing that *Purcell* is "not some magic wand that bars Courts from issuing injunctions some amount of time out from an election." *See Purcell v. Gonzalez*, 549 U.S. 1 (2006); *cf. Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018) ("there is no universal rule that forbids a stay after Labor Day"). Indeed, *Purcell* is not at issue where, as here, the preliminary injunction "does not fundamentally alter the nature or rules of the election, create voter confusion, or create an incentive for voters to remain away from the polls," but rather it "*restores* and *maintains* the status quo that existed until" the SBEC's emergency rule. *Craig v. Simon*, 493 F. Supp. 3d 773, 789 (D. Minn.), *aff'd*, 980 F.3d 614 (8th Cir. 2020); *see also Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) ("the same rationale that works to prevent election interference by federal courts also works to prevent interference by other entities as well"). Accordingly, *Purcell*'s concern with altering the election rules on the eve of an election is not at play here.

their statutory rights under federal law: to have otherwise legible and complete voter registration applications accepted by their county clerks regardless of any immaterial errors or omissions. *See League of Women Voters of Mo.*, 336 F. Supp. 3d at 1006 ("[E]nsuring qualified voters exercise their right to vote is always in the public interest." (citations and quotations omitted)). In contrast, granting the preliminary injunction will not cause any harm to Defendants—at most it will require them to accept registration applications with digital signature which they undisputedly already do. Accordingly, Plaintiffs' Motion for Preliminary Injunction (Doc. 46) is **GRANTED**.

VI. MOTIONS TO DISMISS

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Lastly, the Court takes up the Motions to Dismiss by Defendants Harrell and Hollingsworth (Docs. 39 & 41). The Court finds that Plaintiffs have stated a plausible claim of relief as to both Harrell and Hollingsworth. Both Defendants are permanent registrars under Amendment 51, tasked with registering qualified applicants to vote and enforcing the Wet Signature Rule, making them proper Defendants to this action. *281 Care Comm. v. Arneson*, 638 F.3d 621, 631–32 (8th Cir. 2011); *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 785 (W.D. Ark. 2021) ("If an injunction against the county [officials] would provide at least partial redress to the alleged injury, it stands to reason that they are appropriate defendants for such a suit."); *see also* Ark. Const. amend. 51, §§ 2, 9(c); Doc. 46-7, p. 63. Further, Harrell's contention that the Individual Plaintiffs do not have standing against her is insufficient for dismissal, where, as here, the Court has already found that one party, GLA, has shown that it likely has standing as to all Defendants. *281 Care Comm.*, 638 F.3d at 631–32; *Horne*, 557 U.S. at 446–47 (where plaintiffs seek identical

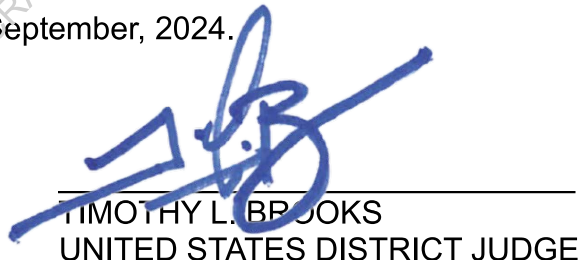
relief, only one needs standing). Therefore, the Motions to Dismiss (Doc. 39 & 41) are **DENIED**.

VII. CONCLUSION

For the reasons explained herein, **IT IS ORDERED** that Plaintiffs' Motion for Preliminary Injunction (Doc. 46) be **GRANTED**, and Defendant Harrell and Defendant Hollingsworth's Motions to Dismiss (Docs. 39 & 41) be **DENIED**.

IT IS FURTHER ORDERED that Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, be **PRELIMINARILY ENJOINED** 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.

IT IS SO ORDERED on this 9th day of September, 2024.



TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

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1 IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
2 FAYETTEVILLE DIVISION

3

4 GET LOUD ARKANSAS; VOTE.ORG;
NIKKI PASTOR; and TRINITY "BLAKE"
5 LOPER, PLAINTIFFS

6 v. CASE NO. 5:24-CV-05121

7 JOHN THURSTON; SHARON BROOKS;
JAMIE CLEMMER; BILENDA HARRIS-
8 RITTER; WILLIAM LUTHER; JAMES
HARMON SMITH, III; and JOHNATHAN
9 WILLIAMS, in their official capacities
as Commissioners of the Arkansas State
10 Board of Election Commissioners;
BETSY HARRELL, in her official capacity
11 as Benton County Clerk; BECKY LEWALLEN,
in her official capacity as Washington
12 County Clerk; and TERRI HOLLINGSWORTH,
in her official capacity as Pulaski
13 County Clerk, DEFENDANTS

14 ____

15

16 CASE MANAGEMENT AND MOTIONS HEARING

17 BEFORE THE HONORABLE TIMOTHY L. BROOKS

18 AUGUST 29, 2024

19 FAYETTEVILLE, ARKANSAS

20

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1:34PM 1 THE COURT: The next matter before the Court is the
2 case of Get Loud Arkansas and others versus John Thurston,
3 also members of the State Board of Election Commissioners
4 and certain county clerks. Our case number is
1:34PM 5 5:24-CV-05121. The matter is before the Court today
6 ostensibly for purposes of a case management hearing, but as
7 is our practice, we also take up motions that are ripe. And
8 in this case, there is a motion for a preliminary injunction
9 that is before the Court and is now ripe, so we will be
1:35PM 10 taking that matter up today.
11 Appearing for the plaintiff organizations and
12 individuals are Peter Shults, Christopher Dodge, and
13 Mr. Uzoma Nkwonta.
14 Appearing for the State Board of Election
1:35PM 15 Commissioners is Graham Talley. Brian Lester is present
16 representing Washington County Court Clerk Becky Lewallen.
17 Tom Kieklak is present representing Benton County
18 Court Clerk Betsy Harrell. And Dominic Lane is present
19 representing Terri Hollingsworth, who is the Pulaski County
1:36PM 20 Court Clerk. All of the individually named defendants here
21 are sued in their official capacities.
22 Based on the Court's review of the complaint, the
23 responsive pleadings that have been filed, the motion
24 practice and the parties' Joint Rule 26 report, the Court is
1:36PM 25 given to understand that the plaintiffs here, the individual

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1:36PM 1 plaintiffs, Nikki Pastor and Blake Loper, are citizens of
2 Washington County and I believe it's Pope County
3 respectively.
4 They accessed a voter registration application
1:37PM 5 developed by plaintiff, Get Loud Arkansas, and through that
6 application, they completed the required information and
7 they affixed a digital signature that was then forwarded to
8 their respective county clerk offices.
9 Their voter registration applications were
1:37PM 10 rejected. The basis for the rejection has to do with
11 whether the applications were properly signed, and more
12 specifically, whether a digital, or what we might also call
13 an electronic signature, is permissible on such an
14 application, or whether wet ink or scrawl your signature
1:38PM 15 across the page where there is friction between your
16 ballpoint pen and a piece of paper is required.
17 As the Court understands it, the history here dates
18 back to perhaps December of last year and then the first few
19 months of this year when Get Loud Arkansas, which is a
1:39PM 20 nonprofit whose mission is voter registration and the
21 promotion of civic obligations, namely voting, had created
22 this application. There was apparently a concern originally
23 about what would be required. The Arkansas Constitution as
24 I understand in Amendment 51 sets out certain requirements
1:39PM 25 on the registration form and it says that the form has to be

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1:40PM 1 executed by a signature or a mark, but that's as far as
2 Amendment 51 goes.
3 So Get Loud Arkansas informally sought advice from
4 the Secretary of State's office about whether a digital
1:40PM 5 signature would be permissible as this would bring much more
6 utility and efficiency to their efforts to getting people
7 registered to vote, something that I think all civic-minded
8 people are proponents of. And initially, anyway, according
9 to the affidavits and materials attached to the filings
1:40PM 10 here, the Secretary of State's office either said that would
11 be fine or perhaps more cautiously said they didn't then
12 know of any reason why it would be a problem.
13 Afterwards, as I understand it, the Secretary of
14 State, who is ultimately in charge of all things voting in
1:41PM 15 Arkansas, solicited a legal opinion from the Arkansas
16 Attorney General who -- and his opinion is in the materials
17 as well -- but he ultimately opined in a formal Attorney
18 General opinion that an electronic signature satisfies
19 Amendment 51's signature or mark requirement. I don't want
1:42PM 20 to read anything between the lines here, but perhaps one can
21 infer that that was not the answer that the Secretary of
22 State was anticipating because very shortly after that, some
23 emergency rule-making process was engaged and the State
24 Board of Election saw that this was going to create a
1:42PM 25 scenario where some local county clerks would accept

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1:42PM 1 electronic signatures and other county clerks would not.
2 And in an effort to bring uniformity, the emergency rule,
3 among other things, provided that signatures on voter
4 registration applications would have to be of the wet ink
1:43PM 5 variety.
6 According to Get Loud Arkansas, this about-face has
7 been very problematic. It has hampered their efforts to
8 sign up new voters, at least at the pace that they had been
9 when they could use the digital signatures. And ultimately,
1:43PM 10 they brought this suit.
11 This suit is predicated on what it known as the
12 materiality provision found at 52 U.S. Code Section 10101.
13 And this law basically says that state governments cannot
14 put roadblocks in the way of voting that are not material to
1:44PM 15 the actual prerequisites of qualifying one as a voter. I
16 think the idea here has its roots back when states, decades
17 ago, would perhaps have poll taxes in place or they would
18 have poll tests in place or they would have various hurdles
19 and hoops that people desiring to vote would be required to
1:45PM 20 jump through before they would actually be allowed to vote.
21 And so this materiality idea came into play and it was
22 codified.
23 Here, the plaintiffs are using the vehicle of
24 Section 1983 and 1988 to assert a violation of their rights
1:45PM 25 under federal statutes. They also invoke the Declaratory

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1:45PM 1 Judgment Act, 28 U.S.C. Section 2201. And in their motion
2 for preliminary injunction, they invoke Rule 65 of the
3 Federal Rules of Civil Procedure.
4 Another entity is a plaintiff here, Vote.org.
1:46PM 5 Vote.org contends that it's the largest nonprofit in the
6 country in terms of its efforts to get people registered to
7 vote and to turn out to vote. And they run campaigns
8 nationally, unlike Get Loud Arkansas, which has focused its
9 efforts here in the State of Arkansas.
1:46PM 10 Vote.org contends that it has efforts in the State
11 of Arkansas, that it would like to have more efforts in the
12 State of Arkansas, and in particular, it would like to be
13 able to use a feature that would allow it to engage in its
14 activities of registering people to vote via the form of an
1:47PM 15 electronic signature. Now, my understanding is that they
16 haven't done that yet or in the past in Arkansas, but that
17 they would like to do so going forward.
18 Both the organizational plaintiffs as well as the
19 individual plaintiffs claim that they are injured by the
1:47PM 20 rule-making undertaken by the State Board of Election
21 Commissioners. My understanding is that at the time that
22 the complaint and then motion for preliminary injunction was
23 filed, the posture was that the rule-making was at the
24 emergency rule-making level. I mean, first, they announced
1:48PM 25 it and then there had to be some sort of legislative

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1:48PM 1 executive committee give its blessing. And then the
2 emergency rule went into effect. The idea was it would
3 remain in place, I think it was no more than 90 days, but in
4 any event, by no later than September 1st.
1:48PM 5 The Court understands -- I'm not sure if it's
6 specifically in the pleadings or papers it's alluded to --
7 but it would appear as though the final version, the
8 non-emergent version, has either passed or will be passed
9 shortly, and in any event, it's contemplated as going into
1:49PM 10 effect by September 1st. I frankly am not aware of whether
11 there are or are not any material differences between the
12 emergency and final rule, but as best I can tell, there are
13 not.
14 So the defendants for their part have various
1:49PM 15 contentions. The State Board of Election Commissioners as I
16 understand it contend that it is their responsibility to
17 promulgate rules and regulations that are consistent with
18 the Arkansas Constitution and as pertinent here, Amendment
19 51. And that it is in fact their job to bring uniformity
1:50PM 20 and efficiency to the processes and policies set out in
21 Amendment 51 and that their actions here were for that very
22 reason and purpose, to bring uniformity and efficiency. The
23 board contends that it has complied with all of the rules
24 that it's required to comply with and that the rule is in
1:50PM 25 place and must be followed.

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1:51PM 1 Beyond that, they raise several problems with the
2 complaint and petition that are before the Court. They
3 argue in their response that, as a couple of threshold
4 matters, number one, they raise a question as to whether
1:51PM 5 there is any private right of action under the materiality
6 provision. I understand that they would suggest that the
7 executive branch of federal government, the Attorney
8 General, would have to enforce any purported violations, and
9 so they question whether there is a private right of action
1:52PM 10 here.
11 Secondly, they dispute whether some or perhaps all
12 of the plaintiffs have standing, which I understand to mean
13 they contend that the plaintiffs do not have Article 3
14 standing for various reasons, but in particular, because
1:52PM 15 they have not suffered any harm. And they have other
16 reasons too, but that's one of them.
17 And then as to the appropriateness of the
18 preliminary injunction, both sides have analyzed the
19 appropriateness of the issuance of a preliminary injunction
1:53PM 20 through the lens of the *Dataphase* considerations, and each
21 side views those considerings as applied to the facts here
22 differently, obviously. And from the defendants' point of
23 view, they disagree on about every element. And beyond
24 that, they say that there's no need for a preliminary
1:53PM 25 injunction, that at most, the matter should proceed to

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1:53PM 1 litigation and a decision can be made about a permanent
2 injunction when we reach the trial or a hearing on the
3 merits.
4 Certain of the defendants have filed motions to
1:54PM 5 dismiss, namely Ms. Harrell and Ms. Hollingsworth. They
6 contend that it's not necessary for them to be in this
7 lawsuit in order for the plaintiffs to get redress for the
8 relief they contend they are entitled to. A little more
9 specifically, they note that neither of the plaintiffs --
1:54PM 10 well, they note that the individual plaintiffs have not
11 returned any voter registration applications to their
12 counties and so they see no reason why they should be joined
13 here, so they seek to be dismissed.
14 So that's kind of my understanding of what the case
1:55PM 15 is about, and it's a super high-level view of the issues to
16 be taken up today. Here's how I would propose we go about
17 attacking this. Of course, it's the plaintiffs' motion and
18 so I will allow them to make argument first. I'm not going
19 to purport to tell you how to make your argument, but I
1:55PM 20 would like you to hit those three things for me; the private
21 right of action, whether one exists, with regard to each
22 plaintiff, whether they have standing and why, and then you
23 can switch to the appropriateness of a preliminary
24 injunction and the *Dataphase* factors, and of course
1:56PM 25 likelihood of success on the merits is the key one there.

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1:56PM 1 Who will be arguing for the plaintiffs today?
2 MR. DODGE: I will, Your Honor. Mr. Dodge.
3 THE COURT: All right. Mr. Dodge, you may proceed.
4 MR. DODGE: Good afternoon, Your Honor, and thank
1:56PM 5 you for that summary of the case and also for indicating the
6 issues you are most interested in. I'll take them in turn.
7 Starting with private enforcement of the
8 materiality provision through Section 1983. As we explain
9 in our brief, the overwhelming majority of Courts to
1:56PM 10 consider this question over the last two decades have
11 determined that private plaintiffs may enforce the
12 materiality provision through Section 1983. This includes
13 decisions of the Third, Fifth and Eleventh Circuits, as well
14 as Judge Holmes within this very district as well.
1:57PM 15 The relevant standard to determine whether a
16 federal statute may be enforced through Section 1983 was set
17 out by the Supreme Court in the *Gonzaga* case. Just last
18 term in *Talevski*, the Supreme Court reaffirmed that *Gonzaga*
19 controls that question. The inquiry under *Gonzaga* is
1:57PM 20 whether the federal statute contains rights creating
21 language. Every single Federal Court that plaintiffs are
22 aware of, when they have engaged in that *Gonzaga* analysis
23 with respect to the materiality provision, has determined
24 that it has such rights creating language. In fact, the
1:57PM 25 Fifth Circuit in *Callanen* said that it had strong rights

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1:57PM 1 creating language, because throughout the statute, you have
2 phraseology, like all citizens of the United States shall be
3 entitled and allowed to vote. Voters cannot be denied the
4 right of any individual to vote. That kind of rights
1:57PM 5 creating language satisfies the *Gonzaga* inquiry, as the
6 overwhelming majority of Courts have concluded.
7 My friend from the state board has pointed to some
8 rather outdated precedent from some time ago. I think it's
9 important to note that none of those cases engaged in the
1:58PM 10 *Gonzaga* analysis. In fact, the only appellate authority,
11 *McKay*, the Sixth Circuit case, reached that determination in
12 a *pro se* litigation before *Gonzaga*, so it had no occasion to
13 engage in that analysis. And even then, that Court
14 dispensed with the question with no analysis whatsoever. It
1:58PM 15 simply said, well, the statute points to the Attorney
16 General, so I guess only the Attorney General can enforce
17 it. And my friend on the other side has not explained why,
18 again, this overwhelming march of authority of the last two
19 decades has uniformly found a private cause of action.
1:58PM 20 Their chief argument seems to be that because the
21 statute is framed as a directive to state officials, it is
22 not concerned with individual rights. But as Justice
23 Jackson explained in the *Talevski* case, that is the wrong
24 way to go about the *Gonzaga* inquiry. *Gonzaga* does not care
1:58PM 25 if the statute is framed as a command to state officials to

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1:58PM 1 not violate individual rights. That was made very, very
2 clear. And indeed other Courts have in other statutory
3 contexts said that when you do have that rights creating
4 language, as is present here, the fact that the statute is
1:59PM 5 framed as a command to state officials does not bar
6 enforcement under Section 1983.
7 Now, there are situations where Congress can
8 prohibit enforcement under Section 1983. Most obviously, it
9 can do so expressly. No such language exists in the Civil
1:59PM 10 Rights Act. There's nothing that makes the Attorney
11 General's enforcement powers exclusive. There's nothing
12 that says this statute shall not be enforced under 1983.
13 There is a narrower path where a statute may implicitly
14 preclude Section 1983 enforcement. But the Supreme Court
1:59PM 15 made clear, again in the *Talevski* case, which my friend did
16 not cite, that that happens in very, very, very narrow
17 circumstances. It happens in circumstances where Congress
18 has crafted its own alternative remedial regime through an
19 administrative process or some other special cause of action
2:00PM 20 that would be undercut if a litigant could just go to 1983
21 and say, well, I'm going to take this straight to a Federal
22 District Court. There is no such comprehensive alternative
23 regime within the Civil Rights Act that would be
24 incompatible with Section 1983 enforcement.
2:00PM 25 I guess just one final point on this private cause

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2:00PM 1 of action issue. There is obviously a notable case from the
2 Eighth Circuit recently interpreting the Voting Rights Act
3 and whether that can be privately enforced, but as we note
4 in our briefing, there are two critical distinctions. One,
2:00PM 5 the plaintiffs there did not proceed under Section 1983.
6 That is plain from the decision. They were proceeding on
7 the theory that the Voting Rights Act itself supplied a
8 cause of action. That alone makes that case not relevant
9 here. Even if that was a case concerned with the *Gonzaga*
2:00PM 10 analysis, though, it's a separate statute, and you have to
11 look at each statute to see whether it has the rights
12 creating language. Again, uniformly, Federal Courts that
13 have done that analysis with this statute have found that it
14 may be enforced. I'm glad to answer any other questions,
2:01PM 15 otherwise, I'll move on to the standing question.
16 As we also note in our brief, standing is no real
17 impediment here because every defendant concedes that at
18 least one plaintiff has standing as to them. The state
19 board, for example, is very clear in its brief. They raise
2:01PM 20 no argument whatsoever to suggest that the individual
21 plaintiffs here, Blake Loper and Nikki Pastor, lack
22 standing. Likewise, the two county clerks from Pulaski, and
23 I believe Benton County, that have moved to dismiss, they
24 only challenge standing as to the individual plaintiffs.
2:01PM 25 They don't dispute standing as to the organizations. And I

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2:01PM 1 think also notably the Washington County Clerk does not
2 dispute standing whatsoever. So there's no argument that
3 this Court lacks subject matter jurisdiction altogether.
4 Even so, there's no standing deficiency here whatsoever as
2:01PM 5 to any plaintiff, as to any defendant. And I'll just take
6 it first with the county clerks.
7 As Your Honor noted, Amendment 51 governs voter
8 registration in the State of Arkansas. Under that law,
9 county clerks are the public officials most immediately
2:02PM 10 tasked with enforcing voter registration rules. They
11 approve voter registration forms, they review them for
12 compliance of state law. No one disputes that.
13 The wet signature rule promulgated by the state
14 board likewise makes very clear it is a command to the
2:02PM 15 county clerks. You shall only accept voter registration
16 forms when they have how the state board chooses to define a
17 signature or mark. The Benton County Clerk actually
18 concedes that point in the Rule 26(f) report saying, as the
19 Benton County Clerk, Betsy Harrell is required to enforce
2:02PM 20 the SBEC's wet signature requirement. That is a completely
21 accurate statement.
22 So as the officials in Arkansas who are tasked most
23 immediately with enforcing voter registration rules, they
24 are the appropriate officials. They are appropriate
2:02PM 25 officials, not exclusively so, to serve as defendants here.

