

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION**

BARRY HAAS

PLAINTIFF

VS.

NO. 60CV-18-752

**MARK MARTIN, in his official capacity as
Secretary of State for the State of Arkansas
and his official capacity as Chairman of the
Arkansas State Board of Election Commissioners;
RHONDA COLE; JAMES HARMON SMITH III;
BELINDA HARRIS-RITTER; CHARLES ROBERTS;
CHAD PEKRON; and JAMES SHARP, in their
official capacities as Commissioners of the
Arkansas State Board of Election Commissioners**

DEFENDANTS

ORDER ENTERING PRELIMINARY INJUNCTION

This cause came on for hearing before the Court on Plaintiff's Motion for Preliminary Injunction. Plaintiff appeared personally and through his counsel, Jeff R. Priebe and Daniel R. Carter. Separate Defendant Mark Martin, in his official capacity as Secretary of State for the State of Arkansas and his official capacity as Chairman of the Arkansas State Board of Election Commissioners, appeared through his representative, Leslie Bellamy, and through counsel, A.J. Kelly and Michael Fincher. Separate Defendants Rhonda Cole, James Harmon Smith III, Stuart Soffer, Charles Roberts, Chad Pekron, and James Sharp, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners, appeared through their representatives, Keith Rutledge and Daniel Shults, and through counsel, Lee P. Rudofsky, Sarah Page Tacker, and Dylan L. Jacobs (Belinda Harris-Ritter, in her official

capacity as a Commissioner on the Arkansas State Board of Election Commissioners, was substituted as a party for Stuart Soffer on April 26, 2018).

The Court hereby finds and orders:

PLAINTIFF'S CLAIMS

Act 633 of 2017 ("Act 633") imposes "verification of registration" requirements upon an Arkansas voter each time he votes in an election. Plaintiff contends that Act 633 is unconstitutional for several reasons.

Count I of the Complaint asserts that Act 633 violates section 19 of Amendment 51 because Act 633 is not germane to Amendment 51 or consistent with the purpose and policy of Amendment 51.

Count II of the Complaint asserts that Act 633 violates article 3, section 1 of the Arkansas Constitution by improperly adding requirements to vote in elections in Arkansas.

Count III of the Complaint asserts that Act 633 violates article 3, section 2 of the Arkansas Constitution by impairing the free exercise of the right of suffrage guaranteed by that section.

Plaintiff asks this Court to find that Act 633 is unconstitutional, to enter an injunction prohibiting Defendants from enforcing the "verification of voter registration" requirements found in Act 633 against Plaintiff or any other voter in Arkansas, and to enter an order declaring that the rules promulgated by the Arkansas State Board of Election Commissioners pursuant to Act 633 that contain "verification of voter registration" requirements are unconstitutional.

VOTER REGISTRATION IN ARKANSAS

A. Amendment 51

Amendment 51 to the Arkansas Constitution was enacted in 1964 and is a comprehensive regulatory scheme governing the registration of voters. *Martin v. Kohls*, 2014 Ark. 427, *17, 444 S.W.3d 844, 854 (Goodson, J., concurring). Amendment 51 established the process for Arkansas citizens to register to vote. It sets forth the process to register to vote, lists the information an individual must provide on a voter registration form, and addresses how a voter transfers his registration. Amendment 51 also provides for cancelling a voter's registration based upon certain conditions, for compiling registered voters by the various county clerks and the Secretary of State, and for other matters related to registration of voters.

Amendment 51 allows citizens to register to vote using various methods, including registering by mail. If registering by mail, a citizen may provide a copy of a current and valid photo identification or a current utility bill, bank statement, government check, paycheck, or other government document that shows the citizen's name and address.¹

B. Act 595 of 2013

The General Assembly enacted Act 595 in 2013. Generally, Act 595 required a voter to present a photographic document as "proof of identity" when voting. Act 595 defined "proof of identity" as either (1) a voter identification card, or (2) a document or identification card that (i) showed the name of the person to whom the document was

¹ See Ark. Const., amend. 51, § 6(a)(7).

issued; (ii) showed a photograph of the person to whom the document was issued; (iii) was issued by the United States, the State of Arkansas, or an accredited postsecondary education institution in the State of Arkansas; and (iv) was not expired or had expired no more than four years before the date of the election. Examples of acceptable documents included (1) a driver's license; (2) a photo identification card; (3) a concealed handgun carry license; (4) a United States passport; (5) an employee badge or identification document; (6) a United States military identification badge; (7) a student identification card issued by an accredited postsecondary educational institution in the State of Arkansas; (8) a public assistance identification card; and (9) a voter identification card.

If a voter did not present photo identification when voting, the voter was required to vote a provisional ballot. That provisional ballot would be counted only if the voter returned to the county board of election commissioners or the county clerk by 12:00 p.m. on the Monday following the election and either (1) provided proof of identity in the form of a photo identification; or (2) provided an affidavit stating that the voter could not provide proof of identity in the form of a photo identification because the voter was indigent or had a religious objection to being photographed. The Arkansas Supreme Court that held Act 595 was facially unconstitutional as it established additional qualifications to vote that were not found in the Arkansas Constitution. *See Martin v. Kohls*, 2014 Ark. 427, *15, 444 S.W.3d 844, 852.

C. Act 633 of 2017

In 2017, the General Assembly enacted Act 633, which was "An Act to Require that a Voter Provide a Verification of Voter Registration when Voting; to Amend

Amendment 51 of the Arkansas Constitution; and for Other Purposes.” Section 1 of Act 633 amended section 6(a)(2) of Amendment 51 to add the following language to the voter registration application:

- (F) Inform applicants that they will be required to verify their registration when voting in person or by absentee ballot by providing a required document or identification card as provided in Arkansas Constitution, Amendment 51, § 13.

See Act 633, § 1.

Section 2 of Act 633 amended section 13 of Amendment 51 by adding several provisions that did not exist previously. As one example, section 2 requires each voter to “verify his or her registration” by presenting a document or identification card that (1) shows the person’s name and photograph, (2) is issued by either the United States, State of Arkansas, or a postsecondary educational institution in Arkansas, and (3) which is not expired or expired no more than four years before the election. Documents that comply include:

- (1) a driver’s license;
- (2) a photo identification card;
- (3) a concealed handgun carry license;
- (4) a United States passport; and employee badge or identification document issued by a postsecondary educational institution in Arkansas;
- (5) a United States military identification document; a public assistance identification card if the card includes a photograph of the person to whom it was issued; or
- (6) a voter verification card under § 7-5-324.

See Act 633, § 2. If a legally-registered voter does not present compliant photo identification when voting in person, the election official must note the lack of photo identification on the precinct voter list. That legally-registered voter cannot cast a

regular ballot. He² may cast only a provisional ballot simply because he did not present a compliant photo identification. No compliant photo identification means no regular ballot. A resident of an Arkansas-licensed long-term care or residential facility is not required to present compliant photo identification when voting in person, but he must present documentation from the facility administrator attesting that he is a resident of the facility.

If an individual voting by absentee ballot fails to enclose a compliant photo identification in the return envelope, the absentee ballot shall become a provisional ballot. Certain absentee voters are exempt from this photo identification requirement, including active duty military members who are absent from the country on election day because of their service, spouses or dependents of such active duty military members, and residents of Arkansas-licensed long-term care or residential facilities whose absentee ballots are accompanied by the above-described administrator's statement.

Act 633 added a sworn statement provision that was not found in Act 595, the previous voter identity law struck down in *Martin v. Kohls, supra*. Section 2 provides that a provisional ballot cast by an in-person voter who does not present a required photo identification document shall be counted if the voter completes a sworn statement at the polling site stating that he is registered to vote in this state and that he is the person registered to vote, but signing the sworn statement does not guarantee the provisional ballot will count. That provisional ballot counts only (1) if the county board of election commissioners does not find the provisional ballot is invalid for other reasons, and (2) if the county board votes to count the ballot. The voter who does not present compliant

² The pronouns "he" and "she" are used interchangeably in this order when referring to voters.

photo identification when he votes may also go to the county board of election commissioners or the county clerk by 12:00 noon on the Monday following the election and present compliant photo identification.

In effect, as will be addressed herein, Act 633 reinstates the proof of identity provisions of Act 595 that were struck down in *Martin v. Kohls*, *supra*, but now places them within Amendment 51 and calls them “verification of voter registration.”

PLAINTIFF'S STANDING

The general rule is that one must have suffered an injury or belong to that class that is prejudiced in order to have standing to challenge the constitutional validity of a law. *Martin v. Kohls*, 2014 Ark. 427, *8, 444 S.W.3d 844, 849 (citing *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981)). A plaintiff must show that the questioned act has a prejudicial impact on him or her. *Id.* (citing *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995)). A registered voter is only required to demonstrate that he or she is among the class of persons affected by the legislation. *Id.* (citing *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)).

Furthermore, the Arkansas Supreme Court allows challenges to the constitutionality of statutes and regulations by persons who have not been penalized under the statutes or regulations. *See Jegley v. Picado*, 349 Ark. 600, 618, 80 S.W.3d 332, 341 (2002). A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *Id.* at 615, 80 S.W. 3d at 339 (quoting *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301 (1979)). One does not have to await the consummation of threatened injury to

obtain preventative relief. *Id.* (quoting *Babbitt v. United Farm Workers National Union, supra.*). If the injury is certainly impending, that is enough. *Id.* (quoting *Babbitt v. United Farm Workers National Union, supra.*).

Plaintiff is a United States citizen and a resident of Arkansas. He is a registered voter in Arkansas and Pulaski County. He intends to vote in the upcoming preferential primary election in May 2018. Plaintiff must comply with the new “verification of voter registration” requirements set forth in Act 633 or his vote will not be counted. Plaintiff’s actions will not comply with those “verification of voter registration” requirements. As Plaintiff is among the class of persons affected by Act 633, the Court finds that Plaintiff has standing to bring this lawsuit for injunctive and declaratory relief.

NECESSARY PARTIES

Separate Defendant Secretary of State Mark Martin is the “chief election official” of the State of Arkansas. *See* Ark. Const., amend. 51, § 5(b)(1). Collectively, Separate Defendants Rhonda Cole, James Harmon Smith III, Belinda Harris-Ritter, Charles Roberts, Chad Pekron, and James Sharp, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners, have the authority to “[c]onduct statewide training for election officers and county election commissioners.” *See* Ark. Code Ann. § 7-4-101(f)(2). The Secretary of State and the Arkansas State Board of Election Commissioners, in their positions of authority, train and direct the county clerks and the county election commissioners across the State of Arkansas. *See Martin v. Kohls*, 2014 Ark. 427, *9, 444 S.W.3d 844, 850: Additionally, the State Board of Election Commissioners is charged with promulgating rules and regulations to secure uniform

and efficient procedures in the administration of the voter registration process throughout the State of Arkansas. *See* Ark. Const., amend. 51, § 5(e). All necessary parties have been joined in this lawsuit.

