IN THE SUPREME COURT OF ARKANSAS

MARK MARTIN, et al. APPELLANTS

v. Case No. CV-14-462

FREEDOM KOHLS, et al. APPELLEES

AN INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

THE HONORABLE TIMOTHY FOX, CIRCUIT JUDGE

BRIEF OF AMICUS CURIAE PEOPLE FIRST VOTING PROJECT IN SUPPORT OF APPELLEES

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I. INTRODUCTION

People First Voting Project ("People First") is a nonprofit corporation that promotes and facilitates nonpartisan civic engagement, voter participation, voter registration, and voter turnout in Arkansas. In support of its mission, People First calls and visits registered Arkansas voters to encourage them to vote. If the voter ID provisions in Act 595 of the 2013 Arkansas General Assembly are upheld, People First will be compelled to divert a substantial amount of its limited resources, which it otherwise would have used for its regular voter outreach and education efforts, to inform voters about Arkansas' voter ID requirements, and conduct get-out-the-vote efforts directed toward people who will be discouraged by the new law from even attempting to vote, as well as those who would have voted absentee, but could not take the risk that their ballots—like the ballots of over 1,000 other voters in the recent primary election—might be thrown out.

People First submits this brief as amicus curiae in support of Appellees to urge the Court to affirm the circuit court's decision that Act 595's requirement that all voters produce ID before they may cast a legal ballot in Arkansas violates Article 3, Section 1 of the Arkansas Constitution. It is well-settled that Article 3, Section 1 provides the *only* qualifications that an Arkansas voter may be required to meet to participate in state elections in Arkansas. Because Act 595 requires that voters *also* show ID that meets the specific requirements set forth in the Act before

casting a ballot, it is an invalid attempt to add to the qualifications set forth in Article 3, Section 1.

This result follows not only from the text of that provision, but is compelled by the provision's unique history and place in the Arkansas Constitution, which reflects the prescient understanding of both the framers and, in more recent years, the people of Arkansas, that future legislatures may attempt to make it more difficult or impossible for some Arkansans to vote. To protect against such attacks on the franchise, the Constitution strictly regulates not only the qualifications for voting, but—through Amendment 51—the requirements for voter registration. Thus, when understood as a whole, the Constitution leaves no place for Act 595's voter ID provisions. Finally, the voter ID law cannot be justified as necessary for compliance with federal law; to the contrary, the Arkansas Constitution currently adequately implements both the National Voter Registration Act and the Help America Vote Act.

For all of these reasons, explained further herein, this Court should invalidate Act 595's voter ID provisions, which unconstitutionally infringe on Arkansans' right to vote.

II. BACKGROUND

A. Voter ID Law Before Act 595

Before Act 595, Arkansas law did not require voters to produce ID to cast a ballot. Instead, under Ark. Code Ann. § 7-5-305(a)(8), poll workers were to "[r]equest the voter for purposes of identification to provide a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." With one narrow exception for first-time voters who registered by mail without providing the last four digits of their social security number or a driver's license number, voters unable to provide the requested identification were nonetheless permitted to cast regular ballots after the poll worker noted in the poll books the lack of identification. *See* Ark. Code Ann. § 7-5-305(a)(8)(B)(ii) (2013), *amended by* Act 595 of 2013, § 4. Prior law guarded against possible voter fraud by permitting the county board of election commissioners to review the precinct voter registration lists and poll books following each election. *Id.* § 7-5-305(a)(8)(B)(iii) (2013). The board was expressly permitted to "provide the information of the voters not providing identification at the polls to the prosecuting attorney," who, in turn, was permitted to "investigate." *Id.* § 7-5-305(a)(8)(B)(iii)–(iv).

