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

LEAGUE OF WOMEN VOTERS OF ARKANSAS, et al.,

Plaintiffs,

and

PROTECT AR RIGHTS, et al.

Intervenor Plaintiffs,

v.

COLE JESTER, in his official capacity as Secretary of State of Arkansas,

Defendant.

CIVIL ACTION NO. 5:25-CV-5087

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL STAY PENDING APPEAL

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Introduction

The Court granted Plaintiffs and Intervenors a preliminary injunction, enjoining the Secretary of State from enforcing six laws that protect the citizen-initiative process and effectively enjoining the Secretary from complying with a seventh law (the Arkansas Freedom of Information Act) that neither Plaintiffs nor Intervenors challenged. *See* Doc. 50, at 75.[1] Defendant requests a partial stay of the Court's preliminary injunction pending appeal related to the photo-ID requirement, post-circulation affidavit, and the READ Act.

"[B]alancing" "the relative strength of the [following] four factors," Defendant is entitled to a partial stay pending appeal: (1) he is likely to succeed on the merits; (2) he will be irreparably injured without a stay; (3) a stay will not substantially injure the Plaintiffs or Intervenors; and (4) the public interest favors a stay. *Kansas v. United States*, 124 F.4th 529, 533 (8th Cir. 2024).

I. Defendant is likely to succeed on the merits of the photo-ID requirement, post-circulation affidavit, and the READ Act.

The likelihood-of-success factor does "not require[] [it] to predict its own reversal." *Northport Health Servs. of Ark., LLC v. HHS*, No. 5:19-cv-5168, 2020 WL 2091796, at *2 (W.D. Ark. Apr. 30, 2020) (Brooks, J.) (citation omitted). Movants need only identify "serious and substantial legal issues" to make the requisite likelihood-of-success showing. *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993). Below, Defendant identifies multiple legal issues that are

[1] The Court's order also dismissed Attorney General Tim Griffin. Doc. 50, at 74. This filing will thus consistently use the singular "Defendant" for the reader's ease.

serious and substantial with three of the laws the Court enjoined him from enforcing. Defendant's motion for partial stay should be granted.

A. Requiring petitioners to verify their identity with photo ID does not violate the First Amendment.

Act 240 of 2025 requires canvassers to "view a copy of a potential petitioner's photo identification to verify the identity of the potential petitioner before obtaining the signature." Ark. Code Ann. § 7-9-109(g)(1). Potential petitioners have a variety of documents in multiple formats to choose from when presenting a photo identification. *See id.* §§ 7-9-109(g)(4) ("'photo identification' means a document or identification card permitted under § 7-1-101(40)"), 7-1-101(40) (providing requirements and nonexclusive list of examples).

The Court concluded this requirement (1) implicates the First Amendment; (2) is content based, triggering strict scrutiny; and (3) severely burdens petitioning, also independently requiring strict scrutiny. Doc. 50, at 53, 55, 56. Each of these conclusions is incorrect.

First, the Court incorrectly held that Act 240 implicates the First Amendment because canvassers may ask petitioners to see photo ID. *Id.* at 53. But that is the wrong framing. Act 240 regulates who may sign a petition (not the communication of ideas) by prohibiting potential petitioners from signing the petition without presenting photo ID. The Court erroneously concluded otherwise because "Act 240 does not change the definition of qualified petitioners." *Id.* But "qualified petitioner" is not a term the undersigned is aware of existing in Arkansas law, much less a term in the relevant chapter's definitions. *See* Ark. Code Ann. § 7-9-101. Rather than a

unified definition, Arkansas law dictates who may sign a petition in various legal provisions. *See, e.g.*, Ark. Const. art 5, § 1 (limiting allowed petitioners to "electors"); Ark. Code Ann. § 7-9-103(a)(1)(A) (requiring a potential petitioner to provide certain information to sign a petition). Act 240's amendments to Arkansas Code § 7-9-109 are of the same kind: requiring all potential petitioners to present photo ID to sign a petition. As the Eighth Circuit explained in *Hoyle v. Priest*, a law that "regulates who qualifies to legally sign an initiative petition … does not violate the First Amendment" if it is content neutral. 265 F.3d 699, 704 (8th Cir. 2001). That is because such laws "d[o] not implicate the First Amendment" at all. *Miller v. Thurston*, 967 F.3d 727, 738 (8th Cir. 2020) (characterizing *Hoyle*).