SOVEREIGN IMMUNITY

Article 5, section 20 of the Arkansas Constitution provides that “[t]he State of Arkansas shall never be made a defendant in any of her courts.” *Board of Trustees of University of Arkansas v. Andrews*, 2018 Ark. 12, *10, 535 S.W.3d 616, 623. Prior to the *Andrews* decision, the Arkansas Supreme Court recognized that a claim of sovereign immunity could only be overcome in three circumstances:

- (1) when the State is the moving party seeking relief;
- (2) when an act of the legislature has created a specific waiver of sovereign immunity; and
- (3) when the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute.

Id. at *11, 535 S.W.3d at 623 (citing *Arkansas Department of Community Correction v. City of Pine Bluff*, 2013 Ark. 36, 425 S.W.3d 731)). In *Andrews*, the Arkansas Supreme Court held that the General Assembly cannot waive the State’s sovereign immunity pursuant to article 5, section 20 of the Arkansas Constitution. *See id.* at *9, 535 S.W.3d at 622.

However, *Andrews* did not address the other two exceptions to the sovereign immunity defense. *See Arkansas Community Correction v. Barnes*, 2018 Ark. 122, *3, ____ S.W.3d ____ (“We emphasize here, as in *Andrews*, that the only issue before this court is whether the General Assembly’s choice to abrogate sovereign immunity in the [Arkansas Whistle Blower Act] is prohibited by the constitution.”); *also see id.* at *4 (Wynne, J., concurring) (“This case

and *Andrews* stand for the proposition that the legislature does not have the authority to override Article 5, § 20. I feel it imperative to note that this is the *only* proposition for which these cases stand regarding the state's constitutional immunity from suit, as it was the only issue before this court in either case.”).

In this action for injunctive and declaratory relief, Plaintiff asks this Court to find that Act 633 is unconstitutional and ineffective. Plaintiff named the Secretary of State, Mark Martin, and the members of the Arkansas State Board of Election Commissioners as Defendants. All Defendants were sued only in their official capacities. A suit against a public official in his or her official capacity is essentially a suit against that official's agency. *Smith v. Daniel*, 2014 Ark. 519, *6, 452 S.W.3d 575, 579 (citing *Simons v. Marshall*, 369 Ark. 447, 255 S.W.3d 838 (2007); *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002)). Official-capacity suits generally represent a way of pleading a cause of action against the entity of which the officer is an agent. *Id.* (citing *Simons v. Marshall, supra.*).

By filing suit against the Defendants in their official capacities, Plaintiff has sued the office of the Arkansas Secretary of State and the office of the Arkansas Board of Election Commissioners. Plaintiff asserts that those two agencies would be acting illegally by enforcing the provisions of Act 633, and seeks to enjoin them from so acting. Thus, the Court finds that this lawsuit falls under an exception to the defense of sovereign immunity. The Court has jurisdiction over this lawsuit.

**COUNT 1: WHETHER ACT 633 IS GERMANE TO AMENDMENT 51
AND CONSISTENT WITH ITS POLICY AND PURPOSE**

Act 633 amended certain sections of Amendment 51 to the Arkansas Constitution. Act 633 also amended certain statutes governing the conduct of elections.

Section 19 of Amendment 51 allows the General Assembly to amend sections 5 through 15 of Amendment 51 in the same manner as required for amending laws initiated by the people. *See* Ark. Const., amend. 51, § 19. Laws initiated by the people may be amended by the two-thirds vote of both houses of the General Assembly. *See Martin v. Kohls*, 2014 Ark. 427, *18, 444 S.W.3d 844, 854 (Goodson, J., concurring); Ark. Const., art. 5, sec. 1. The parties agree that Act 633 received the required number of votes of the General Assembly. However, the amendments the General Assembly makes to Amendment 51 must still be germane to Amendment 51, and consistent with its policy and purposes. *See* Ark. Const., amend. 51, § 19. Plaintiff contends that Act 633 is invalid as it violates section 19 of Amendment 51 because it is not germane to Amendment 51 or consistent with Amendment 51's purpose and policy.

Section 1 sets forth the policy of Amendment 51. It provides that the purpose of Amendment 51 is *to establish a system of 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. *See* Ark. Const., amend. 51, § 1. Amendment 51 sets forth the information a potential voter must provide to register to vote in Arkansas. *See* Ark. Const., amend. 51, § 6. Notably, an individual registering to vote is not required to provide photo identification.³

³ The only mention of photo identification during registration under Amendment 51 is in section 6(a)(7)(C) concerning first-time voters. The mail-in voter registration application form shall include a statement that if the individual is registering to vote for the first time and does not have a valid driver's license number or Social Security number, in order to avoid additional identification requirements when he votes for the first time, he 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 the individual's name and address. *See* Ark. Const., amend. 51, § 6(a)(7)(C). Therefore, a first-time

The latest time that an individual may complete all requirements of the voter registration process is thirty (30) days before an election, as provided by the following:

Registration shall be in progress at all times except during the thirty-day period immediately prior to any election scheduled within the county, during which period registration of voters shall cease for that election, but registration during such period shall be effective for subsequent elections.

Ark. Const., amend. 51, § 9(b). An individual's part of the voter registration process is complete once he submits his completed application. All completed voter registration applications are transmitted to the Secretary of State, who then has ten (10) days to transmit the applications to the appropriate permanent registrar. *See* Ark. Const., amend. 51, § 8. The "permanent registrar" is the county clerk in each of the several counties of Arkansas. *See* Ark. Const., amend. 51, § 2(b). The county clerk shall register a qualified applicant when the clerk receives and acknowledges a legible and complete voter registration application. *See* Ark. Const., amend. 51, § 9(c)(1).

Under Amendment 51, the county clerk is the permanent registrar whose role in the registration process is complete once the clerk receives the application, determines that the individual meets the legal qualifications to become a registered voter, then registers the individual. Once registered, the individual is eligible to cast a ballot in any election in Arkansas. The provisions of Amendment 51 do not require the voter to register again unless his registration is cancelled in a manner provided for by Amendment 51. *See* Ark. Const., amend. 51, § 4.

registrant by mail does not have to provide a photo identification to become a registered voter, but instead can provide an alternate, non-photographic form of identification. If a first-time registrant by mail fails to provide one of the above forms of identification with the registration form, this provision only requires him to provide photo identification the *first* time he votes.

By June 1 each year, the county clerk must publish lists of registered voters by precincts and certify the total number of registered voters in the county to the Secretary of State. *See* Ark. Const., amend. 51, sec. 14(a). The Secretary of State uses that information to tabulate the total number of registered voters in the state. *See* Ark. Const., amend. 51, § 14(b).

Section 1 of Act 633 amended section 6(a)(2) of Amendment 51 to require that when he registers to vote, an individual must be notified that he must verify his registration when he votes by providing a “required document or identification card” as provided in Arkansas Constitution, Amendment 51, § 13. *See* Act 633, § 1. Section 2 of Act 633 then amended section 13 of Amendment 51 to add the requirement that, to cast a **regular** ballot, a voter must present a “verification of voter registration” that complies with Act 633. *See* Act 633, § 2. This “verification of voter registration” means presenting photographic identification as set forth in Act 633. *See* page 5 of this Order for discussion of “verification of voter registration.” Presenting just any photo identification will not suffice. The photo identification must comply with the requirements of Act 633 (“compliant photo identification”). If a voter does not present compliant photo identification, then the voter may vote only a **provisional** ballot. That voter may complete a sworn statement that (1) she is registered to vote in this state, and (2) that she is the person registered to vote. However, the Secretary of State decided to advise the voter in writing that this sworn statement is **OPTIONAL** (to be addressed later herein). If the voter who casts a provisional ballot does not complete the sworn statement when voting, and does not provide a compliant photo identification either when he votes, or to the county board of election commissioners or the county clerk by 12:00 noon on the Monday following the

election, then that voter's provisional ballot will not be counted by the county board of election commissioners.

An absentee voter must supply a copy of a compliant photo identification for his absentee ballot to be treated as a regular ballot. If the absentee voter does not return a compliant photo identification with his absentee ballot, then that absentee ballot is a provisional ballot and will not be counted unless the voter:

(1) signed the sworn statement that the voter is registered to vote in Arkansas and that the voter is the person registered to vote, or

(2) goes to either the county board of election commissioners or the county clerk by 12:00 noon on the Monday following the election and presents a compliant photo identification.

Even then, the provisional ballot will still be subjected to further scrutiny and could be ruled invalid for reasons unrelated to registration or identification. The provisional ballot will not count unless the board votes to count it. Further, one must not confuse these two steps with what the absentee voter is actually told at the time he votes. When the voter receives the absentee ballot, he is told in writing that signing the sworn statement is OPTIONAL. He is not told when he votes that he could, alternatively, take his compliant photo identification to the county clerk or commission by noon the following Monday.

Nothing in the requirement to produce a compliant photo identification or to complete a sworn verification statement each time one votes involves the actual process of registering to vote. If an individual meets the requirements to register to vote, Amendment 51 mandates that the county clerk register that individual to vote. The voter registration process is complete once the country clerk confirms the applicant meets the qualifications to vote in Arkansas and registers that individual. At that point,

the individual is added to the list of qualified, registered voters who are eligible to cast ballots in any election in Arkansas. The voter registration process is complete long before the voter appears at a voting location or casts his ballot.

It is clear from the voter registration system established by Amendment 51 that a voter cannot verify her registration each time she votes. County clerks register voters. County clerks maintain lists of lawfully registered voters. County clerks verify whether individuals are registered to vote. For in-person voters, the poll worker asks three questions: the voter's name, address and date of birth. These three items of information are already in the poll books because the voter provided them when he registered to vote. *See Ark. Code Ann. § 7-5-107.* The poll worker uses these three items of information to locate the voter in the county clerk's poll book of only verified, legally-registered voters. Ronald Poe, Elections Director for the Pulaski County Election Commission, also testified that poll workers are trained to use these three items of information to verify the voter's entry in the poll book.

