

**CASE NO.: CV-14-462**

**IN THE SUPREME COURT OF ARKANSAS**

**MARK MARTIN, et al.**

**APPELLANTS**

**v.**

**FREEDOM KOHLS, et al.**

**APPELLEES**

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**AN INTERLOCUTORY APPEAL FROM THE  
CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
HONORABLE TIMOTHY DAVIS FOX, CIRCUIT JUDGE**

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**AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES, BY THE  
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., W. HAROLD  
FLOWERS LAW SOCIETY, THE ARKANSAS NAACP, & ADDITIONAL  
AMICI LISTED ON THE NEXT PAGE**

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The W. Harold Flowers Law Society

The Arkansas State Conference of the NAACP

Arkansas Advocates for Children and Families

Arkansas Community Organizations

Arkansas Homeless Coalition

The King's Outreach

Arkansas Public Policy Panel

Arkansas Trans Equality Coalition

Center for Artistic Revolution

Disability Rights Center of Arkansas

Interfaith Alliance of Arkansas

Just Communities of Arkansas

League of Women Voters of Arkansas and of Pulaski and Washington Counties

The National Organization for Women-Arkansas and Little Rock

Rock of Hope

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## STATEMENTS OF INTEREST

The **NAACP Legal Defense and Educational Fund, Inc.** (LDF) is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation. Since 1957, LDF has been a separate entity from the NAACP, and its state branches.

Since its founding, LDF has been involved in nearly all of the precedent-setting litigation relating to voting rights for people of color in Arkansas and across the nation, including cases involving legal challenges to discriminatory state voter identification laws. *See, e.g., Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Texas v. Holder*, 888 F. Supp.2d 113 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2886 (2013) (mem.); *South Carolina v. United States*, 898 F. Supp.2d 30 (D.D.C. 2012); *Jeffers v. Clinton*, 740 F. Supp. 585, 596 (E.D. Ark. 1990); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1256 (N.D. Miss. 1987), *aff'd sub nom.*, 932 F.2d 400 (5th Cir. 1991).

Of particular relevance to this case, LDF successfully sued Arkansas to end the State's discriminatory voter registration practices, which burdened Black, poor,

and disabled Arkansas voters in a manner similar to Act 595 of 2013. *See* Consent Decree, *Ark. Cmty. Org. for Reform Now v. Clinton*, No. 4:84-cv-00808; *Phillips County Ministerial Alliance v. Benz*, No. H-C-84-49 (E.D. Ark. Dec. 28, 1987).

The **W. Harold Flowers Law Society** (the Society), the National Bar Association affiliate for the State of Arkansas, was formed in 1938 under the laws of Arkansas. The Society is composed of Black lawyers, judges, law professors, law school graduates, and law students, who are dedicated to the pursuit of excellence in the legal profession, and who believe in justice and fairness for all despite social or economic status. Consistent with the Society's beliefs, it opposes laws that deny Black and other groups of voters equal access to the political process in Arkansas.

The **Arkansas State Conference of NAACP Branches** (Arkansas NAACP) implements the mission of the National Association for the Advancement of Colored People (NAACP) at the state level and local level in Arkansas. The Arkansas NAACP seeks to promote the full, equal, and active participation of Black people in Arkansas's democracy, and opposes prerequisites to voting that disproportionately deny the franchise to Black citizens in Arkansas. Accordingly, the Arkansas NAACP was a named plaintiff in the consolidated actions of *Ark. Cmty. Org. for Reform Now v. Clinton* and *Phillips County Ministerial Alliance v. Benz*.

**Arkansas Advocates for Children and Families** (AACF) was founded in 1977 by a group of prominent Arkansans who believed that children needed an in-

dependent force to provide information and education to parents and citizens about our state's policies toward children and families. For almost 40 years, AACF has provided leadership, research and advocacy to promote wide-ranging reforms that have improved the lives of Arkansas children and their parents.

**Arkansas Community Organizations** (ACO) is Arkansas's largest grass-roots organization. ACO organizes low-income and working class families across the State to enable them to fight for social and economic justice. ACO was incorporated in Arkansas on December 7, 2009, and grew out of local leaders' interest in continuing the work of the Arkansas Community Organization for Reform Now.

The **Arkansas Homeless Coalition** and **The King's Outreach of Arkansas, Inc.** are both members of the National Coalition for the Homeless that serve as voices and advocates for homeless people living on the streets of Arkansas. The King's Outreach is a primary resource for homeless veterans in Arkansas.

**Arkansas Public Policy Panel** was founded in 1963 as a statewide organization dedicated to achieving social and economic justice by organizing citizen groups around the State, educating and supporting them to be more effective and powerful, and linking them with one another in coalitions and networks. The Panel seeks to bring balance to the public policy process in Arkansas.

The **Arkansas Trans Equality Coalition** (ARTEC) is a developing statewide transgender organization led by transgender people and collaborating

with families, providers, organizations and other groups in Arkansas. The mission of ARTEC is to advance equality, justice and inclusion for transgender and gender non-conforming people in Arkansas and building educational awareness, resources and gender-inclusive communities within the State.

The **Center for Artistic Revolution (CAR)** is a statewide, grassroots community based organization that was founded in Little Rock in 2003 by Lesbian, Gay, Bisexual, Transgendered and Queer (LGBTQ) people and their straight allies in Arkansas. CAR believes that any law that unfairly encumbers or deprives Arkansans of equitable access to the franchise is reprehensible. Therefore, CAR opposes Act 595 of 2013 because the law chills the political engagement of LGBTQ people and other vulnerable groups of voters.

**Disability Rights Center of Arkansas (DRC)** is the independent, nonprofit organization designated by the Governor of Arkansas to implement federally funded and authorized programs to protect and advocate for the rights of people with disabilities throughout the State. DRC vigorously advocates for and enforces the legal rights of people with disabilities in Arkansas, including the right to vote.

The **Interfaith Alliance of Arkansas** is committed to protecting the integrity of both religion and democracy in Arkansas. The Alliance champions religious freedom by respecting individual rights, promoting policies that protect both reli-

gion and democracy, and uniting diverse voices to challenge extremism and build common ground.