Second, the Court erroneously held that Act 240 is unconstitutionally content based because people who sign petitions related to "independent candidates and new political parties [seeking] … ballot access are not required to comply with" Act 240's photo-ID requirement. Doc. 50, at 56. As a preliminary matter, that is a speaker-based distinction, not a content-based one, Doc. 39, at 47–48, and not "all regulations distinguishing between speakers warrant strict scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994). In any event, the Eighth Circuit already rejected the Court's logic related to Arkansas's local-petition process. In *Wellwood v. Johnson*, the plaintiff challenged Arkansas's local initiative laws that treated sponsors of "the 'wet/dry' issue"—"regardless of viewpoint"—differently from "those who want other issues on the ballot." 172 F.3d 1007, 1009–10 (8th Cir. 1999). But Arkansas's laws in *Wellwood* that regulated different categories of issues on the same type of initiative

in different ways "did not implicate the First Amendment." *Miller*, 967 F.3d at 738. That is because plaintiffs cannot smuggle what is essentially an equal protection claim into a First Amendment analysis. *See Wellwood*, 172 F.3d at 1010. *Wellwood*'s holding that the First Amendment is not implicated even when there are legislative distinctions between different issues within the same local-initiative process applies with even more force here, where Act 240 applies equally to all issues within the statewide- and local-initiative processes. The ballot access of independent candidates and new political parties does not alter the First Amendment analysis.

Third, the Court materially and inaccurately stated Arkansas law when it erroneously found Act 240 "imposes a severe burden on petitioning." Doc. 50, at 55. The Court declared that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), "is not controlling" because "Arkansas charges a $5 fee"—something Plaintiffs and Intervenors never asserted—to obtain the necessary photo ID to sign a petition. *Id.* (citing Ark. Code Ann. § 27-16-805(a)(2)(A)). In truth, petitioners are not required to pay to obtain a valid photo ID. A petitioner may present any "document or identification card permitted under § 7-1-101(40)." Ark. Code Ann. § 7-9-109(g)(4). That subsection, which the Court overlooked, provides a nonexhaustive list of acceptable identification. Among the listed IDs is "[a] voter verification card under § 7-5-324." *Id.* § 7-1-101(40)(C)(viii). And the relevant official "shall not require or accept payment" when issuing a voter verification card. *Id.* § 7-5-324(c)(1). The Court thus improperly declined to follow *Crawford* based on a misunderstanding of Arkansas law. Instead, *Crawford* controls: the burden of showing photo identification "does not

qualify as a substantial burden." 553 U.S. at 198 (plurality opinion); *see id.* at 209 (Scalia, J., concurring) ("The burden of acquiring, possessing, and showing a free photo identification is simply not severe ….").

Further, the Court's assertion that people (1) "may not have an ID" at "the farmers market or university campus" and (2) "may not feel comfortable showing their ID to a canvasser" does not change the *Crawford* analysis. Doc. 50, at 55. For one, as *Crawford* noted, a photo ID requirement does not become unconstitutional merely because a person may not have his photo ID with him for a variety of reasons "arising from life's vagaries." 553 U.S. at 197 (plurality opinion). So too here. The fact that a potential petitioner may go to the farmers market without his photo ID—something for which Plaintiffs and Intervenors provided no empirical evidence—does not suddenly convert Act 240 into a severe, unconstitutional burden. Nor does showing a photo ID to canvassers "represent a significant increase over the usual burdens of" signing a petition, *id.* at 198, where before Act 240 petitioners still had to give canvassers a slew of personal information: "name, address, birth date, and" signature, Ark. Code Ann. § 7-9-103(a)(1)(A).[2]

* * *

Related to Act 240's photo-ID requirement, Defendant is likely to succeed on the merits: The Court erroneously held the First Amendment applies, Act 240 is content based, and Act 240 imposes a severe burden. And for the reasons explained in

[2] To the extent the Court collapsed its analysis with the READ Act, that was improper and is another basis for which Defendant is likely to succeed. *See infra* pp. 14–15.

Defendant's earlier briefing, Act 240 would survive even strict scrutiny. Doc. 39, at 40–41.

B. Requiring canvassers to verify they followed the law when collecting signatures does not violate the First Amendment.

Act 241 of 2025, § 1 requires *all* canvassers—paid and volunteer—to "file a true affidavit with the Secretary of State certifying that" they complied with *all* of Arkansas's applicable laws. Act 241 of 2025, § 1 (codified at Ark. Code Ann. § 7-9-111(j)(1)). And while it is true that "Act 241 applies only to statewide measures, not local measures," Doc. 50, at 21, Act 768 of 2025, § 6—codified in the same subdivision as Act 241, § 1—applies the same requirement to local measures, other than the official with whom the affidavit must be filed. The Court's analysis of Act 241's post-circulation affidavit is erroneous for three reasons: (1) the Court misinterpreted Arkansas law, (2) the Court erroneously held the post-collection affidavit implicates the First Amendment, and (3) the Court incorrectly found that the post-collection affidavit does not survive any level of First Amendment scrutiny.