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2:02PM 1 The reason why is that their enforcement of the rule causes
2 injury to the plaintiffs. As to the individual plaintiff
3 who tried to apply within Washington County, the injury is
4 apparent. The county clerk denied their voter registration
2:03PM 5 application. And as to the organizations Get Loud and
6 Vote.org, they wish to operate within these counties. These
7 are Arkansas' three largest counties. They tend to have a
8 more diverse and younger population, the sorts of new voters
9 that these organizations are most interesting in reaching
2:03PM 10 out to. But we know that if they were to offer their
11 registration tools within these counties, to voters within
12 these counties, if they were to complete the registration
13 form, under the rules and under the interpretation imposed
14 by the state board, the county clerks would have to deny
2:03PM 15 their applications given their responsibilities under
16 Amendment 51. So they are the officials that cause the
17 injury, the injury is traceable to their enforcement of the
18 rule, and an injunction against those county clerks will
19 redress that harm by permitting individuals within those
2:03PM 20 counties to apply using electronic signatures, or to use
21 tools within those counties.
22 THE COURT: But it sounds like some of your
23 argument here, we could copy and paste over into your
24 response to the motions to dismiss that the two clerks have
2:04PM 25 filed. What I would really like to hear you focus on is why

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2:04PM 1 the two organizations have Article 3 standing as plaintiffs
2 here. And let's start with Get Loud Arkansas.
3 The complaint is lengthy, and I don't know that I
4 can say that this is exclusive. I'm sure it's probably not.
2:04PM 5 But one of the main themes, anyway, is the impact that the
6 wet signature rule has had is it has caused Get Loud
7 Arkansas to have to divert its resources and to dilute its
8 resources. It was humming along very well when it could
9 present a tablet to someone at an event and they could just
2:05PM 10 sign it or have them take a QR code and do it later on their
11 own time and you were able to completely bypass the part of
12 having to print and go through one or two additional steps
13 of mailing it, either to you and then to the clerk or what
14 have you. And so that was going along great.
2:06PM 15 The wet rule comes along, the wet signature rule
16 comes along, and all of a sudden, you are now having to
17 divert resources back to what Get Loud might call the
18 old-fashioned way of doing things.
19 So I get it, all that makes common sense. But as
2:06PM 20 we all know, the Supreme Court has recently held that mere
21 diversion of resources is not sufficient to give an
22 organization standing. That's the mifepristone case, the
23 *Alliance* case from the Supreme Court this past summer.
24 Was Get Loud's standing based on diversion of
2:06PM 25 resources?

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2:06PM 1 MR. DODGE: In part, Your Honor. I think Get Loud
2 Arkansas has two independently sufficient bases for Article
3 3 standing here. And I would say that the *FDA* case, the
4 *Alliance for Hippocratic Medicine* case, actually confirms
2:07PM 5 the unequivocal presence of standing here. The issue in the
6 *FDA* case, the point that Justice Kavanaugh made in that
7 decision, was that when a public official directly regulates
8 an entity and thus prohibits it from doing something,
9 standing is canonically present. And that is this case.
2:07PM 10 The SBEC has issued a rule that prohibits Get Loud Arkansas
11 from offering its online application that permits people to
12 use electronic signatures. And, in fact, that is precisely
13 what happened. That's what is set forth in our pleadings.
14 They were required effectively to take it down, because as a
2:07PM 15 result of defendants' enforcement of the rule, those
16 applications would all be rejected. And so that is a direct
17 regulation of how Get Loud and also Vote.org goes about
18 conducting voter registration in the State of Arkansas.
19 That on its own, according to the *FDA* case, I would
2:07PM 20 cite to 602 U.S. at 382, because it forbids some action by
21 the plaintiffs -- namely their offering of these tools --
22 provides standing.
23 They also have standing because of a diversion of
24 resources, however. The *FDA* case did not disturb the
2:08PM 25 preexisting *Havens* test for a diversion of resources theory.

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2:08PM 1 It still stands for the proposition that when a state
2 regulation impedes an organization from going about its
3 work, and when that organization then has to divert
4 resources to ameliorate that impediment and that the
2:08PM 5 diversion impairs other aspects of its operation, that
6 standing is present. That again is the case here. Because
7 you have a rule from the state board, and the enforcement of
8 that rule from county clerks, that impedes how Get Loud can
9 go about registering voters.
2:08PM 10 When they had this tool in place, they set very
11 lofty goals for voter registration; nearly 10,000 people.
12 That was their goal for this year. They are no longer on
13 track to meet that, because as Your Honor indicated, they
14 now have to go back to the old-fashioned way, which as we
2:09PM 15 describe in our complaint has numerous limitations as far as
16 being able to reach people in different parts of the state,
17 being able to engage them at certain events, the logistics
18 of ensuring that the application is properly completed and
19 submitted, all of which was expedited and made more
2:09PM 20 convenient and more efficient by the tool that is now
21 prohibited by enforcement of the rule.
22 And in response to that limitation, because voter
23 registration is the main goal, the main mission of Get Loud
24 Arkansas, it has had to take resources from its other very
2:09PM 25 important missions; educating people about local government,

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2:09PM 1 getting people out to vote once they are registered, helping
2 people who have been purged from the voter roles. All those
3 efforts have tangibly suffered as a result of the need to
4 put more resources into less efficient methods of
2:09PM 5 registering voters. Nothing about the *FDA* case disturbs
6 that as a basis of standing, and even if it did, the direct
7 prohibition of their method of offering voter registration
8 would itself supply standing.
9 The same goes, it's essentially the same reasoning
2:10PM 10 for Vote.org. They also have an e-signature that they have
11 offered in other states where it has proven popular. As
12 indicated in Ms. Hailey's declaration at paragraph 9, they
13 wish to offer it in Arkansas. They cannot do so.
14 THE COURT: With regard to Vote.org, the defendants
2:10PM 15 also argue that Vote.org, unlike Get Loud, was not in this
16 space in Arkansas, they just would like to be in future
17 elections. And they say that that is not a present injury
18 to Vote.org since they haven't suffered one yet.
19 What's your response to that?
2:10PM 20 MR. DODGE: Two thoughts, Your Honor. One,
21 Vote.org has, in fact, been engaged in Arkansas. They have
22 registered many Arkansans, albeit using different modes of
23 offering voter registration tools. But Your Honor's
24 question, I think my friend from the state board takes a
2:11PM 25 very cramped view of *Clapper* and this imminence sort of

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2:11PM 1 question when it comes to injury. We have declaration
2 testimony from the CEO of Vote.org saying, but for the
3 enforcement of this rule, we have a tool that we would offer
4 in this state.
2:11PM 5 THE COURT: Offer this election, or offer in the
6 next election?
7 MR. DODGE: As a practical matter that may turn on
8 what this Court does and the timing of that, and I don't
9 know that I know precisely what their timeline was. As I
2:11PM 10 think is alluded to from the briefing, this is an issue that
11 has arisen in other states, and given the hostility that
12 certain states have had to this method of promoting voter
13 registration, I think understandably Vote.org requires real
14 clarity before they can commit resources to offering
2:11PM 15 something in a state. And given the lack of clarity from
16 the Secretary of State here, the state board, the sort of
17 wishy-washiness, the back and forth on whether or not this
18 is permissible, that clarity has been lacking here.
19 A declaration from this Court, an injunction from
2:12PM 20 this Court, saying to prohibit this kind of voter
21 registration form would violate federal law, that would
22 remove the barrier, and, again, consistent with Ms. Hailey's
23 declaration, they would then have the present intent to
24 offer this within Arkansas. That is an injury.
2:12PM 25 *Clapper* and Article 3 do not require that for

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2:12PM 1 prospective relief, for injunctive and declaratory relief,
2 that you need some sort of backwards looking inquiry. They
3 do not contest the declaration testimony that but for this
4 rule, and with declaratory relief in hand, Vote.org would
2:12PM 5 move forward with offering this tool in Arkansas. I think
6 that satisfies Article 3.
7 THE COURT: All right.
8 MR. DODGE: And I guess one further point specific
9 to Get Loud. And this is in our briefing. But the
2:12PM 10 rule-making itself is littered with references to Get Loud.
11 Let there be no ambiguity in the record. The state board
12 passed this rule to target Get Loud's activities. And when
13 a state agency singles out an entity and says, you're doing
14 something that we don't like, we're going to pass a rule
2:13PM 15 that prohibits it. Again, consistent with the *FDA* case,
16 that is a canonical Article 3 injury that is traceable to
17 the officials tasked with enforcing the rule, which in this
18 case would be the state board and county clerks.
19 Unless Your Honor has additional questions on
2:13PM 20 standing, I can move on, I think, to the merits.
21 THE COURT: That's fine.
22 MR. DODGE: So the merits are in large part not
23 substantially disputed. Your Honor's characterization of
24 the materiality provision was correct.
2:13PM 25 What the provision does is look to whether an error

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2:13PM 1 or an omission on a voter registration form is material or
2 not in determining whether a person is qualified to vote
3 under state law. So the question here is -- and I would
4 emphasize the term "determining" there -- it's a practical
2:14PM 5 inquiry. How do state officials actually use the
6 information on the form to determine, is this person a
7 citizen? Are they over 18? Are they a resident? Have they
8 been convicted of a felony and the like?
9 There is no argument in the record from any
2:14PM 10 defendant, either in the briefing or in the rule-making, as
11 to what conceivable purpose the method of signature plays in
12 determining any of the qualifications in Article 3 of the
13 Arkansas Constitution to determine whether someone is
14 qualified to vote. There is simply no argument on that
2:14PM 15 point whatsoever. The only record evidence comes from
16 plaintiffs.
17 We have submitted, for example, a declaration from
18 Ms. Susan Inman, who is formerly the county clerk of Pulaski
19 County and also a member of the state board at one point.
2:14PM 20 She has explained that, in practice, the way county clerks
21 treat the signature box on mail voter registration forms is,
22 they look to see, is a signature or mark present. In other
23 words, has the applicant sworn under penalty of perjury,
24 consistent with Amendment 51, that they satisfy the
2:15PM 25 requirements to vote. Once they have done so, there is no

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2:15PM 1 further inquiry into, well, how clean is the signature? Did
2 they use blue ink or black ink? Did they use one method or
3 the other? It has no role whatsoever.
4 And defendants don't dispute any of that testimony.
2:15PM 5 There's no rebuttal to Ms. Inman's testimony, which I think
6 lays out in great detail the practical immateriality of the
7 method of signature.
8 THE COURT: Well, the defendants seem to think that
9 requiring a wet signature is important in a few respects,
2:15PM 10 one of which is integrity. Another is fraud. Maybe those
11 are one and the same thing, or the opposite of the other,
12 but ensuring integrity and making sure that there's not any
13 fraud in the registration process.
14 What is your understanding of how the wet signature
2:16PM 15 or mark has promoted those efforts in the past?
16 MR. DODGE: I think that's an excellent question
17 and it's one the defendants have yet to answer here, so I'll
18 make two points on that question; one legal and one factual,
19 I think going to Your Honor's concern.
2:16PM 20 As a legal matter, policy rationales for voter
21 registration requirements do not answer the core inquiry of
22 the materiality provision; is an error or omission material
23 in determining a voter's qualification. You might think it
24 promotes uniformity or notions of voter integrity. That is
2:16PM 25 not a defense to the Civil Rights Act. There's nothing in

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2:16PM 1 the statute. Such a theory is completely divorced from the
2 statutory text, so as a legal matter, even if those
3 interests are sincere or true or promoted by a rule, they do
4 not answer to a violation of the materiality provision.
2:16PM 5 But I think at least as importantly, it sort of
6 remains a mystery how any of those interests are promoted
7 here. Take a few of them in turn. The state board is
8 responsible for promoting uniformity of election
9 administration in the state. Fair enough. But we know, for
2:17PM 10 example, that Arkansas already allows many voters to use
11 electronic signatures to register to vote if you happen to
12 do so at a state agency. In other words, you have thousands
13 of electronic signatures used already in Arkansas to
14 register to vote.
2:17PM 15 So the state board's rule does not promote any sort
16 of uniformity. Some Arkansans can use electric signatures
17 and some do not. In contrast, all relief would in fact
18 ensure uniformity across the state by requiring all
19 applicants, or permitting all applicants to use electronic
2:17PM 20 signatures, regardless of where or how they choose to
21 register to vote.
22 Likewise, these notions of fraud and voter
23 integrity, I mean, there's no supporting declaration
24 testimony, there's no real explanation of how those
2:17PM 25 interests are promoted. Again, the two things that

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2:17PM 1 contradict that in the record are, one, the fact that
2 thousands of Arkansans already are registered with
3 electronic signatures. There's no suggestion that they are
4 more prone to fraud or that they undermine the integrity of
2:18PM 5 Arkansas' elections. And the second is the testimony of
6 Ms. Inman who says that, as a practical matter, what clerks
7 do is just look to see if a signature is present. There's
8 no explanation of how a county clerk would use a wet as
9 compared to electronic signature to somehow promote voter
2:18PM 10 integrity. It is sort of a generic state interest that
11 neither answers the text in the materiality provision, nor
12 is it supported factually.
13 All that said, I think what they are really doing
14 is trying to hang their hat on some out-of-circuit case law,
2:18PM 15 specifically the *Callanen* decision from the Fifth Circuit
16 and the *Byrd* decision from the Northern District of Florida.
17 As an initial matter, those cases came to those Courts in a
18 very fundamentally different posture. In both those cases,
19 state legislatures had enacted unambiguous, express wet
2:18PM 20 signature requirements into state law. In *Callanen* in
21 particular, the panel majority -- two to one vote -- was
22 unambiguous that their finding of materiality was almost
23 exclusively due to deference to the legislature's judgment
24 about the importance or materiality of a wet signature.
2:19PM 25 This case comes to us in the exact opposite

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2:19PM 1 posture. The term "wet signature," "original signature," it
2 exists nowhere in the Arkansas code. They cannot point to
3 it. It does not exist. This is an invention of an
4 unelected state agency; not the Arkansas state legislature.
2:19PM 5 For that reason, it is fundamentally different than the
6 *Callanen* case. In fact, it is the opposite of the *Callanen*
7 case.
8 THE COURT: Well, explain to me this process of
9 taking these rules to some subcommittee of the legislature.
2:19PM 10 MR. DODGE: My best understanding is that under
11 administrative law in Arkansas, for a rule to become
12 effective, it needs sort of an up or down vote from this
13 subcommittee of sorts. But that committee does not purport
14 to act on behalf of the legislature. A statute -- federal
2:19PM 15 or state -- does not become law solely at the behest of a
16 state committee. It obviously must be presented to both
17 bicameralism, both houses of the legislature, the assent of
18 the executive. I mean, there's certainly plenty of federal
19 case law -- I know *INS v. Chadha* comes to mind -- where --
2:20PM 20 THE REPORTER: Sir, could you please slow down.
21 MR. DODGE: I apologize. Something does not gain
22 the force of law purely through committee assent. Certainly
23 it doesn't assume the same force as a state statute that has
24 been passed by the legislature and signed by the governor,
2:20PM 25 which was the case in the *Callanen* case, the *Byrd* case. Not

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2:20PM 1 the case here.

2 In fact, as the Attorney General explained in his
3 legal opinion, Amendment 51, as drafted, reflects the
4 opposite judgment, which is that many kinds of signature
2:20PM 5 satisfy Amendment 51. So, if anything, *Callanen*'s inquiry
6 into, well, what is the judgment of the legislature as to
7 materiality comes out the other way here, because the actual
8 state law at issue, as the Attorney General we think
9 correctly determined, supports the idea that many different
2:21PM 10 kinds of signature have long been accepted under Arkansas
11 law.

12 I would add also, we think the *Callanen* and *Byrd*
13 cases were wrong. I can say more as to why. I think it's
14 in our briefing. I would point Your Honor in particular to
2:21PM 15 Judge Higginson's dissent in the *Callanen* case, which we
16 agree with and we think is well reasoned.

17 I think that covers the merits inquiry of the
18 immateriality of the wet signature, so I'll just make a few
19 final points.

2:21PM 20 With respect to the *Dataphase* factors, I'll note at
21 the top that no defendant disputes that public interest here
22 weighs in favor of an injunction. There's no briefing on
23 that from defendants. Or the balance of the equities.
24 There are a few arguments with respect to irreparable harm,
2:21PM 25 but they are not persuasive for the reasons set forth in our

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2:21PM 1 brief. The suggestion of the state board is essentially
2 that, well, you can just comply with the rule and keep going
3 about doing voter registration the way it used to be done.
4 That is not an answer to irreparable harm. Forced
2:22PM 5 compliance with a challenged rule does not ameliorate
6 irreparable harm.
7 And I think also, for the reasons I described, the
8 diversion of resources, the need to engage in less efficient
9 voter registration techniques, that is irreparable harm that
2:22PM 10 really impacts these organizations. And also I would point
11 out, there are individuals -- plaintiffs in this case, but
12 also third parties -- who now cannot register to vote in
13 Arkansas in a manner consistent with the Civil Rights Act.
14 That, too, is irreparable harm.
2:22PM 15 One final thought on the equities. I guess two
16 related thoughts. I suspect my friend from the state board
17 is going to stand up and say that this case will soon be
18 moot because the emergency rule will soon lapse. That is a
19 deeply flawed argument for a few reasons.
2:22PM 20 The first is that it misreads our complaint. Very
21 clearly, page 24, 25 of our complaint, the prayer for
22 relief, we make very clear that we are not challenging the
23 emergency rule alone. We are not limiting the relief we are
24 seeking to an injunction against the emergency rule. We
2:23PM 25 seek to enjoin enforcement of any rule or requirement that

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2:23PM 1 would reject otherwise complete and sufficient mail voter
2 registration forms merely on the basis that they have an
3 electronic as compared to wet signature. That is
4 unambiguous throughout our complaint. It's unambiguous in
2:23PM 5 our opposition, or our reply on the PI.
6 And I'd also note that at pages 4 and 5 of the
7 state board's opposition, they make very clear that they
8 think Amendment 51, the actual existing state law, is what
9 requires county clerks to reject mail voter registration
2:23PM 10 forms that lack a wet signature. So the rule itself is not
11 sort of the sole operative source of harm here. It is the
12 state board telling county clerks, Amendment 51 requires you
13 to reject a mail voter registration form that lacks a wet
14 signature. That interpretation of state law will not expire
2:24PM 15 with the emergency rule. So long as they hold that rule of
16 state law and impose it on the county clerks, all of our
17 harm is live and there's the same need for an injunction to
18 redress it.
19 And, lastly, there's no dispute -- to your
2:24PM 20 suggestion, Your Honor, that there's a forthcoming final
21 rule. That is correct. That final rule will become
22 operative September 2nd. It has gone through the necessary
23 approval process. And also to Your Honor's point, it is
24 materially identical. There's no distinction whatsoever as
2:24PM 25 between that and the emergency rule. So, at most, all that

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2:24PM 1 is required -- I mean, I think the original pleading is
2 sufficient as it is. At most, plaintiffs might need to
3 supplement their complaint under Rule 15(d) to add a few
4 paragraphs of allegations as to the final rule, but nothing
2:24PM 5 about the turnover and rule moots this case or resets the
6 clock or ameliorates the need for injunctive relief.
7 Unless Your Honor has further questions, I'll let
8 my friend say something.
9 THE COURT: Well, you reminded me about the
2:25PM 10 defendants' other argument, which is that Amendment 51
11 doesn't allow anyone except the state agencies that are
12 allowed to register the people to vote; the DMV, the revenue
13 office, and there might be one another, but those two. They
14 can use a computer process, which I guess somehow means use
2:25PM 15 electronic signatures. And they extrapolate from that that
16 only those two recognized agencies can engage in electronic,
17 or the use of electronic signatures.
18 What is your response to that argument?
19 MR. DODGE: That's a very strained reading of the
2:26PM 20 statute, Your Honor, and one very notably that the Attorney
21 General rejected. What Amendment 51 does say is that
22 certain state agencies can use a computer process to aid in
23 registering people who come to those agencies. In other
24 words, the DMV can put out some sort of a computer terminal,
2:26PM 25 it can use processes to draw information from a voter

