No. 20-2095

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BONNIE HEATHER MILLER; ROBERT WILLIAM ALLEN; ADELLA DOZIER GRAY; and ARKANSAS VOTERS FIRST,
Plaintiffs-Appellees,

v.

JOHN THURSTON, in his official capacity as Arkansas Secretary of State,
Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Arkansas
No. 5:20-CV-05070 PKH (Hon. P.K. Holmes, III)

Appellant's Brief

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

The district court below unilaterally rewrote the rules governing Arkansas's initiative process. Arkansas's Constitution governs that process, and for a century, it has required initiative petitions be signed in a canvasser's presence and that a canvasser attest to that fact by affidavit. Those antifraud measures are also set forth in corresponding statutory provisions. The district court enjoined those statutory provisions on the grounds that COVID-19 had made petitioning more difficult and rendered them unduly burdensome under the First Amendment.

But contrary to the district court's approach, COVID-19 "has not given unelected federal judges a roving commission to rewrite state election codes." *Tex. Democratic Party v. Abbott*, No. 20-50407, — F.3d —, 2020 WL 2982937, at *1 (5th Cir. June 4, 2020) (cleaned up). Rather, applying the same rules that always apply, Plaintiffs' challenge fails because they lack standing, the antifraud provisions do not implicate the First Amendment, and, in any event, the enjoined provisions are constitutional. Nor did the district court have the authority to second-guess Arkansas's elected officials' decisions about how to balance electoral integrity and public health, or to dictate how Arkansas conducts its elections. This Court should therefore reverse the district court's decision and dismiss this case.

Given the urgent nature of this matter, Defendant-Appellant Arkansas Secretary of State John Thurston does not believe oral argument is necessary.

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STATEMENT OF JURISDICTION

On May 25, 2020, the district court preliminarily enjoined portions of Arkansas law governing the mechanics of the process for enacting legislation and constitutional amendments through ballot initiatives. ADD1-25. On May 29, the district court converted its preliminary injunction into a permanent injunction, ADD26-27, and entered final judgment, ADD28-31. Arkansas filed a timely notice of appeal on June 1. APPX86.

The district court had jurisdiction under 28 U.S.C. 1331 and 1343. This Court has jurisdiction over the district court's final judgment, 28 U.S.C. 1291, which additionally confers jurisdiction over "all of the previous rulings and orders that led up to and served as a predicate for that final judgment," *Greer v. St. Louis Reg'l Med. Ctr.*, 258 F.3d 843, 846 (8th Cir. 2001); *see Johnson v. Leonard*, 929 F.3d 569, 575 (8th Cir. 2019).

STATEMENT OF THE ISSUE PRESENTED

1. Did the district court err by rewriting certain antifraud provisions regulating the mechanics of legislation by ballot initiative in Arkansas?

Apposite Authority: Ark. Const. art. 5, sec. 1; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997); *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020).

STATEMENT OF THE CASE

A. Constitutional and Statutory Framework

In their constitution, "the people" of Arkansas "reserve[d] to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly." Ark. Const. art. 5, sec. 1. This case concerns that power and Arkansas's century-old requirements for placing constitutional amendments on the ballot.

Since 1920, to place a constitutional amendment on the ballot, the Arkansas Constitution has required proponents to collect signatures equal to 10% of the "total number of votes cast of the office of Governor in the last preceding general election." *Id.*; *see* Ark. Const. amend. 7 (approved by voters Nov. 2, 1920) (amending Ark. Const. art. 5, sec. 1).[1] Those signatures must come from a geographically diverse cross-section of the State. *See* Ark. Const. art. 5, sec. 1 (requiring signatures from at least 15 different counties). And proponents must file them with the Secretary of State "not less than four months before the election." *Id.* For the November 2020 general election, proponents must file 89,151 valid signatures by July 3, 2020. APPX49-50.

[1] For the text of Amendment 7, see Proposed Amendment no. 13, 42d Gen. Assembly, Reg. Sess., 1919 Gen. Acts 481-89 (approved at Nov. 2, 1920 election as Ark. Const. amend. 7), available from HeinOnline at https://bit.ly/37whPiG.