B. Act 595

On January 14, 2013, Senate Bill 2 ("SB 2") was introduced to amend the law to require Arkansans to produce ID before they could vote.[1] The sponsor of SB 2 publicly stated that the goal of the bill was to combat voter fraud. On February 20, 2013, SB 2 was read for the third time and passed by the Senate on a vote of 23 in favor and 12 opposed. The bill was referred to the House of Representatives, where it was adopted, with amendment, on March 13, 2013. SB 2 was then returned to the Senate, where it was re-referred to the Senate Committee on State Agencies and Governmental Affairs. On March 14, 2013, the Senate Committee on State Agencies and Governmental Affairs returned the bill with a recommendation that it "do pass" with concurrence in the House's amendment.

SB 2 was then re-referred to the Senate Rules Committee, which concluded that the bill did not properly pass the Senate in February. Specifically, the Committee concluded that SB 2 would alter the Constitution and, therefore,

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[1] To the extent that the legislative history summarized here is not found in the appendices submitted to this Court by Appellants or Appellees, it is available on-line at the General Assembly's website at http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=sb2.

required a two-thirds vote for approval. The original vote of 23–12 was one vote short of a two-thirds majority.

Around the same time, a Representative Jim Nickels of the Arkansas House of Representatives requested an expedited opinion from the Attorney General as to whether SB 2, if enacted, would "violate Article 3 of the Arkansas Constitution by imposing additional qualifications on the right of a citizen to vote." AG Op. No. 2013-025 at 1. On March 19, 2013, the full Senate, by a vote of 13 to 21, rejected the Senate Committee's recommendation that SB 2 required a two-thirds vote for approval. The bill was read for the third time and passed by the Senate on a vote of 22 in favor, with 12 opposed.

The bill was delivered to the Governor on March 19, 2013. On March 25, 2013, the Attorney General issued an opinion in response to Representative Nickels' request, in which he explained that, "[t]he provisions of Section 1 are unambiguous in declaring that anyone meeting the four recited conditions is entitled to vote." *Id.* at 3. He also cited the Arkansas Supreme Court's decision in *Rison v. Farr*, 24 Ark. 161, 1865 WL 377, at *7 (1865), which "discussed at great length the primacy of the Arkansas Constitution over any legislative enactments in setting voting qualifications," and "bluntly declared that the 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.'" AG Op. No. 2013-025 at 3. Although the Attorney General noted that some other state courts interpreting similar provisions have upheld voter identification laws against challenges, he described many of those authorities as employing "only conclusory analyses." *Id.* at 4. He further noted that many of those authorities relied, at least in part, on other provisions in their state constitutions that explicitly empower the state legislature to police the election system for fraud or otherwise guard against abuses of the elective franchise. *Id.* Because the Arkansas Constitution lacks any similar provision, the Attorney General concluded that those decisions are of limited value in predicting the ultimate conclusion of the Arkansas courts as to the constitutionality of SB 2. *See id.* at 4–5. As a result, the Attorney General was unable to conclude whether SB 2 would violate Article 3, Section 1 of the Arkansas Constitution. *See id.* at 2–5.

The Governor vetoed SB 2 on March 25, 2013. In his veto statement, the Governor explained that he "believe[d] the bill unnecessarily restricts and impairs our citizens' right to vote" and that he had "obvious concerns about" the bill's constitutionality "either as an unconstitutional impairment of the right to vote, and/or as an invalid attempt to add additional qualifications for voting that are not found in Article 3, Section 1." AG Add. at 1. The Governor also noted that SB 2 "is not supported by any demonstrated need." *Id.* at 2. Specifically, "[w]hile proponents of laws similar to [SB] 2 argue that they are necessary to combat

'election fraud,' the bill addresses only voter impersonation, and no credible study of 'election fraud' supports the notion that such voter impersonation is or has been common in Arkansas." *Id.* Furthermore, "[t]here has been no demonstration that our current law is insufficient to deter and prevent voter impersonation." *Id.* In conclusion, the Governor described SB 2 as "an expensive solution in search of a problem." *Id.*

As a result of the Governor's veto, SB 2 was returned to the Senate. Both chambers of the General Assembly voted to override the veto by simple majority, and SB 2 was transmitted to the Secretary of State on April 1, 2013. On April 2, 2013, the Secretary of State issued notice that SB 2 was Act 595 of 2013.