Both the election statutes and the Defendant State Board of Election Commissioners recognize that it is the county clerk, not the voter, who verifies a voter's registration. For example:

When a voter provides his or her name, address, and date of birth to a poll worker, and the voter's name is not on the precinct voter registration list, the poll worker must:

1) Contact the county clerk's office to verify the voter's registration status . . . (emphasis added)

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 902(A)(1). Similarly, section 808 of the State Board of Election Commissioners' Rules for the Verification of Voter Registration provide that:

If a voter verifies his or her voter registration to the county clerk after the election, **the county clerk who conducts the verification** shall provide the copy of the voter's photo identification to the county board before the county board certifies the election. (emphasis added)

"Verifies his or her voter registration" to the county clerk means the voter simply shows the clerk a compliant photo identification. That is all he must do, and all he can do after Election Day. Then the county clerk actually "conducts the verification."

Another State Board of Election Commissioners rule recognizes that it is the county clerk who verifies registration:

When a voter provides his or her name, address, and date of birth to a poll worker, and the name is not on the precinct voter registration list, the poll worker must:

1) Contact the county clerk's office to verify the voter's registration status... (emphasis added)

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 902(A)(1). Additionally, the rules again make clear that it is the county clerk who certifies the registration status of all provisional voters:

The county board of election commissioners will forward, in a secured container, the sealed "provisional voter envelopes" to the county clerk's office for certification of each provisional voter's registration status.

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 905(A)(11); § 905(B)(13). Pulaski County Elections Director Ronald Poe confirmed that it is the county clerk who verifies provisional voters' eligibility to vote:

So if that is signed, then, you know, we have a whole process that we go through. We compile a list. We send it over to the clerk's office with the ballots. The clerk's office checks that and checks their list, checks their voter registration database, and then sends it back, you know, whether they were able to determine that person's eligibility.

See Hearing Transcript, pages 82 – 83.⁴ Ark. Code Ann. § 7-5-418(d)(1) provides that:

If the voter is not listed in the county voter registration record files and **the county clerk is unable to verify the voter's registration** and if the voter contends that he or she is eligible to vote, then the voter may vote a provisional ballot.... (emphasis added)

As to absentee voters, the county clerk verifies voters' registrations before voters even receive their absentee ballots.

The county clerk must satisfy himself or herself that the applicant for an absentee ballot is a **qualified registered elector** in the ward, precinct, or township in which he or she claims to be a resident.....(emphasis added)

If the applicant is registered or is otherwise eligible to vote absentee, the county clerk, prior to mailing or delivery the ballot, shall detach the ballot stub and deposit the ballot stub into a sealed box.....and deliver to the applicant or to the applicant's designated bearer..... (emphasis added)

See Ark Code Ann 7-5-409(a)-(b). The county clerk verifies the applicant's registration first, then releases the absentee ballot to the voter.

That Act 633 imposes requirements that are not related to the system of voter registration in Amendment 51 is particularly clear when one considers the entirety of the consequences for a voter who does not present a compliant photo identification at the time he votes. An otherwise lawfully-registered voter, such as Plaintiff, is forced to vote a provisional ballot only because he does not present a compliant photo identification when he votes in person or by absentee ballot. This is so despite the fact that the voter submitted his application to vote, the county clerk registered him, placed his name on the precinct list of registered voters, and notified both the voter and the Secretary of

⁴ All transcript page number references in this Order are to the original March 12, 2018, hearing transcript. Any appeal transcript page numbers may be different.

State that he was a legally qualified and registered voter. All of this occurred long before the election.

The lawfully-registered voter who presents photo identification at the polls, such as an Arkansas driver's license, must still pass a photo identification review process by poll workers before he receives a regular ballot. *See* State Board of Election Commissioners' Rules for the Verification of Voter Registration § 802. The election judge could still require him to vote a provisional ballot. *Id.* Once he is allowed to vote on the regular ballot, his ballot is not scrutinized further. The regular ballot is counted, period.

In contrast, a lawfully registered voter who does not present compliant photo identification is forced to vote a provisional ballot. A provisional ballot is not treated the same as a regular ballot. A provisional ballot is not automatically counted, but is subjected to far greater scrutiny than a regular ballot. When a voter casts a provisional ballot, the county board of election commissioners meets later and checks his registration again (even though the voter's name, address, and date of birth all appeared in the county clerk's poll book of lawfully registered voters for that precinct), checks his correct precinct again (even though the poll worker determined his correct precinct before he voted), and checks whether he voted on the correct ballot (even though the poll worker provided the voter the correct ballot style before he voted). The county election commissioners are allowed to consider other information in ruling a ballot invalid, even when a ballot is provisional *only* because the voter did not present compliant photo identification when he voted:

Based upon its examination of the "Provisional Voter Eligibility Affirmation," the "Challenged Ballot Form," if applicable, the "Reason for Voting Provisional," the county clerk's certification, the "Verification of Identity Affirmation," if

applicable, **and any additional information available**, the county board shall make a determination of whether the provisional ballot was cast by an eligible voter and was the correct ballot for the precinct of the voter's residence according to the precinct listed on the voter's eligibility affirmation or the registration address of the absentee voter. (emphasis added)

State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 907. For example, the county board can refuse to count a ballot for reasons unrelated to verification of a voter's registration:

When reviewing a ballot of an unverified provisional voter, the county board shall determine whether the voter executed a Verification of Identity Affirmation. An unverified provisional ballot that is accompanied by a Verification of Identity Affirmation shall be counted when the county board makes its initial determination **so long as there is no additional reason, unrelated to the verification of the voter's registration, that would also cause the ballot to be treated as provisional.** (emphasis added)

State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 907(B). Furthermore, the provisional ballot does not count unless the county election commission votes to count it. *See* State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Ballots § 907. This additional scrutiny is applied solely because the voter did not present compliant photo identification when he voted, and *not* because there was a legitimate question about whether or not he was a registered voter.

Act 633 requires the voter to "verify her voter registration" each time she votes, as long as she lives. Amendment 51 established a system of permanent personal registration. Nothing in Act 633 is related to this "permanent" registration system. In reality, Act 633 requires the voter to resurrect the completed registration process and

re-qualify as a voter each time she votes, as long as she lives. There is enough discretion in whether a poll judge accepts the identification and allows the voter to vote a regular ballot that conceivably, a voter who shows the same photo identification at two elections could be allowed to vote a regular ballot in one election, and only a provisional ballot in the next election. If she has to vote a provisional ballot, the county board has enough discretion in the rules to invalidate the ballot for reasons that have nothing to do with registration or identity. See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 907. When it ruled proof of identify requirements were unconstitutional, the Arkansas Supreme Court observed:

We do not interpret Act 595's proof-of-identity requirement as a procedural means of determining whether an Arkansas voter can "lawfully register [] to vote in the election." Ark. Const. art. 3, § 1(4). Under those circumstances, Act 595 would erroneously necessitate every lawfully registered voter in Arkansas to requalify themselves in each election. See generally Ark. Const. amend. 51 (proposed by initiative petition, approved at the general election in 1964, and providing for an extensive voter-registration process whereby proof of identity is required).

Martin v. Kohls, 2014 Ark. 427, *15, 444 S.W.3d 844, 853.

Pulaski County Election Director, Ronald Poe, testified about the impact of Act 633:

If the voter refuses to provide or doesn't provide ID or doesn't, or, you know, doesn't provide ID and say that, you know, you left it in the car or . . . you left it at the house, then, that voter would be referred to the poll judge in order to receive a provisional ballot.

See Hearing Transcript, page 53. A qualified, lawfully-registered voter whom the poll workers know might stand in a long line to vote, then realize he simply forgot to bring his photo identification. He will have to vote a provisional ballot, if he wants to vote then.

His provisional ballot could be ruled invalid for reasons that are not related to his registration or identity. That qualified and lawfully-registered voter could also be referred to the prosecuting attorney simply because he forgot to bring his photo identification, as explained below.

Even more concerning is what is done with the information of voters who, for whatever reason, do not provide compliant photo identification. Poll workers must make a separate list containing the names and addresses of all persons who voted provisional ballots because they did not provide compliant photo identification. See Act 633, § 7 (amending Ark. Code Ann. § 7-5-308(b)(1)). Even a person who provided photo identification could be added to this list if the poll judge refused to accept his photo identification and only allowed him to vote a provisional ballot. Following each election, the county board of election commissioners may provide the prosecuting attorney the information of each voter who did not present compliant photo identification when he or she voted. Specifically, the language reads:

Following each election, the county board of election commissioners may review the precinct voter registration lists and may provide the information of each voter not presenting a document or identification card necessary *to verify his or her voter registration* when voting in person or by absentee ballot to the prosecuting attorney. (emphasis added)

See Act 633, § 2 (amending Ark. Const., amend. 51, § 13). Similarly, the State Board's rules provide:

Following each election, the county board of election commissioners may review the precinct voter registration lists for voters not providing information at the polls and forward the information to the prosecuting attorney for investigation of possible voter fraud.

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 910. The county board is not required to have evidence of or even suspect any fraud or other criminal activity before sending the voter's information to the prosecuting attorney.⁵ The county board is authorized to forward the voter's name to the prosecuting attorney merely because the voter did not present compliant photo identification when he voted. No other reason is necessary. Lawfully-registered voters may be subjected to criminal inquiry simply because they did not have identification that met the requirements of Act 633, even if they signed the sworn statement verifying their identities as allowed under Act 633. This referral to the prosecuting attorney has nothing to do with a system of permanent, personal voter registration. Defendants contend that voter fraud exists, but there was no evidence of voter fraud presented at the hearing.

The provisions of Act 633 are not germane to Amendment 51 and are not consistent with Amendment 51's purpose and policy. Therefore, Act 633 is unconstitutional because it does not amend Amendment 51 in the manner required by the Arkansas Constitution. The Court will address Count II of Plaintiff's Complaint to determine whether the requirements imposed by Act 633 are unconstitutional proof of identity requirements.

**COUNT II: WHETHER ACT 633 IMPOSES ANOTHER REQUIREMENT TO VOTE
IN VIOLATION OF ARTICLE 3, SECTION 1 OF THE ARKANSAS CONSTITUTION**

⁵ Separate provisions of Act 633 and the rules allow for the county board to refer suspected voter fraud to the prosecuting attorney. *See* Act 633, § 2 (amending Ark. Const., amend. 51, § 13); State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 910.