But that is not the only opportunity to meet the signature requirement. Instead, proponents who submit valid signatures equal to 75% of the requirement and meet a geographic-distribution requirement get an extra 30 days to collect additional signatures. *See* Ark. Const. art. 5, sec. 1; Ark. Code Ann. 7-9-111(d); *see also* 2013 Ark. Acts S.J.R. 16, 89th Gen. Assembly, Reg. Sess. (approved by voters Nov. 4, 2014) (amending art. 5, sec. 1 to impose 75% signature threshold). That so-called "cure period" commences when the Secretary notifies the proponents of an amendment that they qualified for additional time. *See* Ark. Const. art. 5, sec. 1. Thus, as relevant here, if Plaintiffs submit 75% of the required signatures by July 3 and meet the geographic-distribution requirement, they will have an additional 30 days to petition this summer.

Also since 1920, the Arkansas Constitution has imposed detailed requirements for collecting signatures, and two of those requirements are relevant here. First, the Arkansas Constitution imposes an in-person signature requirement mandating that signatures be "made in the presence of" the canvasser. *Id*. Second, its affidavit requirement provides that "each part of any petition shall have attached thereto the affidavit of" the canvasser attesting to, among other things, compliance with the in-person requirement. *Id.* That affidavit must also be notarized. *See Roberts v. Priest*, 975 S.W.2d 850, 853, 855 (Ark. 1998); *Porter v. McCuen*, 839

S.W.2d 521, 522 (Ark. 1992). Both requirements prophylactically police and prevent fraud at the outset of the collection process. *See Sturdy v. Hall*, 143 S.W.2d 547, 551 (Ark. 1940) (describing canvasser's role as "the sole election officer, in whose presence the citizen exercises his right to sign the petition").

Statutes also govern the collection process, but as relevant here, the statutory provisions simply "facilitate [the] operation" of the constitutional requirements. Ark. Const. art. 5, sec. 1. For example, one statutory provision echoes the in-person and affidavit requirements. *See* Ark. Code Ann. 7-9-108(b). And others provide additional procedural details. *See, e.g.*, *id.* 7-9-104(a) (form for initiative petition); *id.* 7-9-109(a) (same, canvasser's affidavit); *see also id.* 7-9-106 (describing necessary attachments); *id.* 7-9-601(a)(2), (b) (describing training and background-check requirements for paid canvassers).

The petitioning process is typically run by a "ballot question committee." A ballot question committee "makes expenditures for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of any ballot question." *Id.* 7-9-402(2)(A). A handful of simple filing requirements govern the formation of ballot question committees. They must file "a statement of organization" within five days of receiving or spending more than $500. *Id.* 7-9-404(a)(1)(A). And they must file a draft of their initiative petition with the Secretary of State's office before they begin circulating their petitions. *Id.* 7-9-107(d). Within these parameters, a ballot question committee may fundraise, campaign, and collect signatures as far in advance of an election as it wishes.

B. Factual and Procedural Background

Plaintiffs are a ballot question committee and individuals who support that committee's efforts to place a constitutional amendment concerning redistricting on Arkansas's 2020 general election ballot. APPX3-4. They claim that COVID-19 has burdened their ability to legislate by initiative. *See* ADD1-2.

While Plaintiffs have long been interested in redistricting issues and been organizing to place an initiative on Arkansas's 2020 election ballot, they did not begin collecting signatures until less than four months before the July 3 submission deadline. For example, Bonnie Heather Miller, one of the individual plaintiffs and the chairperson of the plaintiff ballot question committee, testified below that she has "been passionate about redistricting reform for many years." APPX43. Similarly, the plaintiff ballot question committee's director testified that he "began looking into the prospects of a ballot initiative supporting independent redistricting" more than a year ago "in May 2019." APPX27. And by "late 2019," Plaintiffs had "beg[u]n developing a broad network of volunteer petition canvassers." APPX6.

Yet Plaintiffs did not file paperwork to begin circulating petitions until March 16, 2020, less than four months before the deadline to submit petitions. APPX6. By then, as Plaintiffs acknowledged below, COVID-19 had already begun to affect life in Arkansas and around the Nation. *See* APPX8-10. By contrast, other ballot question committees began the process as early as March 2019.[2] As a result, those other ballot question committees had nearly a year to collect signatures before COVID-19 struck. And that means that whatever COVID-19's effect, Plaintiffs' own delay at least exacerbated—perhaps even *solely caused*—their alleged injuries.