**Just Communities of Arkansas (JCA)**, formerly the National Conference for Community and Justice of Arkansas, works to advance diversity in the community and establish a place where every person is valued, every voice is heard, and everyone has a fair chance to succeed. JCA believes that prejudice and bias are based on a lack of understanding among people—and that civil discussion between different people with different points of view fosters mutual understanding. Therefore, JCA opposes laws which stifle the ability of particular groups of Arkansan citizens to vote and to otherwise actively engage in civic society in Arkansas.

**The League of Women Voters of Arkansas and of Pulaski and Washington Counties (LWV-Arkansas)** are nonpartisan, political organizations that encourage informed and active participation in government; work to increase the public's understanding of major policy issues; and influence public policy through education and advocacy on issues. The goal of the LWV-Arkansas is to empower everyone to shape better communities through education and the study of the issues that challenge Arkansans.

The **National Organization for Women (NOW)** is a grassroots movement that is dedicated to its multi-issue and multi-strategy approach to women's rights. NOW is the largest organization of women activists in the United States, with

chapters in every state and hundreds of local chapters, including chapters representing Arkansas and the City of Little Rock. Priority issues vary among chapters but include ending sex discrimination, constitutional equality, promoting diversity and ending racism, and economic justice with a current focus on voting rights, especially in light of recent legislation that curtails the rights of so many citizens.

**Rock of Hope** is a faith-based organization that works towards eliminating homelessness in Central Arkansas. Rock of Hope's unique approach of offering one-on-one support for each participant allows individuals to alleviate and rise above homelessness and sustain independent living. Rock of Hope also provides short-term transitional housing and transportation services that have a lasting impact and helps to reduce the population of homeless people in Central Arkansas.

As organizations representing Arkansans who are Black, women, living in poverty, LGBTQ, living with disabilities, and/or homeless, and other people across the State whose fundamental right to vote is denied or unduly burdened by Act 595 of 2013, *Amici* have a substantial interest in the just and proper resolution of this matter. On the basis of their collective knowledge and experience, *Amici* urge this Court to hold that Act 595, by its terms, violates the Arkansas Constitution.

## ARGUMENT

The Arkansas Constitution underscores the fundamental importance of the right to vote by both enumerating the sole qualifications of electors and forbidding “any law” that “impair[s] or forfeit[s]” this right. Ark. Const. art. III, §§ 1, 2.

Nonetheless, for decades, Arkansas, as elsewhere in the South, used overly restrictive voter registration laws to disfranchise Black voters. “[T]he key disfranchising features” of such laws were a “proof of registration” requirement, limitations on “the times and places set for registration,” and “the specificity of the information required” to register. J. M. Kousser, *The Shaping of Southern Politics* 48 (1974).

Although over twenty-five years have passed since several of the undersigned *Amici* successfully sued Appellants to end such racially biased restrictions on the right to register to vote, with Act 595 of 2013 (“Act 595” or “the Voter ID Law”), Arkansas is poised to come full circle and implement a law that again disproportionately disfranchises Black and other vulnerable Arkansas voters. As detailed herein, Act 595 requires otherwise eligible electors who lack acceptable photo ID to expend considerable resources to navigate a complex process during set hours at limited locations, and to provide specific documentary proof of identity. It thereby imposes severe and discriminatory burdens on the rights of Black and other vulnerable voters which are strikingly similar to the prior discriminatory voter registration systems of Arkansas and other Southern states. *Amici* therefore con-



tend that the Pulaski County Circuit Court’s decision to enjoin Appellants from enforcing the Voter ID Law and its administrative rules, was not an abuse of discretion. Rather, Act 595 is a facially unconstitutional infringement on the right to vote that will cause irreparable harm absent an injunction. Thus, *Amici* encourage this Court to affirm the circuit court’s decision.

## **I. THE SUBSTANTIAL, DISCRIMINATORY BURDENS OF ACT 595**

The evidence in the record, the U.S. Census, and the commonly known facts about the hours and locations of the offices of the county clerks and the ancillary costs of obtaining a photo ID,<sup>1</sup> all “[i]nescapably” demonstrate that Act 595 severely and unequally infringes upon the right to vote for qualified electors who lack photo ID. *Applewhite v. Commonwealth*, No. 330, 2014 WL 184988, at \*19-20 (Pa. Commw. Ct. Jan. 17, 2014). To vote under Act 595, large numbers of otherwise eligible Arkansas electors who lack the required photo ID must overcome both the inaccessibility of the photo voter ID card-issuing offices of the county clerks and the money, time, and inconvenience costs of obtaining a photo ID.

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<sup>1</sup> Judicial notice can be taken of commonly known facts. *See* Ark. R. Evid. 201; *see, e.g., Manatt v. State*, 311 Ark. 17, 22, 842 S.W. 2d 845, 847 (1992) (taking judicial notice of census data); *St. Louis S.W. Ry. Co. v. Taylor*, 258 Ark. 417, 421-22, 525 S.W.2d 450, 452-53 (1975) (taking judicial notice of the locations of and distances between towns, the travel time between them, and customary routes).

To address such burdens, most states’ photo ID laws either “make photo IDs readily accessible to voters” or “create some method by which voters without photo IDs can continue to vote . . . , typically with an affidavit.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 46 (D.D.C. 2012). But, as written, Act 595 does not ameliorate the barriers posed for qualified electors who lack photo ID—indeed, it is almost unique in also requiring absentee voters to provide “proof of identity.”

In light of these concerns, *Amici*, the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) and others, wrote to Appellant, Secretary of State Mark Martin, explaining how the inaccessibility of the county clerks and the costs of obtaining photo ID would result in Black voters having unequal access to the political process in Arkansas. Letter from LDF to Sec’y of State, May 5, 2014, at 4-7, available at [http://www.naacpldf.org/files/case\\_issue/LDF%20Letter%20to%20Arkansas%20re%20Voter%20ID%20Law\\_2.pdf](http://www.naacpldf.org/files/case_issue/LDF%20Letter%20to%20Arkansas%20re%20Voter%20ID%20Law_2.pdf) (hereinafter “May 5 Letter from LDF”). In its response, the Secretary’s office acknowledged that LDF’s letter raised “serious issues” and that the “[t]ransportation issues, cost issues, and other purported burdens . . . merit further discussion and review.” Letter from Dir. Elections, Ark. Sec’y of State, to NAACP Legal Defense Fund, Inc., May 15, 2014, at 4-5, available at [http://www.naacpldf.org/files/case\\_issue/05.15.2014%20AR%20SOS%20Full%20Response.pdf](http://www.naacpldf.org/files/case_issue/05.15.2014%20AR%20SOS%20Full%20Response.pdf) (hereinafter “May 15 Letter from Sec’y of State”). The only step that the Secretary’s office has taken to address these concerns, how-