First, the Court misconstrues Arkansas law. As Defendant explained in his earlier briefing, before Act 241, neither paid nor volunteer canvassers were required to verify after the fact that they followed applicable laws while collecting signatures. Doc. 39, at 7–8. The Court, however, incorrectly labeled this as "at best misleading" because paid canvassers—not volunteer canvassers—submit "[a] signed statement" *before* collecting signatures "that they read and understand the applicable law and have not been convicted of a disqualifying offense." Doc. 50, at 22 (citing Ark. Code Ann. § 7-9-601(d)(3)–(4)). Respectfully, the Court's accusation fails to acknowledge

three significant facts: (1) the distinction between paid and volunteer canvassers, (2) the distinction between the document filed by paid canvassers *before* collecting signatures and the affidavit filed by all canvassers *after* collecting signatures, and (3) the distinction between what is sworn to in paid canvassers' pre-circulation statements and in all canvassers post-circulation affidavits.

As to the distinction between paid and volunteer canvassers, there are significant numbers of volunteer canvassers, who do not submit the pre-collection signed statement that paid canvassers do. *See* Ark. Code Ann. § 7-9-601 (applying only to paid canvassers). The Court need look no further than one of the Intervenors here, who has previously organized an "all-volunteer canvassing effort" of "approximately 750 volunteer canvassers" and "expects that volunteers will collect most of its signatures" this cycle. Doc. 25, at 16, 18. Without Act 241's post-circulation affidavit, the volunteer canvassers verify *nothing* about their compliance with the laws identified in the pre-circulation statement submitted by paid canvassers.

As to the distinction in timing and what is sworn to, the Court's criticism disregards the difference for paid canvassers between the *pre*-circulation signed statement in § 7-9-601 and the *post*-circulation affidavit in Act 241. *Before* collecting signatures, a paid canvasser must confirm he *understands* what is lawful: *after* collecting signatures, a paid canvasser must affirm he *did* what was lawful. *Cf. Ark. Peace Ctr.*, 992 F.2d at 147 (finding a likelihood of success based on "the district court's interpretation").

Second, the Court erred by holding the post-circulation affidavit implicates the First Amendment because it may "nullif[y]" a petitioner's signature—petitioners who are not parties to this case—if the canvasser tainted the collected signatures by refusing to verify he complied with Arkansas's applicable laws. Doc. 50, at 59–60. Plaintiffs did not make this argument or any other argument for why Act 241 implicates the First Amendment. *See* Doc. 42, at 12–13.

To be sure, "signing a petition is core political speech." *SD Voice v. Noem*, 60 F.4th 1071, 1078 (8th Cir. 2023) (citation modified). But whether a *petitioner*'s First Amendment right to sign is implicated is a different question from whether the First Amendment rights of *sponsors or canvassers* are violated. The Court's approach raises serious third-party standing concerns to which Defendant never had an opportunity to respond. *See, e.g.*, *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008) (analyzing whether a third party will be hindered from bringing their own First Amendment claim); *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 912 (8th Cir. 2017) ("It is inappropriate to entertain a facial overbreadth challenge when the plaintiff fails to adduce any evidence that third parties will be affected in any manner differently from herself."). Though it is true that the Eighth Circuit has held that sponsors may have standing to challenge canvasser regulations when sponsors' and canvassers' legal "interests are highly intertwined, if not inseparable," *Dakotans for Health v. Noem*, 52 F.4th 381, 387 (8th Cir. 2022), Defendant is unaware of (and the Court did not cite) any caselaw that allows sponsors to hitch their standing wagon to petitioners. *See* Doc. 50, at 60. And on top of that, Plaintiffs

never made the argument the Court's order adopts, so Defendant never had an opportunity to address the Court's view. In other words, the Court "[e]lect[ed] not to address the party-presented controversy," instead choosing to "takeover" Plaintiffs' claim. *United States v. Sineneng-Smith*, 590 U.S. 371, 379–80 (2020). But the Court is supposed to be "essentially [a] passive instrument[] of government" that does not "sally forth each day looking for wrongs to right." *Id.* at 376 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)). The Court's failure to follow the party-presentation principle is sufficient reason alone to find Defendant is likely to succeed. *Id.* at 380 (vacating and remanding).