To avoid the consequences of not beginning the process earlier, Plaintiffs sued to enjoin the statutory framework governing signature collection. *See* APPX19-21. But they sought to enjoin only Arkansas's *statutory* in-person and affidavit requirements. APPX20. They failed to challenge relevant *constitutional* provisions imposing those same requirements.

At bottom, Plaintiffs' lawsuits rests on an assertion that "[t]he COVID-19 pandemic makes in-person signature gathering impossible." APPX13. Yet they do

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[2] *See Arkansas 2020 Statewide Ballot Issues and COVID-19*, U. of Ark. Extension Serv. (accessed June 16, 2020), https://bit.ly/2YdbPbE (containing links to draft petitions submitted to the Secretary's office); *see also* APPX48-49 (relying on this website).

not allege that Arkansas—or its officials—did anything that restricted signature gathering.

Nor could they. Arkansas did not impose *any* stay-at-home orders or do anything else that restricted signature gathering. For instance, although Arkansas Governor Asa Hutchinson declared a state of emergency on March 11, 2020, that declaration did not restrict Arkansans' ability to travel outside their homes. APPX32-33. Likewise, even Governor Hutchinson's later March 26 order limiting gatherings in "confined" spaces "outside a single household or living unit" to ten or fewer people did not impose the same kind of broad-based restrictions that became common elsewhere. APPX35-36. Then, on May 5, shortly after Plaintiffs filed this lawsuit, Governor Hutchinson issued an executive order that began relaxing what few targeted restrictions—like those on gyms, barbershops, and dine-in service at restaurants—the State had imposed. *See* Executive Order 20-25 (accessed June 17, 2020), https://bit.ly/37Fjmmy. And just this week, on June 15, Arkansas entered "Phase 2" of its reopening plan, which relaxed those restrictions even more. *See Ark. Dep't of Health Directives & Orders*, Ark. Dep't of Health (effective June 15, 2020; accessed June 17, 2020), https://bit.ly/37G09AZ.

Plaintiffs consequently cannot point to any pandemic-response measure that allegedly restricted their ability to petition. Far from it, Plaintiffs' complaint merely alleges that "*the COVID-19 pandemic* makes in-person signature gathering impossible." APPX13 (emphasis added). And they asked the district court to amend Arkansas law on that basis alone.

C. <u>Decision Below</u>

After a hearing during which the parties presented only argument, the district court acceded to Plaintiffs' requests. In a preliminary injunction order—that it converted to a permanent injunction days later, ADD26-27—the district court held that Arkansas's statutory in-person and affidavit requirements were unconstitutional and blocked their enforcement. ADD10-16. In their place, the district court imposed a requirement that canvassers execute an unsworn declaration of its own design. *See* ADD22-25; *see also* ADD28-30.

The district court first found that Plaintiffs had standing to challenge the relevant provisions despite their failure to allege that those provisions—or anything Arkansas had done in response to COVID-19—restricted their signature-collection efforts. ADD3-5.

It compounded that error by applying an incorrect legal standard. *See* ADD6. To start, it ignored this Court's precedent holding that laws that merely govern the *mechanics* of the initiative process—like those challenged here—do not implicate the First Amendment and do not have to withstand exacting scrutiny. *See* ADD11. Instead, to find a First Amendment violation, the district court relied on precedent scrutinizing restrictions on candidate ballot access and political discussion surrounding initiatives. *See* ADD6, 14-18.

It then misapplied the *Anderson/Burdick* undue-burden framework that was developed to resolve those claims and declared *sans* citation to any relevant authority that the challenged "requirement[s] impose severe burdens on Plaintiffs' core political speech, especially in light of the State-recognized need for social distancing." ADD14. Ignoring Arkansas's interest in prophylactic requirements designed to *prevent* fraud, the district court then held that the challenged provisions were not narrowly tailored since fraud is a crime. ADD14-16.

Finally, having relied on an erroneous legal standard to justify rewriting the statutory requirements that Plaintiffs challenged, the district court went on to enjoin "other requirements dependent upon them" that Plaintiffs had not challenged. ADD17. And not content to stop there, the district court made its injunction universal—despite acknowledging that "Plaintiffs move[d] for preliminary injunctive relief only for themselves." ADD19.

Days later, the district court denied Arkansas's motion to dismiss, converted its preliminary injunction into a permanent injunction, and entered final judgment. ADD26-30.