ever, was to offer the county clerks unspecified “additional training” and to also “provide Voter ID update refresher training at the Clerk’s continuing education seminar.” *Id.* at 6. Furthermore, after a June 18, 2014 meeting with LDF, the Secretary’s office expressed only a vague hope that, in the future, it would employ ameliorative procedures to address these serious issues. To date, however, the Secretary has neither offered, nor implemented, any concrete corrective plans. Letter from Dir. Elections, Ark. Sec’y of State, to LDF, July 1, 2014, at 2-4, *available at* [http://www.naacpldf.org/files/case\\_issue/07.01.2014-AR-SOS-Letter-to-LDF-and-Attachments.pdf](http://www.naacpldf.org/files/case_issue/07.01.2014-AR-SOS-Letter-to-LDF-and-Attachments.pdf) (hereinafter “July 1 Letter from Sec’y. of State”).

Accordingly, and as discussed in detail below, the three primary problems that electors face in complying with the Voter ID Law remain.

**A. Thousands of Arkansas Electors Lack the ID Required By Act 595.**

Under the Voter ID Law, “proof of identity” for in-person voters includes a driver’s license, passport, U.S. military ID, or student ID card, and in-person voters without the requisite ID are prohibited from casting a regular ballot. Ark. Code Ann. § 7-1-101(25)(B) (2013). While the “proof of identity” requirement for absentee voting is different, *id.* at § 7-5-201(d)(1)(B), the mail-in ballots cast by absentee voters without the requisite ID are automatically discarded.

The “proof of identity” requirement poses great difficulties for a large part of the electorate. Nationally, “[a]s many as 11 [%] of United States citizens—more

than 21 million individuals—do not have government-issued photo [ID].” See Brennan Ctr., *Citizens Without Proof* 3 (2006), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf). This lack of photo ID is more pronounced amongst certain groups of voters. For example, one quarter of the Black voting-age population (VAP) and 19% of the Latino VAP (as compared to 8% of the white VAP) in America lack photo ID. *Id.* at 3. Eighteen percent of the VAP over 65 lack photo ID; *id.*, and, while 79% of white youth age 18-20 have a driver’s license, only 57% of Latino and 55% of Black youth possess such ID. See AAA Found. for Traffic Safety, *Timing of Driver’s License Acquisition and Reasons for Delay among Young People in the United States*, at 9 (2013), available at [https://www.aaafoundation.org/sites/default/files/Teen%20Licensing%20Survey%20FINAL\\_0.pdf](https://www.aaafoundation.org/sites/default/files/Teen%20Licensing%20Survey%20FINAL_0.pdf); Jon C. Rogowski & Cathy J. Cohen, The Black Youth Project, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election*, at 5 (Figure 1), (2013), <http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf> (finding that 71.2% of Blacks, 67.0% of Latinos, and 85.1% of whites aged 18-29 have a driver’s license).

Although Appellants have an obligation to educate voters about Act 595, they have made no effort to determine how many of Arkansas’s registered voters

have – or do not have – photo ID.<sup>2</sup> July 1 Letter from Sec’y of State, at 3-4. *Cf. Applewhite*, 2014 WL 184988, at \*15-17 (describing the attempts, while flawed, of Pennsylvania to identify and contact voters without photo ID). This is unreasonable because Appellants unquestionably have the ability to acquire this information: they can simply perform a matching analysis between the identifying information of registered voters and that of individuals in the Department of Motor Vehicles (DMV) database to estimate the number of voters without DMV-issued photo ID.

Notwithstanding Appellants’ unreasonable failure to determine how many Arkansas voters lack the ID required by Act 595, evidence suggests the number is substantial. For example, in the May 20, 2014 primary and June 10, 2014 runoff—the first elections in which the Voter ID Law was in effect—over 1,000 in-person provisional and absentee ballots were invalidated solely due to the otherwise eligi-

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<sup>2</sup> The Appellants have at times stated that because “there were more than 2.4 million validly-issued State Driver’s Licenses and [ID] Cards . . . while the state had 1.62 million registered voters; [or] nearly 800,000 more people with photo [ID] than currently registered to vote,” few voters are likely to lack photo ID. May 15 Letter from Sec’y of State, at 4.

There is no logical basis for this claim, however. Absent a deliberate matching analysis between each of the individual electors appearing on the two above-referenced databases, the Secretary’s bare numbers comparison is meaningless.

ble electors' failure to provide "proof of identity." See Ex. B: Dickson Aff. at 3-4, Pls.' Mot. to Lift Stay, *Kohls v. Martin*, No. 60CV-14-1495 (Pulaski Cnty. Cir. Ct. June 24, 2014) (showing, based on records requests to county election officials, that 933 absentee and 131 in-person provisional ballots from the May 20, 2014 election were not counted due to Act 595); July 1 Letter from Sec'y of State, at 2, 14-19 (data from the Secretary of State showing that at least 742 absentee and 36 in-person provisional ballots from the May 20, 2014 election and 68 absentee ballots from the June 10, 2014 runoff were not counted due to Act 595).<sup>3</sup> The invalidation of such large numbers of ballots can, and does, change the outcome of elections and eliminates the voice of large portions of the electorate. For example, in St. Francis County—where Black people represent over half the population—80% of the absentee ballots cast were invalidated due solely to otherwise valid voters' failure to mail-in "proof of identity" with their ballots. Dickson Aff. at 4; *Most St. Francis Absentee Ballots Disqualified*, Associated Press, May 22, 2014, available at <http://www.washingtontimes.com/news/2014/may/22/most-st-francis-absentee-ballots-disqualified/>.

Notwithstanding this significant and burdensome voting change, and its likely impact on Arkansas's Black voting population (among others), Appellants have

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<sup>3</sup> The County Clerks, not the Secretary of State, are the more reliable source for data on voters disfranchised by Act 595. July 1 Letter from Sec'y of State, at 2.

issued only 33 photo voter ID cards through the county clerks since January 2014. July 1 Letter from Sec’y of State, at 12. Clearly, the production of this relative handful of voter ID cards does not alter, in any meaningful way, the number of voters who lack photo ID or the racial and age disparities that exists among those voters. In fact, the low number of issued voter ID cards underscores the failure of Act 595 to make such IDs widely accessible to the many voters who need them.