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2:26PM 1 registration record to help pre-fill and transmit a voter
2 registration form. No one disputes that.
3 What the state board then seems to say is that,
4 implicitly, you cannot use electronics or computers of any
2:26PM 5 sort when you use any other kind of voter registration
6 method, which I think is a very reaching importation of the
7 term computer process in one context into another. It's
8 also one that they themselves have disclaimed.
9 During the rule-making process, they acknowledged
2:26PM 10 that in completing a mail voter registration form, a person
11 could pre-fill it electronically on a computer, print it
12 out, and then sign it. And so this just sort of invites the
13 question, what does computer process actually exclude under
14 their reading of the statute, because they seem to concede
2:27PM 15 that you can use a computer for certain elements of the mail
16 voter registration form; just not the signature. But that
17 is a very self-serving reading of the statute, because even
18 if you sort of credit, as the Attorney General did not,
19 their exclusio alterius sort of canonical reading of the
2:27PM 20 statute, well, there's no reason why you could use a
21 computer to type in your name or address or your age, but
22 then not the signature through an electronic method.
23 There's no reason to distinguish between those two. It's
24 purely in service of the rule itself.
2:27PM 25 THE COURT: Pragmatically, do you have an

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2:27PM 1 understanding as to what the Secretary of State or the
2 county clerks do with the signature on the registration
3 petition after they have added that person's name to the
4 roll of registered voters. Is it used later in the process
2:28PM 5 in any way? Is it used to compare against, for example,
6 people who sign their name when they show up at a polling
7 station? What is the practical effect of it, other than to
8 verify that the information submitted is from a human being?
9 MR. DODGE: So Ms. Inman's declaration speaks to
2:28PM 10 this a bit. I mean, most immediately and in the first
11 instance, you look to see if the signature is there to know
12 that the form was completed under penalty of perjury. As
13 for sort of later administrative uses, a few things.
14 One, again, it's, I think, not the case that that
2:28PM 15 is a defense to a materiality provision violation under the
16 text of the law. But getting to the practical question Your
17 Honor is interested in, the one use that's been identified
18 by the state board is to compare signatures when someone
19 applies to vote absentee. You have to send in an
2:29PM 20 application, they may compare the signature on the
21 application to the one on the registration form.
22 But, again, as Ms. Inman explains, county clerks
23 are instructed to err on the side of the voter, to sort of
24 not -- they are not handwriting experts. They are not
2:29PM 25 signature analysts. And as she also explains, it's already

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2:29PM 1 the case that many people who apply to vote absentee will
2 have used an electronic signature at the DMV to register to
3 vote. So the method of signature originally used on the
4 registration is sort of no impediment to that matching
2:29PM 5 process at a later date.
6 My further understanding is that, the way they
7 record the signature from the registration, they don't --
8 this is my best understanding -- they don't go into a closet
9 and dig out the paper form and use a Sherlock Holmes
2:30PM 10 magnifying glass to look at it. They scan and they get a
11 PDF of it and they store it on a computer. And so they are
12 already looking -- regardless of how they sign the form,
13 whether electronically or pen and paper -- they are already
14 looking at a scan of the signature when, a few years later,
2:30PM 15 they compare it to an absentee ballot application request.
16 So the notion that this sort of has practical
17 implications there, again, is not supported by the record.
18 All the testimony suggests that it is no impediment
19 whatsoever. And beyond that, I don't think the state board
2:30PM 20 has in fact pointed to any possible use of the signature
21 after the fact. Unless Your Honor has further questions.
22 THE COURT: Thank you. I think we will proceed
23 this way. We will have Mr. Talley respond to those same
24 matters, and then to the extent that Mr. Lester and
2:31PM 25 Mr. Kieklek and Ms. Lane would like to respond, they may as

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2:31PM 1 well. And then after that, we will invite Mr. Kieklek and
2 Ms. Lane to make argument on their motions to dismiss.
3 Mr. Talley?
4 MR. TALLEY: Thank you, Judge. May I proceed?
2:31PM 5 THE COURT: You may.
6 MR. TALLEY: So I'm going to try and hit the points
7 that Mr. Dodge made and then some of those posed by the
8 Court. One of the ones that the Court has kind of flagged,
9 Mr. Dodge mentioned at the end of his argument, was this
2:31PM 10 issue with the emergency rule and the permanent rule and how
11 kind of the timeline here has shaken out.
12 I will submit to you, Your Honor, that there is a
13 potential problem with there being an Article 3 case or
14 controversy as this case is currently postured on
2:32PM 15 August 29th. And I don't mean to be cute with this
16 argument, because I think the Court knows the parties have
17 an obligation to raise subject matter jurisdiction. The
18 Court has an obligation to raise subject matter jurisdiction
19 when it exists. And for that reason, I talked to Mr. Shults
2:32PM 20 last week about this after the permanent rule passed through
21 ALC, I believe last Friday.
22 THE COURT: I'm very interested in hearing this,
23 but before I forget it, is there any difference in the final
24 rule as compared to the emergency rule, or is it verbatim
2:32PM 25 the same?

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2:32PM 1 MR. TALLEY: I couldn't represent to the Court that
2 it is verbatim, but I will concede it is substantially or
3 completely identical. There is no material difference for
4 the Court's purpose here.
2:32PM 5 THE COURT: And is there anything left that would
6 prevent it from going into effect come September 1st or 2nd?
7 MR. TALLEY: There is not. It will go into effect
8 absent an order enjoining it on September the 2nd.
9 THE COURT: Then if it's certain to go into effect,
2:33PM 10 and if it is in all material respects identical to the
11 version that was pled, what's missing from the concreteness
12 of a present injury?
13 MR. TALLEY: Because -- and that's where I was
14 getting, Your Honor -- is that that case or controversy must
2:33PM 15 exist through the life of the matter, from the moment a
16 complaint is filed and through appellate review, assuming --
17 THE COURT: This Court all the time is asked to
18 address the constitutionality of legislative actions after
19 they have been passed by the legislature, signed by the
2:34PM 20 Governor, but they don't go into effect until August 1st or
21 September 1st or what have you. And this Court has to
22 quickly get up to speed, have a hearing, get a ruling out
23 before it goes into effect.
24 How is this situation different than those
2:34PM 25 situations?

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2:34PM 1 MR. TALLEY: I certainly agree with the Court as to
2 prospective enjoinment of a law or a rule that has been
3 passed and finalized. If this complaint had been filed on
4 Monday, this would not be a problem and I would not be up
2:34PM 5 here talking about it.
6 THE COURT: If it had been filed this past Monday?
7 MR. TALLEY: Yes, Your Honor, because the rule had
8 been finalized and would be going into effect. But there is
9 law --
2:34PM 10 THE COURT: Well, do we need to take a recess and
11 allow the plaintiffs to attach the new rule to their
12 complaint and handwrite with a pen on paper the word
13 "amended" and file it and then rejoin our hearing?
14 MR. TALLEY: I think absent either a new complaint
2:35PM 15 or I think arguably an amended complaint, that that could be
16 a problem. And that is what I talked about on the phone
17 with Mr. Shultz on this issue, because it is certainly not
18 me trying to be cute on this. It is certainly a subject
19 matter jurisdiction issue that I wanted to put out in front
2:35PM 20 of the Court and the parties from the jump. Because if this
21 complaint had been filed Monday challenging the permanent
22 rule and we're here on Thursday, I certainly agree that the
23 Court has subject matter jurisdiction, assuming the parties
24 have standing, and that can be enjoined. But this complaint
2:35PM 25 was filed on June 5th before that rule-making process had

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2:35PM 1 been finalized. And Federal Courts generally do not disturb
2 the law-making process as it is ongoing.
3 THE COURT: Whoa, whoa, whoa, whoa, whoa, whoa,
4 whoa, whoa, whoa. The rule-making process while it's
2:36PM 5 ongoing, okay.
6 MR. TALLEY: Yes, Your Honor. As that process is
7 unfolding, because it could change. It could be amended.
8 THE COURT: And that was the point of me asking
9 you, is there anything left to happen at this point.
2:36PM 10 MR. TALLEY: There is not. And I am just pointing
11 this out from a subject matter jurisdiction perspective,
12 because I believe that is a potential problem because this
13 complaint was filed on June 5 while the rule-making process
14 was still underway as to the permanent rule.
2:36PM 15 THE COURT: But it was always the intent of the
16 SBEC to go through a process that by its nature involved,
17 first, an emergency rule, and then the steps to work it to a
18 final rule after a prescribed amount of time has passed. So
19 there has always been a controversy from the point in time
2:37PM 20 that the lawsuit has been filed here.
21 MR. TALLEY: As to the emergency rule, certainly.
22 THE COURT: Okay. But how has the controversy
23 changed? I mean, you have just told me that what is going
24 to go into effect on September 2 is the same.
2:37PM 25 MR. TALLEY: And that's the challenge, Your Honor,

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2:37PM 1 is, I admittedly concede it is an unusual posture factually,
2 because here we are 72 hours before the emergency rule
3 expires. The emergency rule is not challenged on the face
4 of the complaint.
2:37PM 5 THE COURT: So very pragmatically, if the
6 plaintiffs were to file an amended petition or amended
7 complaint and petition tomorrow, is there anything else that
8 you would need to say in response? Would the Court need to
9 give you more time? Would we need to have a second hearing?
2:38PM 10 MR. TALLEY: I don't think so, though I would
11 request if the Court is inclined to go that direction, that
12 we have an opportunity to very quickly file some response,
13 if any, that addresses that.
14 THE COURT: Well, we kind of have a lesser of two
2:38PM 15 evils situation here. By the end of next week, we're going
16 to be 60 days out from the election, which means we are
17 going to be 30 days out from the deadline to register, is
18 that right?
19 MR. TALLEY: That's correct, Your Honor.
2:39PM 20 THE COURT: So every day we penetrate that
21 remaining 30 days, not only do the plaintiffs, not only are
22 the plaintiffs hampered, but I would think that the board is
23 hampered because of remaining uncertainty. And I guess if
24 there's going to be a change, if the Court -- I'm just
2:39PM 25 speaking hypothetically here -- if the Court were to issue

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2:39PM 1 an injunction, I would assume the board would want to know
2 that sooner rather than later. And so every day of delay is
3 a problem. Of course, if you think that there is a
4 legitimate issue about standing, then we have to be
2:39PM 5 concerned about that too.
6 What is your thought about a compromise of two
7 not-so-good results here?
8 MR. TALLEY: I completely agree with the Court.
9 It's an unusual posture given just the timeline here. I
2:40PM 10 think the Court wisely pointed out that if the Court was
11 inclined to enter some type of injunctive relief or consider
12 that, then an amended pleading might be necessary. And I
13 think that could be a good solution to it.
14 And I agree with the Court that not only the
2:40PM 15 plaintiffs are placed in a difficult position by some
16 uncertainty, so is the board, because the board does have an
17 interest in having uniform procedures, whatever they may be,
18 across all 75 counties in the state.
19 THE COURT: The other thing is, I think it's
2:40PM 20 obviously undisputed that previously we have been in the
21 emergency rule, and then very soon, we are going to be under
22 the more or less identical final rule. But Mr. Dodge points
23 out that the relief that they request in their complaint and
24 in their injunction is not limited to the confines of the
2:41PM 25 emergency rule. It has to do with whether the wet -- the

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2:41PM 1 requirement of wet signatures in general.
2 MR. TALLEY: I understand that.
3 THE COURT: And the controversy was, when the
4 secretary of state did the about-face, that created a
2:41PM 5 controversy. They come to court. They are seeking a
6 declaration that the Court arguably has the ability to
7 redress. Their relief wasn't limited to whether the
8 controversy was in its emergency or final stages.
9 What's your response to that?
2:42PM 10 MR. TALLEY: As to my clients, the SBEC, there is
11 the emergency rule and then what I would call the permanent
12 rule. So as to my clients, I would submit to the Court that
13 the only case or controversy could be as to those two rules,
14 and anything beyond that would be some hypothetical or
2:42PM 15 speculative further rule-making or relief that isn't
16 sufficiently concrete to confer standing upon anyone, much
17 less any of the plaintiffs in this case.
18 THE COURT: Okay.
19 MR. TALLEY: And I'm sorry to bring that up on the
2:42PM 20 front end. Again, I don't do it to be cute or make some
21 argument. I'm flagging it because it is, I believe, a
22 potential issue in this case.
23 THE COURT: No, I accept that. Thank you.
24 MR. TALLEY: And that, Your Honor, will turn to the
2:42PM 25 related concept of standing as to all four of these

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2:42PM 1 plaintiffs. I will start with the individual plaintiffs.
2 THE COURT: I want to hear your argument. I just
3 want to see if you will concede one thing upfront.
4 Do you agree that for purposes of standing, for
2:43PM 5 purposes of this Court's jurisdiction, only one plaintiff
6 need to have standing?
7 MR. TALLEY: I do concede that, yes, Your Honor.
8 THE COURT: Okay. Please proceed.
9 MR. TALLEY: Plaintiff Nikki Pastor is the
2:43PM 10 Washington County resident. And along with the plaintiffs'
11 preliminary injunction materials, Ms. Pastor executed a
12 declaration in which she testified that she submitted an
13 application to the Washington County Clerk's office on
14 February 24 of 2024. That application was rejected, quote,
2:44PM 15 "nearly one month later" and she is not currently registered
16 to vote. I think those are undisputed facts. I certainly
17 don't dispute them.
18 But the issue here as to the SBEC, the state board,
19 is whatever injury Ms. Pastor sustained occurred before any
2:44PM 20 of this rule-making by the state board. The emergency rule
21 went into effect on May 2nd, or May 4th, 2024, which was
22 more than a month after she had submitted her application
23 and it had been denied by the Washington County --
24 THE COURT: So the state can disrupt the status quo
2:44PM 25 and leave a plaintiff without a remedy and deprive them of

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2:44PM 1 standing?

2 MR. TALLEY: If I understand the Court's question,

3 I don't think the SBEC -- the SBEC would submit, Your Honor,

4 that Ms. Pastor, her application wasn't rejected as a result

2:45PM 5 of some action or inaction on the part of the State Board of

6 Election Commissioners. Rather whatever relief there would

7 be as to the Washington County Clerk. It wasn't the product

8 of the emergency rule that went into effect May 4, or the

9 permanent rule that would go into effect on September 2.

2:45PM 10 THE COURT: So you are saying that Ms. Lewallen's

11 policy was not to accept digital signatures to begin with?

12 MR. TALLEY: I'm not sure, Your Honor, what --

13 THE COURT: Then what is your argument?

14 MR. TALLEY: -- the Washington County Clerk's

2:45PM 15 position on that was. It's just that Ms. Pastor's injury is

16 not fairly traceable to an act or inaction on the part of

17 the State Board of Election Commissioners.

18 THE COURT: Well, give me the timeline between --

19 I'm sorry -- let's digress just a little bit.

2:46PM 20 There are allegations in some attachments to the

21 affidavits that the people that work for Mr. Thurston, when

22 asked on this issue about any problem with electronic

23 signatures, they were in substance told, no problem, that

24 will be fine. And then, cynically speaking, according to

2:46PM 25 the plaintiffs, there's a newspaper article and a couple

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2:46PM 1 days later, Mr. Thurston lets it be known -- this is
2 according to the plaintiffs' allegations -- that
3 Mr. Thurston gets the word out to the county clerks to stop
4 that and to only accept wet ink. And then on the heels of
2:47PM 5 that is when they convene the proceedings to implement the
6 emergency rule.
7 I don't have a good grasp as I sit here in the
8 moment -- I could find it, I have some tabs, if I needed to,
9 I could find it -- of the timeline of when Ms. Pastor,
2:47PM 10 what's the date on her voter registration application versus
11 the date that Secretary Thurston supposedly verbally or
12 informally got the word out to the county clerks to not do
13 that?
14 MR. TALLEY: Ms. Pastor's application, according to
2:47PM 15 her declaration, was submitted on February 24.
16 THE COURT: And it was rejected?
17 MR. TALLEY: It was rejected, yes, Your Honor.
18 THE COURT: On which day?
19 MR. TALLEY: There is not a date in the record as
2:48PM 20 to the date of rejection. That would be with the Washington
21 County Clerk.
22 THE COURT: Did she testify that it was about a
23 month later?
24 MR. TALLEY: In her declaration, she testified that
2:48PM 25 she received notice about one month later.

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2:48PM 1 THE COURT: About one month later would be when?
2 MR. TALLEY: It would be, assuming for this
3 purpose, March 24 of 2024.
4 THE COURT: When did the word go out from
2:48PM 5 Mr. Thurston that the county clerks should not accept
6 electronic signatures?
7 MR. TALLEY: I believe, Your Honor, that was in
8 early March, but I am not certain as to the specific date in
9 the materials that I have got with me in front of me on the
2:48PM 10 lectern.
11 THE COURT: So on that timeline, Ms. Pastor would
12 have submitted her registration application when the state
13 of affairs was approving of electronic signatures, but had
14 it rejected after the about-face?
2:49PM 15 MR. TALLEY: It would have been after, I believe,
16 the Secretary of State made the decision that he made. And,
17 again, without trying to slice this too thin, and I
18 certainly don't mean to be cute about it, I really don't.
19 The Secretary of State's office certainly oversees elections
2:49PM 20 in the State of Arkansas. But the Secretary of State's
21 involvement in this case is in his capacity as a member of
22 the State Board of Election Commissioners. And Ms. Pastor's
23 rejection occurred before any rule promulgated or enforced
24 by the State Board of Election Commissioners was in place,
2:49PM 25 which began on May 4.

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2:49PM 1 THE COURT: Okay.
2 MR. TALLEY: So the simple position of the state
3 board on that piece, Your Honor, is that there is not a
4 fairly traceable injury between Ms. Pastor and an act or
2:50PM 5 inaction of the board. And I understand the Court's point
6 on that.
7 As to plaintiff Blake Loper, Mr. Loper, I believe,
8 submitted an application on December 11th. It was rejected
9 on May the 2nd. And this isn't pointed out, I don't think,
2:50PM 10 in any of the briefing, but if you take a close look at
11 Ms. Loper's declaration, which I believe is Document
12 number 46-5, she later submitted a hand-signed application
13 to the Pope County Clerk, which according to the testimony,
14 appears to have been accepted. But she is incorrectly
2:50PM 15 entered on the roll as "Trinity Blake Lopez," with a Z,
16 instead of "Loper" with an "R." So based on that
17 declaration, Ms. Loper appears registered to vote and the
18 only issue with her voter registration is a typographical
19 error with the Pope County Clerk.
2:51PM 20 THE COURT: Well, what would happen if she shows up
21 on election day in November? Would they let her vote?
22 MR. TALLEY: They would. She would present her ID,
23 just like any Arkansan does, and they would make that change
24 on the rolls. And I asked my client the question, would she
2:51PM 25 be required to cast a provisional ballot. And the answer is

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2:51PM 1 no. She would be allowed to vote.
2 THE COURT: The plaintiffs say that they have been
3 trying to get the secretary or some of the defendants to let
4 them know, I guess the board to let them know whether the
2:51PM 5 board is going to retroactively apply these rules and they
6 can't get an answer on that.
7 What's the answer?
8 MR. TALLEY: I don't believe that there would be
9 retroactive canceling by the board. That responsibility
2:52PM 10 rests with individual county clerks, and I'm not aware of
11 any directive to cancel voter registrations on the part of
12 the board.
13 THE COURT: Has anyone definitively said that?
14 MR. TALLEY: I'm not aware of any discussion one
2:52PM 15 way or the other, but I'm not aware of that occurring.
16 THE COURT: All right.
17 MR. TALLEY: Vote.org, organizational plaintiff, I
18 think the Court pointed out the diversion of resources
19 issue. In some of the briefing, there is a discussion from
2:52PM 20 the *Callanen* case out of Fifth Circuit about Vote.org, and
21 the Court there found it had organizational standing.
22 This case is a little bit different on one key
23 point. In that case originating out of Texas, Vote.org had
24 already deployed the mobile application that it was using in
2:53PM 25 Texas to register voters or assist voters with registration

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2:53PM 1 using a wet ink signature. And given the law that passed,
2 had to go ahead and discontinue those efforts. In this
3 case, Vote.org has not done that. The declaration of its
4 chief executive that was submitted with the briefing simply
2:53PM 5 claims, as the Court noted, that Vote.org wishes to use that
6 at some point in the future, be it maybe this election or
7 some election down the road. That's not sufficient to
8 confer standing as to Vote.org, and it also isn't sufficient
9 for the purposes of a preliminary injunction where that
2:53PM 10 relief or harm must be irreparable. Apparently what we are
11 talking about is something happening in the future,
12 potentially many elections down the road.
13 So I think, Your Honor, that's pretty
14 straightforward because Vote.org simply has not deployed any
2:54PM 15 application in Arkansas. It simply says it wishes to do
16 that, but can't.
17 The final one, Your Honor, is Get Loud Arkansas. I
18 will candidly acknowledge for the Court that this one is
19 closer. It's a closer call than Vote.org as to its
2:54PM 20 organizational standing. But principally in the record
21 evidence, the declaration of, I believe, the deputy director
22 of Get Loud Arkansas, there is a lot of discussion about the
23 tool, this online tool that was used by Get Loud Arkansas
24 and kind of its evolution. That it was rolled out. It was
2:54PM 25 originally rolled out where the applicant or prospective

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2:54PM 1 applicant would print it out and then submit it, which they
2 found to be cumbersome. So they rolled out the new tool, I
3 believe as the Court noted in December, at least on a trial
4 basis, that disposed or dispensed of having to print it out.
2:55PM 5 There is a claim in the affidavit or the
6 declaration that significant resources were expended on the
7 tool. There is no evidence that Get Loud Arkansas has
8 submitted that quantifies in any way -- measurable or not --
9 as to what exactly has been done. What resources have been
2:55PM 10 diverted by that organization that are specific to that one
11 feature of this tool. Rather, all of the evidence talks
12 about the tool generally. It talks in the abstract about it
13 being more difficult to register voters. When, in reality,
14 part of the issue here is Arkansas simply does not have a
2:55PM 15 state-wide centralized electronic voting registration system
16 like many states do.
17 The Arkansas Constitution in Amendment 51 is pretty
18 clear, I submit, Your Honor, that that's not
19 constitutionally permissible in our state. And in the past
2:56PM 20 two or three legislative sessions, there has been proposed
21 bills filed by members of the General Assembly that have
22 tried to create one, and those bills have not passed. They
23 have not been passed out of legislature to be submitted to
24 voters ultimately for consideration in an up and down vote
2:56PM 25 that would create something like that. So the issue with

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2:56PM 1 Get Loud Arkansas, Judge, is simply that there is nothing in
2 this declarational record evidence that quantifies whatever
3 resources have been diverted by that organization as a
4 result of this one part or one feature on this tool that it
2:56PM 5 developed. For that reason, and I think that some of the
6 cases that are cited in the briefing point out that
7 substantial resources need to be diverted, and that changed
8 some in light of the Supreme Court's decision --
9 THE COURT: So let's be clear here. Is your
2:57PM 10 reasoning that Get Loud Arkansas, that there's a failure of
11 proof in the declarations to quantify what the resources are
12 that they expended for naught, or is your argument that
13 after *Alliance*, mere diversion of resources does not give
14 rise to standing?
2:57PM 15 MR. TALLEY: It's both, Your Honor. Like Mr. Dodge
16 says, he believes, or the plaintiffs believe -- excuse me --
17 that the diversion of resources by that organization is
18 enough on these facts. And I would submit that, no, they
19 aren't, based on the declaration evidence. And they
2:58PM 20 certainly don't chin the bar under any Supreme Court
21 precedent like the Court has discussed.
22 THE COURT: So if there were an allegation or
23 testimony in the declarations about an expenditure of
24 resources, how much resources would they have to allege?
2:58PM 25 A whole bunch or just a little tiny bit?