D. Stay Proceedings

Arkansas thereafter asked the district court to stay its order pending this Court's review. Arkansas's motion highlighted the district court's failure to analyze whether Plaintiffs' claim triggers First Amendment scrutiny and discussed the Sixth Circuit's recent decision staying a nearly identical injunction. *See Thompson v. DeWine*, 959 F.3d 804, 812-13 (6th Cir. 2020). The district court declined to address either argument. *See* APPX91-92, 95. Indeed, rather than explain why this Court would likely disagree with *Thompson*, the district court simply labeled that case as "*Contra*" authority. APPX95.

Arkansas then asked this Court to stay the district court's injunction pending appeal, to administratively stay the district court's order pending resolution of Arkansas's stay motion, and to expedite this appeal. On June 15, this Court granted Arkansas's motion for a temporary administrative stay, expedited this appeal, and consolidated the stay motion with the merits briefing. This Court should now reverse the district court's order.

Applying those principles, this Court should reverse the district court's judgment.

SUMMARY OF THE ARGUMENT

The district court should not have rewritten the challenged antifraud provisions, and in so doing, it erred as a matter of law and exceeded its authority. This Court should reverse that decision, vacate the injunction, and dismiss this case.

The district court's injunction rests on four legal errors. *First*, despite Plaintiffs' failure to show that their alleged injuries are redressable by a federal court or traceable to any action by Arkansas, the district court nonetheless concluded that they have standing to bring this lawsuit. *Second*, the district court applied a heightened legal standard based on its legally erroneous view that Arkansas's antifraud requirements trigger First Amendment scrutiny. Reviewed under the correct legal standard, these requirements easily pass constitutional muster. *Third*, even under the district court's incorrect standard, Arkansas's antifraud requirements are constitutional. Purporting to apply the so-called *Anderson/Burdick* framework, the district court incorrectly held that the requirements severely burden Plaintiffs and are not narrowly tailored. *Fourth*, in issuing its injunction, the district court failed to consider the self-inflicted nature of Plaintiffs' alleged harm or the public's interest in seeing Arkansas's law enforced and avoiding chaos on the eve of an election. Each of those errors independently warrants reversal.

Further, reversal is also warranted because the district court lacked the authority to unilaterally rewrite Arkansas law and enjoin provisions that Plaintiffs did not even challenge. Indeed, by any standard, the district court overreached when it literally rewrote the forms that petition canvassers must distribute this election cycle.

ARGUMENT

For many independent reasons, Plaintiffs have not shown "actual success on the merits." *Oglala Sioux Tribe v. C&W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). This Court should therefore reverse the district court's judgment and remand with instructions to vacate the injunction and dismiss this lawsuit—without even reaching the other injunction factors. *See id.* Even so, consideration of those other factors would only underscore the need for reversal. Indeed, aside from the underlying legal errors, the district court's injunction violates the principle that federal courts should not rewrite state election laws on the eve of an election and risk undermining public confidence in the electoral process.

I. Standard of Review

To be entitled to a permanent injunction, Plaintiffs needed "to show *actual* success on the merits." *Oglala Sioux Tribe*, 542 F.3d at 229 (emphasis added). Only if Plaintiffs have actually succeeded on the merits does this Court go on to consider the other injunction factors: "the threat of irreparable harm" to Plaintiffs; the balance between that threat and the harm an injunction will inflict upon Arkansas and its citizens; and "the public interest." *Id.* In this way, the permanent-injunction standard resembles the "more rigorous" standard that applies where parties seek to preliminarily enjoin "a duly enacted state statute." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc). Requiring a rigorous showing of success on the merits ensures that Arkansas's "presumptively reasonable democratic processes" are thwarted "only after an appropriately deferential analysis." *Id.* at 733.

Moreover, a deferential approach is even more warranted here because Plaintiffs have essentially challenged Arkansas's decisions about how to best balance electoral integrity and public health. Indeed, as this Court recently warned, federal courts must not "usurp[] the functions of the state government by second-guessing the State's policy choices in responding to the COVID-19 pandemic." *In re Rutledge*, 956 F.3d 1018, 1031 (8th Cir. 2020). After all, it is not unelected judges who bear primary responsibility for Americans' health and safety. Instead, the "'Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect."'" *Tex. Democratic Party*, 2020 WL 2982937, at *1 (quoting *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., concurring), and *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

When reviewing an order granting a permanent injunction, this Court of course reviews de novo the district court's legal conclusions. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc). So this Court reviews de novo each of the key questions in this case: whether Plaintiffs have standing, *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016); whether their claim implicates the First Amendment, *Pulaski Cty. Special Sch. Dist.*, 306 F.3d at 621; whether the challenged requirements impose a severe burden, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016); and whether the challenged requirements are narrowly tailored to a compelling interest, *Wilson v. City of Bel-Nor*, 924 F.3d 995, 999 (8th Cir. 2019).