In Count II of his Complaint, Plaintiff asserts that Act 633 violates article 3, section 1 of the Arkansas Constitution by improperly adding requirements to vote in elections in Arkansas. Act 633 Imposes proof of identity requirements upon voters as a prerequisite to voting. This is borne out by the language of Act 633 itself, and by election officials charged with drafting the rules, implementing Act 633, and training others thereon. In several sections of Act 633, the term “proof of identity” was merely changed to “verification of registration.” Examples are set forth below.⁶

Act 633, section 4, amends Ark. Code Ann. § 7-1-101 by striking through the term “proof of identity” and substituting in its place “verification of voter registration.” Act 633, section 5, amends Ark. Code Ann. § 7-5-201(d)(1)(A):

(d)(1) Except as provided in subdivision (d)(2) of this section and subsection (e) of this section, any person desiring to vote in this state shall:

(A) Present ~~proof of identity~~ verification of voter registration to the election official when appearing to vote in person either early or at the polls on election day.

Act 633, section 5, also amends Ark. Code Ann. § 7-5-201(d)(2):

(2)(A) A person who is a resident of a long-term care or residential care facility licensed by the state is not require to provide ~~proof of identity~~ present verification of voter registration before voting.

(B) A person not required to ~~provide proof of identity~~ present verification of voter registration under subdivision (d)(2)(A) of this section shall provide documentation from the administrator of the facility, attesting that the person is a resident of the facility.

Act 633, section 6, amends Ark. Code Ann. § 7-5-305(a)(8) in several ways:

(8)(A)(i) Except as provided in subdivisions ~~(a)(8)(A)(ii) and (a)(8)(B)(ii)~~ of this section, request the voter for purposes of identification to provide ~~proof of identity~~ that the voter present verification of voter registration by

⁶ Struck-through passages are deleted language. Underlined passages are added language.

providing a document or identification card that meets the requirements of Arkansas Constitution, Amendment 51, § 13, if required by that section.

(B)(i) If a voter is unable to provide this proof of identity present verification of voter registration in the form of a document or identification card required by Arkansas Constitution, Amendment 51, § 13 shall:

(a) Indicate on the precinct voter registration list that the voter did not provide proof of identity present verification of voter registration by providing a document or identification card required by Arkansas Constitution, Amendment 51, § 13 . . .

(b)(ii) When a voter is unable to provide proof of identity verification of voter registration, the voter and the election official shall follow the procedure under § 7-5-321 Arkansas Constitution, Amendment 51, § 13.

(b)(iv) Following each election, the county board of election commissioners may review the precinct voter registration lists and may provide the information of the voters not providing proof of identity presenting verification of voter registration at the polls to the prosecuting attorney.

Act 633, section 13, amends Ark. Code Ann. § 7-5-418(c):

(c) Before a person is permitted to cast an early vote, the county clerk or election official shall:

(1) Request the voter to identify himself or herself by stating his or her name, date of birth, and address in order to verify his or her registration; (2) Request the voter to present proof of identity to the county clerk or election official that the voter verify his or her registration by providing a document or identification card that meets the requirements of Arkansas Constitution, Amendment 51, § 13, if required by that section;

(2) Request the voter to present proof of identity to the county clerk or election official that the voter verify his or her registration by providing a document or identification card that meets the requirements of Arkansas Constitution, Amendment 51, § 13, if required by that section;

(3) If the voter's name or address is not the same as that in the county voter registration record files, request the voter to complete an updated voter registration application form;

(4) Request the voter to sign an early voting roster or early voting request form that identifies his or her name, address, date of birth, and the date on the roster or form;

(5) Enter the voter's precinct number on the early voting roster or early voting request form;

(d)(1) If the voter is not listed in the county voter registration record files and the county clerk is unable to verify the voter's registration and if the voter contends that he or she is eligible to vote, then the voter may vote a provisional ballot that shall be counted only upon verification of the voter's registration status.

(2)(A) If the voter fails to ~~provide proof of identity~~ to present verification of voter registration, the election official shall follow the procedure in ~~§ 7-5-324~~ Arkansas Constitution, Amendment 51, § 13.

(B)(i) A person who is a resident of a long-term care or residential care facility licensed by the state is not required to provide ~~proof of identity~~ verification of voter registration before voting.

(ii) A person not required to provide ~~proof of identity~~ verification of voter registration under subdivision (d)(2)(B)(i) of this section shall provide documentation from the administrator of the facility attesting that the person is a resident of the facility.

Under Amendment 51, the Secretary of State is the chief election officer for Arkansas. Leslie Bellamy is the Director of Elections for the Secretary of State. She referred to the legislation as the "voter ID law":

THE COURT: I do have one other question of this witness . . . I want to make sure, this meeting that the Commissioners have on the Monday after the election, the only thing that they can consider from a voter at that time is the ID, one of the forms of ID, listed in the law?

MS. BELLAMY: Yes.

THE COURT: Is that right?

*MS. BELLAMY: For the **voter ID law**. Yes. Or the Voter Verification Law... (emphasis added)*

See Hearing Transcript, page 207. Ronald Poe, Director of Elections for the Pulaski County Election Commission, also alternatively referred to providing the required photo identification as a way for the voter to identify himself. The State Board of Election Commissioners recognizes in more than one rule that verification of voter registration actually means showing photo identification. As one example, when a voter does not verify his registration at the polls, the poll worker does not note that the voter failed to verify his registration. The rules require the poll worker to call it what it is - the voter did not present identification:

Provisional ballots cast at the polls during early voting or on election day because a voter was required to verify his or her voter registration and failed to do so, shall be handled as follows:

- (1) The poll worker shall indicate on the precinct voter registration list that the **voter did not present a required document or identification card**. (emphasis added)
- (2) The poll worker shall notify the voter that the voter must cast a provisional ballot in the election...

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 905(B). In addition, the definition of "Verification of Voter Registration" describes it as the process by which an individual seeking to vote presents photo identification to the election official. *See* State Board of Election Commissioners' Rules for the Verification of Voter Registration § 800(f). It is also clear from other provisions of the rules that verification of registration means presenting compliant photo identification. *See generally* State Board of Election Commissioners' Rules for the Verification of Voter Registration.

Defendants rely heavily on cases from some other jurisdictions that upheld proof of identity legislation. This Court reviewed those cases and distinguishes each of them from the case at hand. Without addressing each case herein, suffice it to say that this Court agrees with the statement the Arkansas Supreme Court made when it invalidated Arkansas's voter identity law in 2014:

On this issue, Appellants cite numerous cases from other jurisdictions declaring a voter's proof of identity simply as much-needed regulations to verify voter registration. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion); *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind.2010); *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011); and *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn.2013). However, these cases are inapposite to this case because those courts interpreted the United States Constitution or their respective states' constitutions, whereas this case presents issues solely under the Arkansas Constitution.

Martin v. Kohls, 2014 Ark. 427, *15-*16, 444 S.W.3d 844, 853. Likewise, Count II of Plaintiff's Complaint presents an issue solely under the Arkansas Constitution. The Arkansas Constitution requires that, in order to vote, a person must be

- (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.

See Ark. Const., art. 3, § 1. These four qualifications set forth in our state's constitution simply do not include any proof-of-identity requirement. *Martin v. Kohls*, 2014 Ark. 427, *14, 444 S.W.3d 844, 852. The General Assembly cannot add requirements to vote that fall outside the ambit of article 3, section 1 of the Arkansas Constitution. *See Martin v. Kohls, supra*. (invalidating a proof-of-identity requirement voters as an addition by the General Assembly to the voting requirements found in article 3, section 1 of the

Arkansas Constitution); *Rison v. Farr*, 24 Ark. 161, 162 (1865) (holding the requirement imposed by the legislature that a voter take an oath before voting invalid because such a requirement was not found in the state constitution).

With the exception of adding the ability to sign a sworn statement, the verification of voter registration requirements of Act 633 are essentially the same as the proof-of-identify requirements of Act 595 that were ruled unconstitutional in *Martin v. Kohls*, *supra*. Proof of identify is not one of the requirements to vote set out in article 3, section 1 of the Arkansas Constitution. The added requirement to provide proof of identity before one votes runs afoul of article 3, section 1 of the Arkansas Constitution. Act 633 reinstated proof of identity requirements and is unconstitutional as it adds additional requirements to vote that are not found in article 3, section 1 of the Arkansas Constitution, and which were previously struck down in *Martin v. Kohls*, *supra*.

COUNT III: FREE AND EQUAL ELECTIONS AND FREE EXERCISE OF THE RIGHT OF SUFFRAGE

No right is more precious in a free country than having a voice in the election of those who make the laws under which we must live. *Wesberry v. Sanders*, 376 U.S. 1, *17, 84 S.Ct. 526, 535 (1964). Voting is of the most fundamental significance under our constitutional structure. *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990 (1979) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534 (1964); *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964); *Dunn v. Blumenstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999 (1972)). Recognizing this fact, article 3, section 2 of the Arkansas Constitution states:

Elections shall be free and equal. No 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, except for the commission of a felony, upon lawful conviction thereof.

This provision that "elections shall be free and equal" has been characterized as a guarantee that elections shall be free and equal. *See Whitley v. Cranford*, 354 Ark. 253, 260, 119 S.W.3d 28, 32 (2003) (quoting *Henderson v. Gladish*, 198 Ark. 217, 224, 128 S.W.2d 257 (1939)). This guarantee is essential because it is of the utmost importance that the public should have confidence in the administration of the election laws, and to know that the will of the majority, when fairly expressed, will be respected. *Id.* (quoting *Wheat v. Smith*, 50 Ark. 266, 280, 7 S.W. 161 (1888)).

As will be addressed below, the express terms of Act 633 impair Plaintiff's and other lawfully-registered voters' free exercise of the right of suffrage. Additionally, the manner in which the agencies charged with implementing Act 633 (the Secretary of State's office and the State Board of Election Commissioners) may operate to impair the rights of Plaintiff and other qualified voters, in violation of article 3, section 2 of the Arkansas Constitution.

A. Express Terms of Act 633 Impair the Right of Suffrage

1. Act 633's Lack of Important Notices to Absentee Voters

The federal constitution does not require states to create absentee voting regimes, and allows states to determine who qualifies to vote absentee. *See McDonald v. Board of Election Commissionerrs of Chicago*, 394 U.S. 802, 89 S.Ct. 1404 (1969); *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). Once a state creates such a regime, it must

administer it in accordance with the Constitution. *Zessar v. Helander*, 2006 WL 642646, *6 (N.D. Ill. Mar. 13, 2006) (citing *Paul v. Davis*, 424 U.S. 693, 710-12, 96 S.Ct. 1155 (1976) (an otherwise protected interest can attain “constitutional status by virtue of the fact that [it has] been initially recognized and protected by state law” if “as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered”)); *Raetzel v. Parks/Bellefont Absentee Election Board*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990).