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2:58PM 1 MR. TALLEY: I think it's a whole bunch. Well, let
2 me step one back.
3 THE COURT: I'm talking about to create standing.
4 Does it have to be a little bit or a whole bunch?
2:58PM 5 MR. TALLEY: And that's a good point, Your Honor,
6 because that standard looks a little bit different in some
7 of these cases depending on the posture of the case.
8 To survive 12(b)(6) dismissal, there's case law out
9 there that says it just has to be a little bit. And if you
2:59PM 10 look at some of the cases decided on summary judgment, the
11 comments used, for example, by Judge Holmes in the *League of*
12 *Women Voters* case was substantial resources. So to chin the
13 bar on the face of the pleadings -- which is not what we are
14 here arguing about at this moment -- what's in the pleadings
2:59PM 15 might be enough. But we're here on a preliminary injunction
16 and the Court must decide whether the plaintiffs have
17 carried their burden of showing the likelihood of success on
18 the merits.
19 THE COURT: So you think there's no reasonable
2:59PM 20 inference that they have, in fact, expended and/or diverted
21 resources?
22 MR. TALLEY: I think that there is record proof
23 that there has been some resource or expense that has been
24 diverted. What that is or whether or not it is sufficient
2:59PM 25 to confer standing for the purposes of a preliminary

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2:59PM 1 injunction motion, I would disagree and submit to the Court
2 that that is not here.
3 THE COURT: So separate from the resources expended
4 that are now for naught, or the requirement that they divert
3:00PM 5 resources in the wake of the new rule, Get Loud argues that
6 not only has this rule directly impaired their mission, but
7 that in fact Get Loud was -- and I think Mr. Dodge's term
8 was target -- Get Loud was the target of this emergency
9 rule. And I don't know whether that's a good word to use or
3:01PM 10 not, but circumstantially, the timeline would perhaps
11 suggest such an inference. Regardless, what is your
12 argument that under the traditional standards under *Havens*,
13 even before we get to *Alliance*, that just the impairment of
14 the mission of their organization would be sufficient to
3:01PM 15 give them standing?
16 MR. TALLEY: There's kind of two pieces to that, at
17 least as I understand the Court's question, the first being
18 the timeline, the circumstantial side of some of these facts
19 that are before the Court. And I think that on the board's
3:01PM 20 side of that, there is plenty of references and record proof
21 as to the problem with nonuniformity in what was going on
22 across 75 counties.
23 In Pulaski County, some of these applications were
24 being accepted, and apparently in Pope County and Washington
3:02PM 25 County, they weren't. So the State Board of Election

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3:02PM 1 Commissioners has a constitutional obligation to ensure
2 uniform processes and procedures across the State of
3 Arkansas, and that was the purpose of the rule.
4 THE COURT: Well, what was the thinking on bringing
3:02PM 5 uniformity on the side of disallowing electronic signatures
6 as opposed to bringing uniformity on the side of permitting
7 electronic signatures?
8 MR. TALLEY: And that goes, Your Honor, to the
9 state board's interpretation of this computer process
3:02PM 10 language that's in Amendment 51, that the computer process
11 is permitted by the Office of Driver Control or Driver
12 Services, the Department of Motor Vehicles, disability
13 organizations, social services organizations and that is it.
14 THE COURT: But in those organizations, they
3:03PM 15 already have the four or five critical pieces of data that
16 go into the voter registration form. It's already in their
17 computer system. So I don't know how the software works
18 behind the scenes, but my imagination suggests that the
19 existing data, somebody hits a button and it populates it
3:03PM 20 into the voter registration electronically, and then they
21 sign something and probably they sign it electronically.
22 That whole methodology that's allowed for those two
23 or three registration agencies is not what happens on the
24 individual side going down to the courthouse, nor is it on
3:04PM 25 these organizations who are collecting the registration

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3:04PM 1 forms. They still follow a process of completing the actual
2 board-authorized version of the registration application.
3 Seems like it's two totally different concepts to me.
4 MR. TALLEY: And I understand that, Your Honor. I
3:04PM 5 think the plaintiffs frame that in their briefing as this
6 two-tiered system of voter registration. This was
7 addressed -- and I think correctly -- by the Fifth Circuit
8 in the *Callanen* case that we are going to talk about a
9 little bit more, I suspect. And the quote from that case
3:04PM 10 near the end of it discussed this concept of uniformity as
11 to the state agencies, because in Texas, the law allowed for
12 the Department of Public Safety to submit electronic
13 signatures to registered voters. And the Fifth Circuit in
14 that case found, quote, "That Texas allows electronic
3:05PM 15 submissions via the Department of Public Safety does not
16 necessarily alter the calculus. Texas exerts more control
17 over and may legitimately have more confidence in that
18 department's system."
19 The same is true with respect to Driver Control
3:05PM 20 Services or the Department of Motor Vehicles here in the
21 State of Arkansas where the state has more control over
22 those computer processes that are done or in place, and
23 therefore sought the uniformity with respect to everything
24 else.
3:05PM 25 THE COURT: And let's assume all that is true.

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3:05PM 1 Getting kind of back to the point here.
2 What does any of that have to do with the
3 materiality provision of the Civil Rights Act?
4 MR. TALLEY: So turning to that merits issue, Your
3:05PM 5 Honor, of --
6 THE COURT: I'm just saying, even if you have a
7 different mechanism in place for these agencies that already
8 have data, and even if the thinking is, well, we think that
9 they are the only ones that are authorized to do things
3:06PM 10 electronically, how does that alter the ultimate legal issue
11 here of whether the requirement of a wet signature versus a
12 digital signature is immaterial to establishing one's
13 requirements to be entitled to vote?
14 MR. TALLEY: And the reason that comes up in this
3:06PM 15 case, Your Honor, just like it did in *Callanen* and the *Byrd*
16 case out of the Northern District of Florida is because it
17 was an argument presented by the plaintiffs that other
18 organizations like Driver Control Services or Department of
19 Motor Vehicles, they accept electronic signatures, so
3:06PM 20 therefore, any wet signature requirement as to other
21 applications must be invalid as a violation of the
22 materiality provision.
23 THE COURT: Okay.
24 MR. TALLEY: So the position of the state board is,
3:07PM 25 quite frankly, that the fact that those organizations --

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3:07PM 1 Department of Motor Vehicles, Driver Control Services -- the
2 fact that they do use this computer process has no impact or
3 bearing on the materiality inquiry as to the wet ink
4 signature requirement.
3:07PM 5 THE COURT: And Secretary Thurston and Attorney
6 General Griffin just agree to disagree on that?
7 MR. TALLEY: They disagree on that, yes, Your
8 Honor.
9 THE COURT: All right.
3:07PM 10 MR. TALLEY: So turning, Your Honor, to that
11 materiality inquiry. This Court is not the first to be
12 presented with almost the same case. I'm aware of Texas
13 litigation that culminated in the Fifth Circuit's decision
14 in *Callanen*; litigation out of the Northern District of
3:08PM 15 Florida, that's *Byrd*; and then pending litigation in the
16 Northern District of Georgia.
17 I'll submit respectfully, Your Honor, that the two
18 merits decisions that have come out of those cases have
19 found that a requirement of a wet ink signature, just like
3:08PM 20 the one imposed by the board in the emergency rule and
21 forthcoming permanent rule, were found to be material and
22 did not offend the materiality provision. And the reason
23 for that is pretty straightforward. And it's supported --
24 well, I think the issue was framed by the Fifth Circuit's
3:08PM 25 decision in *Callanen* as, does the state have an interest in

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3:08PM 1 knowing that someone is who they say they are? And does a
2 wet ink signature requirement advance that interest?
3 Perhaps imperfectly, but as Courts have noted, the
4 materiality provision is not a least restrictive means case.
3:09PM 5 And the justification that was passed by the board, or
6 offered by the board, some of these rationales, are in the
7 record. As submitted by the board, the signature mark
8 provided by voters a necessary component for the
9 verification of the voter's identity. Ensuring that
3:09PM 10 lawfully registered voters sign or mark their documents is
11 further supported by the criminal penalties associated with
12 signature forgery. Forging the signature of a voter on a
13 voter application application is a felony.
14 In both *Callanen* and *Byrd*, these two decisions out
3:09PM 15 of the Fifth Circuit and then the Northern District of
16 Florida, that was the justification offered by both of those
17 cases. *Callanen* walked through the case law on the issue,
18 walked through some of the various interests.
19 THE COURT: The justification was what?
3:10PM 20 MR. TALLEY: Physically signing the form with
21 warnings in front of the applicant, threatening penalties
22 for perjury, and stating the needed qualification has some
23 prospect of getting the attention of many applicants and
24 dissuading false statements that an electronic signature,
3:10PM 25 without these warnings, does not. That was the

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3:10PM 1 justification of the Fifth Circuit in upholding, or
2 reversing, the District Court's decision striking down the
3 law as a violation of the materiality provision.
4 THE COURT: How does that relate to the facts
3:10PM 5 before us?
6 MR. TALLEY: The law was substantively identical in
7 requiring a physical or handwritten wet signature or mark.
8 THE COURT: I'm talking about the warnings part. I
9 mean, the application in Arkansas, as I understand it,
3:11PM 10 whether it's completed by inputting information on a
11 computer or not, it has to have a signature or mark under
12 penalty of perjury, either way, right?
13 MR. TALLEY: Yes, Your Honor.
14 THE COURT: It's not like if you sign it digitally,
3:11PM 15 you get a pass on the "under perjury" part.
16 MR. TALLEY: That's correct, Your Honor.
17 THE COURT: Okay.
18 MR. TALLEY: And what the Courts found in both
19 *Callanen* and *Byrd* is that the act of handwriting that
3:11PM 20 signature on a physical form, the language used was,
21 "carries a solemn weight."
22 THE COURT: Solemnity?
23 MR. TALLEY: That was the justification for both of
24 those Courts and is compatible or identical to what the
3:12PM 25 State Board of Election Commissioners has done there, that

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3:12PM 1 there is some weight or gravity to the act of physically
2 signing as opposed to an electronic signature.
3 THE COURT: When I was in private practice, I used
4 to have a signature stamp. Are you familiar with this
3:12PM 5 concept?
6 MR. TALLEY: I am, Your Honor.
7 THE COURT: Can I use a signature stamp under the
8 emergency rule, or do I have to take my Bic ball pen and
9 scratch it across linen paper?
3:12PM 10 MR. TALLEY: I think as the emergency rule and
11 permanent rule are written, you would need to physically
12 move a pen across a piece of paper.
13 THE COURT: So what's the magic about one being
14 more solemn than the other?
3:12PM 15 MR. TALLEY: According to the State Board of
16 Election Commissioners and the decisions in both *Callanen*
17 and *Byrd*, that that act of moving the pen gets the
18 signatory's attention better than an electronic signature
19 would.
3:13PM 20 THE COURT: And where are these registrations after
21 they have been provided to the county clerk? And by the
22 way, can they be mailed to the Secretary of State too, or do
23 they have to be mailed to the county clerk?
24 MR. TALLEY: They need to be mailed, I believe, to
3:13PM 25 the county clerk.

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3:13PM 1 THE COURT: What happens to them then?
2 MR. TALLEY: That's a good point that Your Honor
3 raised earlier with Mr. Dodge is, they are kept in a file.
4 And they are used later when someone submits a request to
3:13PM 5 vote absentee.
6 THE COURT: So somewhere, Washington County
7 maintains a large storage shed that someone goes out to and
8 looks through banker's boxes full of paper registrations?
9 MR. TALLEY: I believe that's what the law
3:14PM 10 requires.
11 THE COURT: Well, my question was, is that how it's
12 done in a practical matter, or are they scanned in and then
13 someone is comparing a digital signature?
14 MR. TALLEY: I can't speak to the practices of the
3:14PM 15 individual county clerks, so I have to say I don't know.
16 But the Court made a good point as to, are these
17 things just cast aside and never see the light of day again.
18 And the plaintiffs have leaned on this declaration from
19 Susan Inman as to the practices in Pulaski County. And I'll
3:14PM 20 respectfully submit, Your Honor, that those practices are
21 from when Ms. Inman was the Pulaski County Clerk; not as
22 what the law says today. And back years ago, when a voter
23 requested an absentee ballot, that signature could be
24 compared against any signature in the file. Like when Your
3:15PM 25 Honor goes to vote in November, you use a stylus and sign

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3:15PM 1 in. The law has changed, and I believe the statute is
2 7-5-404, that requires the county clerk to compare the
3 signature on the absentee form and the signature on that
4 applicant's voter registration application. So under the
3:15PM 5 law, these signatures are used and must be used during the
6 absentee balloting process.
7 THE COURT: I'm just wondering whether they are
8 comparing the solemnly moved strokes across the linen paper
9 against another wet ink, or are they pulling up a PDF
3:15PM 10 version and looking at a digital copy of the signature on
11 the registration?
12 MR. TALLEY: And I'm not sure the answer to that
13 question. But those two signatures should be, under the
14 law, compared when an applicant submits a request to vote
3:16PM 15 absentee.
16 THE COURT: Going back to this solemnity idea, does
17 that mean that if you register to vote because the DMV agent
18 asks you if you would like to register to vote, and you sign
19 electronically, that that's less solemn?
3:16PM 20 MR. TALLEY: Specific to at the DMV?
21 THE COURT: Yeah, is it less solemn at the DMV?
22 MR. TALLEY: I think the use of computer, or the
23 authorization of computer process and the fact that the
24 state has more control over that department gives it the
3:16PM 25 solemnity that a wet ink signature on a mailed-in

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3:16PM 1 application form would get.

2 THE COURT: No, you said that taking your Bic pen
3 and scrawling it across linen paper presented a magnitude of
4 responsibility that someone was committing on their oath
3:17PM 5 that the information was true. Is it a less solemn event if
6 you use a stylus on a keypad at the DMV?

7 MR. TALLEY: It perhaps might be, but given the
8 fact that that is a state system under the state's control
9 and authorized Under Amendment 51 --

3:17PM 10 THE COURT: Well, one is to prevent fraud. I mean,
11 there's two arguments here. One is to prevent fraud. The
12 other is that it's some solemn act.

13 MR. TALLEY: And I think those are part and parcel,
14 Your Honor. The solemn act furthers the state's interest in
3:17PM 15 preventing fraud and knowing who voters say they are.

16 THE COURT: Is it a solemn act to show up on
17 election day and vote?

18 MR. TALLEY: I think it is, Your Honor, yes.

19 THE COURT: When I show up and vote at Washington
3:18PM 20 County -- which is where I will vote -- do I take a Bic pen
21 and scrawl over a linen piece of paper, or do I take a
22 stylus and put it on an electronic keypad?

23 MR. TALLEY: I would assume, given I know how
24 Pulaski County works, that you use a stylus.

3:18PM 25 THE COURT: So that means the act of voting is

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3:18PM 1 somehow viewed as less solemn than the act of registering to
2 vote, in the state's view?
3 MR. TALLEY: I don't think that's necessarily true,
4 Your Honor, because they certainly are both solemn acts and
3:18PM 5 perhaps equally solemn. But what we're here about it
6 Amendment 51, and that creates the system related to voter
7 registration.
8 THE COURT: Well, actually what we're here about is
9 whether there is anything material about whether the
3:19PM 10 signature is electronic or in wet ink in the statutory
11 construction of the materiality provision of the Civil
12 Rights Act.
13 MR. TALLEY: I agree.
14 THE COURT: And I'm just trying to understand --
3:19PM 15 you're arguing the materiality of it and I'm trying to
16 understand what it is.
17 MR. TALLEY: And just to, I guess, put a fine point
18 on that solemn act of voting, which I agree the state, I'm
19 sure, would certainly agree it is a solemn act. There is a
3:19PM 20 process whereby the voter presents an identification to
21 assure they are who they say they are.
22 THE COURT: Yeah, and the signature on my driver's
23 license was made with -- let me not put it that way.
24 If you pull your driver's license out and look at
3:20PM 25 your signature, did that come from you writing it on a piece

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3:20PM 1 of paper or on the stylus pad at the DMV?

2 MR. TALLEY: A stylus pad at the DMV, Your Honor.

3 THE COURT: So maybe there is something to the fact

4 that if we're going to be comparing one's signature, we

3:20PM 5 compare apples to apples and not styluses to Bic pens.

6 MR. TALLEY: And with respect to the absentee

7 balloting process, Your Honor, I think that's a requirement

8 imposed by 7-5-404 that's not the challenged rule here. And

9 with respect to the materiality of a wet ink signature on

3:20PM 10 these voter registration applications, as both *Callanen* and

11 *Byrd* found, this may be an imperfect way of doing it, but

12 the law does not impose some least restrictive means test

13 when using, or when going through that analysis under the

14 materiality provision.

3:21PM 15 THE COURT: Is least restrictive means an issue

16 here?