Third, even if the First Amendment were implicated, the Court incorrectly found that the post-circulation affidavit fails "any level of scrutiny." Doc. 50, at 60. Initially, the Court improperly held the burden is severe, asserting that it is "draconian" to "invalidat[e] … signatures collected by a canvasser" who fails to submit a post-circulation affidavit. *Id.*[3] The Court incorrectly analyzed the "character and magnitude" of the requirement. *Miller*, 967 F.3d at 739 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). As the Eighth Circuit explained in *Miller*, the magnitude inquiry is focused on a party's *ability* to comply with the requirement—not, as this Court analyzed, the downstream effects of a failure to

[3] The Court incorrectly stated that Act 241 allows the Secretary to invalidate signatures. Act 241 does not allow the Secretary to invalidate signatures. Instead, those signatures are not counted until the canvasser complies with the law or unless an exemption to the post-circulation affidavit requirement exists. *See* Ark. Code Ann. § 7-9-111(j)(2), (4).

comply. *Id.* at 740; *cf. Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021) (distinguishing between "the severity of any demonstrated burden" and "the scope of the challenged restrictions"). Thus, if "one can imagine relatively simple ways for individuals … [to] comply with the [challenged] requirement," the law does not "impose[] severe burdens" and "[s]trict scrutiny is therefore not applicable." *Id.* Compliance with Act 241's post-circulation affidavit requirement is simple: canvassers must sign a single sheet of paper confirming they followed the law. *Cf. id.* (finding it "simple" for sponsors to purchase multiple forms of advertising, "sterilize[] petition[s]," and find ways to "transfer[]" petitions for signing "with little to no contact").

Further, the Court simultaneously and incorrectly concluded that there is "[n]othing in the record" to show that the post-circulation affidavit "actually serves any interest" and declared—with nothing in the record—that "the General Assembly[] [has an] apparent desire to make disqualifying citizen petitions easier and more efficient." Doc. 50, at 60. The Court misunderstands the State's burden. Arkansas is "not required to present 'elaborate, empirical verification of the weightiness of [its] asserted justifications,'" but instead it may "respond to potential deficiencies in the electoral process with foresight." 967 F.3d at 740 (quoting *Timmons*, 520 U.S. at 364). Requiring canvassers to confirm that they followed the law while collecting signatures is a reasonable means to protect the integrity of and public confidence in the initiative process from sources such as fraud. Not only did Defendant detail the continued presence of bad actors in Arkansas's initiative process, Doc. 39, at 4–11, the Eighth Circuit has already found "that Arkansas has encountered fraud in the

initiative process before, meaning its interest is legitimate as well as important." *Miller*, 967 F.3d at 740 (citing *Hoyle*, 265 F.3d at 702).

Additionally, the Court indicates that any interest is "already served by the petition part affidavits." Doc. 50, at 60. But the notarized statement in Arkansas Code § 7-9-109 that is attached to each petition part does not accomplish the same interests. That statement only provides that, "[t]o the best of [the canvasser's] knowledge and belief, each signature is genuine and each signer is a registered voter of the State"; that the canvasser circulated with the "signature sheet[] an exact copy of the popular name, ballot title, and text"; and that the READ Act was complied with. Ark. Code Ann. § 7-9-109(a). The Court's order fails to acknowledge that Act 241's post-circulation affidavit requirement provides far greater coverage than § 7-9-109 because Act 241 requires canvassers to verify compliance with *all* applicable laws, not just the three subsets of provisions identified in § 7-9-109.

Finally, in a footnote, the Court asserts that "Intervenor-Plaintiffs also argue that the State lacks a legitimate interest in this additional affidavit because additional affidavits are barred by the Arkansas Constitution." Doc. 50, at 61 n.28. Intervenors, however, did not challenge Act 241, *see* Doc. 39, at 15 (providing chart of challenged laws), and the Court provided no citation, so the purpose of the Court's footnote is unclear.

* * *

Defendant is likely to succeed in his appeal of the Court's order regarding Act 241's post-circulation affidavit. And for the same reasons in Defendant's earlier

briefing, the post-circulation affidavit requirement would survive strict scrutiny. Doc. 39, at 30–32.

C. Allowing petitioners to confirm they are signing the petition they think they are signing does not violate the First Amendment.