Act 633 impairs the right of suffrage for absentee voters by treating absentee voters differently from in-person voters in two important ways: (1) by providing crucial notices to an in-person voter when he casts his ballot, but not providing similar notices to an absentee voter when he casts his ballot; and (2) by failing to notify an absentee voter of his right to cure⁷ his provisional ballot, while providing such notice to an in-person voter.

Under Act 633, a poll worker must inform each in-person voter who does not present compliant photo identification that he may cast a provisional ballot. *See* Act 633, § 7 (amending Ark. Code Ann. § 7-5-308). The poll worker must also give that in-person voter written instructions explaining how to ensure that his provisional ballot will be counted, and what happens if his ballot is not counted. *Id.* The notice to in-person voters includes the following information:

- (a) that the provisional voter will be notified by first class mail whether his or her vote was counted and the reason if not counted;
- (b) the address, telephone number, and regular office hours of the county clerk;
- (c) an explanation of the provisional voting process;

⁷ As used in this context, “cure” refers the ability of a provisional voter to present a compliant photo identification to either the county clerk or the county board of election commissioners after the election, but by noon on the Monday following the election.

(d) an explanation of how a voter who cast a provisional ballot because the voter failed to verify his or her voter registration and who did not sign the Verification of Identity Affirmation can return to the clerk or the county board to verify their voter registration before Monday at noon following the election; and

(e) the date, time, and address of a hearing for the voter if the provisional ballot is rejected.

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 906(a). The poll worker must tell the in-person voter in writing, *before* he casts his ballot, that he is voting a provisional ballot, and the steps he must take to ensure that his provisional ballot is counted. It is crucial that the voter have this information before he votes on a provisional ballot.

To comply with Act 633, the State Board of Election Commissioners prepared a document titled "Notice to Provisional Voters." ***See Attachment A.*** Only in-person voters receive this Notice to Provisional Voters. The Notice explains the reasons the voter has to vote a provisional ballot, and informs the voter of his right to "cure" his ballot by presenting a compliant photo identification to the county clerk or county board of election commissioners by noon Monday following the election. The Notice gives the voter the date, time, and location of a hearing in the event his ballot is not counted by the county board of election commissioners.

While Act 633 mandates the above notice to an in-person voter, the terms of Act 633 do not require anyone to provide the absentee voter the above information before he votes. Instead, absentee voters receive a Voter Statement when they receive their ballots. ***See Attachment B.*** This Voter Statement does not advise absentee voters of the information that in-person voters receive before they vote. A review of the notice to in-person voters (Attachment A) and the notice to absentee voters (Attachment B) reveals

the stark difference in material information that affects whether the voter's ballot will be counted.

If an absentee voter fails to comply with Act 633's "verification of registration" requirements because he does not return his compliant photo identification with his ballot, his absentee ballot becomes a provisional ballot.⁸ The court hearing record does not contain evidence that anyone tells the *absentee* voter, before or when he votes, that his ballot will be provisional if he does not return compliant photo identification with his ballot. Before he votes, no one tells the absentee voter how to cure his ballot. No one tells the absentee voter who cannot provide compliant photo identification that it is important that he sign the sworn verification statement. Instead, the Voter Statement tells the absentee voter that signing that sworn verification statement is OPTIONAL. No one gives the absentee voter examples of identification that comply with Act 633's photo identification requirements. *See Attachment B.* The in-person voter receives a list of those examples. *See Attachment A.*

Ark. Code Ann. § 7-5-409(b)(2) requires the county clerk to provide an absentee voter "instructions for voting and returning the official absentee ballot to the county clerk." Absent contrary evidence that was not provided at the hearing, this provision is limited to what it sets forth, and does not include the Act 633 "verification of voter registration" requirements regarding photo identification, provisional ballots, curing, and hearing rights that are provided in writing to in-person voters. On the other hand, Act 633 and statutory law mandate that specific information regarding Act 633 be given to

⁸ See Act 633, § 2 (amending Ark. Const., amend. 51, § 13(b)(3)(A)); State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 901(C.).

an in-person voter, at the polling place. *See* Act 633, § 7 (amending Ark. Code Ann. § 7-5-308).

Leslie Bellamy is the Director of Elections for the Secretary of State. The Court questioned her about two exhibits. She testified that instructions were drawn up by a subordinate and distributed to the county clerks, but she does not know the content of those instructions:

THE COURT: The Court does have a question.

MS. BELLAMY: Yes, ma'am.

THE COURT: . . . I am looking at Joint Exhibit 10 and Joint Exhibit 12. Joint Exhibit 10, there is a provisional voter envelope that was on the screen earlier.

MS. BELLAMY: Yes, ma'am.

THE COURT: That one states near the bottom, Verification of Identity Affirmation, and in parenthesis the word, Optional.

MS. BELLAMY: Yes, ma'am.

THE COURT: Okay. And I am also looking at the voter statement that, I believe, someone completes when they are voting absentee.

MS. BELLAMY: Yes, ma'am, that is sent back with their absentee ballot to be counted.

THE COURT: And at the bottom, it states, Optional Verification of Identity. Who decided to put the word, optional, on those forms?

MS. BELLAMY: That would have been a member of my staff. The assistant director was who drew up the forms, I believe.

THE COURT: Is the word, optional, anywhere in this Act 633, that makes the verification of identity something that is optional?

MS. BELLAMY: *To be honest, I'm not sure the word, optional, is in there, but I think that they added just as – that is just an affirmation instead of actually showing an ID. It is an optional method to provide that you are who you say you are, instead of providing the forms of ID.*

THE COURT: *But it doesn't say all of that, does it, on the forms? And this is what the voters are going to be taking a look at before they sign it.*

MS. BELLAMY: *Right.*

THE COURT: *It tells them that this Verification of Identity is optional.*

MS. BELLAMY: *I believe that he added it, and it is available to voters who are unable to verify their voter registration. And, I believe, that he added the word, optional, just to allow them – because they are only going by their affirmation. No actual documentation.*

THE COURT: *Now, the photo – providing a photo ID, is also optional; isn't it?*

MS. BELLAMY: *It would be, I guess, considered – yeah, but I think they are using this as actually part of an ID, not one of the ID listed, but another way to prove you are who you say you are.*

THE COURT: *Okay. But the form doesn't say all of that; does it?*

MS. BELLAMY: *No, ma'am.*

THE COURT: *Okay. Does the form provide anywhere that providing an ID is optional?*

MS. BELLAMY: *No, I mean, I can't see where it would provide that, if it's ID.*

THE COURT: *I am going to have you take a look at Joint Exhibit 10 and 12.*

MS. BELLAMY: *No, I mean, it doesn't say that providing a driver's license is optional.*

THE COURT: All right. And the person in your office who made the decision to add, optional, to these forms, is –

MS. BELLAMY: An assistant director. A director and also an attorney.

.....

THE COURT: On the form, only one of those is listed as optional. That is why I am asking the witness about it. Why the form doesn't state that providing that ID, the photo ID, is also optional.

MS. BELLAMY: I honestly couldn't answer that, I would have to ask –

THE COURT: Okay. Thank you

MR. KELLY (Attorney for Secretary of State): May I ask a clarifying question, Your Honor?

MR. KELLY: You are the person responsible for training clerks on how to conduct absentee voting; is that right?

MS. BELLAMY: Correct.

MR. KELLY: Just wanted to make sure that I ask, generally, for absentee voting, do you talk about this voter statement that the Judge has been talking about, this statement at the bottom, is there a separate set of instructions that goes with that?

MS. BELLAMY: Yes. There is an instruction sheet that was drawn up by the same attorney in our office.

MR. KELLY: Does it address those issues that the Judge was asking you about?

MS. BELLAMY: **I honestly don't know, I haven't looked at them.** He put all of that together and the election coordinator sent it out to the clerks. (emphasis added)

See Hearing Transcript, pages 265 – 270. No one offered the instructions Bellamy referred to into evidence. The Voter Statement is the only document in the court record that contains written information the absentee voter receives before she votes. The Court cannot be certain that any alleged instructions to absentee voters concerning the Act 633 requirements even exist. The absentee voter not being told of the strict Act 633 requirements could result in her failing to comply with the requirements, and her ballot not being counted.

The lack of pre-voting notice to an absentee voter under Act 633 is only the first step in a process leading to the county board of election commissioners rejecting her ballot. As noted above, if an absentee voter fails to comply with the “verification” requirements of Act 633, that absentee voter’s ballot is considered a provisional ballot. The absentee voter may go the county clerk or the county board of election commissioners by noon on the Monday following the election and present a compliant photo identification. Upon opening the absentee ballot envelope and discovering that it does not contain compliant photo identification, no one is clearly required to notify the absentee voter of the Monday noon deadline.

According to Ronald Poe, as soon as possible after opening absentee ballots, the Pulaski County Election Commission mails notices to voters that their ballots are provisional if they failed to include a copy of a compliant photo identification:

(Examination of Ronald Poe by Jeff Priebe, counsel for Plaintiff)

Q And if the absentee ballots are opened on the day of the election, is the absentee voter ever notified that their ballot’s not going to count?

A Yes. The – another new provision of the law is that voters be – all voters be announced – or announced – be notified if their ballot doesn't count for any reason.

So, in that case, like I saw we have a, you know, say tomorrow there's an absentee ballot comes in and, you know, they didn't include their ID, so it's made provisional.

We would then send to that person a notice as soon as possible to let them know that their ballot wouldn't count and then provide them, you know, with the information they would need in order to get it to count.

Q And how would you provide that notice to absentee voters?

A It would be first class mail.

Q Okay. So it would be mailed the day after the election, correct?

A As soon as possible, yes. Depending on the number. Like for something small like this, probably the day after.

Q So it'd be mailed on a Wednesday?

A Yes.

Q And the absentee voter would have to get it and then get to the courthouse by noon on the following Monday in order to – before their vote could count; correct?

A That – that is my understanding.

See Hearing Transcript, pages 57 – 58.

No one offered this notice into evidence at the hearing, so the Court cannot ascertain its contents. Despite what the Pulaski County Election Commission does, nothing in Act 633 or the State Board's rules require notice to an absentee voter of the cure provision before the cure deadline expires.