**B. The County Clerks Offices in Arkansas are Inaccessible.**

In order to vote under Act 595, voters without “proof of identity” must negotiate a complicated process that may only be completed at one of few limited locations during restricted hours. Any person without a photo ID must *either* (a) go to the office of the county clerk *before* the election to obtain a “free” voter ID card<sup>4</sup> that permits her/him to cast a regular ballot, Ark. Code Ann. § 7-5-322(a)(1)(B)(iv) (2014), or (b) cast a provisional ballot in-person during the election, but this vote is counted only if “[t]he voter returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election.” *Id.* § 7-5-321(c)(1). Thus, if a voter casts a provisional ballot s/he must then complete the often-lengthy trip to the county clerk or election commission, and, if not chal-

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<sup>4</sup> The voter ID cards issued by the county clerks are the one form of ID that is issued without a direct fee, Ark Code Ann. at § 7-5-322(b), and that does not require joining a group (*e.g.*, the military) or learning a new skill (*e.g.*, to drive).

lenged on another basis, must either: (a) show valid photo ID, which s/he lacked in the first instance; or (b) swear in an affidavit that s/he is indigent or has a religious objection to being photographed. *Id.* § 7-5-321(c). The votes of people who do not present photo ID or are unable to perfect their provisional ballots are discarded. As the data from the 2014 elections shows, this can and does have devastating results.

In Arkansas, the county clerks' offices are the *only* place where a person can obtain a voter ID card *and* complete the provisional ballot process.<sup>5</sup> However, Act 595 does not provide statewide rules on when or where a county clerk must issue voter ID cards. Thus, the county clerks use their discretion to decide when and where to offer voter ID related-services. Currently, such services are only available during business hours on weekdays; are rarely available on weekends; and are never available in the evenings. May 5 Letter from LDF, at 3; May 15 Letter from Sec'y of State, at 5. Neither the State, nor the county clerks operate offsite or mo-

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<sup>5</sup> While a voter can go to the board of election commissioners to perfect a provisional ballot, *id.* § 7-5-321(c)(1), the county clerks' offices are the only places at which a voter can *both* obtain a photo ID card *and* complete a provisional ballot. *Id.* § 7-5-322(a)(1)(A)(iv). Thus, for many qualified electors, the option of visiting the election commissioners to perfect a provisional ballot is not meaningful because s/he will often face two trips—one to get the photo ID at the county clerk's office and a second to the election commissioners to perfect her/his ballot.



bile photo ID-issuing offices. July 1 Letter from Sec’y of State, at 2-3. There are no ride-shares offered to voters in need of transportation. *Id.*

Electors without the required “proof of identity” necessarily lack state driver’s licenses, which increases the importance of reliable public transportation. *Cf. Applewhite*, 2014 WL 184988, at \*23 (finding that requiring “electors lacking a drivers’ license to find a means of transport to [a photo ID-issuing office], which may be several miles away . . . , during restricted hours on select days, unnecessarily inconveniences the fundamental right to vote.”). In Arkansas, 15.3% of Black households, as compared to 4.8% white households, have no vehicle. U.S. Census Bureau, *Selected Population Profile*, 2010-2012 American Community Survey 3-Year Estimates, generated at <http://factfinder2.census.gov/> (hereinafter “ACS”). People over 65 years old (14.6% of the Arkansas population) and non-institutionalized people with disabilities (16.4% of the population) are also more dependent on public transportation. *Selected Population Profile*, 2010-2012 ACS; Ark. State Highway & Public Transp. Dep’t, *The 2013 Arkansas Public Transportation Directory* 3, [https://www.arkansashighways.com/public\\_transportation/2013\\_PT\\_Directory\\_Update\\_Final2.pdf](https://www.arkansashighways.com/public_transportation/2013_PT_Directory_Update_Final2.pdf) (recognizing the special transportation needs of seniors and the disabled). But, Arkansas spends just \$1.38 per capita on public transportation, placing it in the bottom fifteen states in the nation for such spending. Am. Ass’n of State Highway & Transp. Officials, *Survey of State Funding for*

*Public Transportation, Final Report 2012*, at 1-16 (Table 1-10), available at <http://scopt.transportation.org/Documents/SSFP-6.pdf>. Thus, a significant number of voters do not have a way to reach the clerks' offices and secure a voter ID card.

Given the limited availability of public transportation, the county clerk's offices are all but completely inaccessible to even the most determined, non-driving Black voters in multiple cities and towns. For example, for the residents of Cotton Plant Township, Woodruff County—where 72.7% of the population is Black, 43.3% of Black households have no vehicle, and 51.5% of Black households are in poverty, *Selected Population Profile*, 2006-2010 ACS—the shortest drive between the township and the clerk's office in Augusta is an exhausting sixty (60) miles roundtrip. There is no public transportation available for this route.<sup>6</sup> *See Republican Party of Ark. v. Faulkner Cnty., Ark.*, 49 F. 3d 1289, 1297-99 (8th Cir. 1995) (finding unconstitutional Arkansas election laws that “forced [voters] to travel long distances, in some cases as much as sixty miles”). Similarly, voters in Marvell—where 29.7% of Black households, but only 4.2% of white households have no vehicle, *Selected Population Profile*, 2006-2010 ACS—and Elaine—where 46.4% of

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<sup>6</sup> All of the driving and public transportation distances, routes, and travel times described herein were determined by searching for the shortest directions between the named city and the street address of the county clerk's office in Google Maps, <http://maps.google.com> (last visited Aug. 4, 2014).

Black households have no vehicle, *id.*—prospective voters must drive forty (40) and fifty (50) miles roundtrip, respectively, to reach the clerk’s office in Helena-West-Helena. There is no public transportation option for either of these routes.

Even where public transportation is available, such as in Jacksonville—where 15.2% of Black households and 7.6% of white households have no vehicles available, *id.*—a bus ride to the county clerk’s office in Little Rock is a prohibitive one hour and ten minutes of actual travel time each way. And, even though it is technically available, the limited bus schedule between Jacksonville-Little Rock only allows a person to leave Jacksonville at 6:14 AM and return from Little Rock at 5:29 PM. Therefore, the bus trip would, literally, take all day.