This Court's review of any factual findings by the district court "is unique in the context of a First Amendment claim." *Pulaski Cty. Special Sch. Dist.*, 306 F.3d at 621. It "make[s] a 'fresh examination' of those facts that are crucial to the First Amendment inquiry." *Id.* (quoting *Families Achieving Indep. & Respect v. Neb. Dep't of Social Servs.*, 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc)). It must "conduct an independent examination of the record as a whole, *without deference to the trial court*." *Families Achieving Indep. & Respect*, 111 F.3d at 1411 (emphasis added) (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995)).

II. Plaintiffs' claim fails on the merits.

The district court's order suffers from multiple legal flaws—any one of which would require reversal and all of which added together compel reversal. Applying the correct legal standards, Plaintiffs' claim fails on the merits as a matter of law and must be dismissed.

A. Plaintiffs lack standing.

As a threshold matter, the district court erroneously ruled that Plaintiffs have standing to bring their claim. *See* ADD3-5. First, it is not possible for "a favorable judicial decision [to] prevent or redress the injury" that they allege. *Bernbeck*, 829 F.3d at 646 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Plaintiffs have challenged only the *statutory* provisions effecting the in-person and affidavit requirements, not the *constitutional* provisions themselves. Second, their alleged injuries are not "fairly traceable to the challenged action of the defendant," or any other Arkansas official. *Id.* By delaying the start of their signature collection, Plaintiffs inflicted injury upon themselves. And most importantly, Plaintiffs cannot show traceability because any difficulties they have faced in collecting signatures are—by their own admission—due to COVID-19 and not any of Arkansas's targeted pandemic response measures. Plaintiffs do not have standing, and the district court was required to dismiss their complaint.

1. Pleading failures render Plaintiffs' alleged injuries not redressable.

Because of how they pled this case, Plaintiffs cannot obtain redress. Plaintiffs asked the district court to "enjoin[] Defendant and his agents from enforcing" only the *statutory* requirements that "each petitioner sign the petition in the presence of the canvasser" and "each canvasser sign an affidavit in the presence of a Notary Public." APPX20 (citing Ark. Code Ann. 7-9-108(b), 7-9-109). As discussed above, those statutory requirements merely reflect underlying *constitutional* requirements. *See* Ark. Const. art. 5, sec. 1. But Plaintiffs did not challenge the constitutional requirements. *See* APPX20-21. Hence, the district court's judgment cannot reach the unchallenged, constitutional in-person and affidavit requirements.

In a case out of Arizona, the Ninth Circuit recently held the plaintiffs lacked standing for their similar failure to plead a redressable claim. *See Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, — F. Supp. 3d. —, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020), *appeal dismissed*, Order, No. 20-15719 (9th Cir. May 19, 2020), ECF#40. The *Hobbs* plaintiffs claimed that COVID-19 rendered Arizona's similar requirements unconstitutional. *See id.* at *1-2; *see also* Ariz. Const. art. 4, pt. 1, sec. 1(9) (initiative petitions must be "signed in the presence of the affiant"). The district court denied those plaintiffs' motion for a temporary restraining order. As one reason for that denial, the court concluded the plaintiffs lacked standing because they challenged Arizona's statutory provisions governing signature collection but not its constitutional provisions "that, by and large, impose[d] the same requirements." 2020 WL 1905747, at *4. Agreeing with that conclusion, the Ninth Circuit denied the plaintiffs' motion for an injunction pending appeal: "Appellants, having failed to challenge the Arizona constitutional requirement of in-person signatures, cannot get the redress from the court they now seek by only challenging the statute at issue." Order, No. 20-15719 (9th Cir. May 5, 2020), ECF#37 at 1-2.