The timing of sending such a notice to an absentee voter may vary from county to county, as the election code gives counties discretion to determine when to begin opening absentee ballots.⁹ The procedure outlined by Mr. Poe would not timely and adequately notify the absentee voter of her right to cure before the right expires. Curing by presenting a compliant photo identification to the county clerk or the county board must occur by noon on Monday, after the Tuesday election. Mailing notices to absentee voters on the day after the Tuesday election leaves, at most, two and one half business days for a voter to exercise her right to cure by the following Monday. Some absentee voters will be outside Arkansas. Some are out-of-state college students. Some work in foreign countries. It is doubtful that a first-class mailing sent after a Tuesday election will reach many out-of-state absentee voters in time for them to review the notice, understand their rights, and physically appear in Arkansas to present a compliant photo identification by noon on the following Monday. That is why election officials should tell the absentee voter about (1) the Monday noon deadline and (2) the reason that signing the sworn statement is important, rather than optional, *before* he votes, as they do for in-person voters. Having this information is important when one considers how provisional ballots are counted if the voter did not present a compliant photo identification:

Unless enjoined by a court of competent jurisdiction, an unverified provisional ballot shall be counted *if no other grounds exist that would cause the ballot to not be counted* as a general provisional ballot and:

- 1) The voter executed a verification of identity affirmation at the time the voter cast his or her ballot at the poll or returned

⁹ See Ark. Code Ann. § 7-5-416(a)(1) (allowing election officials to open the absentee ballot outer envelopes and begin processing and canvassing absentee ballot paper work as early as the Tuesday before the election).

a verification of identity affirmation with his or her absentee ballot; or

2) The voter returns to the county clerk or county board of election commissioners before 12:00 noon on the Monday following the election and verified his or her registration. (emphasis added)

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 909. Again, the voter was told that executing the verification of identity affirmation (number one above) was OPTIONAL. Nothing requires anyone to tell the absentee voter about his right to cure his ballot (number two above), even after he votes.

As shown above, the absentee voter will receive a notice that his ballot was not counted and why it was not counted. This leads into the final notice problem for an absentee voter created by Act 633 – contradictory rules regarding notice of a hearing to contest the county board's decision to not count his ballot.

While voting absentee is a privilege and a convenience for those unable to vote in person, it is a privilege deserving of due process. *See Raetzel*, 762 F.Supp. at 1358. Due process is not achieved when the election procedures do not provide post-deprivation relief to the affected individual so that any defect can be cured and the individual is not continually and repeatedly denied such a fundamental right. *Id.* An election process is deficient without any procedure providing post-deprivation notice to an individual whose absentee ballot has been disallowed, advising the individual of the disqualification and the reason therefor, and providing some means for the individual to be heard. *Id.* The Arkansas Supreme Court recognized this principle in *Dotson v. Ritchie*, 211 Ark. 789, 793, 202 S.W.2d 603, 604 (1947), in which the Court stated “[t]he

elector has the right to be heard in defense of his ballot before he is disfranchised.” In Arkansas, election commissioners cannot arbitrarily disenfranchise an elector who has cast a ballot that is regular on its face. *Id.* They may do so only after a hearing and a determination of the ballot’s legality. *Id.*

There is some confusion among the election code and the rules as to when the county board meets to make its initial determination of which provisional ballots to count. The county board has the authority to certify the result of the election to the Secretary of State as early as forty-eight (48) hours after the election.¹⁰ However, the county boards must first determine whether provisional ballots are valid before they certify the election results. *See* Ark. Code Ann. § 7-5-308(e)(1).¹¹ Provisional voters have longer than 48 hours after the election to cure their ballots. They have until noon Monday following the election. Therefore, the county board must wait until after the noon Monday deadline to review provisional ballots that were not accompanied by sworn verification statements in order to determine whether the provisional voters exercised their rights to cure.¹² Although a specific time frame is not established in the election code or the rules promulgated by the State Board of Election Commissioners, it appears the county board meets sometime after the Monday noon cure period deadline to initially determine which provisional ballots will be counted. If the county board does not count a provisional ballot during its initial determination, the voter is entitled to a

¹⁰ *See* Ark. Code Ann. 7-5-701(a)(1).

¹¹ Certification of the election results can occur up to fifteen (15) days after the election. *See* Ark. Code Ann. § 7-5-701(a)(1).

¹² *See* State Board of Election Commissioners’ Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 907(B).

hearing to contest that decision. *See* State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 908. A poll worker provides the date, time, and location of this hearing to an in-person voter. *See* State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 906(a). However, there is no similar mechanism in Act 633 to notify an absentee voter of this hearing at the time he votes.

The applicable rules contradict each other regarding who receives notice of the county board's initial determination, and as to what is contained in the notice. *See* State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting §§ 906(b); 906(d); and 907. A reading of the rules appears to indicate that there was little oversight or review to ensure that these provisions were clearly stated. *See generally* State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting. Leslie Bellamy of the Secretary of State's Office testified that there are 75 county election commissions in Arkansas, consisting of 225 election commissioners.¹³ The Court is concerned that there may be several different interpretations of the same rules.

As demonstrated above, Act 633 lacks requirements of key notices to an absentee voter prior to casting a ballot, and also during the cure period after casting a ballot. The discrepancies in notice between in-person and absentee voters operate to favor in-person voters regarding matters that affect whether their ballots will be counted.

¹³ *See* Hearing Transcript, page 89.

2. Futility of County Board Hearing for Non-Compliance with Act 633

Act 633 includes another problem that applies to both in-person and absentee voters – the futility of hearings for voters who did not comply with the “verification of voter registration” requirements of Act 633.

The State Board of Election Commissioners’ rules require a hearing for provisional ballot voters to contest the county board’s initial decision to disqualify their ballots. *See* State Board of Election Commissioners’ Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 908. At this hearing, a voter may present evidence that she was registered to vote and voted the correct ballot for the precinct of her residence.¹⁴ The voter must also prove a third element, that she complied with the verification of registration requirements of Act 633. Section 9 of Act 633 amended Arkansas Code Title 7, Chapter 5, Subchapter 3 to add the following provision:

7-5-323. Procedure when voter fails to provide verification of registration.

If a ballot or absentee ballot is deemed a provisional ballot for failure to provide verification of registration under Arkansas Constitution, Amendment 51, § 13, the voter shall comply with the procedures under Arkansas Constitution; Amendment 51, § 13, for his or her vote to be counted.

A provisional voter, such as Plaintiff, may attend a hearing to contest his vote not being counted. However, by the time of that hearing, it is too late for the voter to “verify” his voter registration in accordance with Act 633 (as codified in Amendment 51). A voter cannot sign the sworn verification statement (that he was told was optional) after Election Day. The only thing the voter can supply after Election Day is his compliant photo identification, by noon Monday after the election. The county election

¹⁴ *See* State Board of Election Commissioners’ Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 908.

commission hearing (for voters whose ballots were not counted because they did not provide photo identification) is held *after* the noon Monday deadline.

The election rules provide:

Provisional voters who cast unverified provisional ballots must satisfy the requirements of Amendment 51 and this rule in order to have their ballot counted.

See State Board of Election Commissioners' Rules on Poll Watchers, Vote Challenges, and Provisional Voting § 908. If Plaintiff or another voter (1) did not supply compliant photo identification when he voted, (2) did not sign the sworn verification statement he was told was optional, and (3) could not present his identification to the county clerk or county board by the noon Monday deadline, it is too late to comply with Act 633 when he appears at the hearing. It does not matter that the county board knows the other two elements were met - that the county clerk verified for the county board that the voter was registered to vote - and the county board determined that the vote was cast on the correct ballot form for the voter's precinct. The end result is that Plaintiff, or a similar voter who is legally-registered to vote and who meets the qualifications to vote in Arkansas, is disenfranchised without any real remedy to challenge his disenfranchisement, such as an appropriate hearing. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *State of Washington v. Thompson*, 339 Ark. 417, 426, 6 S.W.3d 82, 87 (1999) (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976)). A hearing wherein the decision is pre-determined is not an opportunity to be heard in a meaningful manner.

Under the scheme created by Act 633, a legally-registered voter who can show that he met all voting requirements will still lose at a hearing if he failed to comply with

the verification of voter registration requirements of Act 633. His voting rights are impaired, with no means of recourse to the voter.

3. Voter Stripped of Registration for Failure to Comply with “Verification” Requirements of Act 633

Act 633 created a new penalty that could strip a person of his voter registration if he fails to supply photo identification when he votes. *See* Act 633, § 2. The provision states that:

[u]pon application based upon affidavits of one (1) or more qualified voters by the appropriate prosecuting attorney alleging possible voter fraud, the appropriate circuit judge, for good cause shown, may order the permanent registrar to cancel the registration of the voter failing to verify his or her registration as provided by this subsection.

Id. Normally, before a county clerk cancels a voter’s registration, the clerk must warn the voter of the impending cancellation and inform him of what to do to remain on the voter registration list. *See* Ark. Const., amend. 51, § 11(f). In contrast, this new subsection of Act 633 does not require prior notice to the voter whose registration will be cancelled by order of a circuit judge. There is no provision for the voter to be heard.

Act 633 allows a voter’s registration to be ordered cancelled without the voter being provided any due process. Only one affidavit from a qualified voter is necessary.¹⁵ The affidavit need not show actual fraud. Possible fraud is sufficient. This provision would have a chilling effect on voters who may be subject to its application if they failed to provide a compliant photo identification when they voted.

¹⁵ A circuit judge must also find good cause shown to order the county clerk to cancel a voter’s registration.

B. Implementation by State Agencies Impairs Right of Suffrage

1. Outdated Information in Secretary of State's "Voting 101" Booklet

The new requirements imposed by Act 633 and the rules promulgated thereby are extensive and confusing, and are not well understood by election officials. The Secretary of State's office has been slow to update its public information to reflect the significant changes in the law imposed by Act 633. This law took effect on August 1, 2017. When Plaintiff filed this Complaint six months later, on February 7, 2018, the Secretary of State's office had not updated its voting booklet titled "Voting 101: A Pocket Guide to Voting in the Natural State" to reflect the new "verification of registration" requirements mandated by Act 633. The Secretary of State prepares and distributes its "Voting 101" guide to county clerks, other state government agencies, and the public to use when researching and understanding election laws in Arkansas. Leslie Bellamy, the Secretary of State's Elections Director, testified that the booklet's use is "widespread" throughout Arkansas.¹⁶ Six months after Act 633 took effect, only the pre-Act 633 version of the booklet was available on the Secretary of State's website. The "Voting 101" guide still had not been updated when the Court held the preliminary injunction hearing in March 2018, over seven months after Act 633 took effect. Leslie Bellamy of the Secretary of State's Office testified about the outdated voting booklet:

(By Mr. Priebe)

Q. Okay. And, Joint Exhibit Number 6, that's the most current copy; is it not?

¹⁶ See Hearing Transcript, page 99.