17 MR. TALLEY: I think it certainly is, Your Honor,

18 because I'm not advancing the argument today that this wet

19 ink signature requirement is a perfect means of ensuring

3:21PM 20 voters are who they say they are. It's certainly not. But

21 the law does not impose any requirement that it be the best

22 possible means of verifying that. Instead, that it's simply

23 a means, an acceptable means, that makes that requirement

24 material under the law. I think both *Callanen* and *Byrd*

3:21PM 25 stand for that proposition. One was resolved by the Fifth

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3:22PM 1 Circuit after a motions panel had stayed an injunction, and
2 then *Byrd* was decided on 12(b)(6) motion and reached that
3 same conclusion.
4 And when it comes to this argument that the
3:22PM 5 plaintiffs have advanced about legislative weight, that
6 *Callanen* is distinguishable on that basis, I would disagree,
7 primarily because there is legislative judgment as part of
8 this, or these two SBEC rules. Amendment 92 to the Arkansas
9 Constitution created a system where administrative rules are
3:22PM 10 not effective until they are reviewed and approved by a
11 legislative body. And that's what happened here.
12 THE COURT: But that's not the same as how a bill
13 becomes a law sort of legislative act. The Governor doesn't
14 sign it.
3:23PM 15 MR. TALLEY: It is different, certainly, Your
16 Honor. And the Governor doesn't sign some laws that end up
17 going into effect, because the legislature can override them
18 with a simple veto by majority vote. But here, these rules
19 went through a legislative process. It was not the same one
3:23PM 20 as something that goes into the Arkansas code, but it's
21 certainly -- part of our Constitution says the legislature
22 gets to review and approve all of these rules. Whether
23 that's good or bad for executive branch entities or
24 agencies, that's for another day. But here in Arkansas,
3:23PM 25 that's what voters approved in 2014 and gave that check to

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3:23PM 1 the legislature to approve all of these rules, including
2 this wet ink signature requirement.
3 THE COURT: Okay.
4 MR. TALLEY: I touched briefly, Your Honor, on this
3:23PM 5 issue with the Department of Motor Vehicles. That was an
6 issue in Texas. It was the same issue in Florida in *Byrd*
7 where both of those states had what the plaintiffs would
8 call a two-tiered system, one of which allowed for the
9 submission of electronic signatures through the DMV. And in
3:24PM 10 both of those cases, the Court found that that did not
11 change the calculus as to materiality, and I respectfully
12 submit the same is true here.
13 So the final point that I would just briefly touch
14 on is this concept of irreparable harm. Some of the
3:24PM 15 briefing discussed, well, the board just says they can go
16 out there and register another way, and that shouldn't play
17 any role in the materiality calculus. I don't
18 necessarily -- I'm not making that exact argument up here
19 today on behalf of the board, but it certainly goes to the
3:24PM 20 concept of irreparable harm. And *Callanen*, when the motions
21 panel issued its opinion in that case staying the injunctive
22 relief, noted that individuals seeking to register to vote
23 can simply comply with the wet signature requirement or
24 register in another way. Moreover, a stay maintains the
3:25PM 25 status quo. The status quo has been that a wet ink

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3:25PM 1 signature is required on these ballots since at least May 4
2 of 2024, and we are leading into an election that, as the
3 Court noted, begins in 60-some-odd days.
4 In addition to that, Your Honor, the status quo has
3:25PM 5 been uniform, and disturbing that status quo here --
6 THE COURT: Let me go back a little bit. Are you
7 saying that the opportunity to cure the rejected application
8 after the fact somehow makes an immaterial provision
9 material?
3:25PM 10 MR. TALLEY: I'm not making that argument, no, Your
11 Honor.
12 THE COURT: Then what's your argument?
13 MR. TALLEY: It simply goes to the concept of
14 irreparable harm. And the *Callanen* motions panel decision
3:26PM 15 noted that as one of the reasons for staying an injunction
16 as an appeal was pending before the Fifth Circuit is, there
17 is no evidence here that other means of registration can't
18 be used. And in some of those cases, this comes up as,
19 well, does a wet ink signature actually deprive someone of
3:26PM 20 the right to vote? And arguments have been made both ways
21 on that. And I'm not advancing the argument today that it
22 doesn't under the materiality provision, but it does go to
23 the concept of irreparable harm insofar as any person who
24 had a voter registration application rejected, the county
3:26PM 25 clerk has an obligation to notify them of that, as pointed

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3:26PM 1 out in the declarations of the individual plaintiffs, and
2 they are able to be register, as Ms. Loper did, using an
3 alternative means.
4 THE COURT: All right.
3:27PM 5 MR. TALLEY: I'm happy to answer any additional
6 questions that the Court may have.
7 THE COURT: That's fine. Thank you.
8 MR. TALLEY: Thank you, Your Honor.
9 THE COURT: We have been going for about two hours.
3:27PM 10 We are going to need to take a break at some point, but just
11 let me see where we are here.
12 I explained that I would allow the court clerk and
13 their attorneys to respond to the motion for preliminary
14 injunction if they would like.
3:27PM 15 Mr. Lester, are you going to want to do that? And
16 if so, do you have something that is unique to your county
17 clerk's role? And then the same question for Mr. Kieklek
18 and Ms. Lane.
19 MR. LESTER: Your Honor, I have one bit of
3:28PM 20 information as it relates to a question that you asked that
21 I thought may be pertinent. Would you like me to address
22 from --
23 THE COURT: Sure, that would be fine.
24 MR. LESTER: Your Honor, you asked the question
3:28PM 25 about the records, are they just scanned and kept. They are

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3:28PM 1 actually paper kept. They are kept by paper. 42 U.S.C.
2 1974 Civil Rights Act requires that we keep those for 22
3 months following the federal election.
4 THE COURT: The registration?
3:28PM 5 MR. LESTER: The original registration form as
6 submitted to the county clerk. So those documents, the
7 paper copies of those are kept by Washington County.
8 THE COURT: For 22 months past when?
9 MR. LESTER: For 22 months past the federal
3:28PM 10 election in which the voter was eligible. So if they come
11 in --
12 THE COURT: But the system in Arkansas is a
13 permanent registration.
14 MR. LESTER: Right. That's the federal code
3:29PM 15 requirement on how long you have to keep the permanent, or
16 the actual physical piece of paper. After that, it's kept
17 electronically.
18 THE COURT: So the first time you register, you
19 have to keep it 22 months after the first election that they
3:29PM 20 were eligible to vote in?
21 MR. LESTER: The first federal election they were
22 eligible to vote in, yes, sir, that's correct.
23 THE COURT: But on this idea of comparing the
24 signature on the registration to an absentee ballot, do you
3:29PM 25 know whether that's done by pulling the paper copy, or is

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3:29PM 1 that comparison made to a scan of the paper copy?
2 MR. LESTER: In Washington County, it's a scan of
3 the paper copy. I do know that.
4 THE COURT: That's helpful, Mr. Lester. Thank you.
3:29PM 5 Were you wanting to more fulsome address or are you
6 going to stand on --
7 MR. LESTER: No, sir. I think Mr. Talley hit all
8 the points that I had out, so I'll sit down.
9 THE COURT: Mr. Kieklek?
3:29PM 10 MR. KIEKLACK: Nothing else to add, Your Honor.
11 Thank you.
12 THE COURT: Ms. Lane?
13 MS. LANE: Briefly, Your Honor.
14 THE COURT: Okay.
3:30PM 15 MS. LANE: Your Honor, Pulaski County, through
16 defendant Terri Hollingsworth, stands by our motion to
17 dismiss from this case for the reasons stated.
18 THE COURT: And I'm going to give you a chance to
19 argue your motion.
3:30PM 20 MS. LANE: Yes, Your Honor. And that is
21 essentially our response to the motion for preliminary
22 injunction. We are in a unique position in that we do not
23 oppose the motion for preliminary injunction. We only think
24 that we should not be here.
3:30PM 25 Beyond what has been stated in our motion, Your

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3:30PM 1 Honor, the county has nothing further to say. And I must
2 beg the Court's permission to be excused.
3 THE COURT: Okay. Are you feeling ill?
4 MS. LANE: No, Your Honor. I am in danger of
3:30PM 5 missing a flight, Your Honor.
6 THE COURT: Where are you flying in here from?
7 MS. LANE: I'm flying out of here, Your Honor.
8 THE COURT: That's what I meant. Where are you
9 flying out of here from, or to?
3:31PM 10 MS. LANE: Houston, Your Honor.
11 THE COURT: Houston, okay.
12 MS. LANE: And of course if the Court is unwilling
13 to dismiss me, then --
14 THE COURT: No, that's okay. I just for some
3:31PM 15 reason assumed you were coming from Little Rock. I haven't
16 looked at where your law firm is.
17 MS. LANE: I am coming from Little Rock, Your
18 Honor. This date fell in with an already obligation that I
19 had.
3:31PM 20 THE COURT: It doesn't matter. You don't have to
21 go into any more details. Let me just ask you this, then.
22 There is an argument by the county clerks that they
23 are not necessary parties and so they should be dismissed
24 under Rule 19. But just because someone is not a necessary
3:32PM 25 party, i.e. the action can't proceed without them, doesn't

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3:32PM 1 mean that they are not -- that they can't be a party.
2 Can you address that?
3 MS. LANE: I absolutely agree, Your Honor. And
4 that was a -- if I can be frank -- a clumsy way of
3:32PM 5 attempting to address redressability. That the plaintiffs'
6 injury here doesn't need -- they don't need the Pulaski
7 County Clerk to be redressed. Simply enjoining the State
8 Board of Election Commissioners redresses all of their
9 injuries, because as they state, we have to follow what it
3:32PM 10 is the SBEC does. So simply enjoining them gives them
11 redress of all of their injuries. And that was the argument
12 I was making, Your Honor, that we are not necessary here.
13 As far as injuries go, the injuries in fact that
14 have been stated here, obviously, we did not cause. We do
3:33PM 15 not promulgate the rules. We have not denied anyone, a
16 qualified electorate, the right to register to vote.
17 Obviously, the plaintiffs also allege likely
18 injuries, that if Get Loud or Vote.org were to presume --
19 have business, have their business at large in the state,
3:33PM 20 that they believe that the Pulaski County Clerk would deny
21 applications that have been put forth using their app, the
22 county cannot speak to what the future holds, Your Honor.
23 Certainly it is a practice that sometimes a clerk does not
24 agree with what the SBEC says and has filed their own
3:33PM 25 action. That's not happened. So that is future.

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3:33PM 1 We will leave it up to the Court's decision as to
2 decide whether or not that is sufficient injury to give them
3 standing against us.
4 THE COURT: All right. Thank you very much for
3:33PM 5 explaining that, and you are excused.
6 MS. LANE: I appreciate you so much, Your Honor,
7 and I apologize for this inconvenience.
8 THE COURT: No worries. No worries.
9 We're going to take a short break, and when we come
3:34PM 10 back, I'm going to give Mr. Dodge an opportunity to reply.
11 And then if they wish, we will hear from Mr. Lester and
12 Mr. Kieklek on their motion to dismiss.
13 We'll be in recess for about 15 minutes.
14 (Recess from 3:34 p.m. to 3:52 p.m.)
3:34PM 15 THE COURT: Mr. Dodge, any reply?
16 MR. DODGE: Thank you, Judge. And I'll try and
17 keep this as brief as possible. Again, open to any
18 questions the Court may have.
19 I want to start with the subject matter
3:53PM 20 jurisdiction question, specifically sort of the mootness
21 one. Adversity has existed in this case from the moment the
22 SBEC decided that Amendment 51 requires county clerks to
23 reject voter registration forms with electronic signatures.
24 That determination actually predates even the emergency
3:53PM 25 rule. The board issued a declaratory ruling -- it's an

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3:53PM 1 exhibit to my declaration, I believe it's F or G -- where
2 they say under Amendment 51, a clerk cannot accept a voter
3 registration form with an electronic signature.
4 THE COURT: What date was that?
3:53PM 5 MR. DODGE: The date? I believe it was April 28th,
6 which was a month and a half before the complaint was filed.
7 So certainly at the time the complaint was filed, there was
8 adversity between all the plaintiffs, including the
9 individual plaintiffs who still need to apply to be
3:53PM 10 registered. There has been adversity since the moment the
11 complaint was filed between the board and all plaintiffs.
12 I think we can't get too caught up on the rule.
13 Obviously the rule expresses the board's view of the law,
14 but even absent these rules, their interpretation of
3:54PM 15 Amendment 51 creates the necessary adversity. They didn't
16 disclaim their interpretation of the state law.
17 In rule-making sometimes, an agency might say,
18 well, it's unclear, give us some deference, we're reading
19 into the law here. That's not the case here. They have an
3:54PM 20 independent view of the statute that alone requires an
21 injunction and declaratory relief, absent these individual
22 rules. But sort of a brief sub-point there, there was
23 discussion of amending the complaint. That's not necessary
24 here, because as I think Your Honor pointed out, our
3:54PM 25 complaint is very clearly broader than the emergency rule.

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3:54PM 1 Page 2, footnote 1, "The phrase 'wet signature rule' refers
2 to the State Board of Election Commissioners' emergency
3 rule, and any other regulations or procedures that county
4 clerks have applied to reject applications with electronic
3:54PM 5 or digital signatures."
6 Basically the same thing on page 24 in our prayer;
7 "Enjoin defendants, their agents, et cetera, from enforcing
8 the wet signature rule, or any other requirement that
9 applicants sign their voter registration applications by
3:55PM 10 hand or with a wet signature." That's subparagraph (b) in
11 our prayer.
12 THE COURT: So I get it. That's kind of the way I
13 see it. But Mr. Talley says he's not trying to be cute
14 here. I'm not exactly sure what that means, but what it may
3:55PM 15 mean is, if this Court issues a ruling on the injunction in
16 this posture, that he's going to ask the Eighth Circuit to
17 reverse any ruling that's not favorable to his clients and
18 that's the argument that he's going to make.
19 MR. DODGE: Two thoughts, Your Honor.
3:56PM 20 THE COURT: At which point --
21 MR. DODGE: I hear you, Your Honor, and I
22 appreciate the practical concern. I'll raise two points.
23 One, I think that's just resolved by issuing an
24 injunction and a declaratory ruling that says that the
3:56PM 25 practice of rejecting a mail voter registration form with a

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3:56PM 1 wet signature violates the materiality provision. They
2 can't circumvent that by just slapping the word "final" in
3 front of the same rule. Mr. Talley rightfully acknowledged
4 it is the same rule.
3:56PM 5 THE COURT: So you are in favor of not going the
6 amended complaint route?
7 MR. DODGE: Here's what I will say on that point.
8 Rule 15(d) permits a supplemental complaint. A
9 supplemental complaint is a little different than an amended
3:56PM 10 complaint in that it does not replace the original pleading.
11 It says that a party may serve a supplemental pleading
12 setting out any transaction, occurrence, or event that
13 happened after the date of the pleading to be supplemented.
14 An amended pleading is to fix a deficiency in the
3:57PM 15 complaint, perhaps regarding facts that arose before the
16 complaint was filed. It replaces the original pleading.
17 A supplemental complaint does not. It essentially
18 adds pleadings on top of the existing one. If the Court
19 would be more comfortable, we are more than willing to do
3:57PM 20 that. This circumstance is the precise one for which Rule
21 15(d) was designed, because you have a transaction or
22 occurrence, the promulgation of the final rule that occurred
23 after the original pleading. And so with that in hand, it
24 would not supplant the original complaint, it wouldn't
3:57PM 25 require any sort of do-over here, and it would just put the

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3:57PM 1 final rule into the pleading and add it to the prayer, and
2 then I think even this very, sort of theoretical concern,
3 would be fully redressed.
4 So I think we are more than willing to do that if
3:57PM 5 the Court would feel more comfortable proceeding that way.
6 THE COURT: Thank you very much for that
7 observation.
8 MR. DODGE: On standing as to the individual
9 plaintiffs, we seek prospective injunctive relief here. So
3:58PM 10 the original rejections in the past don't change the fact
11 that if any of the individual plaintiffs were to try and
12 apply in the same method using GLA's tool now, they would be
13 rejected. They need an injunction and declaratory relief to
14 redress that prospective harm.
3:58PM 15 On GLA, a couple thoughts. One, fundamentally,
16 what Mr. Talley is saying is that a state agency can pass a
17 rule saying, you there, organization, I'm going to call you
18 out by name. We don't like what you are doing, we're going
19 to ban it, and you don't have standing to challenge that
3:58PM 20 rule. I mean, the *FDA* said that that is the mine-run --
21 sorry, not the *FDA* -- but the Supreme Court in the *FDA*
22 decision said that that is a mine-run example of standing.
23 I mean, if that doesn't supply standing, what on earth does,
24 when a government actor says, I'm going to ban you from
3:58PM 25 doing something. That is just textbook Article 3. And the

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3:58PM 1 Court really doesn't have to go further than that to find
2 standing for GLA.
3 But there is also a diversionary harm, this idea of
4 the quantum of diversion. That's not what the test set out
3:59PM 5 in *Havens* looks to. That's a damages question. We are not
6 seeking damages. The inquiry under *Havens* is whether or not
7 an organization is impaired. The quantum doesn't matter.
8 The Seventh Circuit said that in the *Crawford* case. That's
9 472 F.3d at 951. That was a Judge Posner decision.
3:59PM 10 So the real question here for diversion is, is GLA
11 impaired from pursuing its mission? The answer is
12 absolutely yes. This is not Microsoft. It's a small civic
13 organization in Little Rock devoted to getting people
14 registered to vote. And they went into this year planning
3:59PM 15 on using this tool to register voters. And they were very
16 excited about it, because they knew they would be able to
17 register a lot more people. And their initial experience
18 with it proved that. They were able to register people much
19 more effectively. And the Secretary said, that's great.
3:59PM 20 The Attorney General said, that's great. Then they got
21 sucker-punched. And this organization that has extremely
22 finite resources -- both financial and in terms of
23 volunteers and staff -- on the fly had to completely rebuild
24 their voter registration plans after they were
4:00PM 25 sucker-punched by the state board. That not only is very

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4:00PM 1 clear evidence of impairment under the *Havens* standard.
2 It's also irreparable harm. So that satisfies GLA.
3 On Vote.org, I just think this is like kind of
4 using a fine-tooth comb with this declaration. There is
4:00PM 5 unrefuted declaration testimony that Vote.org wants to offer
6 this tool in Arkansas. They can't, because the state board
7 won't let them. Again, there's really no need to
8 overcomplicate the standing analysis there. They are not
9 saying they want to offer it in 2032. They want to offer it
4:00PM 10 as soon as they have clarity through a declaratory judgment
11 or an injunction that they can do so.
12 THE COURT: Does Vote.org bring anything -- if the
13 Court were hypothetically to find that Vote.org didn't have
14 standing, do the plaintiffs overall lose anything?
4:01PM 15 MR. DODGE: Well, that's a bit of a metaphysical
16 question. I take Your Honor's point; only one plaintiff
17 needs standing. If you were to find standing for GLA, the
18 scope of any declaratory ruling or injunction would be
19 neither broader nor narrower.
4:01PM 20 THE COURT: It seems that they are very parallel
21 with Get Loud, except that Get Loud is the one that actually
22 has the skin in the game at this point.
23 MR. DODGE: Get Loud, they interacted with the
24 Secretary, so in that sense, there is some greater
4:01PM 25 proximity, but their standing is essentially -- it exists

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4:01PM 1 for essentially the same reason. So, I mean, to answer Your
2 Honor's point, Vote.org is not necessary for relief to issue
3 here. I would agree with that. Is there some benefit to
4 them having an injunction in hand that they can also
4:01PM 5 enforce? Yeah, I would say so. And I do think their
6 standing exists --
7 THE COURT: Well, they would be the beneficiary if
8 an injunction was issued, right?
9 MR. DODGE: A third-party beneficiary in effect,
4:02PM 10 rather than one who could enforce the injunction. But I
11 won't belabor the point. I think I understand Your Honor's
12 view.
13 On the merits, Mr. Talley spoke on them for some
14 time, and yet he did not answer the key question in this
4:02PM 15 case. How do county clerks even use a wet signature to
16 determine if someone is qualified to vote? That remains a
17 mystery. There is still no argument on this point from any
18 defendant. What does a county clerk actually do when they
19 look at the signature box on a voter registration form to
4:02PM 20 determine the identity of the person or whether they satisfy
21 Amendment 3?
22 There is a suggestion that Arkansas doesn't permit
23 online voter registration. That is a completely irrelevant
24 consideration. The way GLA's tool works is that after you
4:02PM 25 complete it, GLA prints it out and sends it to the county

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4:02PM 1 clerk through the mail. So it's no different than if the
2 person filled it out themselves and mailed it to the county
3 clerk. Ultimately, it's the county clerk who gets a
4 physical copy in the mail, reviews it, makes sure it
4:03PM 5 qualifies under Arkansas law and satisfies all the
6 requirements and then adds them to the existing voter
7 registration database. This isn't some private,
8 third-party, online voter registration database.
9 There was some suggestion, all this stuff about
4:03PM 10 solemnity and added criminal penalties. It is in the record
11 in the declaration testimony that GLA's tool, it is
12 identical in effect to the Secretary of State's form. It
13 populates all the same fields. And at the point where the
14 person affixes their electronic signature, it has the
4:03PM 15 identical warning, that you sign this under penalty of
16 perjury. And I assume as well -- I feel safe in saying --
17 that in the State of Arkansas, fraudulently filing a voter
18 registration form probably is any number of crimes. And so
19 the idea that there is some greater sword of Damocles over
4:04PM 20 an applicant because they scrawl their Bic pen over linen
21 paper with the warning there versus online, that there's
22 greater -- the state has a greater cudgel, it just does not
23 wash at all.
24 I would note in *Callanen*, the majority pointed to
4:04PM 25 the fact that they were unsure whether the app showed them