The locations of the county clerks and a lack of access to transportation, further combine with the limited hours of the county clerks, to create significant barriers for Black, elderly, poor, and disabled voters. Low wage workers—in particular, Black Arkansans who are nearly twice as likely as white Arkansans to work in service occupations, *Selected Population Profile, 2010-2012 ACS*—often have less flexibility to take time off to visit the county clerk during normal weekday business hours. *Cf. Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1256 (N.D. Miss. 1987), *aff’d sub nom.*, 932 F.2d 400 (5th Cir. 1991) (finding that, because Black people “predominate[d]” in “service worker positions,” a law requiring them to register to vote during weekday business hours had a disparate impact).

There are also nearly three times as many Black female-headed, single parent households (31.7%) as there are such white households (10.3%), which can increase the relative childcare costs and inconveniences of reaching the county clerks during weekday business hours. *Selected Population Profile, 2010-2012 ACS*.

Moreover, the limited accessibility and hours of the clerks' offices violate the spirit of a consent decree between Appellants and *Amici* LDF and the Arkansas NAACP. In *ACORN v. Clinton*, Appellants were sued under the Voting Rights Act (VRA) and U.S. Constitution and were required to provide additional opportunities for voter registration. Consent Decree, *Ark. Cmty. Org. for Reform Now v. Clinton*, No. 4:84-cv-00808 (E.D. Ark. Dec. 28, 1987) ("Attachment A" of the May 5 Letter from LDF, at 9-18). Prior to this lawsuit, the State had severely burdened the right of Black, elderly, and poor people to register to vote by restricting registration to the county clerks' offices, refusing to conduct off-site registration, and largely limiting registration to the regular weekday business hours of the clerks' offices. May 5 Letter from LDF, at 12-13. These are the very same burdens that Act 595 now imposes on Black, elderly, and disabled voters. Thus, Appellants' current failure to create equal opportunities for Black voters "to obtain what [under Act 595] is essentially a license to vote" may also violate the VRA. *Frank v. Walker*, Nos. 11-CV-01128, 12-CV-00185, \_\_\_ F. Supp.2d \_\_\_, 2014 WL 1775432, at \*29-30 (E.D. Wis. Apr. 29, 2014) (holding that Wisconsin's voter ID law violates the VRA).

Additionally, the history of racial violence at Arkansas’s county courthouses and county seats—the places in which the county clerks’ offices are located—can further deter Black voters from securing a voter ID card. *See, e.g., Moore v. Dempsey*, 261 U.S. 86, 88-89 (1923) (describing the lynch mob-influenced, unconstitutional convictions of several Black men in Phillips County, Arkansas); *Two Murderers Lynched.; Hanged to a Telegraph Pole and Their Bodies Filled with Bullets*, N.Y. Times, Feb. 14, 1892 (describing the lynchings of two Black men at the Jefferson County Courthouse in Pine Bluff, Arkansas). In Arkansas, and elsewhere, “public spaces were used to enforce the message of white supremacy, often violently.” Sherrilyn A. Ifill, *On the Courthouse Lawn*, at xviii, 16-17 (2007) (describing Hope, Arkansas, as “the lynching capitol of the South” and “the burning of Will Turner in a city park” in Helena, Arkansas). Given this history, many Black people are hesitant to go to county courthouses to qualify to vote. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 625-26 (1982) (finding that “the effects of past discrimination . . . still haunt the county courthouse”); *United States v. Dallas Cnty. Comm’n*, 739 F.2d 1529, 1538 (11th Cir. 1984) (finding that “fear by [B]lack of the county courthouse, the site of the Board of Registrars,” impaired Black voter registration).

### **C. The Ancillary Costs and Difficulties of Obtaining Photo IDs.**

Even if an eligible voter is able (and willing) to reach a county clerk, s/he must present acceptable documentation to prove identity and residency in order to

obtain a voter ID card. Voter Identification Admin. R. 7.03 and 7.04 (hereinafter “Admin. R.”). These rules provide an exclusive list of such documentation, including a birth certificate, marriage license, notarized tax return, paycheck, certified school transcript, insurance policy, or bank statement. *Id.* Because of the fees and distinct problems that voters who are Black, Latino, female, LGBT, living in poverty, and/or homeless face in securing this documentation, these rules constitute substantial barriers to voting.

The money and time costs faced by voters seeking this documentation can be disheartening. The fees for the documents vary, *e.g.*, \$12 for an Arkansas birth certificate and \$10 for marriage records, but they can be substantial for voters with limited incomes, rivaling the fees paid for a driver’s license.<sup>7</sup> Ark. Dep’t of Health, *Vital Records / Statistics*, <http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/default.aspx>. Birth certificates can also take up to six weeks for delivery. *Id.* Similarly, notarized tax returns and certified transcripts can cost \$5.00 or more. Ark. Code Ann. § 21-6-309(a)(3); *Transcript Request*, Registrar, Univ. of Ark., <http://registrar.uark.edu/412.php>. Fees for similar documents originating outside of Arkansas can exceed these costs. *See, e.g., Weinschenk v.*

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<sup>7</sup> A driver’s license costs \$25 and a state ID costs \$5. Ark. Dep’t of Finance & Admin., *FAQ – Driver License and ID Cards for Adults*, <http://www.dfa.arkansas.gov/offices/driverServices/Pages/FAQ%27s.aspx#g>.

*State*, 203 S.W.3d 201, 208 (Mo. 2006) (“Missouri charges \$15 to provide the certified, embossed copy of a birth certificate” and other states’ “fees rang[ed] from \$5 to \$30.”).

These costs unquestionably discourage the poor from voting. In Arkansas, 28.6% of the Black population, 26.4% of Latino population, and 14.1% of the white population over age 18 live in poverty. *Selected Population Profile, 2010-2012 ACS*. Requiring poor electors who lack the required photo ID to pay such fees in order to vote is akin to a poll tax. Ark. Const. amend. 51 § 17 (repealing the poll tax). *See, e.g., Harman v. Forssenius*, 380 U.S. 528, 540-42 (1965) (“Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity [to the poll tax] subverts the effectiveness of the Twenty-fourth Amendment and must fall . . .”).