A. Yes. . . . It's not the current one. It's the last one we have. We're currently – I have it delegated to a person on my staff that's working on it to try and get it completed.

Q. But this is the last one that's been printed?

A. Yes, sir.

Q. And this is the one that's available on the website? The Secretary of State's website?

A. Well, I was not aware it was on the website – the new website – and I asked for them to take it down.

Q. Okay. But it was on the website?

A. Yes, sir, it was.

Q. Since Act 633 passed; correct?

A. Yes, sir.

Q. And this has been disseminated out throughout the state of Arkansas since Act 633 has passed; correct?

A. When you say, disseminated, do you mean that we were still passing it out or –

Q. Yes, ma'am.

A. We had a few individuals that still had them, but we have tried to keep them in house. And, like I said, I wasn't aware that it was still on the website. I had asked for that to be taken down.

See Hearing Transcript, pages 99 – 101. This guide is intended for voters, but does not explain any of the new "verification" requirements under Act 633. Leslie Bellamy's testimony continued:

(By Mr. Priebe)

Q. But you'll agree with me – and I know you've looked at this, Ms. Bellamy – that no one in here – nowhere in here,

does it discuss the verification of registration requirements found in Act 633?

A. No. Not in this one.

Q. It doesn't tell voters that if you don't supply an ID, you'll be asked to sign an affirmation; does it?

A. No, sir. Not this one.

Q. And if you don't supply – and it doesn't tell you that if you don't have an ID and you don't sign an affirmation, your vote's not going to count?

A. Like, I stated, not in this one. It's the one we're working on.

Q. I guess, Ms. Bellamy, anywhere in this Voting 101 Pocket Guide set forth by the Secretary of State, does it say or does it advise voters that if they don't show ID, that they have to sign an affirmation in order for their vote to be counted?

A. Not in that one, because it was before Act 633.

Q. And anywhere in here does it say that if you don't show ID, and you don't sign an affirmation, and don't cure, your vote won't – your vote will not count?

A. No.

Q. And you requested that that be taken down and that be – and that book be updated after this lawsuit was filed; correct?

A. That it be taken down after – no – not – we've been working on the publication for a while. I was made aware that it was on the website when I looked after the lawsuit, yes, but I didn't know it was on there because it – when we transferred to this new website, I was not aware that that was put back up.

Q. Okay. But, again, you asked that to be taken down from your website after this lawsuit was an issue?

A. Yes.

See Hearing Transcript, pages 103 – 105.

When this Court held the March 2018 hearing, three special elections had already taken place after Act 633 took effect, all without the “Voting 101” guide containing anything about the photo identification or other requirements of Act 633. The Secretary of State is the chief election official for the State of Arkansas. As such, the public should be entitled to believe that election information supplied by the chief election official is up-to-date and accurate. Yet, the outdated “Voting 101” guide lacked crucial information that would make a difference in whether a voter’s ballot would be counted. Dissemination of inaccurate election information by the State’s top election official could lead to improper training for the 75 county election commissions, who train county clerks and poll workers. Inaccurate information from the top election official also leads to voters receiving inaccurate information. This could result in confusion and errors by voters casting their ballots in the upcoming primary election, with the end result being ballots not being counted due to noncompliance with Act 633’s “verification” requirements. This confusion is compounded by other incorrect information and conflicting interpretations being provided to voters by those charged with implementing Act 633.

2. Other Incorrect Information on Secretary of State’s Website

The Secretary of State’s elections division posts other election information on its website for voters and candidates. Before Plaintiff filed his Complaint six months after Act 633 took effect, this information still did not reflect the new requirements set forth in Act 633:

(Examination of Leslie Bellamy Mr. Priebe)

Q. *Okay. And what's the purpose of this information being on your website?*

A. *It would be informational for the public and the voters.*

Q. *To inform the voters –*

A. *Candidates.*

Q. *-- of what's required?*

A. *Yes.*

Q. *And you'll agree with me that after this lawsuit was filed, this website got changed; didn't it?*

A. *Yes.*

Q. *Why?*

A. *I realized that the link was still up to the publication that I had delegated to be worked on by someone in my office.*

Q. *And it contained old information?*

A. *Yes.*

Q. *Information that does not comply with Act 633?*

A. *No.*

See Hearing Transcript, pages 106 – 107. This information was not updated until after Plaintiff filed this lawsuit putting Defendants on notice about the outdated website information. There is no evidence that voting and election information being disseminated by the Secretary of State is now up to date and accurate.

3. **Discrepancy Between Secretary of State's and State Board of Election Commissioners' Interpretations of Act 633 Notice**

Act 633 requires poll workers to provide written information to an in-person voter who votes a provisional ballot. This required information is supposed to be in the Notice to Provisional Voters prepared by the State Board of Election Commissioners. The Notice essentially provides that a provisional ballot can be cured if the voter possesses photo identification, but failed to present it when he voted. "Verification of Voter Registration" means showing photo identification:

If you cast a Provisional Ballot for failure to present Verification of Voter Registration **and you possess ID**, but chose not to sign the OPTIONAL VERIFICATION OF IDENTITY AFFIRMATION, you may present proof of identity to the county clerk or the County Election Commission by noon of the first Monday following the election for the provisional ballot to be counted. (emphasis added)

The voter reads this Notice while he is at the voting location. Reading the above language, the voter could reasonably believe that he cannot take his photo identification to the county clerk or county board later unless he possesses photo identification on the day he votes. The State Board of Election Commissioners drafted this paragraph. However, Leslie Bellamy, Elections Director at the Secretary of State's Office, has a different interpretation. She testified that if a voter does not have identification on the day he votes, he may obtain identification later and present it later:

THE COURT: Okay. So someone who does not have an ID, their vote is not going to count, if they didn't have it the day of the election . . . and they didn't sign the statement.

MS. BELLAMY: Yes.

THE COURT: Then they – their vote only counts if they go and get an ID between the election and –

MS. BELLAMY: Correct.

THE COURT: -- the following Monday at noon.

*MS. BELLAMY: Correct. That's how it should be done.
Yes.*

See Hearing Transcript, pages 207 – 208. She is correct, but that does not correct the inaccurate Notice to Provisional Voters that will be given to in-person voters during the primary election beginning May 7, 2018.

Officials in the Secretary of State's Office and the State Board of Election Commissioners differ on what is required for a provisional voter to cure his ballot, even though the Secretary of State is the Chairman of the State Board of Election Commissioners. Confusing, contradictory, and incorrect information from agencies tasked by law with implementing the requirements of Act 633 and training election officials and poll workers will lead to voters receiving incorrect information. A qualified, lawfully-registered voter could be disenfranchised because he received wrong information from election officials concerning the Act 633 requirements.

4. Documents Provided to Voters Not Drafted According to Statute

Ark. Code Ann. § 7-5-409 requires the county clerk to provide a "voter statement" to an individual voting by absentee ballot. *See* Ark. Code Ann. § 7-5-409(b)(4)(A). The statute dictates the statements that must appear in the "voter statement" and in what format they must appear. *See* Ark. Code Ann. § 7-5-409(b)(4)(A)(i)-(ii). Certain specific

information must appear in bold capital letters. *Id.*¹⁷ The “voter statement” must include language regarding the sworn statement added by Act 633:

The voter statement shall include a sworn statement portion that may be completed by the voter stating that the voter is registered to vote and that he or she is the person who is registered.

The sworn statement portion of the voter statement is not required to be notarized, but the voter shall execute the sworn statement under penalty of perjury.¹⁸

The person at the Secretary of State’s elections division who drafted the provision failed to follow these instructions, and also added additional wording to the sworn statement portion of the “voter statement,” as shown below:

OPTIONAL VERIFICATION OF IDENTITY (Available to voters unable to verify their Voter Registration)

I, _____, certify under penalty of perjury that I am registered to vote, and that I am the person who is registered.

Signature of Voter _____

Several things about this voter statement are wrong and misleading. Not only was the word “OPTIONAL” included, but the sworn statement heading was also bolded and

¹⁷ Ark. Code Ann. § 7-5-409(b)(4)(A)(i)-(ii) provides that the “voter statement” shall include the following language in bold type and in all capital letters:

“THIS VOTER STATEMENT MUST BE COMPLETED AND RETURNED IN THE MAILING ENVELOPE OR THE ABSENTEE BALLOT WILL NOT BE COUNTED.”

“THE INFORMATION I HAVE PROVIDED IS TRUE TO THE BEST OF MY KNOWLEDGE UNDER PENALTY OF PERJURY. IF I HAVE PROVIDED FALSE INFORMATION, I MAY BE SUBJECT TO A FINE OF UP TO TEN THOUSAND DOLLARS (\$10,000) OR IMPRISONMENT FOR UP TO TEN (10) YEARS, OR BOTH, UNDER FEDERAL OR STATE LAWS.”

¹⁸ See Act 633, § 11 (amending Ark. Code Ann. § 7-5-409(b)(4) to add subdivision (C) regarding the sworn statement).

capitalized. Act 633's amendment of Ark. Code Ann. § 7-5-409(b)(4) did not authorize this bolded and capitalized language for this portion of the voter statement. By doing so, the lone person who drafted this revision elevated this unauthorized, misleading language in importance, almost ensuring confusion for an unassuming voter attempting to navigate the labyrinth of "registration verification" created by Act 633.

Act 633 does not mention the word "OPTIONAL" concerning the sworn statement and it does not authorize including the word "OPTIONAL." The election form with this unauthorized language was then transmitted to county clerks for the clerks to provide to absentee voters, apparently without any further oversight from top election officials.

THE COURT: Okay. And I am also looking at the voter statement that, I believe, someone completes when they are voting absentee.

MS. BELLAMY: Yes, ma'am, that is sent back with their absentee ballot to be counted.

THE COURT: And at the bottom, it states, Optional Verification of Identity. Who decided to put the word, optional, on those forms?

MS. BELLAMY: That would have been a member of my staff. The assistant director was who drew up the forms, I believe.

THE COURT: Is the word, optional, anywhere in this Act 633, that makes the verification of identity something that is optional?

MS. BELLAMY: To be honest, I'm not sure the word, optional, is in there, but I think that they added just as – that is just an affirmation instead of actually showing an ID. It is an optional method to provide that you are who you say you are, instead of providing the forms of ID.

THE COURT: But it doesn't say all of that, does it, on the forms? And this is what the voters are going to be taking a look at before they sign it.