* * *

As enacted, Act 595 amends Ark. Code Ann. § 7-5-305(a)(8) to require poll workers to request voters to produce "proof of identity" in order to cast an in-person ballot. *See* Act 595 of 2013, § 4 (codified as Ark. Code Ann. § 7-5-305(a)(8)). The Act defines "proof of identity" as:

> A document or identification card that:
>
> (a) Shows the name of the person to whom the document was issued;
>
> (b) Shows a photograph of the person to whom the document was issued;
>
> (c) Is issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in the State of

Arkansas; and

(d) If displaying an expiration date:

(1) Is not expired; or
(2) Expired no more than four (4) years before the date of the election in which the person seeks to vote.

Id. § 1 (codified as Ark. Code Ann. § 7-1-101(25)(A)).

If a voter is unable to provide identification that meets the Act's "proof of identity" definition, he or she will be required to vote by provisional ballot, which will be counted only if the voter "returns to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election" and provides either qualifying identification or an affidavit stating that he or she cannot provide the requested proof due to either indigence or a religious objection to being photographed. *Id.* §§ 4, 5 (codified as Ark. Code Ann. §§ 7-5-305(a)(8)(B)(ii), 7-5-321).

The Act provides a single exception for residents of long-term care or residential care facilities licensed by the state. These voters may cast an in-person ballot based on "documentation from the administrator of the facility [in which they reside] attesting that the [voter] is a resident of the facility." *Id.* § 4 (codified as Ark. Code Ann. § 7-5-305(a)(8)(A)(ii).

Act 595 became effective on January 1, 2014. *Id.* § 7.

III. ARGUMENT

The framers of the Arkansas Constitution were "jealous of the right of franchise," and intentionally and expressly limited the General Assembly's power to affect it. *Henderson v. Gladish*, 198 Ark. 217, 128 S.W.2d 257, 261 n.5 (Ark. 1939). As a result, the Arkansas Constitution uniquely protects the rights of its citizens to participate in elections. Since 1874, it has forbidden the enactment of any law that would "impair[] or forfeit[]" the right to vote for any reason other than a felony conviction. *Compare* ARK. CONST. art. III, § 2 (1874), *with* ARK. CONST. art. III, § 2 (amended 2008). It expressly and unequivocally limits the qualifications that may be required of voters. ARK. CONST. art. III, § 1. And it governs, in meticulous detail, every aspect of the voter registration process, any changes to which must be approved by a super-majority vote of two-thirds of the General Assembly, *see* ARK. CONST. amend. 51.

Unlike many other state constitutions, the Arkansas Constitution does not include a clause giving the General Assembly broad power to pass legislation to police voter fraud or otherwise protect the integrity of elections. *See* Ex. AG Op. No. 2013-025 at 4-5. Accordingly, Appellant the Secretary of State's assertion that the voter ID requirements of Act 595 are somehow justified by the claim that there is "ample evidence of voter fraud in Arkansas," Sec'y of State's Br. 22, is not only factually unsupported, but entirely beside the point. Under the plain language of

the Arkansas Constitution and this Court's governing precedent, the only relevant question is whether the Act imposes an additional requirement on voters before they may participate in elections in this State. Because the answer in this case is decidedly "yes," the law violates the Constitution and must be declared null and void. *Rison*, 24 Ark. 161, 1865 WL 377, at *7.