Fees aside, it is difficult, and at times impossible, to obtain documentary proof of identity without already having a photo ID. For instance, Arkansas, like most other states, requires a photo ID before a person can obtain a copy of their birth certificate. Ark. Dep’t of Health, *Vital Records / Statistics*, <http://www.health.y.arkansas.gov/programsServices/certificatesVitalRecords/Pages/default.aspx>.

Internet access also is crucial to acquiring a birth certificate and similar documents. Yet, 24% of Black Arkansans do not use the internet, as compared to only 15% of white Arkansans. Connect Arkansas, *Broadband Survey Results 2013*,

<http://www.connect-arkansas.org/sites/default/files/BroadbandSurveyResults2013.pdf>. Similarly, 49% of people with no high school degree, 36% of disabled people, and 31% of people with incomes below \$25,000 also do not use the internet. *Id.*

Further, people of color have unique problems in obtaining birth certificates. For example, “[a]s late as 1950, nearly a quarter of nonwhite births in rural areas in the United States went unregistered, as opposed to 10% of white births in rural areas in the United States.” *Frank*, 2014 WL 1775432, at \*30 n.36 (citing Sam Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4:1 *Populations Studies: A Journal of Demography* 86, 98–99 (1950)). And voters born at home by midwife are often required to engage in a long, complex, and costly legal process to acquire an official birth certificate. *See, e.g.*, Richard Sorbel, *The High Costs of ‘Free’ Voter Identification Cards* at 20, Houston Inst. (June 2014), <http://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf>. Relatedly, the 2,343 Arkansans born in Puerto Rico, *Place of Birth By Citizenship Status, 2006-2010 ACS*, will need to obtain new birth certificates “because the Puerto Rican government annulled all birth certificates of individuals born there prior to 2010. To obtain a new birth certificate, a person must either travel to Puerto Rico or pay a ‘hefty charge’ to obtain a new birth certificate by mail.” *Frank*, 2014 WL 1775432, at \*30 n.37.



Securing photo ID that accurately reflects current information also presents burdensome costs and challenges. Nationally, 10% of all voters do not have a photo ID that reflects their current name or address. Brennan Ctr., *Citizens Without Proof*, at 3. Even people who have a driver’s license, but wish to change their names must pay a \$10 fee. Ark. Dep’t of Finance and Admin., *FAQ – If You Have Changed Your Name*, <http://www.dfa.arkansas.gov/offices/driverServices/Pages/FAQ%27s.aspx#c>. For example, women who “follow the social custom of taking their husband’s name upon marriage; [or,] in the event of a divorce, women [who] revert to using their maiden name” must acquire photo ID or documentation showing their correct name. *Weinschenk*, 203 S.W.3d at 208. But, the rules do not allow divorce records to be used for obtaining a voter ID card. Admin. R. 7.03.

Likewise, 40% of transgender Americans—individuals who are living their lives as a gender different from the gender assigned to them at birth—have yet to update their driver’s licenses to reflect changes in their names, genders, and appearances. The Williams Inst., *The Potential Impact of Voter Identification Laws on Transgender Voters 2* (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Voter-ID-Apr-2012.pdf>. Because poll workers compare the photo and name on the ID to the voter, transgender voters may be more susceptible to vote challenges if the differences in their names, genders, and appearances are not clearly evident on their official ID. *Id.*

Finally, homeless voters must overcome an unduly restrictive proof of residency requirement to obtain a photo ID. *See* Admin. R. 6.03(b) (requiring proof of a “Residential street address where the applicant is registered to vote”); Admin. R. 7.04 (listing acceptable proof of residency documentation). In Arkansas, 56.3% of the homeless are unsheltered, which represents the third highest rate of such homeless people nationwide. U.S. Dep’t of Hous. & Urban Dev., *The 2013 Annual Homeless Assessment Report to Congress*, at 9 (2013), available at <https://www.onecpd.info/resources/documents/AHAR-2013-Part1.pdf>. A residential address is impossible for many unsheltered homeless people to provide, but the administrative rules require a physical address at which to mail the voter ID card. Admin. R. 7.07. Arkansas has recognized the problems that this can cause for homeless and rural voters at the registration phase, *i.e.*, registrants can simply draw their location on a map, but not at the point of obtaining voter ID cards. *See* Ark. Voter Registration Application, available at [http://www.sos.arkansas.gov/elections/Documents/Voter\\_Reg\\_Ap\\_6-11.pdf](http://www.sos.arkansas.gov/elections/Documents/Voter_Reg_Ap_6-11.pdf). *See also* Frank, 2014 WL 1775432, at \*15 (finding that Wisconsin’s voter ID law created similar obstacles for homeless electors).

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Because Black and other marginalized voters are more likely than white or other more affluent voters to shoulder the increased costs associated with voting under the Voter ID Law, the law is more likely to discourage and prevent these

vulnerable voters from casting a ballot. *See, e.g., United States v. Berks Cnty., Pa.*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (“[D]enial of equal access to the electoral process discourages future participation by voters.”); Rogowski & Cohen, *supra*, at 1 (“Black youth reported that the lack of required identification prevented them from voting at nearly four times the rate of white youth . . .”).

## **II. THE PRELIMINARY INJUNCTION WAS PROPERLY GRANTED.**

In light of the above-described improper and discriminatory burdens on the franchise caused by Act 595, the circuit court, before issuing a preliminary injunction, correctly determined that: (1) irreparable harm would result absent the injunction, and (2) Appellees were likely to succeed on the merits. *Baptist Health v. Murphy*, 365 Ark. 115, 120, 226 S.W.3d 800, 806 (2006).

Because the instant proceedings arise from an interlocutory appeal of an injunction, this Court’s review is limited to determining whether the circuit court abused its discretion in granting the injunction. *Potter v. City of Tontitown*, 371 Ark. 200, 206, 264 S.W.3d 473, 478 (2007). This Court must “not delve into the merits of the case further than is necessary to determine whether the circuit court exceeded its discretion in granting the injunction.” *Murphy*, 365 Ark. at 121, 226 S.W.3d at 806-07. Accordingly, the circuit court is entitled to substantial deference and, for the reasons below, this Court should affirm the grant of an injunction.