MS. BELLAMY: *Right.*

THE COURT: *It tells them that this Verification of Identity is optional.*

MS. BELLAMY: *I believe that he added it, and it is available to voters, who are unable to verify their voter registration. And, I believe, that he added the word, optional, just to allow them – because they are only going by their affirmation. No actual documentation.*

See Hearing Transcript, pages 266 – 267. There does not appear to be sufficient oversight when forms are drafted for voters to read before they vote. Leslie Bellamy testified:

MR. KELLY: *Just wanted to make sure that I ask, generally, for absentee voting, do you talk about this voter statement that the Judge has been talking about, this statement at the bottom, is there a separate set of instructions that goes with that?*

MS. BELLAMY: *Yes. There is an instruction sheet that was drawn up by the same attorney in our office.*

MR. KELLY: *Does it address those issues that the Judge was asking you about?*

MS. BELLAMY: ***I honestly don't know, I haven't looked at them.** He put all of that together and the election coordinator sent it out to the clerks. (emphasis added)*

See Hearing Transcript, pages 269 – 270.

Telling the voter in bold, capital letters that signing the sworn statement is “OPTIONAL” could lead him to conclude that he does not have to sign the statement. Merriam-Webster defines optional as “not compulsory.”¹⁹ Other terms that come to mind when one is told something is optional are: left to one’s choice, the power to

¹⁹ *Optional*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/optional> (last visited April 20, 2018).

choose, discretionary, elective, and unnecessary. Using the word “OPTIONAL” in this document is misleading, insufficient, and not authorized.

Varying interpretations could be fatal to an absentee voter’s ballot if he fails to include compliant photo identification with his ballot, and he is unable to appear and present it before the Monday noon deadline after the election. The only remaining way to *possibly* have his vote counted would be to sign the sworn statement (that he is told is OPTIONAL). There are three methods of having a ballot count, although the second two ways do not guarantee the provisional ballot will count.

(1) present a compliant photo identification at the time of voting;

(2) sign the sworn verification statement at the time of voting; or

(3) present a compliant photo identification to the county clerk or the county board of election commissioners prior to noon on the Monday following the election.

The voter statement does not include the third way to meet Act 633’s requirements. It also presents signing the sworn verification statement as the only option.

The drafter also added language that signing the sworn statement was available for voters “unable to verify their registration.” This language is not contained in the explicit instructions on what to include in this Voter Statement. Nothing on the Voter Statement tells absentee voters what “verify their registration” means. ***See Attachment B.*** It also does not advise the absentee voter that the ballot will become a provisional ballot (and subject to more scrutiny) if he does not enclose compliant photo identification.

Lack of important notices to absentee voters, the futility of hearings for those whose votes were not counted, providing incorrect and insufficient information concerning Act 633 to voters when they vote, and incorrect and contradictory

interpretations of Act 633 by those charged with training and implementation, taken together, impair the free exercise of the right of suffrage for Arkansas voters.

CONCLUSION

Amendments made to Amendment 51 of the Arkansas Constitution must be germane to Amendment 51 and consistent with its purpose and policy. Act 633 does not meet these requirements, and is an unconstitutional attempt to amend Amendment 51.

The Arkansas Constitution forbids the General Assembly from adding requirements to vote that are not set forth in article 3, section 1 of the Constitution. Act 633 is unconstitutional as it imposes additional requirements to vote that are not found in the Arkansas Constitution.

Article 3, section 2 of the Arkansas Constitution guarantees the free exercise of the right of suffrage to all Arkansans. Several provisions of Act 633 and their corresponding administrative rules, when considered together with the manner in which they are being interpreted and implemented by the State of Arkansas's top election officials, operate to impair this right of suffrage guaranteed to Arkansas citizens, and are unconstitutional.²⁰

²⁰ Plaintiff presented evidence that over 1,000 votes were not counted in the May 2014 preferential primary and judicial election. The previous voter identification law, Act 595, was in effect during that election. Although the provisions of Act 633 are the same as those of Act 595, except for the sworn verification statement, the Court did not rely on this evidence in reaching its decision because this evidence was not necessary to resolve the issues currently before the Court.

RELIEF

Rule 65 of the Arkansas Rules of Civil Procedure governs preliminary injunctions. *See Arkansas Department of Human Services v. Ledgerwood*, 2017 Ark. 308, *7, 530 S.W.3d 336, 342. A circuit court must consider two issues when determining whether to issue a preliminary injunction under Rule 65, (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Id.* (citing *Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005) (per curiam)).

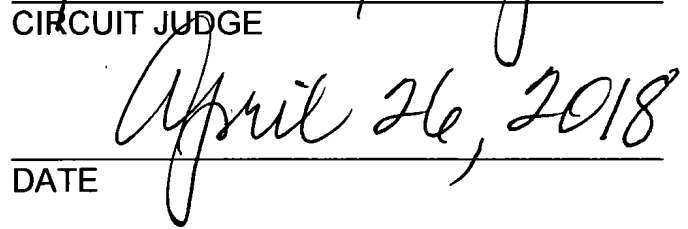
For the reasons set forth in this Order, the Court finds that Plaintiff has established a likelihood of success on the merits on all claims raised in his Complaint.

Plaintiff is faced with the choice of complying with the unconstitutional requirements imposed by Act 633, or not having his ballot counted during the May 2018 preferential primary. The Court finds that this is not really a choice at all, and that irreparable harm would result to Plaintiff in the absence of a preliminary injunction, as his ballot will not be counted.

The Court hereby enters a preliminary injunction prohibiting and enjoining Defendants from enforcing the requirements of Act 633, and from enforcing the rules of the Arkansas State Board of Election Commissioners that address Act 633 and its requirements.

IT IS SO ORDERED.


CIRCUIT JUDGE


DATE

cc: Jeff R. Priebe
Daniel R. Carter
A.J. Kelly
Michael Fincher
Lee P. Rudofsky
Sarah Page Tacker
Dylan L. Jacobs

77-

NOTICE TO PROVISIONAL VOTERS

☐ REASON 1: No Verification of Voter Registration Provided and Failed to Sign the Optional Verification of Identity Affirmation

If you cast a Provisional Ballot for failure to present Verification of Voter Registration and you possess ID, but chose not to sign the **OPTIONAL VERIFICATION OF IDENTITY AFFIRMATION**, you may present proof of identity to the County Clerk or the County Election Commission by noon of the first Monday following the election for the provisional ballot to be counted.

County Clerk's Address

_____ County Courthouse
Street Address:

Hours:

Phone:

City:

"Verification of Voter Registration" is a document or photo ID card that is issued by the State, the federal government or an accredited postsecondary educational institution in Arkansas. The ID must show the name and photograph of the person to whom it was issued, and, if it has an expiration date, must not be expired more than 4 years before Election Day. Examples of acceptable proof of identity include but are not limited to:

- An Arkansas driver's license;
- An Arkansas State ID (for example issued by the Revenue Office)
- A U.S. passport;
- A concealed carry handgun license issued by the State of Arkansas;
- An employee badge or ID document issued by the State of Arkansas or the federal government;
- A U.S. military ID document (Active or Retired);
- A student or employee ID card issued by a postsecondary educational institution located in Arkansas;
- A public assistance ID card issued by the State of Arkansas or federal government;
- A voter ID card issued by the county clerk.

☐ REASON 2: Signed Optional Verification of Identity Affirmation for No Verification of Voter Registration

If the only reason you are required to vote provisionally is that you did not verify your voter registration with a photo ID and you executed the optional **Verification of Identity Affirmation** your ballot will be counted when it is reviewed by the County Board of Election Commissioners. However, if the Board determines that your provisional ballot is invalid and should not be counted on other grounds, you will be notified and may attend an administrative hearing referenced below to bring evidence of the validity of your ballot. **The meeting date is listed below.**

☐ REASON 3: Provisional Ballots Unrelated to Verification of Registration

If you were required to vote provisionally for any reason unrelated to the verification of your voter registration, the County Election Commission will set an administrative hearing to determine if your ballot will be counted for this election. You will be notified by mail concerning your provisional ballot. If your ballot did not count you are invited to attend this hearing to bring evidence and defend the validity of your ballot. If your ballot is counted, then you will be notified as such.

Hearing Date for Provisional Ballots that are rejected will be held:

DATE & TIME: _____

LOCATION: _____

For more information, contact: _____ County Election Commission

PHONE: _____ **EMAIL:** _____

You will be notified by first class mail whether your vote was counted, and if not, the reason why.

CERTIFIED COPY

Attachment A
in-person voter

Voter Statement

**THIS VOTER STATEMENT MUST BE COMPLETED AND RETURNED
IN THE MAILING ENVELOPE OR THE ABSENTEE BALLOT
WILL NOT BE COUNTED**

I reside at the address listed on my application.

I have enclosed in the return envelope the following:

1. My completed Voter Statement (this piece of paper);
2. **A copy of an identifying card or document (as detailed below and in instructions) if applicable:**
 - a. **For first-time voters who registered by mail:** If I am a newly registered voter of this county and this is the first time I am voting in this county, I am enclosing a copy of a current and valid photo identification card or a current utility bill, bank statement, government check, paycheck, or other government document that shows my name and address; or
 - b. **For other voters:** A copy of a document or identification card issued by the United States, the State of Arkansas, or an accredited postsecondary education institution in Arkansas that shows your name and photo and is not expired or has expired no more than four years before the date of the election.
3. The Ballot Only Envelope containing my marked ballot.

**THE INFORMATION I HAVE PROVIDED IS TRUE TO THE BEST OF MY KNOWLEDGE
UNDER PENALTY OF PERJURY. IF I HAVE PROVIDED FALSE INFORMATION, I MAY BE
SUBJECT TO A FINE OF UP TO TEN THOUSAND DOLLARS (\$10,000) OR IMPRISONMENT FOR
UP TO TEN (10) YEARS, OR BOTH, UNDER FEDERAL OR STATE LAWS.**

Signature of Voter

If applicable, complete the following:

Printed Name of Voter

Printed name of Designated Bearer, Agent or Administrator

Voter's Date of Birth (required)

Signature of Designated Bearer, Agent or Administrator

Address of Voter

Address of Designated Bearer, Agent or Administrator

- If you use a Designated Bearer, Authorized Agent, or Administrator to obtain or deliver your Absentee Ballot be sure to include that information on this Voter Statement. Your Absentee Ballot may not be counted if you use a Bearer, Agent or Administrator and fail to include that information.

OPTIONAL VERIFICATION OF IDENTITY (Available to voters unable to verify their Voter Registration)

I, _____, certify under penalty of perjury that I am registered to vote, and that I am the person who is registered.

Signature of Voter _____

CERTIFIED COPY

Attachment B
absentee voter