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4:04PM 1 the same warnings. It did, but that's beside the point.
2 Here, there is declaration testimony to that effect, that
3 the person experiences that warning in the same way.
4 On the legislative judgment point, I mean, I think
4:04PM 5 that is what distinguishes this from *Callanen*. I think Your
6 Honor understands this. A subcommittee at the legislature
7 is not the same as bicameralism and presentment. Certainly
8 there is a lot of federal case law on that; *INS v. Chadha*,
9 *City of New York v. Clinton*, which was the line item veto
4:05PM 10 case. I'll admit I don't know if the exact same principles
11 apply under Arkansas law, but I assume that in the ordinary
12 course, the way something becomes law in Arkansas is both
13 houses of the legislature approve it, or override the
14 Governor's veto, and that's lacking here.
4:05PM 15 On irreparable harm, I would note that the *Callanen*
16 motions panel, the merits panel rejected a very substantial
17 part of the motions panel, so I would caution the Court
18 against relying on it, as Mr. Talley urges.
19 And then finally on this notion of the status quo
4:05PM 20 and timing, I'll just sort of address, I guess, what people
21 sometimes call the Purcell principle. First of all, there
22 was no argument in the briefing here on Purcell, nor was
23 there any suggestion that an injunction here would confuse
24 voters or election officials, which is what Purcell is
4:06PM 25 concerned about. Both the Supreme Court and the Eighth

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4:06PM 1 Circuit are unambiguous that Purcell is not some magic wand
2 that bars Courts from issuing injunctions some amount of
3 time out from an election. The Court's equitable powers are
4 not dissolved by mere temporal proximity to elections.
4:06PM 5 It is, in fact, an inquiry that looks at the
6 strength of the merits, the existence of irreparable harm,
7 the balance of the equities, and the likelihood of
8 confusion. There is no record evidence whatsoever here that
9 an injunction will disrupt anything. In fact, I think
4:06PM 10 Ms. Inman's testimony, the concessions from the Pulaski
11 County Clerk today, make clear that that is not a real risk.
12 Voters will experience the voter registration form the exact
13 same way. Clerks, as we hear from Ms. Inman, they just look
14 to see that a signature is there. That, too, will not
4:06PM 15 change.
16 And finally, in the *Carson* case, which is an Eighth
17 Circuit case from 2020, the Eighth Circuit said there that
18 the way you establish the status quo is by looking at what
19 the legislature did. Here, we have a state agency that has
4:06PM 20 disrupted the status quo. Amendment 51 has not changed
21 during the course of this dispute. The legislature has not
22 set a new status quo. The status quo is longstanding. It
23 was disrupted by Secretary Thurston when he sent the letter
24 to county clerks telling them, you have got to start
4:07PM 25 rejecting this stuff, and then by the board when they issued

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4:07PM 1 the rule. So the status quo favors an injunction that
2 restores the longstanding status quo.
3 With that, I'm open for questions.
4 THE COURT: Nothing further. Thank you.
4:07PM 5 MR. DODGE: Thank you, Judge.
6 THE COURT: Mr. Kieklek, I will go ahead and let
7 you argue your motion to dismiss, if you like.
8 MR. KIEKLACK: I'll walk slowly to the lectern, but
9 if you tell me it's already denied, I won't take it hard.
4:08PM 10 Your Honor, my name is Tom Kieklak. I'm here on
11 behalf of Benton County, Arkansas. And the point is, what
12 can Benton County do? And I think that my colleague from
13 Pulaski County expressed that very thing. We can't give any
14 relief. That's been established today, I think, with
4:08PM 15 emphasis, that we are banned, I believe the word was banned.
16 We do have a role in Amendment 51. We are a
17 registrar. We do receive and examine applications. By the
18 way, Your Honor, do you know what we're supposed to do if an
19 application doesn't comport with, whether it be a signature
4:08PM 20 rule or didn't get the right address or is somehow
21 incomplete?
22 THE COURT: What?
23 MR. KIEKLEK: I will go ahead and submit, even
24 though it's a motion to submit, it's not material. We are
4:09PM 25 doing it right now. We send it back. We notify the

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4:09PM 1 applicant and say, would you please fix this? In fact, we
2 are there to help them fix it. They might bring it in.
3 THE COURT: Matter of fact, Amendment 51 requires
4 you to do that.
4:09PM 5 MR. KIEKLACK: Yeah, that's what we do. I went
6 ahead and confirmed that. That's what we do.
7 THE COURT: What about the earlier question of
8 there's these component things, pieces of information that
9 have to be included. You have to verify that you're a
4:09PM 10 United States citizen, that you're a resident of Arkansas
11 and two or three other things, that you're at least 18 years
12 old. And then of all of the elements that are required,
13 then at the bottom, you have to add a signature or mark
14 under penalty of perjury.
4:10PM 15 When that application is received by the Benton
16 County Clerk, what about the signature or mark are they
17 looking to determine the qualifications of the person that
18 would like to vote?
19 MR. KIEKLEK: I want to be sure to stay within the
4:10PM 20 confines of the complaint, but I would say its existence.
21 THE COURT: The existence of a signature or mark?
22 MR. KIEKLEK: Yes, sir.
23 THE COURT: Okay.
24 MR. KIEKLEK: That is what they're looking for.
4:10PM 25 And then the process, as I believe in the complaint, was

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4:10PM 1 changed, was interrupted and changed, because they were
2 receiving electronic signatures and then they stopped when
3 they got the sort of -- at first they got an edict, kind of
4 an advisory and then received the rule.
4:11PM 5 Just as an aside, maybe just for economy sake.
6 Esteemed counsel already introduced metaphysics into this
7 hearing, and so I couldn't be more thrilled, except when he
8 invoked the sword of Damocles. But metaphysically, I'm not
9 sure if the rule isn't the rule is the rule. In other
4:11PM 10 words, the rule is written. It is submitted through a
11 process. It is temporary because some legislative something
12 or other hasn't said grace over it. It works its way to the
13 legislature. That I can track online. I can find different
14 applications and transmittals. But it is made permanent.
4:12PM 15 It isn't replaced with a rule. It is made permanent. In
16 other words, it's either made permanent or it's not made
17 permanent. I'm not sure whether it can change. I would
18 defer to co-counsel, codefendants' counsel.
19 In other words, if that legislative body, the
4:12PM 20 legislative council, first in a committee and then in a full
21 legislative council, which voted a week ago Friday, a week
22 ago tomorrow, they voted six days ago to make it permanent.
23 The rule itself may just exist as a rule through that whole
24 time.
4:12PM 25 I wish I could ascertain that. Legally, I can't,

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4:12PM 1 but I do think, just metaphysically, I think it might be the
2 same item, it survives. But I digress.
3 So we look at it. We were interrupted. And so
4 counsel argued that we are an enforcement. I don't find
4:13PM 5 that word in Amendment 51. It may be there, but I don't
6 find that we are enforcers. I find that we are
7 administrators. We have a role. Again, your question begs,
8 what if we don't see a signature? Then we would contact the
9 applicant and say, you need to add a signature.
4:13PM 10 So not only can we not give relief, we really
11 couldn't do harm either. And the reason we couldn't do harm
12 is because in that administrative role, it's very clear that
13 we are bound to follow the rules that are set forth by the
14 state board and of course the legislature itself. And so we
4:13PM 15 really don't have a choice, and that's why, to put it in its
16 most basic, what could we do here. We are defendants. So
17 we're here, but I don't know that we can hurt and I don't
18 know that we can help. I know we haven't hurt so far. That
19 sort of theoretical, if you are doing the person doing the
4:14PM 20 process, then you are hurting the plaintiff because the
21 plaintiff is being hurt. It's sort of a self-serving
22 argument when in fact there's no activity that we have
23 taken, neither alleged nor in fact, that we have taken in
24 any way to add to or take away from the harm. And quite
4:14PM 25 frankly, nor could we. We are simply not permitted to.

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4:14PM 1 And so why would I not want to be here? Well,
2 selfishly, when I'm around lawyers who are this good and in
3 this Court, I mean, my paltry talents and abilities at this
4 job get better -- it's just that simple -- by being around
4:14PM 5 people who are this good. And I think it's evident today,
6 not to mention in the writing. But I think about when Judge
7 Stites Jones looked at me in a settlement conference back
8 when settlement conferences were young and said to my face,
9 you, Mr. Kieklek, are being an impediment to the process,
4:15PM 10 because I was arguing my summary judgment motion in a
11 settlement conference. And I don't want to slow the process
12 down, in other words, by simply being a party that isn't
13 necessary. And I don't mean to argue unnecessary, that
14 we're not necessary means that we should be dismissed. But
4:15PM 15 I'm just saying, practically, that's sort of the motivation.
16 Otherwise, quite frankly, it's an enjoyable
17 process.
18 THE COURT: Thank you, sir. Mr. Lester?
19 MR. LESTER: Your Honor, we --
4:15PM 20 THE COURT: You didn't have a motion.
21 MR. LESTER: I didn't have a motion.
22 THE COURT: I'm sorry.
23 MR. LESTER: With all due respect, we have been
24 down this not too long ago in another election case and so I
4:16PM 25 thought, I know what the Judge's ruling is on this and I'm

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4:16PM 1 just going to sit back and do whatever the Judge wants me to
2 do. We would certainly be happy if that was the case, but
3 just like Mr. Kieklek, I certainly understand the Court's
4 position on that.
4:16PM 5 THE COURT: All right. Thank you, sir.
6 Mr. Dodge, anything you would like to say in
7 response to the motions to dismiss from Pulaski County and
8 Benton County?
9 MR. DODGE: I'll keep it very brief, Your Honor.
4:16PM 10 I appreciate the views of the counties and I
11 understand that no one likes to be in litigation they view
12 themselves as unnecessary to. I don't think that changes
13 the Article 3 analysis. I think each of the county clerks
14 has accepted today that they are bound to enforce the rule.
4:16PM 15 That is their duty under the Arkansas Constitution. None of
16 them have disclaimed that, so they are appropriate.
17 With respect to their role in the case, I can
18 certainly represent on behalf of plaintiffs that we do not
19 intend to burden them with significant or unnecessary
4:17PM 20 discovery. We are sensitive to their limited time and
21 resources and I wanted to make that representation on the
22 record. That said, counties often, because in so many
23 states, including in Arkansas, counties administer
24 elections, they are oftentimes repositories of responsive
4:17PM 25 materials, because they are tasked with enforcing election

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4:17PM 1 rules. And so that is part of why we view it as important
2 that there be counties in the case. I'll just leave it at
3 that.
4 THE COURT: So sometimes we get cases seeking
4:17PM 5 injunctions of legislative acts, especially where there
6 might be a criminal component where the plaintiffs sue or
7 bring in as defendant parties every prosecuting attorney in
8 the state, for example. They don't just bring in the three
9 prosecutors from the most populous states. Not that this
4:18PM 10 has a lot to do with anything necessary to the decision, but
11 the point is made that the county clerks are somewhat
12 surplusage here.
13 To the extent that there's merit to your argument
14 that they are tasked to enforce the rules at the county
4:18PM 15 level, if they are really necessary, why didn't you name all
16 75? And if they are not necessary, then why just these
17 three?
18 MR. DODGE: I take your point, Your Honor. This is
19 sort of a function of Article 3. Article 3 does not specify
4:19PM 20 that plaintiffs need serve the bare minimum necessary for
21 some measure of relief, or the maximum number of defendants
22 for the most complete sense of relief. This was informed, I
23 think, by a need to make sure that there are parties with
24 responsive discovery materials, that the injunction would
4:19PM 25 run to counties that are most critical to our organizational

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4:19PM 1 plaintiffs' efforts. Get Loud Arkansas is based in Pulaski
2 County. It's sort of their ground of operations. And then
3 obviously Washington and Benton are the next two largest
4 counties.
4:19PM 5 I think Article 3 would have permitted us to sue
6 all 75 counties, or potentially to pursue some sort of a
7 class action, but it does not require that. And obviously
8 there are administrability concerns of having this courtroom
9 filled with 75 county clerks and their representatives.
4:20PM 10 So at the end of the day, each of the county clerks
11 here has acknowledged their obligation to enforce the rule.
12 I think Eighth Circuit precedent, Supreme Court precedent,
13 is very clear that by dint of that, the quasar injury, the
14 injury is traceable to their commitment to enforce the rule
4:20PM 15 and would be redressed through an injunction or a
16 declaratory ruling directed to them.
17 THE COURT: All right. Thank you, sir.
18 So the next election, including elections for
19 federal office, are a little over two months away. To vote
4:21PM 20 in Arkansas, you have to be registered to vote. To register
21 to vote, you must do so 30 days prior to the election. So
22 from that deadline, from today, we're a little over a month
23 away. So the Court does see some urgency in making a ruling
24 so that both sides, all parties, will have some certainty
4:22PM 25 and can take whatever actions they may need to take.

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4:22PM 1 In a case where the Court had more time, it might
2 just take this matter under advisement and take as much time
3 as it prudently could to get out a letter perfect memorandum
4 opinion and order. Since we are somewhat under the gun, I'm
4:22PM 5 going to take a little bit of a bifurcated approach. I'm
6 going to make some rulings from the bench, and then we are
7 going to follow that up within hopefully 10 days with a more
8 fulsome memorandum opinion and order.
9 The purpose of ruling from the bench is to bring
4:23PM 10 some measure of direction to the parties, and to the extent
11 that there are predicate things that either the plaintiffs
12 need to do or that the defense wants to start getting lined
13 up, they can start working on those things before our
14 memorandum opinion hits CM/ECF.
4:24PM 15 It will also give the plaintiffs an opportunity,
16 because I don't see that we are going to be able to get a
17 memorandum opinion out before September 2nd. It will
18 probably be a week after that. It will give the plaintiffs
19 an opportunity to file a supplemental pleading under Rule
4:24PM 20 15(d) if they choose, and then the Court could address the
21 supplemental pleading in its memorandum opinion and order.
22 With that in mind, the Court intends to grant the
23 motion for preliminary injunction of the most hotly
24 contested issues here. The Court will make these more
4:25PM 25 specific rulings:

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4:25PM 1 Number one, the Court finds that there is a private
2 right of action under the materiality provision of the Civil
3 Rights Act codified at 52 U.S.C. Section 10101(a)(2)(B) and
4 the Court finds that that is enforceable pursuant to
4:25PM 5 Section 1983.
6 In arriving at this finding, the Court further
7 observes, believes and finds that Congress did, quote,
8 "Unambiguously confer federal individual rights," close
9 quote, in 52 U.S.C. Section 10101 by creating a presumption
4:26PM 10 of enforcement under Section 1983 that was not rebutted.
11 Thus, there is a private right of action to enforce the
12 materiality provision under Section 1983. This is the
13 *Gonzaga* analysis, 536 U.S. 273. The pinpoint page is 282.
14 More recently, the Supreme Court in *Telvesky*, 599
4:26PM 15 U.S. 166 at page 172, reinforces that. In the circuits,
16 there's the *Migliori* case out of the Third Circuit, 36 F.4th
17 153. The *Schwier* case, S-C-H-W-I-E-R. That's the Eleventh
18 Circuit, 340 F.3d 1284, Eleventh Circuit. And then the
19 *Callanen* case, actually, 89 F.4th 459. That's the Fifth
4:27PM 20 Circuit case from last year that actually acknowledges this
21 point.
22 The second finding that the Court makes is that at
23 least one plaintiff likely has standing. At this
24 preliminary phase, that's the only finding that the Court
4:27PM 25 has to make is that at least one plaintiff likely has

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4:27PM 1 standing. Where multiple plaintiffs seek identical relief,
2 only one plaintiff need satisfy the standing requirements.
3 The Court expressed that opinion in its *Arkansas United*
4 opinion. That's 517 F. Supp. 3d at 777 at page 792. More
4:28PM 5 importantly, though, the Court, in making that finding,
6 relied on the Supreme Court's case in *Horne*, 557 U.S. 433.
7 The pages are 446 through 447. Here, the Court finds a
8 little more specifically that it is likely that at least GLA
9 has standing against all of the defendants.
4:28PM 10 The second point under the Court's ruling on
11 standing here is that -- and more specifically with regard
12 to GLA -- the Court finds that GLA has shown that it likely
13 suffered or will suffer an injury in fact that was caused or
14 will be caused by defendants' actions of implementing and
4:29PM 15 enforcing the so-called wet signature rule and the Court
16 finds that that harm is redressable by this Court. The
17 Court relies not only on the diversion of resources theory,
18 but also on the perceptible impairment to GLA's activities.
19 And the Court actually relies on what I was calling the
4:30PM 20 *Alliance* case; what Mr. Dodge was calling the *FDA* case.
21 That's 602 U.S. 367 at page 378 and also at page 395. And
22 then of course the precedent before that that was not
23 displaced is the *Havens Realty* case, 455 U.S. 363. The page
24 number is 379.
4:30PM 25 The third issue here is that the Court, in finding

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4:30PM 1 that a preliminary injunction should issue, the Court
2 analyzes the factors to be considered, in the Eighth Circuit
3 anyway, under *Dataphase*, 640 F.2d 109 at page 114. The
4 first and typically most important factor is likelihood of
4:31PM 5 success on the merits. The Court finds the plaintiffs
6 likely to succeed on the merits. The Court finds that there
7 is an issue here that goes to the denial of a right to vote.
8 The Court finds it very likely that the rejection of
9 registration applications under the so-called wet signature
4:31PM 10 rule constitutes a denial of the right to vote under the
11 materiality provision of the Civil Rights Act codified at
12 Section 10101(a)(2)(B), and I don't think that that is even
13 in debate here.
14 Number two, the Court finds a likelihood of success
4:32PM 15 on the merits as it relates to the error or omission on the
16 record or paper provision. The Court finds that in
17 rejecting applications because they have a digital rather
18 than a wet signature, that that constitutes a rejection that
19 is based on an error or omission on a record or paper, and
4:32PM 20 once again, the Court doesn't believe that that's even in
21 dispute here.
22 As to materiality, the Court finds that the use of
23 a digital signature and thus the omission of a wet signature
24 is not material to determining whether a person is qualified
4:33PM 25 to vote under Arkansas law. The Court would observe that

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4:33PM 1 first, a wet signature as opposed to a digital signature is
2 not used to determine whether an applicant meets the
3 qualifications to vote under Article 3, Section 1 and
4 Amendment 51, Section 11 of the Arkansas Constitution. This
4:33PM 5 is supported by the Inman declaration.
6 Secondly on materiality, even if the wet signature
7 rule is permissible under Arkansas law, this does not
8 insulate it from violating the materiality provision, which
9 is a federal statutory rule that Arkansas is obliged to
4:34PM 10 comply with.
11 Third, under materiality, the Court finds that the
12 state's interests are not a relevant consideration in
13 analyzing a violation under the materiality provision. In
14 so finding, the Court notes that it disagrees with the Fifth
4:34PM 15 Circuit's importation of the Fourteenth Amendment and the
16 Voting Rights Act case law on to the materiality provision
17 in *Callanen*. That's, for the benefit of the court reporter,
18 C-A-L-L-E-N-E-N, 89 F.4th at pages 480 through 489.
19 Accordingly, the Court finds that it is likely at
4:35PM 20 this stage that the omission of a wet signature on a voter
21 registration form is immaterial to determining a voter's
22 qualifications under Arkansas law and plaintiffs are thus
23 likely to succeed on the merits of their claim.
24 The second *Dataphase* factor is irreparable harm.
4:35PM 25 Here, the Court makes these findings:

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4:35PM 1 First, the Court finds plaintiffs are likely to
2 suffer irreparable harm from the continued enforcement of
3 the wet signature rule.
4 Secondly, and more specifically with regard to the
4:35PM 5 perspective of GLA and Vote.org -- and I'm quoting now from
6 *League of Women Voters of Missouri*, quote:
7 "Courts routinely recognize that organizations
8 suffer irreparable harm when a defendant's conduct causes
9 them to lose opportunities to conduct election-related
4:36PM 10 activities such as voter registration and education."
11 336 F. Supp. 3d 998 at page 105. That was a case
12 out of the Western District of Missouri from 2018 and it
13 collects case law on this proposition of law.
14 Third, under irreparable harm, and specifically to
4:36PM 15 the individual plaintiffs, and quoting from a different
16 *League of Women Voters* case, quote:
17 "Courts routinely deem restrictions on fundamental
18 voting rights an irreparable injury."
19 That's *League of Women Voters of North Carolina*.
4:37PM 20 This is a Fourth Circuit case from 2014, 769 F.3d 224 at
21 page 247.
22 And to kind of close the loop on our discussion
23 earlier this afternoon, the Court agrees with the plaintiffs
24 when they state in their briefing, quote:
4:37PM 25 "The SBEC appears to conflate the opportunity to