Act 274 of 2025, known as the "Require Examining of Authoritative Documents Act" ("READ Act"), Act 274 of 2025, § 1, requires a petitioner to complete—in a canvasser's presence—either of the following before signing a petition: (1) "read[] the ballot title" or (2) hear "the ballot title … read aloud." Ark. Code Ann. § 7-9-103(a)(1)(A). For a canvasser, the READ Act only requires that the canvasser not "knowingly accept[] a signature" from a petitioner who did not comply with the READ Act in his presence. *Id.* § 7-9-103(c)(11).

The Court (1) found Plaintiffs and Intervenors have standing to challenge the READ Act; (2) held the READ Act implicates the First Amendment; (3) indistinguishably analyzed the READ Act with two other, unrelated acts; and (4) concluded that the READ Act violates the First Amendment. The error in each of these conclusions is sufficient to establish Defendant's likelihood of success.

First, the Court's analysis relies on statements of fact that no party asserts exist, and thus it erroneously concluded Plaintiffs and Intervenors have standing to challenge the READ Act. As Defendant explained in his briefing, to establish an injury in fact to challenge statutes with knowledge requirements, a plaintiff must assert an intent to knowingly engage in the proscribed conduct. *See Tex. State LULAC v. Elfant*, 52 F.4th 248, 256 (5th Cir. 2022). "Uncertainty" about a law's application is not enough. *Id.*; *see Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1079 (8th

Cir. 2024) (finding plaintiffs did not have standing to bring a First Amendment claim because they "cannot say the [challenged law] chills them" if "they have shown no desire to place cameras"—i.e., engage in the regulated conduct). The approach where a statute includes a knowledge requirement differs from cases in which "intent is not an element of a challenged statute," and thus a "likelihood of inadvertently or negligently" violating a law can be "sufficient to establish a reasonable fear of prosecution." *281 Care Comm. v. Arneson*, 638 F.3d 621, 629 (8th Cir. 2011).

Defendant provided specific citations to Plaintiffs' and Intervenors' evidentiary filings, showing that they had not alleged an intent to knowingly violate the READ Act. *See* Doc. 39, at 22 (citing Doc. 20-3, ¶ 6; Doc. 20-7, ¶ 9; Doc. 20-9, ¶ 6; Doc. 20-10, ¶ 13; Doc. 20-12, ¶ 6; Doc. 24-6, ¶ 31). Neither Plaintiffs nor Intervenors disputed Defendant's recitation of the record, instead disagreeing only with Defendant's legal analysis. *See* Doc. 42, at 6–7; Doc. 43, at 5–6. The Court's order, however, claims that Plaintiffs and Intervenors "have alleged that they want to accept signatures without waiting for petitioners to read or have the ballot title read to them." Doc. 50, at 30. Because the Court's order did not provide any citation, Defendant is unaware of any basis in the record for that finding.

Second, the Court concluded the READ Act implicates the First Amendment, not because the text itself regulates expression, but because "[i]n the real world" a canvasser may not want to disturb a petitioner who is complying with the law. Doc.

50, at 54.[4] But the READ Act does not require a canvasser to alter his communication of ideas; only the canvasser's personal decision to be considerate does that. The fact that the reality of the READ Act might increase "the difficulty of the process"—whether by legal requirement or (as here) social mores—"is insufficient to implicate the First Amendment." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

Third, the Court improperly analyzed the tailoring analysis by mixing the READ Act's requirement with two unrelated laws. *See* Doc. 50, at 52–59. One law requires canvassers to inform potential petitioners that "petition fraud is a criminal offense," Act 218 of 2025, § 1, and the other is Act 240, which requires petitioners to present photo ID. The Court offered no legal basis for smashing these disparate legislative enactments together, and caselaw indicates each of Plaintiffs' and Intervenors' challenges must be analyzed separately. For example, in *Initiative & Referendum Institute v. Jaeger*, the Eighth Circuit analyzed two canvasser regulations—a residency requirement and a commissions ban—independently, even though both directly regulated canvassers, and the challenger asserted that both made it more difficult to "collect signatures." 241 F.3d 614, 617, 618 (8th Cir. 2001). Similarly, in *Miller*, the Eighth Circuit independently analyzed whether Arkansas's in-person signature and in-person notarization requirements implicated the First Amendment. 967 F.3d at 738–39. Independent analysis also aligns with the requirement that plaintiffs show Article III standing "'with respect to *each* provision' they challenge."

[4] The fact that the Court's analysis had to focus on "the real world," instead of the text, is further evidence that the facial challenges must fail. *See infra* pp. 16–18.