### **A. The Preliminary Injunction Will Prevent Irreparable Harm.**

The circuit court did not abuse its discretion in finding that Appellees would suffer irreparable harm in the absence of an injunction. The court properly held that, as an unconstitutional elector qualification, Act 595 irreparably harms the right to vote; and *no* qualified elector is legally obligated to comply with it.<sup>8</sup>

The threatened violation of a constitutional right is an irreparable harm that money damages cannot repair. *See, e.g., McCuen v. Harris*, 321 Ark. 458, 467, 902 S.W.2d 793, 798-99 (1995) (holding that irreparable harm resulted from the violation of a “constitutional mandate” where “[n]o monetary value [could] be placed on the resulting prejudice”). The right to vote is an explicit, fundamental right. Ark. Const. art. III, §§ 1, 2. Thus, a law that “heavily burden[s]” this fundamental right is presumed to work an irreparable harm. *Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056, 1061-63 (E.D. Ark. 2006). *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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<sup>8</sup> Despite Appellants’ arguments, Appellant Sec’y of State Br. at 2-4, as registered voters, *id.* at Ab. 2, Appellees had standing to challenge Act 595. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009) (“Requiring a registered voter either to produce photo [ID] to vote . . . is an injury sufficient for standing. . . . [T]he lack of an acceptable photo [ID] is not necessary . . .”).

As discussed *supra*, Act 595 has already lead to the rejection of over a thousand otherwise valid ballots due solely to voters' failure to provide "proof of identity," and thereby imposed real, irreparable harm. *See Dickson Aff.* at 3-4 (over one thousand ballots invalidated in the May 20, 2014 election). Because those "voters denied equal access to the electoral process cannot collect money damages after trial for the denial of the right to vote," *Berks Cnty., Pa.*, 250 F. Supp. 2d at 540-41, the actual disfranchisement of voters constitutes a significant harm that justifies an injunction. *See Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir.1986) (holding that the denial of the franchise "certainly" constitutes "irreparable harm").

**B. Appellees are Likely to Succeed on the Merits.**

The circuit court also was correct in concluding that Appellees are likely to succeed on the merits. There is a "clear incompatibility between [Act 595] and the Arkansas Constitution." *Robert D. Holloway, Inc. v. Pine Ridge Addition Residential Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998). The Arkansas Constitution has an exclusive list of elector qualifications. Ark. Const. art. III, § 1. "The [C]onstitution having fixed the qualification of an elector in this state, those possessing the qualifications required, [cannot] be deprived of the right to vote by legislative enactment . . . ." *Rison v. Farr*, 24 Ark. 161, 176 (1865). Because Act 595 is a legislatively-created intrusion upon the right to vote, it is unconstitutional.

Moreover, because, as described above, Act 595 heavily and unequally encumbers the right to vote of Arkansan electors who are Black, Latino, women, LGBT, and/or living in poverty, the law is subject to strict scrutiny. *Ark. Dep't of Human Servs. v. Cole*, 2011 Ark. 145, 380 S.W.3d 429, 437, 440 (2011). Even assuming the validity of the asserted State interests for Act 595—*i.e.*, preventing voter fraud, ensuring election modernization, or safeguarding voter confidence, Appellant Sec'y of State Br. at 22-23—it is not “the least restrictive means necessary to serve the State’s interest” and, thus, must fail. *Cole*, 380 S.W.3d at 440-42.

1. *Act 595 is an Unconstitutional Additional Elector Qualification.*

Unlike the federal Constitution, the Arkansas Constitution “fixes the qualifications and determines who shall be deemed qualified voters in this state, in direct, positive and affirmative terms, and these qualifications cannot be added to by legislative enactment.” *Rison*, 24 Ark. at 161. The Constitution also expressly guarantees that “[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby such right shall be impaired or forfeited . . . .” Ark. Const. art. III, § 2. Because the concrete rights of Arkansas electors offer greater protections than the federal Constitution, this Court must again “recognize[] protection of individual rights greater than the federal floor.” *Jegley v. Picado*, 349 Ark. 600, 631, 80 S.W.3d 332, 349 (2002).

Here, the best corollary in the federal Constitution to the specific individual elector qualifications in the Arkansas Constitution are the Qualification Clauses for U.S. Senators and Representatives in Article I. In *U.S. Term Limits, Inc. v. Hill*, this Court considered whether an amendment to the Arkansas Constitution establishing term limits for incumbent members of Congress created an additional eligibility standard in violation of the U.S. Constitution. 316 Ark. 251, 872 S.W. 2d 349, 355 (1994), *aff'd* 514 U.S. 779 (1995). Like the state Constitution's clause governing individual electors, the federal Qualification Clauses expressly describe the qualifications for service in Congress. U.S. Const. art. 1, § 2, cl. 2 and § 3, cl. 3. Thus, this Court rejected claims that the term limits were "regulatory," and held that the "additional criterion based on length of service [were] in direct conflict with the Qualification [C]lauses" because these Clauses "fix the sole requirements for congressional service." *Hill*, 316 Ark. at 266, 872 S.W.2d at 356-57.

Under the Voter ID Law, the Legislature, without the benefit of a constitutional amendment, has sought to add a "proof of identity" requirement to elector eligibility; thereby expanding the constitutional list of qualifications to read nationality, residency, age, registration, *and* "proof of identity." But, electors are immunized from such extra-constitutional requirements; and the limited regulatory powers entrusted to the Legislature do not provide a legal basis for Act 595. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193 (2008) ("[N]either [the]

H[elp] A[merica] V[ote] A[ct] nor [the] N[ational] V[oter] R[egistration] A[ct] required Indiana to enact [the photo ID law.]; *Rison*, 24 Ark. at 172 (“The legislature cannot, under color of regulating the manner of holding elections . . . impose such restrictions as will have the effect to take away the right to vote . . .”).

Because the “proof of identity” requirement, on its face, legislatively expands the list of individual elector qualifications, Act 595 is unconstitutional and Appellees are likely to succeed on the merits of this claim.

2. *Act 595 is Overly Restrictive and Fails under Strict Scrutiny.*

As detailed in Part I, Act 595 places unforgiving burdens on the franchise for Black and other voters, infringing upon their explicit right to vote in the Arkansas Constitution. Ark. Const. art. III, §§ 1, 2. *Cf. Cole*, 380 S.W.3d at 438-40 (applying strict scrutiny to an act that “substantially burden[ed]” an implicit right). The burdens inherent in Act 595 “have the effect [of] tak[ing] away the right to vote.” *Rison*, 24 Ark. at 172. Thus, because these “increases in the costs of voting can deter a person from voting,” *Frank*, 2014 WL 1775432, at \*17, the law is subject to strict scrutiny. *See Applewhite*, 2014 WL 184988, at \*21 (“The burdens the Voter ID Law entails are unnecessary and not narrowly tailored to serve a compelling governmental interest.”); *Weinschenk*, 203 S.W.3d at 217 (similar).