A. Article 3, Section 1 Does Not Permit The General Assembly To Require Otherwise Qualified Voters To Produce ID To Vote

The circuit court properly held that Act 595's voter ID requirements violate Article 3, Section 1 of the Arkansas Constitution, which has long been understood to set forth the only requirements that a voter need meet to have the right to participate in elections in this State. That provision provides, in its entirety:

> Except as otherwise provided by this Constitution, any person may vote in an election in this state who is:
>
> (1) A citizen of the United States;
>
> (2) A resident of the State of Arkansas;
>
> (3) At least eighteen (18) years of age; and
>
> (4) Lawfully registered to vote in the election.

ARK. CONST. art. III, § 1.

For almost 150 years, Arkansas courts have held this provision to grant an inalienable right to vote to anyone who meets its qualifications, and to prohibit the General Assembly from imposing any additional requirements as a precondition of

voting. *See Rison*, 24 Ark. 161, 1865 WL 377, at *7 ("[T]he 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."); *accord Jones v. Floyd*, 129 Ark. 185, 195 S.W. 360, 361 (1917) ("The Constitution has prescribed the qualifications of an elector, and, having done so, it is beyond the power of the Legislature to prescribe other or different qualifications."). Whoever possesses these qualifications has a constitutional right to vote and "cannot be restrained from the exercise of that right except by the alteration of the constitution, [therefore] any law infringing upon that right as vested by the constitution is null and void." *Rison*, 24 Ark. 161, 1865 WL 377, at *7.

Act 595 denies the right of Arkansans to vote unless they *also* proffer "proof of identity" as defined in the Act. Thus it clearly "infringes" upon the right established and protected by Article 3, Section 1, and is invalid. This conclusion is compelled by the Arkansas Constitution's unique history. This Court has consistently struck down legislative attempts to add voter qualifications, in the process explicitly rejecting the argument that the Secretary of State now makes—that the law may be justified as a "regulation," rather than "qualification":

> [C]learly, if the legislature cannot, by direct legislation, prohibit those who possess the constitutional qualification to vote, from exercising the elective franchise, that end cannot be accomplished by indirect legislation. The legislature cannot, under color of <u>regulating</u> the

> manner of holding elections . . . impose such restrictions as will have the effect to take away the right to vote as secured by the constitution.

Rison, 24 Ark. 161, 1865 WL 377, at *8 (emphasis supplied).

Pursuant to this long-standing precedent, the General Assembly's power to "regulat[e] the manner of holding elections" extends only to such matters as "fix[ing] the time of holding elections, and the manner of making returns, etc." *Id.* at *9. As for voter qualifications, the General Assembly may at most "compel a voter to take an oath to the effect that he possesses the qualifications prescribed by the constitution." *Id.* The General Assembly may not, however, require that a voter prove that he possesses those qualifications by any other fixed or rigid prescription. Thus, in *Henderson v. Gladish*, 198 Ark. 217, 128 S.W.2d 257, 262 (Ark. 1939), decided in 1939, when payment of a poll tax was one of the constitutionally enumerated requirements for voting set forth in the Arkansas Constitution, the Court found that a law passed by the General Assembly that required voters to produce proof that they had paid that tax in the form of a receipt written in ink was an unconstitutional addition to the constitutional qualifications for voting. Although Arkansas has rightfully eliminated the poll tax, the logic of the case nevertheless applies to the instant situation, where the General Assembly would require voters to produce proof that they possess the constitutionally enumerated qualifications through specifically defined forms of ID. Whether or not the General Assembly was in fact motivated by a desire to impose a "fraud-

preventing safeguard" on the process is of no moment; under the Arkansas Constitution, it "did not have power" to impose this additional requirement. *Id.*

Finally, SBOE's argument that requiring voters to affirmatively obtain and produce specific forms of voter ID before they may cast their ballots "is not much different than" the oath implicitly approved of in *Rison*, SBOE's Br. 7, is incorrect as both a matter of law and of common sense. As just discussed, in *Henderson*, the Court specifically rejected an argument that the General Assembly could permissibly require voters to produce specific forms of "proof" that they met the constitutionally-enumerated qualifications to vote. Moreover, a voter who appears at the polls with nothing more than the clothes on his back has everything that he needs to take an oath; thus, there is no practical risk that such a requirement would prevent voters who are otherwise qualified to vote in Arkansas from voting. The same cannot be said of Act 595's voter ID requirements. If voter who meets all of the constitutional qualifications to vote nevertheless does not posses a form of ID specifically identified by the Act, or even forgets that ID when he or she goes to vote, that voter's constitutional right to cast a ballot will in fact be infringed or denied. Thus, under *Rison* and *Henderson*, Act 595 is invalid and the lower court's decision should be affirmed.