Animal Legal Def. Fund v. Reynolds, 89 F.4th 1071, 1076 (8th Cir. 2024) (emphasis added) (quoting *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006)). And, although Defendant has not yet obtained a transcript from the preliminary-injunction hearing, counsel recalls that Plaintiffs and Intervenors were unable to identify any binding case in which disparate petition-related laws were analyzed together. The Court's order should have followed binding cases like *Jaeger* and *Miller*, analyzing the challenged laws independently.

Fourth, providing no independent analysis of the READ Act, the Court erroneously held the READ Act violates the First Amendment. *See* Doc. 50, at 54–59.[5] As to the severity of the burden, it is unclear why the Court believed it is a severe burden on canvassers to prohibit only those potential petitioners whom the canvasser knows did not comply with the READ Act from signing a petition. Instead, it is "relatively simple" for a canvasser to comply, such as by asking petitioners to confirm they read or heard the ballot title before signing. *Miller*, 967 F.3d at 740. The lower level of scrutiny therefore applies. And applying the appropriate scrutiny, the READ Act is nondiscriminatory, applying to all petitions; it is a reasonable way to allow potential petitioners to confirm neither a mistake nor a bad actor is causing them to sign a petition they do not want to sign; and it thus furthers Arkansas's paramount interest in protecting the integrity of the process, including by combatting fraud and

[5] The Court stated that Defendant did "not attempt[] to rebut the evidence of the severe burdens" imposed by the READ Act and did "not attempt to meet its burden." Doc. 50, at 54, 57. That is inaccurate. *See* Doc. 39, at 41–43 (arguing the READ Act is constitutional, including that its "burden on communication is not severe and survives [either] the lower scrutiny [or] … strict scrutiny").

corruption (like canvassers tricking petitioners into signing the wrong petition) and preventing unintentional mistakes (like accidentally signing the wrong petition). The State is entitled to act reasonably and preemptively to address these concerns, especially considering the long history of bad actors in the petition process. *See Miller*, 967 F.3d at 740 (explaining that States are "not required to present 'elaborate, empirical verification of the weightiness of [its] asserted justifications,'" but instead it may "respond to potential deficiencies in the electoral process with foresight"—especially Arkansas, which "has encountered fraud in the initiative process before" (quoting *Timmons*, 520 U.S. at 364)); Doc. 39, at 4–11 (detailing recent history). The Court appears to believe more is required, insinuating that the State must wait until harmful conduct occurs to pass legislation. *See* Doc. 50, at 58 (discounting Arkansas's law because "the State offered no evidence of a single petition fraud conviction"). It does not.

D. The Court erroneously flipped the burden of Plaintiffs' and Intervenors' facial challenges onto the Court itself and Defendant.

Plaintiffs and Intervenors brought facial challenges to the three laws at issue in this motion, though Intervenors also brought an as-applied challenge to the READ Act. *See* Doc. 39, at 23. That choice "comes at a cost"; they made their own case "hard[er] to win." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). To succeed on the facial challenges, it is the Plaintiffs' and Intervenors' burden to show that "the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 723–24.

Plaintiffs provided no evidence about the sweep of the law for their facial challenges. *See, e.g.*, Doc. 42 (not responding to Defendant's argument about the analysis required to bring a facial challenge). And Intervenor did little more than offer generic statements about the law's effect. *See* Doc. 43, at 42–45. But even the generic statements offered by Intervenors contradict caselaw. Intervenors stated that a facial challenge is proper because "[a]ll canvassers must comply with these requirements in exactly the same way." *Id.* at 44. But that fact actually cuts against a facial challenge for election-related laws where the Court "must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people,'" particularly when the challenged law is "neutral, nondiscriminatory regulation of voting procedure." *Crawford*, 553 U.S. at 202–03 (plurality opinion) (quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006) (alteration in original) (ruling against a facial challenge to a photo-ID requirement to vote because plaintiff failed to show the requirement burdened enough voters)); *id.* at 204 (Scalia, J., concurring) (agreeing with the plurality that "petitioners have not assembled evidence to show that the special burden [on 'some voters'] is severe enough to warrant strict scrutiny").

Although providing sufficient evidence is Plaintiffs' and Intervenors' burden, the Court improperly imposed the burden on itself and Defendant. Addressing the facial-challenge issue in one footnote, the Court stated the laws apply only to the "circulation of initiative and referendum petitions" and reasoned that "[t]he Court cannot conceive of, and Defendants do not offer, any applications of these laws for

which the First Amendment analysis would differ to Defendants' benefit. *See Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 468 n.7 (2005)." Doc. 50, at 36 n.17. But the Court's cited authority demonstrates that it is Plaintiffs' and Intervenors' burden (not the Court's or Defendant's), providing that "*petitioners* still have not shown that [the challenged law] is facially invalid." *Free Speech Coal.*, 606 U.S. at 468 n.7 (citation modified) (emphasis added).