“When a statute infringes upon a fundamental right, it cannot survive unless a compelling state interest is advanced by the statute and the statute is the least re-



strictive method available to carry out the state interest.” *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (internal citation and quotations omitted). Even assuming that compelling State interests exist, *Weinschenk*, 203 S.W.3d at 217—the “proof of identity” requirement is not “the least restrictive” means, *Cole*, 380 S.W.3d at 440-42, of preventing voter impersonation, ensuring election modernization, or safeguarding voter confidence. Appellant Sec’y of State Br. at 22-23.

Appellants assert that the “proof of identity” requirement ensures that the “person attempting to cast a ballot is the registered voter they claim to be.” *Id.* at 21. But, the Voter ID Law is not the least restrictive means of accomplishing this goal for either in-person or absentee voters. Indeed, Arkansas’s prior photo ID law mandated that all in-person voters show photo ID and required poll workers to indicate when a voter failed to show photo ID. Ark. Code Ann. § 7-5-305(a)(8)(B)(i) (a) (2012). That prior law *did not* disfranchise voters who did not show photo ID; they were still able to cast regular ballots. *Id.* at § 7-5-305(a)(8)(A). The fact that the prior law served the same asserted interests as Act 595 without the same undue burden shows that Act 595 is overly restrictive. *Cf. Weinschenk*, 203 S.W.3d at 217-18 (holding that a photo ID law was not narrowly tailored as there was no fraud under a “much less restrictive” prior law).

Appellants point to three recent voter fraud cases to claim that Act 595 is necessary; yet none of these cases involved voter impersonation. Appellant Sec’y

of State Br. at 22-23. *See Willis v. Crumbly*, 371 Ark. 517, 268 S.W.3d 288 (2007) (invalidated absentee votes and alleged county clerk misconduct); *Willis v. Crumbly*, 368 Ark. 5, 242 S.W.3d 600 (2006) (same); *United States v. Hallum, et al.*, No. 4:12-CR-230 (E.D. Ark. 2012-13) (vote buying). Because the in-person “proof of identity” requirement does not address such fraud, the law exacts an undue toll on the right to vote. *Cf. Weinschenk*, 203 S.W.3d at 204-05, 217 (invalidating an in-person photo ID law that failed to address absentee and voter registration fraud).

Likewise, the “proof of identity” requirement for absentee voters also cannot provide the ballot security that Appellants seek. A voter ID requirement for absentee ballots is, at best, futile because “there [is] no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since [the voter] wouldn’t be presenting his face at the polling place for comparison with the photo.” *Crawford*, 472 F.3d 949, 954 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008); *see also City of Memphis v. Hargett*, 414 S.W.3d 88, 110 (Tenn. 2013) (“[U]sing the same method to verify the identity of absentee voters would not be feasible . . . .”); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 768 (Ind. 2010) (applying a voter ID law to absentee ballots “would be impracticable, unnecessary, or of doubtful utility”). This State already has a rigorous system for examining the propriety of absentee ballots. *See, e.g., Willis*, 268 S.W.3d at 296 (invalidating improperly cast absentee ballots).

Although Appellants rely on *Crawford*, in which the U.S. Supreme Court applied a “balancing test” to uphold Indiana’s voter ID law under rational basis because the law “impose[d] only a limited burden on voters’ rights,” 553 U.S. at 203 (internal citation and quotations omitted), that decision is inapposite. Appellant Sec’y of State Br. at 19-20. Indeed, while the state Constitution offers greater protection than the U.S. Constitution, even under federal law, “an unjustified burden on some voters will be enough to invalidate a law, even if, . . . the law burdens [most] other voters only trivially . . . .” *Frank*, 2014 WL 1775432, at \*5; *see also Republican Party of Ark.*, 49 F.3d at 1297-99 (applying strict scrutiny to election laws that imposed “heavy burdens” on some voters, including requiring them to “travel long distances” and to expend “time and energy” to locate polling places).

Finally, the holdings of other state appellate courts do not save Act 595 because none of the ameliorative provisions present in other state voter ID laws are in Act 595. For example, the Michigan Supreme Court upheld a voter ID law that allowed any elector to vote by affidavit without a photo ID.<sup>9</sup> *In re Request for Advi-*

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<sup>9</sup> Voters who are “indigent” or have a “religious objection” to being photographed can vote without ID by affidavit, Ark. Code Ann. § 7-5-321(c), but no statewide affidavit forms exist, so voters must guess whether and how to complete one. July 1 Letter from Sec’y. of State, at 2. The law also fails to define “indigent”

*sory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 24, 740 N.W.2d 444, 457 (2007). The Georgia Supreme Court upheld that state’s voter ID law because, unlike in Arkansas, every Georgian can opt to cast an absentee ballot as of right, without showing ID. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 726, 707 S.E.2d 67, 73 (2011); *see also Hargett*, 414 S.W.3d at 105 (similar). Act 595, on the other hand, mostly requires some “proof of identity” to vote in-person or absentee and lacks the potentially ameliorative aspects of other voter ID laws.

Accordingly, because, on its face, Act 595 is overly restrictive and does not mitigate the undue burdens that it places on Black and other qualified electors, the law is likely unconstitutional and the circuit court properly enjoined it. To admit otherwise “would be to declare part of the constitution which defines the qualifications of a voter, absolutely nugatory . . . .” *Rison*, 24 Ark. at 172.

### **CONCLUSION**

For the forgoing reasons, *Amici* respectfully request that this Court affirm the preliminary injunction order of the circuit court enjoining Act 595.

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or “religious objection,” “leaving those terms open to interpretation, and attendant abuses of discretion.” *Applewhite*, 2014 WL 184988, at \*62.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Maximillan Sprinkle, I hereby certify that true and correct copies of the forgoing have been served via United States Mail, postage prepaid, upon the Circuit Court and the following counsel of record on this the 11th day of August, 2014:

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