B. The Constitution's Strict and Detailed Registration Regime Forecloses The Argument That the Voter ID Requirements Are Permissible Procedural Regulations

Appellants' argument that the voter ID requirement "merely provides a procedure that ensures that a voter who casts a ballot meets the qualifications set out in Article 3 § 1 of the Arkansas Constitution," Sec'y of State's Br. 21, is without merit. "In construction and interpretation of our own constitution and arriving at its intent, meaning and purpose, or the meaning of any part of it," this Court has "always read it as a whole and its various provisions in the light of each other." *Carroll v. Johnson*, 263 Ark. 280, 290 n.2, 565 S.W.2d 10 (1978); *accord Collins v. Humphrey*, 181 Ark. 609, 27 S.W.2d 102, 104 (1930); *State ex rel. Gray v. Hodges*, 107 Ark. 272, 154 S.W. 506, 507 (1913). *See also Ward School Bus Mfg., Inc. v. Fowler*, 261 Ark. 100, 108, 547 S.W.2d 394 (1977) (holding that a constitutional amendment is "part of the whole constitution for the purpose of uniform construction").

Under the unique structure of the Arkansas Constitution, the only constitutionally appropriate means for "ensur[ing] that a voter who casts a ballot meets the qualifications set out in Article 3, [Section] 1," is through the voter *registration* process, which itself is strictly governed by Amendment 51 to the Constitution.[2] Amendment 51 was adopted by the people to "establish a system of

[2] Appellants have never argued that Act 595's ID requirement is part of the

permanent personal registration as a means of determining that all who cast ballots in general, special and primary elections in this State are legally qualified to vote in such elections, in accordance with the Constitution of Arkansas and the Constitution of the United States." ARK. CONST. amend. 51, § 1. As this Court has previously recognized, Amendment 51 "enumerates in meticulous detail" the information that is required to register, *Faubus v. Fields*, 239 Ark. 241, 388 S.W.2d 558, 559 (Ark. 1965) (discussing ARK. CONST. amend. 51, § 6), including precise and extensive instructions about what may be included on voter registration forms and in the statewide voter registration list, as well as detailed rules for the transmittal of voter application forms. ARK. CONST. amend. 51, §§ 6, 7, 8. In enshrining a "permanent" system of registration, the people implicitly recognized that, as the political winds change, so might future legislative bodies attempt to erect barriers, or make changes to, registration requirements, making it difficult or impossible for some Arkansans to vote. Amendment 51 established a

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registration process, nor could they. First, as explained herein, it is well settled that any revisions to Arkansas' voter registration process must be approved by a super-majority vote of the General Assembly; Act 595 did not meet that threshold. Second, the Act requires that voters show the ID when they cast their ballot; although there are states that allow voters to register and cast a ballot on the same day, Arkansas is not presently among them.

constitutional mechanism to protect against that. And, because it was initiated by the people, the General Assembly may amend it only upon a supermajority vote of two thirds. *See* ARK. CONST. amend. 51, § 19; *id.* amend. 7.