Plaintiffs and Intervenors decided to bring "facial challenges, and that matters." *NetChoice*, 603 U.S. at 743. The Court's failure to hold Plaintiffs and Intervenors to their burden is reason alone that Defendant is likely to succeed on the merits. *See id.* at 745 (vacating lower court decisions for failure to apply the appropriate facial-challenge analysis).

E. Enjoining enforcement of the three laws at issue here sows confusion in the petition process, violating principles in *Purcell* and its progeny.

The Supreme Court has been clear that "orders affecting elections … can themselves result in voter confusion." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Thus, the Court must weigh "considerations specific to election cases." *Id.* at 4. Those considerations include "[f]iling deadlines" and "logistical challenges" that precede the election day itself. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring); *see id.* at 888 (Kagan, J., dissenting) (noting that "[t]he general election [was] around nine months away" and the primary "about four months"). While it is true that the relevant election day is in November 2026, the petition process has already begun. Plaintiffs and Intervenors may soon collect signatures in violation of Arkansas law, considering the Court's preliminary injunction. And statewide

petitions may be submitted to the Secretary of State at any time, and at the latest about eight months from now. Ark. Const. art. 5, § 1 (providing that statewide initiative petitions "shall be filed with the Secretary of State not less than four months before the election").

As warned in Defendant's briefing, the Court's preliminary injunction allows "Plaintiffs and Intervenors [to] play by one set of petitioning laws, while every other current and future sponsor"—and, not to mention, petitioners—must play by another. Doc. 39, at 57. That fact impermissibly causes "chaos and confusion." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). That confusion is highlighted by the READ Act, which directly regulates petitioners. Under Arkansas Code § 7-9-103 (as amended by the READ Act), a petitioner may only sign the petition "[a]fter reading the ballot title … or having [it] read aloud to him." Ark. Code Ann. § 7-9-103(a)(1)(A). Thus, petitioners who sign Plaintiffs' and Intervenors' petitions must still comply with the READ Act, while Plaintiffs and Intervenors themselves have obtained a preliminary injunction against its enforcement against them. *See* Doc. 50, at 75. That situation is rife with chaos—potential petitioners may (or may not) understand the READ Act still applies to them; well-meaning (or not) canvassers may try to convince the nonparty petitioners that they need not comply with the READ Act because of the preliminary injunction; and potential petitioners may then give up in confusion or be misled into violating the law. That is the exact type of confusion *Purcell* and its progeny counsel against allowing.

As explained further below, *see infra* pp. 21–22, the chaos and confusion that has already infected the process will continue to spread—making it essentially impossible to unwind. "[I]t is [the courts'] duty, consistent with *Purcell*, to at least preserve the possibility of restoring" the status quo that existed before the Court's preliminary injunction. *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020). Defendant is thus likely to succeed on the merits as the Court erroneously granting a preliminary injunction in violation of *Purcell*.

II. Defendant will be irreparably injured absent a stay, and the public interest favors a stay.

Absent a stay, Defendant will suffer irreparable injury. The public interest likewise favors a stay. *Cf. Eggers v. Evnen*, 48 F.4th 561, 564 (8th Cir. 2022) ("The balance-of-harms and public-interest factors merge when the Government … is the nonmoving party." (citation modified)). The Supreme Court has explained that "[a]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). Thus, the Court's injunction harms the State's broad democratic interests. The State is also irreparably injured by prohibiting Defendant from enforcing Act 240, Act 241, and the READ Act in ways specific to each.

The preliminary injunction causes irreparable harms specific to each law. For Act 240's photo-ID requirement, the Court's injunction allows fraudulent petitioners to sign Plaintiffs' and Intervenors' petitions without ever verifying their identity by photo ID. As the Supreme Court explained when reviewing a law that required photo

ID to vote, the risk of fraud is "real" and can "affect the outcome of a close election"—or in this case, a petition that barely receives enough signatures. *Crawford*, 553 U.S. at 196. For Act 241's post-circulation affidavit, the State will also be irreparably harmed if unscrupulous canvassers are allowed to avoid verifying under oath that they followed Arkansas law when they solicited signatures—something that no other Arkansas law requires. And for the READ Act, the State will be harmed if petitioners unintentionally sign a petition, whether by mistake—after all, some petitions get circulated together, *see* Doc. 20-2, ¶ 4—or tricked by a bad actor.