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4:37PM 1 register to vote in the abstract with the opportunity to
2 register to vote in a manner that is consistent with the
3 guarantees of federal law."
4 I think that's kind of the nub of the back and
4:38PM 5 forth on that discussion earlier. The plaintiffs cited
6 that, or made that argument at Doc 58, page 25.
7 The final two *Dataphase* factors involve a
8 consideration of the balancing of the harms and the public's
9 interests. I don't think that either of these are really in
4:38PM 10 dispute or the subject of the defendants' contentions, but
11 in any event, the Court finds that the harm that the
12 plaintiffs face, or the injunction denied, isn't in fact
13 greater than that which the defendants face were an
14 injunction entered. Additionally, the public has a, quote,
4:39PM 15 "strong interest in exercising the fundamental political
16 right to vote," close quote. That's from *Purcell*,
17 P-U-R-C-E-L-L, 549 U.S. 1 at page 4.
18 So both the balancing of harms and public interests
19 factors under *Dataphase* weigh in favor of the plaintiffs,
4:39PM 20 and for those reasons, the Court finds that preliminary
21 injunctive relief is appropriate.
22 Before I state the injunction language, let me
23 address the motions to dismiss here.
24 So the clerks from Benton County -- that's
4:39PM 25 Ms. Herell -- and Pulaski County -- Ms. Hollingsworth --

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4:40PM 1 seek dismissal for the reasons that we briefly discussed in
2 our hearing today. Those will both be denied.
3 As to Ms. Hollingsworth in Benton County, the Court
4 finds that the plaintiffs have pled sufficient facts against
4:40PM 5 Ms. Hollingsworth to give rise to a right for relief. She
6 is obviously the clerk. And not only is she the county
7 clerk, but in the words of Amendment 51, she is the
8 permanent registrar under the scheme laid out in Amendment
9 51 and it's a role of special significance in the
4:40PM 10 enforcement of that amendment. Therefore, the Court finds
11 that it is plausible that she has rejected, or will in the
12 future reject, an application due to the omission of a wet
13 signature. Ms. Hollingsworth's argument that she should be
14 dismissed as a party because she is not necessary, while I
4:41PM 15 understand the pragmatic considerations, Rule 19 really is
16 not an argument to be made in this context. Rule 19 is an
17 argument about the necessary joinder of a party, not the
18 idea that a party is surplusage and so therefore, even
19 though they are proper, they should be dismissed.
4:42PM 20 Ms. Harrell in Pulaski County, as her attorney said
21 today, she does not dispute that she, too, is a county clerk
22 and a permanent registrar under Amendment 51 that's tasked
23 with the enforcement of the election laws under the
24 structure set out under Amendment 51. Again, the issue is
4:42PM 25 not whether she's necessary in the sense of the Court being

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4:43PM 1 able to issue an injunction in her absence. Obviously, the
2 Court could. It's going to issue an injunction despite the
3 absence of 72, I think, other court clerks. But we have to
4 keep in mind that given the role of the permanent registrar
4:43PM 5 in the scheme under Amendment 51 and how these signatures
6 are actually utilized, either originally in determining the
7 qualifications, or later if those signatures are needed for
8 some reason, perhaps to compare against absentee voter
9 ballots, those are facts that at the hearing and trial on
4:44PM 10 the permanent injunction will require some discovery and
11 proof. And while the Court is capable of relying on
12 affidavits and other trustworthy materials in arriving at
13 and making its conclusions about who will likely prevail in
14 this preliminary injunction hearing, that will not be the
4:44PM 15 case necessarily when we get to a trial on the merits if the
16 case can't be disposed of on Rule 56.
17 So the plaintiffs have a right to name parties such
18 that they can engage in the discovery and present proof that
19 they would need to be required to present, either on a Rule
4:45PM 20 56 or at a trial. And so to that extent, they are
21 necessary, in a roundabout way of speaking.
22 This Court previously in the *Arkansas United* case
23 held, quote, "If an injunction against the county officials
24 would provide at least partial redress to the alleged
4:45PM 25 injury, it stands to reason that they are appropriate

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4:45PM 1 defendants for such a suit." And there, the Court was
2 quoting from the Eighth Circuit's case in *281 Care Committee*
3 *v. Arneson*, A-R-N-E-S-O-N, 638 F.3d 621 at page 631. It's
4 an Eighth Circuit case from 2011.
4:46PM 5 So for those reasons with regard to those two
6 defendants, the motions to dismiss will be denied.
7 At bottom, as the Court said earlier, the Court
8 hereby grants the preliminary injunction and denies the
9 motions to dismiss.
4:46PM 10 Regarding the preliminary injunction, the Court
11 finds that the requirement that a voter registration
12 application be signed with a handwritten wet signature
13 rather than an electronic or digital signature likely
14 violates the materiality provision of the Civil Rights Act
4:46PM 15 of 1964. Enforcement of the wet signature rule will
16 irreparably harm plaintiffs, and the balance of equities and
17 public interests favor granting the preliminary relief.
18 Now, we have had this discussion about whether
19 anything will become moot when the emergency rule becomes a
4:47PM 20 final rule, and so I will leave the lawyers to do whatever
21 they want to do with that. But the Court tends to agree
22 with the plaintiffs that the harm, the controversy first
23 arose when there was this about-face and a pronouncement
24 coming from the Secretary of State basically giving an edict
4:48PM 25 to all the county clerks not to accept wet signatures. That

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4:48PM 1 set in motion the emergency rule-making procedure that we
2 have discussed today. But from the beginning, the
3 plaintiffs' injury is the directive to the county clerks not
4 to accept the wet signatures in whatever form that took,
4:48PM 5 whether it be just his personal edict and/or whether it was
6 later in the form of a preliminary rule, or whether it was
7 later an emergency rule that was made final.
8 And I appreciate Mr. Kieklak's discussion of
9 metaphysics, which would normally fly right over my head,
4:49PM 10 because I'm not that smart. But I actually understood
11 Mr. Kieklek's explanation and it makes practical sense.
12 It's not like there's a clear dividing line between the two.
13 It's part of one singular process and it is a rule that
14 becomes final after the legislative body has had its input.
4:50PM 15 And the input, at least from what I gather from Mr. Kieklek,
16 is an up or down. It's either going to become final or it's
17 not.
18 I don't think that any of that matters to the
19 Court's view or opinion as to why the plaintiffs are
4:50PM 20 entitled to relief given how they pled their claim for
21 relief, but it certainly is consistent with that.
22 In any event, the Court will be entering an
23 injunction in substance and effect as follows:
24 The Court orders that defendants, as well as their
4:50PM 25 respective agents, officers, employees, and successors and

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4:50PM 1 all persons acting in concert with each or any of them, be
2 preliminarily enjoined from enforcing the wet signature rule
3 and from rejecting or refusing to accept any voter
4 registration application on the ground that it was signed
4:51PM 5 with a digital or electronic signature.
6 That's the Court's ruling from the bench. As I
7 indicated, the Court plans to enter a very fulsome
8 memorandum opinion and formal order to that effect.
9 It will likely take us seven to 10 days, probably
4:51PM 10 closer to 10 to issue that. In the meantime, the so-called
11 final rule or the emergency rule will become final, I guess
12 is the better way to put that. If the plaintiffs choose to
13 file a supplemental pleading that incorporates this concept
14 that the emergency rule has now become final and they seek a
4:52PM 15 declaration and injunctive relief from that as well, then
16 they may do so provided that they do so prior to -- what
17 would Thursday of next week be?
18 MS. CRAIG: September 5th.
19 THE COURT: Provided that they do so by no later
4:53PM 20 than the close of business on September 4th. And to the
21 extent that the defendants wish to respond, that they do so
22 by no later than the close of business on September 6th.
23 And that will allow the Court to roll out its memorandum
24 opinion and order by the following Monday or Tuesday.
4:54PM 25 Anything else from the plaintiffs today?

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4:54PM 1 MR. DODGE: Very briefly, Judge. Rule 15(d), in
2 the ordinary course, requires either consent of the opposing
3 party or leave of Court. I understand the Court to have
4 essentially just granted such leave and I'm not sure my
4:54PM 5 friend on the other side would oppose in any event, but I
6 just want to confirm as much.
7 THE COURT: I was granting you leave based on our
8 discussion. Did you have any -- Mr. Talley, you've kind of
9 got us into this mess.
4:54PM 10 MR. TALLEY: And this was part of how I anticipated
11 proceeding. So given the Court's ruling, I certainly have
12 no objection on behalf of my clients, because I think it
13 cleans up issues before the Court.
14 MR. DODGE: Then nothing further from plaintiffs.
4:54PM 15 THE COURT: Anything else, Mr. Talley?
16 MR. TALLEY: Would the Court consider staying its
17 ruling from the bench pending the entry of its written
18 order?
19 THE COURT: No.
4:55PM 20 MR. TALLEY: Thank you.
21 THE COURT: Anything else, Mr. Kieklek?
22 MR. KIEKLACK: No. Thank you, Judge.
23 THE COURT: Mr. Lester?
24 MR. LESTER: No, Your Honor.
4:55PM 25 THE COURT: All right. We're adjourned.

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4:55PM 1 MR. DODGE: Sorry. I apologize, Judge. I
2 apologize. It's been a long hearing.
3 There's no need to file an additional motion as
4 well. Our original actual motion suffices. I don't see why
4:55PM 5 there would be such a need. I just want to confirm the
6 Court is not looking for one.
7 THE COURT: Which motion?
8 MR. DODGE: For preliminary injunction, once we
9 file a supplemental complaint.
4:55PM 10 THE COURT: Well, I haven't mapped all this out in
11 my head. It may be that you need to file a supplemental
12 motion that tracks in parallel with the complaint. I don't
13 have it all laid out in front of me.
14 MR. DODGE: That sounds good. Our understanding is
4:56PM 15 that would in no way impact the injunction the Court just
16 entered.
17 THE COURT: It would not.
18 MR. DODGE: Right. And I think that provides the
19 scope of relief necessary. So we'll consider whether any
4:56PM 20 kind of supplemental request is needed, but I appreciate
21 that.
22 THE COURT: All right. Thank you.
23 MR. TALLEY: And I'll confer with Mr. Dodge on that
24 point. The Court said it's not going to stay its ruling. I
4:56PM 25 think I needed that on the record, and we'll confer as to

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4:56PM 1 some mechanics to make sure we streamline this as best we
2 can.
3 THE COURT: Sounds good. And I appreciate that,
4 Mr. Talley. Extremely well written and argued motion and
4:56PM 5 responses today. Thank you so much. We're adjourned.
6 (proceedings concluded at 4:56 p.m.)
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1 C E R T I F I C A T E

2

3 I, Paula K. Barden, RPR, RMR, FCRR, Federal

4 Official Court Reporter, in and for the United States

5 District Court for the Western District of Arkansas, do

6 hereby certify that pursuant to Section 753, Title 28,

7 United States Code that the foregoing is a true and

8 correct transcript of the stenographically reported

9 proceedings held in the above-entitled matter and that the

10 transcript page format is in conformance with the

11 regulations of the Judicial Conference of the United

12 States.

13 Dated this 30th day of August 2024.

14

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17 ------------------------------------

PAULA K. BARDEN, RPR, RMR, FCRR #700

18 Federal Official Court Reporter

Western District of Arkansas

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GET LOUD ARKANSAS; VOTE.ORG; NIKKI PASTOR; and TRINITY "BLAKE" LOPER, **PLAINTIFFS**

vs. **CASE NO. 5:24-CV-05121-TLB**

JOHN THURSTON; SHARON BROOKS; JAMIE CLEMMER; BILENDA HARRIS-RITTER; WILLIAM LUTHER; JAMES HARMON SMITH, III; and JOHNATHAN WILLIAMS, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners; BETSY HARRELL, in her official capacity as Benton County Clerk; BECKY LEWALLEN, in her official capacity as Washington County Clerk; and TERRI HOLLINGSWORTH, in her official capacity as Pulaski County Clerk, **DEFENDANTS**

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ANSWER OF DEFENDANTS

Comes the Defendants, John Thurston; Sharon Brooks; Jamie Clemmer; Bilenda Harris-Ritter; William Luther; James Harmon Smith, III; and Johnathan Williams, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners; Betsy Harrell, in her official capacity as Benton County Clerk; Becky Lewallen, in her official capacity as Washington County Clerk; and Terri Hollingsworth, in her official capacity as Pulaski County Clerk, by their attorneys, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., and for their Answer for Declaratory and Injunctive Relief state the following:

1. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 1 of the Complaint. Therefore, those allegations are denied. Defendants have complied with state and federal laws at all times relevant hereto.

2. Defendants deny the allegations contained in paragraph 2 of the Complaint. Defendants performed their duties in compliance with the laws of the state of Arkansas.

3. Defendants deny any allegations that may be contained in paragraph 3 of the Complaint. Defendants state that all rules adopted by the Defendants apply to all citizens of the state of Arkansas in a fair and non-discriminatory manner.

4. Defendants deny any allegations that may be contained in paragraph 4 of the Complaint.

5. Defendants deny the allegations contained in paragraph 5 of the Complaint. Defendants deny that any Plaintiff was discriminated against under state or federal law.

6. Defendants deny the allegations contained in paragraph 6 of the Complaint.

7. Defendants deny that they have deprived the Plaintiffs or any other persons of their rights under state or federal law. Defendants deny that they have violated any state or federal laws. Defendants deny that this Court has jurisdiction over these factual allegations and legal issues raised by the Plaintiffs in their Complaint.

8. Defendants Deny that this Court has the authority to grant declaratory relief pursuant to state or federal law.

9. Defendants deny that this Court has personal jurisdiction over the Defendants.

10. Defendants deny that they have violated any state or federal laws and deny that venue is proper in this Court.

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11. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint. Therefore, those allegations are denied.

12. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 12 of the Complaint. Therefore, those allegations are denied.

13. Defendants admit that an emergency rule was properly adopted pursuant to the laws of the state of Arkansas by the State Board of Election Commissioners that required a person seeking to register to vote through a third-party voter registration organization would have to submit a handwritten wet signature on any application to register. The Defendants' actions in passing the emergency rule were done in accordance with Arkansas law and are fair and nondiscriminatory to any person.

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14. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 14 of the Complaint. Therefore, those allegations are denied.

15. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 15 of the Complaint. Therefore, those allegations are denied.

16. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 16 of the Complaint. Therefore, those allegations are denied.

17. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 17 of the Complaint. Therefore, those allegations are denied.

18. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 18 of the Complaint. Therefore, those allegations are denied.

19. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 19 of the Complaint. Therefore, those allegations are denied.

20. Defendants admit that the Plaintiffs have correctly listed the members of the State Board of Election Commissioners. Defendants deny that the Defendants have violated any state or federal laws and state that Defendants have acted in a fair and unbiased manner in dealing with the citizens of the state of Arkansas.

21. Defendants admit that Plaintiffs have correctly identified the county clerks of Benton, Washington, and Pulaski counties. Defendants followed applicable state and federal laws at all times when dealing with the Plaintiffs and all other persons attempting to register to vote in the state of Arkansas.

22. The Arkansas Constitution speaks for itself, in particular Amendment 51 §5(e) which directs The State Board of Election Commissioners to prescribe, adopt, publish, and distribute "such Rules and Regulations supplementary to this amendment and consistent with this amendment and other laws of Arkansas as are necessary to secure uniform and efficient procedures in the administration of this amendment throughout the State." Defendants have followed all applicable state and federal laws when dealing with the Plaintiffs or with any other persons seeking to register to vote under Arkansas law. Defendants deny that they have violated any state or federal law.

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23. Defendants admit that Amendment 51 and other Arkansas laws and rules provide the details for voter eligibility and registration in Arkansas. Defendants have fully complied with the provisions of Amendment 51 and all other applicable state laws, rules, and procedures.

24. Defendants deny that they have violated Amendment 51 or any other provisions of Arkansas law.

25. Defendants admit, pursuant to Amendment 51 § 5(b)(2) The Office of Driver Services and State Revenue Offices shall use a computer process in providing voter registration

opportunities. Defendants admit that pursuant to Amendment 51 §5(b)(3) & (4) public assistance agencies and disabilities agencies may use a computer process in providing voter registration opportunities. However, no such directive or authority for use of a computer process is authorized by Amendment 51 for the other voter registration agencies, public libraries or the Arkansas National Guard. Defendants deny that they have violated Amendment 51 or any other provisions of Arkansas law.

26. Amendment 51 speaks for itself and is very clear as to what voter registration agencies shall or may make use of a computer process in providing voter registration opportunities. Defendants deny that they have violated Amendment 51 or any other provisions of Arkansas law.

27. Amendment 51 speaks for itself and makes clear that a voter registration application is not complete until signed by the applicant. Defendants deny that they have violated Amendment 51 or any other provisions of Arkansas law.

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28. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 28 of the Complaint. Therefore, those allegations are denied.

29. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 29 of the Complaint. Therefore, those allegations are denied.

30. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 30 of the Complaint. Therefore, those allegations are denied.

31. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 31 of the Complaint. Therefore, those allegations are denied. Defendants deny that they have discriminated against any person and deny that they have violated any state or federal law.

32. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 32 of the Complaint. Therefore, those allegations are denied.

33. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 33 of the Complaint. Therefore, those allegations are denied.

34. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 34 of the Complaint. Therefore, those allegations are denied.

35. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 35 of the Complaint. Therefore, those allegations are denied.

36. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 36 of the Complaint. Therefore, those allegations are denied. The Plaintiffs' process for registering to vote does not comply with the Arkansas Constitution, Amendment 51, or the rules of the Defendants, Arkansas State Board of Election Commissioners.

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37. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 37 of the Complaint. Therefore, those allegations are denied.

38. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 38 of the Complaint. Therefore, those allegations are denied.

39. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 39 of the Complaint. Therefore, those allegations are denied.

40. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 40 of the Complaint. Therefore, those allegations are denied.

41. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 41 of the Complaint. Therefore, those allegations are denied.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint.

43. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 34 of the Complaint. Therefore, those allegations are denied.

44. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 44 of the Complaint. Therefore, those allegations are denied.

45. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 45 of the Complaint. Therefore, those allegations are denied.

46. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 46 of the Complaint. Therefore, those allegations are denied.

47. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 47 of the Complaint. Therefore, those allegations are denied.

48. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 48 of the Complaint. Therefore, those allegations are denied.

49. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 49 of the Complaint. Therefore, those allegations are denied.

50. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 51 of the Complaint. Therefore, those allegations are denied. Defendants admit that the Arkansas Secretary of State wrote a letter to all county clerks on or about February 28, 2024. The contents of that letter speak for itself, and to the extent paragraph 50 of the Complaint is inconsistent with the Secretary of State's letter, those allegations are denied.

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51. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 51 of the Complaint. Therefore, those allegations are denied.

52. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 52 of the Complaint. Therefore, those allegations are denied.

53. Defendants admit that prior to the Defendants' adoption of the 2024 Emergency Rule, some county clerks rejected electronic signatures while others continued to accept such applications. This disparity in treatment by county clerks was the rationale for the adoption of the 2024 Emergency Rule. Defendants are directed by Amendment 51 to adopt such rules as are necessary for the uniform administration of the registration process. Defendants deny that they have violated any provisions of Arkansas law in adopting the 2024 Emergency Rule.

54. Defendants admit the allegations contained in paragraph 54 of the Complaint. The Secretary of State asked the Attorney General for an opinion regarding electronic signatures on voter registration applications. The request by the Secretary of State to the Attorney General speaks for itself.

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55. Defendants admit the Attorney General issued an opinion in response to the Secretary of State's request. However, Defendants state that Attorney General opinions are not binding on any court nor does the law require state officials to follow opinions of an Attorney General that are clearly incorrect under the law and rules of the state of Arkansas. Defendants further deny that the Plaintiff's interpretation of the Arkansas Attorney General's Opinion is correct.

56. Defendants admit it asked its staff to prepare an emergency rule addressing the issue of electronic signatures on voter registration applications. Defendants deny all further allegations contained in paragraph 56 of the Complaint.

57. The allegations contained in paragraph 57 of the Complaint are admitted. Defendants followed Arkansas law and acting under their statutory and constitutional authority adopted the 2024 Emergency Rule requiring handwritten wet signatures on applications to register to vote.

58. Defendants deny the allegations contained in paragraph 58 of the Complaint. The emergency rule was adopted in a proper manner acting under Defendants' statutory and constitutional directive in compliance with state and federal law.

59. The Defendants emergency rule speaks for itself and to the extent paragraph 59 of the Complaint misquotes the emergency rule or misinterprets Amendment 51, those allegations are denied.

60. Defendants deny the allegations contained in paragraph 60 of the Complaint to the extent plaintiffs misinterpret Amendment 51 or allege the Emergency Rule added any further requirement not contained in Amendment 51. The emergency rule adopted by the Defendants complies with Arkansas law and further insures the uniform administration of the voter registration process throughout the State.

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61. Defendants admit the allegations in paragraph 61 of the Complaint.

62. Defendants deny the allegations contained in paragraph 62 of the Complaint. Specifically, plaintiff Pastor's registration application was rejected by the Washington County Clerk prior to the adoption of the Emergency Rule. Any alleged rejection by the Pope County Clerk of a request to transfer Plaintiff Loper's voter registration took place prior to May 4, 2024, the effective date of Defendant's Emergency Rule.

63. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 63 of the Complaint. Therefore, those allegations are denied.

64. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 64 of the Complaint. Therefore, those allegations are denied.

65. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 65 of the Complaint. Therefore, those allegations are denied. However,

Defendants state any alleged rejection of plaintiff Pastor's voter registration application by the Washington County Clerk took place prior to May 4, 2024, the effective date of the Defendants' Emergency Rule, and thus the Rule could not have been the basis for the rejection.

66. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 66 of the Complaint. Therefore, those allegations are denied.

67. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 67 of the Complaint. Therefore, those allegations are denied.

68. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 68 of the Complaint. Therefore, those allegations are denied. . However, Defendants state any alleged rejection of plaintiff Loper's transfer of that voter registration application by the Pope County Clerk took place prior to May 4, 2024. The Rule could not have been the basis for the rejection.

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69. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 69 of the Complaint. Therefore those allegations are denied. However, Defendants state any alleged rejection of plaintiff Loper's transfer of that voter registration application by the Pope County Clerk took place prior to May 4, 2024. The Rule could not have been the basis for the rejection.

70. Defendants deny the allegations contained in paragraph 70 of the Complaint.

71. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 71 of the Complaint. Therefore, those allegations are denied. However, Defendants state any alleged voter registration applications collected by plaintiff GLA and rejected by the Ouachita County Clerk took place well prior to May 4, 2024, the effective date of the Defendant's Emergency Rule, thus could not have been the basis for any rejections prior.

72. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 72 of the Complaint. Therefore, those allegations are denied. However, Defendants state any and all cancellations of registrations are governed by Amendment 51 §11.

73. Defendants deny the allegations contained in paragraph 73.

74. Defendants admit the allegations contained in the first sentence of paragraph 74. The stated situation was in fact the rationale for Defendant's adoption of the Emergency Rule. The rest of the allegations contained in paragraph 74, Defendants do not possess sufficient information to admit or deny the allegations. Therefore, those allegations are denied.

75. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 75 of the Complaint. Therefore, those allegations are denied.

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76. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 76 of the Complaint. Therefore, those allegations are denied.

77. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 77 of the Complaint. Therefore, those allegations are denied.

78. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 78 of the Complaint. Therefore, those allegations are denied.

79. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 79 of the Complaint. Therefore, those allegations are denied.

80. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 80 of the Complaint. Therefore, those allegations are denied.

81. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 81 of the Complaint. Therefore, those allegations are denied.

82. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 82 of the Complaint. Therefore, those allegations are denied.

83. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 83 of the Complaint. Therefore, those allegations are denied.

84. Defendants do not possess sufficient information to admit or deny the allegations contained in paragraph 84 of the Complaint. Therefore, those allegations are denied.

85. Paragraph 85 of the Complaint attempts to incorporate paragraphs 1-84. Defendants have fully answered Plaintiffs' Complaint paragraphs 1-84 and no further response is necessary.

86. Defendants deny that they have violated 52 U.S.C. 10101(a)(2)(B) or any other provision of state or federal law.

87. Defendants deny the allegations contained in paragraph 87 of the Complaint. Defendants deny that any Plaintiffs were discriminated against under state or federal law.

88. Defendants admit the allegations contained in paragraph 88 of the Complaint. However, Plaintiffs fail to cite the remaining provisions of Arkansas law applicable to voting in Arkansas. Defendants deny that they have violated any provisions of state or federal law.

89. Defendants deny the allegations contained in paragraph 89 of the Complaint.

90. Defendants deny the allegations contained in paragraph 90 of the Complaint.

91. Defendants deny the allegations contained in paragraph 91 of the Complaint.

92. Defendants deny specifically and separately each and every material allegation contained in the Plaintiff's Complaint not specifically admitted in Defendants' Answer.

AFFIRMATIVE DEFENSES

93. Defendant states affirmatively that the Plaintiff's claims are barred by the doctrine of sovereign immunity.

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94. Defendants state affirmatively that they complied with all state and federal laws when they adopted the emergency rule requiring a wet signature.

95. Defendants state affirmatively that the Plaintiffs have not stated facts sufficient to state a cause of action under state or federal law. Defendants have only alleged facts based on hearsay and speculation in their Complaint.

96. Defendants state affirmatively that the materiality provision of 52 U.S.C. § 1010(a)(2)(B) does not apply to private litigants and is reserved to the authority of the Attorney General of the United States pursuant to 52 U.S.C. § 1010(c).

97. Defendants state affirmatively that the Plaintiffs have failed to name all necessary parties, and that the Plaintiffs' Complaint should be dismissed.

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WHEREFORE, Defendants pray that the Plaintiff's Complaint be dismissed with prejudice, for its costs and expenses, and for all further and proper relief to which it may be entitled.

Respectfully submitted.

Defendants,

____

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2024, I forwarded via email and mail a copy of Defendants Answers to Plaintiffs Complaint to Plaintiffs attorneys to the following address:

Signed: ________________________________

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GET LOUD ARKANSAS; VOTE.ORG; NIKKI PASTOR; and TRINITY "BLAKE" LOPER,

Plaintiffs,

v.

JOHN THURSTON; SHARON BROOKS; JAMIE CLEMMER; BILENDA HARRIS-RITTER; WILLIAM LUTHER; JAMES HARMON SMITH, III; and JOHNATHAN WILLIAMS, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners; BETSY HARRELL, in her official capacity as Benton County Clerk; BECKY LEWALLEN, in her official capacity as Washington County Clerk; and TERRI HOLLINGSWORTH, in her official capacity as Pulaski County Clerk,

Defendants.

Civil Action

Case No. 5:24-cv-05121-TLB

SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

1. On June 5, 2024, Plaintiffs Get Loud Arkansas ("GLA"), Vote.org ("VDO"), Nikki Pastor, and Blake Loper filed the operative Complaint in this action. Compl., ECF No. 2 ("Compl."). Plaintiffs sued the individual members of the Arkansas State Board of Election Commissioners ("SBEC"), as well as the county clerks of Benton, Pulaski, and Washington Counties, seeking declaratory and injunctive relief against enforcement of any requirement that mail voter registration applications be signed with a wet signature ("wet signature requirement"). *See* Compl. at 24.

2. Subsequent to the filing of the operative June 5 Complaint, the SBEC promulgated a permanent rule that requires all county clerks to reject mail voter registration applications that are not signed with a wet signature.[1]

3. The Arkansas Legislative Council's Rules Subcommittee approved the permanent rule on August 22, 2024.

4. The full Arkansas Legislative Council approved the permanent wet signature rule on August 23, 2024. The permanent rule becomes effective on or around September 1, 2024.

5. Plaintiffs file this Supplemental Complaint under Federal Rule of Civil Procedure 15(d) to provide additional allegations regarding "events that have happened since the filing of the" operative Complaint, 6A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1504 (3d ed. 2024), namely the SBEC rulemaking process that promulgated a permanent wet signature requirement.[2]

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[1] The SBEC initially adopted a wet signature requirement in April 2024 as an emergency rule, which was approved by the Arkansas Legislative Council's Executive Subcommittee on May 2, and took effect on May 4. The emergency rule expires on September 1, 2024. *See* Compl. ¶¶ 57, 61; *accord* Answer of SBEC Defendants, ECF No. 44 ¶¶ 57, 61.

[2] Rule 15(d) "permit[s] a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Naturally, such a pleading supplements the operative complaint, and does not supplant it. *See* 6A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1504 (3d ed. 2024); *see also e.g.*, *Trevino v. Kelly*, 245 F. Supp. 3d 935, 943 (E.D. Mich. 2017) (a supplemental complaint "does not supersede—or replace—the original complaint"); *Victor v. Varano*, No. 3:11-CV-891, 2012 WL 2367095, at *6 (M.D. Pa. June 21, 2012) ("A 'supplemental' complaint under Rule 15(d) is a document that does not replace an extant pleading."); *Ducote Jax Holdings, L.L.C. v. Bradley*, No. CIV A 04-1943, 2006 WL 3313716, at *4 (E.D. La. Nov. 14, 2006) (a "[supplemental] pleading does not replace prior complaints, but only adds allegations to those already asserted").

SUPPLEMENTAL ALLEGATIONS

I. The SBEC issues a permanent wet signature rule.

6. On June 12, 2024, the SBEC announced that it would begin the rulemaking process to impose a wet signature requirement for mail voter registration applications on a permanent basis. The text of the proposed permanent rule is identical to that of the emergency rule. *See also* Compl. ¶¶ 57–60.

7. The SBEC held a comment period on the proposed permanent rule from June 14 to July 14, 2024. During the public comment period, the SBEC received over 200 written comments on the proposed permanent rule.

8. The SBEC also held a public comment hearing on July 11, 2024. At that hearing, approximately 16 speakers commented on the proposed rule.

9. Of the 200 written public comments, only eight (8) comments supported the wet signature rule. None of the 16 speakers at the public comment hearing spoke in favor of the rule, and all other commenters opposed the wet signature rule.

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10. On July 15, 2024, SBEC Director Chris Madison issued a letter to SBEC Chairman (and Secretary of State) John Thurston summarizing the public comments on the proposed rule and providing the SBEC's responses to those comments. *See* Letter from Richard Chris Madison to John Thurston (July 15, 2024), ECF No. 53-1.

11. Director Madison's 12-page letter contained only two sentences summarizing public comments in favor of the wet signature: "This category of commentators generally stated that wet signatures provide greater security in the election process and help to prevent fraudulent voting practices. These commentators supported adoption of the Rule." *Id.* at 2. The letter contains no further details or explanation as to how a wet signature serves such purposes.

12. In contrast to the handful of statements in favor of the rule, Director Madison's letter detailed the voluminous opposition, which included comments: (a) supporting adoption of online voter registration systems; (b) arguing that reliance on wet signatures is outdated in an era when electronic signatures are ubiquitous; (c) stating that electronic signatures are permitted by Arkansas law; and (d) explaining that low voter registration and turn-out rates in Arkansas warranted greater registration options. *Id.*

13. Director Madison's letter provided only brief responses to the battery of comments from the public opposing the rule. It argued that the use of electronic signatures "created an unfair and non-uniform application process for applicants," but failed to explain these claims. *Id.* at 3–4. It further suggested that the SBEC believed civic organizations, like GLA and VDO, were seeking to operate third-party voter registration systems, *see, e.g.*, *id.* at 10–11, even though both organizations merely offer online tools that assist applicants in filling in—and submitting to the appropriate election officials—the mail voter registration application form created by the Secretary of State. For the most part, the SBEC did not offer direct responses to the range of concerns raised in the public comments.

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14. On July 15, 2024, the same day Director Madison issued his letter, the SBEC met to discuss the public comments to the proposed permanent rule and to vote on the measure. The SBEC voted to approve the rule and submitted it to the Arkansas Legislative Council for final consideration and approval.

15. On August 22, 2024, the Arkansas Legislative Council's Rules Subcommittee approved the permanent rule, which the Arkansas Legislative Council itself approved the next day, August 23.

16. As a result, the permanent rule was slated to take effect on or around September 1, 2024, the same day that the emergency rule expires.

CLAIM FOR RELIEF

COUNT I

Materiality Provision of the Civil Rights Act of 1964
52 U.S.C. § 10101(a)(2)(B); 42 U.S.C. §§ 1983, 1988; 28 U.S.C. §§ 2201, 2202

17. Plaintiffs incorporate paragraphs one through 16 above as if set forth fully herein.

18. Plaintiffs re-allege and incorporate by reference paragraphs 22 through 91 of the operative Complaint as if set forth fully herein. Compl. ¶¶ 22–91.

19. The permanent wet signature rule, as well as any other requirement that applicants in Arkansas sign their voter registration applications by hand or with a wet signature, violates the materiality provision of the Civil Rights Act of 1964.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue the relief requested in Plaintiffs' operative Complaint, *see* Compl. at 24–25, including that the Court:

(a) Declare that the permanent wet signature rule, and any other requirement that applicants sign their voter registration applications by hand or with a wet signature, violates the materiality provision of the Civil Rights Act of 1964;

(b) Enjoin Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the permanent wet signature rule, or any other requirement that applicants sign their voter registration applications by hand or with a wet signature;

(c) Enjoin Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from rejecting or refusing to accept a voter registration application on the grounds that the application contains an electronic or digital signature;

(d) Award Plaintiffs their costs, expenses, and reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, and any other applicable law.

(e) Grant Plaintiffs any such other, different, or further relief as this Court deems just and proper.

Dated: August 30, 2024

Respectfully submitted,

/s/ Uzoma N. Nkwonta

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 30th day of August, 2024, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GET LOUD ARKANSAS, et al., **PLAINTIFF**

v. **CASE NO. 5:24-CV-05121-TLB**

JOHN THURSTON, et al., **DEFENDANTS**

ANSWER

Defendants John Thurston, Sharon Brooks, Jamie Clemmer, Bilenda Harris-Ritter, William Luther, James Harmon Smith, III, and Johnathan Williams, in their official capacities as Commissioners of the State Board of Election Commissioners (collectively, the "SBEC"), submit this Answer to the Supplemental Complaint, *see* ECF No. 63, filed by Plaintiffs Get Loud Arkansas, Vote.org, Nikki Pastor, and Trinity "Blake" Loper (collectively, "Plaintiffs").

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1. The SBEC admits Plaintiffs filed their original Complaint on June 5, 2024. The SBEC denies Plaintiffs are entitled to the relief requested in the original Complaint. The SBEC denies any remaining allegations in paragraph 1 of the Supplemental Complaint.

2. The SBEC admits it promulgated a permanent Rule Regarding Voter Registration pursuant to its constitutional authority and charge. The SBEC denies the remaining allegations in paragraph 2 of the Supplemental Complaint.

3. The SBEC admits the allegations in paragraph 3 of the Supplemental Complaint.

4. The SBEC admits the allegations in paragraph 4 of the Supplemental Complaint, though the referenced Rule Regarding Voter Registration became effective September 2, 2024.

5. Paragraph 5 of the Supplemental Complaint does not contain allegations which require a response from the SBEC.

6. The SBEC admits the allegations in paragraph 6 of the Supplemental Complaint.

7. The SBEC admits the allegations in paragraph 7 of the Supplemental Complaint.

8. The SBEC admits the allegations in paragraph 8 of the Supplemental Complaint.

9. The SBEC denies the allegations in paragraph 9 of the Supplemental Complaint.

10. The SBEC admits the allegations in paragraph 10 of the Supplemental Complaint.

11. The SBEC admits that the referenced letter includes the language quoted in paragraph 11 of the Supplemental Complaint. The SBEC denies the remaining allegations in paragraph 11 of the Supplemental Complaint.

12. The SBEC admits the referenced letter contains a discussion of public commentary, including public commentary opposed to the Rule Regarding Voter Registration. The SBEC denies any remaining allegations in paragraph 12 of the Supplemental Complaint.

13. The SBEC denies the allegations in paragraph 13 of the Supplemental Complaint.

14. The SBEC admits the allegations in paragraph 14 of the Supplemental Complaint.

15. The SBEC admits the allegations in paragraph 15 of the Supplemental Complaint.

16. The SBEC admits the allegations in paragraph 16 of the Supplemental Complaint, though the referenced Rule Regarding Voter Registration became effective September 2, 2024.

17. In response to paragraph 17 of the Supplemental Complaint, the SBEC incorporates by reference paragraphs 1 through 16 of this Answer.

18. In response to paragraph 18 of the Supplemental Complaint, the SBEC incorporates by reference paragraphs 22 through 91 of their original Answer.

19. The SBEC denies the allegations in paragraph 19 of the Supplemental Complaint.

20. The SBEC denies that Plaintiffs are entitled to any of the relief requested in the paragraph beginning with "WHEREFORE" at the conclusion of the Supplemental Complaint.

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AFFIRMATIVE DEFENSES

1. The SBEC affirmatively states that the Supplemental Complaint fails to state a claim upon which relief may be granted and therefore must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. The SBEC affirmatively states that the Rule Regarding Voter Registration does not violate the Materiality Provision codified at 52 U.S.C. § 1010(a)(2)(B).

3. The SBEC affirmatively states that one or more Plaintiffs lack article III standing.

4. The SBEC affirmatively states that Plaintiffs' claim is not ripe.

5. The SBEC affirmatively states that Plaintiffs' request to enjoin undefined future laws, regulations, or requirements does not present a "case" or "controversy" capable of redress in this Court.

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6. The SBEC affirmatively states that Plaintiffs lack a private right of action to enforce the Materiality Provision codified at 52 U.S.C. § 1010(a)(2)(B).

7. The SBEC affirmatively states that Plaintiffs' claim is barred by the doctrine of sovereign immunity.

8. The SBEC affirmatively states that Plaintiffs have failed to join seventy-two of Arkansas's seventy-five county clerks, all of whom are indispensable parties to this action.

9. The SBEC reserves the right to amend this Answer and assert additional defenses as permitted by the Federal Rules of Civil Procedure.

Respectfully submitted,

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Graham Talley, Ark. Bar No. 2015159
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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 Interlocutory Appeal from the United States
District Court for the Western District of Arkansas
No. 5:24-CV-5121 (Hon. Timothy L. Brooks)

SUPPLEMENTAL DECLARATION OF KRISTIN FOSTER

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I, Kristin Foster, declare as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the facts and information set forth in this declaration.

2. I was born in Russellville, Arkansas and currently reside in Dardanelle, Arkansas. I earned an undergraduate degree in Communication from Rockford University in Rockford, Illinois and have worked in nonprofit management since 2012.

3. I currently serve as Deputy Executive Director of Get Loud Arkansas ("GLA"), a nonprofit organization founded by then-State Senator Joyce Elliott to combat Arkansas's low rates of voter registration and civic participation.

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4. I have served in this position since December 2021. In my role, I am responsible for planning and directing projects, managing the organization's budget and finances, and supervising day-to-day operations.

5. I submit this declaration to inform the Court of factual developments since the district court entered a preliminary injunction on August 29, 2024.

6. After the court issued its order, GLA reactivated the full version of its online voter registration tool, permitting applicants to complete and review the Secretary of State's prescribed mail voter registration application; electronically sign that form under penalty of perjury; and then authorize GLA to print and submit the form on the applicant's behalf to the appropriate county clerk.

7. We have seen significant interest in the tool since the preliminary injunction. In just over two weeks, more than 150 Arkansans across more than 30 counties have used the tool to apply to register to vote. The rate at which Arkansans are using the tool has been increasing significantly as the tool gains broader awareness across the state.

8. Many other civic organizations across Arkansas have also begun using our tool to promote voter registration in their communities, including members of the "Divine Nine" organization of Black sororities and fraternities. Several other organizations, including youth-focused groups like Voters of Tomorrow, are planning to start using the tool soon. Similarly, many small businesses across Arkansas have expressed interest in posting links or QR codes linked to the tool in their windows or checkout areas to promote voter registration to their customers. We expect the rate of applications to increase even further as these organizations and businesses further disseminate GLA's voter registration tool to Arkansans.

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9. Many applications prepared through GLA's tool are presently in transit to county clerks through the U.S. Postal Service. In just the past week, I have mailed roughly 75 completed applications out to county clerks, and those applications may still be en route or awaiting review by county clerks. Yesterday—Friday, September 13, 2024—before this Court issued its order, I deposited approximately thirty (30) completed applications in the mail to county clerks across Arkansas. These

applicants complied with all the necessary requirements to register to vote under the Arkansas Constitution and yet they may have their applications rejected if the wet signature requirement is reinstituted.

10. Similarly, on Friday, September 13, 2024, GLA received ten completed applications from students at a high school in Manila, Arkansas, located in Mississippi County. While I have not yet placed these applications in the mail to the Mississippi County clerk, I feel obliged to do so given the applicants' expectation and understanding that I will do so. These applicants, too, may have their otherwise complete applications rejected if the wet signature requirement is reimposed.

11. GLA and its partner organizations also planned to heavily promote the use of GLA's online tool at rallies across the state on Tuesday, September 17—National Voter Registration Day. A continued stay of the district court's preliminary injunction would create confusion as to whether we may do so and severely diminish our ability to register voters.

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12. Our experience this year has shown that the availability of a simple, online tool to complete and sign the Secretary's mail voter registration form significantly improves our ability to register new voters. The tool has proven particularly useful over the past several weeks because the Secretary of State's office and several county clerks recently ran out of paper applications at several locations across Arkansas. While applications have since been restocked, these shortages

occurred just as we were able to reactivate the full version of our tool. And future shortages are likely, showing the need to provide Arkansans alternative ways to complete the Secretary's form.

13. In contrast, since reactivating our tool, we have neither seen nor received any reports that voters or election officials are confused about the district court's preliminary injunction, or about applications submitted by GLA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 9/14/2024

Kristin Foster

Kristin Foster

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