Understood in its appropriate historical and constitutional context, Appellant's argument that Act 595's voter ID requirement is not an additional unconstitutional "qualification" for voting, but rather a mere "regulation," is untenable. As discussed above, under the Arkansas Constitution, even the voter registration process—which in other states may very well be classified as mere "regulation" —is itself among the four enumerated and exclusive qualifications for voting set forth in Article 3, Section 1. Moreover, that registration regime is set forth "in meticulous detail" in the Constitution. Given this unique structure, to accept Appellant's argument the Court would have to find that, despite the fact that nothing in the Arkansas Constitution explicitly allows for it, the General Assembly may circumvent the strict voter protections found in both Article 3, Section 1 and Amendment 51, by enacting—by bare majority—any number of election "regulations" that disenfranchise Arkansans who are otherwise constitutionally entitled to vote. Such a conclusion would render the voter protections purposefully enshrined in the Arkansas Constitution all but meaningless and, as already discussed, run contrary to long-standing precedent. *See, e.g.*, *Henderson*, 128 S.W.2d at 262; *Rison*, 24 Ark. 161, 1865 WL 377, at *7. *See also Mears v. City of*

Little Rock, 256 Ark. 359, 508 S.W.2d 750, 752 (1974) (holding that where "thousands of citizens who are qualified to vote under the provisions of Amendment 51 . . . to the Constitution of Arkansas could be deprived . . . of the privilege of casting their ballots" one "need say no more to establish that the act is invalid").

C. The Voter ID Requirements Are Not Necessary For NVRA or HAVA Compliance

The Secretary of State's assertion that Act 595's voter ID requirements are "part and parcel of the State's . . . fulfillment of [the] federal requirements" found in the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA"), Sec'y of State's Br. 18, misleadingly suggests that NVRA and HAVA require photo ID for voting. Neither does. To the contrary, HAVA accepts as permissible proof of identification when a person registers by mail to vote for the first time, either photo ID, or a current utility bill, bank statement, government check, paycheck, or other government document that shows the voter's name and address. 42 U.S.C. § 15483(b)(2)(A). And even that limited requirement is only for first time voters; after that, no proof of identity is required at all.

Moreover, Amendment 51 contains several provisions that implement both NVRA and HAVA. *See e.g.*, ARK. CONST. amend. 51, § 7(a) ("By the deadline . . . under the federal [HAVA], . . . the Secretary of State shall . . . ."); *id.* § 8 ("Every

six months the Secretary of State shall compile a statewide report . . . [that] shall be submitted to the Federal Election Commission for the national report pursuant to section (9)(a)(3) of the [NVRA]."); *id.* § 9(e) ("The Director of the Office of Driver Services shall enter into an agreement . . . to verify driver's license information according to § 303 of [HAVA]."). Indeed, Section 6, which governs "voter registration application forms," implements the HAVA ID requirements discussed above. It provides that mail voter registration forms in Arkansas "shall include . . . [a] statement" informing the voter that:

> If your voter registration application form is submitted by mail and you are registering for the first time, and you do not have a valid driver's license number or social security number, in order to avoid the additional identification requirements upon voting for the first time you must submit with the mailed registration form: (a) a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows your name and address.

ARK. CONST. amend. 51, § 6(a)(7).

That this provision is found in Amendment 51 proves at least three things, none of which are helpful to Appellants. First, HAVA and NVRA have historically been implemented through Amendment 51, subject to that provision's super-majority requirement, not through nebulous laws governing election "procedures." Second, the additional (non-photo) identification requirements required for first-time voters under federal law are properly understood in the Arkansas Constitution to be "additional . . . requirements" for voting. And, third,

Act 595's photo ID requirements are inconsistent with Amendment 51, Section 6, which requires mail voter registration forms to advise voters that they will be required to prove their identity at the polls only if they do not include one of the listed forms of identification with their registration form. *See id.* Because the General Assembly cannot purport to amend this Section of Amendment 51 by the vote of a simple majority, this provides further reason for invalidating Act 595's photo ID requirement.

IV. CONCLUSION

For the foregoing reasons, and the reasons stated by Appellees, this Court should affirm the decision of the circuit court.

DATED: August 11, 2014.

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Docket Number: CV-14-462

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