To underscore the scope of the irreparable injury, if the Court's preliminary injunction related to either the READ Act or the photo-ID requirement is overturned, it will be almost impossible to excise unlawful signatures from lawful ones. Plaintiffs and Intervenors will presumptively collect signatures in violation of these laws, given they sued to evade them. But when submitted to the Secretary of State, there will be no distinction between those signatures that complied with law and those that did not. Thus, those irreparable harms—unverified petitioner signatures and unintentionally signed petitions—have already started, incurably infecting Plaintiffs' and Intervenors' petitions. Even a reversal of the Court's order will not remedy that harm.

The harm related to the Court's injunction of the post-circulation affidavit requirement is also looming. Under Arkansas law, statewide initiative petitions can be filed at any moment. *See* Ark. Const. art. 5, § 1 (providing that statewide initiative petitions "shall be filed with the Secretary of State not less than four months before the election"). Then, Defendant has 30 days from the date a petition is filed to review

sufficiency. Ark. Code Ann. § 7-9-111(a). He does not have a roving authority to declare insufficient petitions that were declared sufficient because of the Court's preliminary injunction. Thus, if Plaintiffs and Intervenors submit a petition at any time before the final appellate resolution of this litigation, there will be no going back; Defendant will have no recourse or ability to vindicate the State's democratically enacted laws by declaring those petitions insufficient.

Other laws do not extinguish Arkansas's irreparable harm. The Court's order cites several Arkansas statutes—such as the criminal law and pre-circulation affidavits paid canvassers must submit that they understand Arkansas law—to indicate that the laws at issue here are redundant of other Arkansas laws. As explained above, however, the order drew incorrect conclusions about those provisions. In any event, the fact that Arkansas has criminal laws to punish fraudulent petitioners, canvassers, or sponsors after the fact does not defeat the irreparable harm here. As the Eighth Circuit has already held related to voting, "Even if the State can prosecute fraudulent voters after the fact, it would be irreparably harmed by allowing them to vote in the election." *Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018). The same is true here.

Arkansas will be irreparably harmed when petitioners, canvassers, or sponsors engage in fraud on the front end—a harm that could have been avoided, for example, by deterring potentially fraudulent petitioners who would have had to present photo ID. So too will it be irreparably harmed when canvassers do not verify after the fact that they followed the law while canvassing. That paid canvassers—not volunteer

canvassers—must provide some front-end assurances that they understand (not will follow) Arkansas law does not undercut the harm the State suffers.

III. Plaintiffs and Intervenors will not be substantially harmed absent a stay.

Plaintiffs and Intervenors will not be substantially injured by a partial stay of the Court's order for three reasons. *First,* as explained above, Defendant is likely to succeed on the merits, so Plaintiffs and Intervenors cannot be substantially injured. *Cf. Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015) (holding that a plaintiff who is "unlikely to succeed in showing his First Amendment rights have been violated … has not shown a threat of irreparable harm that warrants preliminary injunctive relief"). *Second,* "[i]n considering whether the issuance of a stay pending appeal will substantially injure the other party, the maintenance of the status quo is an important consideration in granting or denying a stay." *Kansas v. United States*, 124 F.4th 529, 534 (8th Cir. 2024) (citation modified). And it "is generally the state legislature" who "sets the status quo." *Carson v. Simon*, 978 F.3d 1051, 1062 (2020). "Here, the status quo ([Arkansas's] duly-enacted [petition] law[s]) was disrupted by" this Court's preliminary-injunction order. *Id.* Returning to the status quo will restore enforcement of Arkansas's democratically enacted laws to everyone, putting Plaintiffs and Intervenors on equal footing with all others. *Third,* Defendant seeks only a partial stay of the Court's preliminary-injunction order. Thus, Plaintiffs and Intervenors will retain the remainder of the benefits in the Court's order, pending

further resolution of the issues. *See Brakebill*, 905 F.3d at 561 (noting that a partial stay leaves "the remainder of the injunction … in effect").

Conclusion

For these reasons, the Court should grant Defendant's motion for partial stay pending appeal. If the Court does not rule on this motion by Tuesday, December 9, 2025, Defendant will be compelled to move for stay pending appeal before the Eighth Circuit to prevent (or at least halt) the irreparable harm to the ballot-initiative process, Arkansans, and the State.

Respectfully submitted,

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