Plaintiffs here face the same redressability barrier. They challenged the Arkansas Constitution's required number of signatures and accompanying deadlines. *See* APPX20. Those provisions fall within a *single subsection* of Article 5, Section 1, entitled "Initiative." But the constitutional in-person and affidavit requirements are in an entirely different subsection ("Verification") following the second of two headings ("THE PETITION") in Article 5, Section 1. Plaintiffs may have included a vague catchall reference to "any other provision of Arkansas law necessary to effectuate the relief sought." APPX21. Such boilerplate does not amount to pleading a claim based on each of the nearly two dozen subsections—nearly 2,000 words of detailed regulations—in Article 5, Section 1. Plaintiffs' failure to challenge the constitutional in-person and affidavit requirements means their claim is not redressable.

2. Plaintiffs' alleged injuries are not traceable to any state action.

Besides their failure to plead a redressable injury, Plaintiffs lack standing for another reason: Their alleged injury is not "fairly traceable to the challenged action of the defendant." *Bernbeck*, 829 F.3d at 646 (quoting *Summers*, 555 U.S. at 493). In other words, they have not pleaded "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Put in terms of this case, Plaintiffs have not shown that the alleged burdens on their First Amendment rights were "*caused by* private or official violation of law." *Summers*, 555 U.S. at 492 (emphasis added).

For starters, Plaintiffs caused their own alleged injury. Over a year before the deadline to submit signed initiative petitions for the 2020 general election, Plaintiffs "began looking into the prospects of a ballot initiative supporting independent redistricting." APPX27. In fact, the plaintiff ballot committee's chairperson (who is herself an individual plaintiff) has "been passionate about redistricting reform for many years." APPX43. And Plaintiffs admit they understood the stakes of placing their initiative on the 2020 ballot; after all, redistricting only happens once every decade. *See* APPX45 (acknowledging effect of failure to place initiative on 2020 ballot); *see also* Ark. Const. art. 8, sec. 4; Ark. Code Ann. 7-2-101. Yet despite Plaintiffs' apparently longstanding interest in a redistricting initiative, and despite the singularly high stakes of their signature drive, they didn't file the paperwork just to *begin* collecting signatures until March 16, 2020. APPX6.

Three-and-a-half months before the July 3 deadline and *after* COVID-19 had begun to reshape American life, Plaintiffs had barely even started the petitioning process. Other ballot-question committees began the process much earlier. Nothing required Plaintiffs' delay. Their own choices caused their injuries, and such "self-inflicted injuries are not fairly traceable to the Government's purported activities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

Plaintiffs have also failed to show traceability for another reason. They have not even alleged—let alone *proven*—that any Arkansas official's COVID-19 response interfered with their ability to legislate by initiative. Nor could Plaintiffs ever make such a showing. Unlike other States, Arkansas never imposed a pandemic response measure broadly prohibiting travel outside the home or workplace. For instance, while Governor Hutchinson declared a state of emergency on March 11, 2020, that order did not restrict Arkansans' ability to travel outside their homes. *See* APPX32-33. Nor did a later March 26 order limiting gatherings in "confined" spaces impose the kind of restrictions that became commonplace elsewhere. APPX35-36.

Indeed, Arkansas's more targeted pandemic response stands in stark contrast with restrictions imposed elsewhere that dramatically curtailed canvassers' ability to collect signatures. *See, e.g.*, *Thompson*, 959 F.3d at 809 ("Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point."). And it means that whatever burdens Plaintiffs claim to have faced, those burdens were not "caused by private or official violation of law." *Summers*, 555 U.S. at 492. Rather, they were caused by "a disease beyond the control of the State." *Thompson*, 959 F.3d at 810.

Plaintiffs, moreover, effectively concede as much. In fact, their complaint ultimately rests on allegations that signature collection has become more difficult because fearing COVID-19 transmission, Arkansans will be less likely to sign their petition. *See* APPX13-15. But Arkansas did not cause that situation, and the district court was not entitled to "hold private citizens' decisions to stay home" or decline to sign a petition "for their own safety against the State." *Thompson*, 959 F.3d at 810. Because Plaintiffs' claim "depends on the unfettered choices made by independent actors not before the courts," they failed to demonstrate an "essential element[] of standing" and the district court should have dismissed their claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted).

B. <u>The district court applied an incorrect, heightened legal standard.</u>

Without analyzing the distinction between ballot-initiative regulations that implicate the First Amendment and those that do not, the district court applied the

Anderson/Burdick framework to Plaintiffs' claim. *See* ADD6 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). Neither this Court nor the Supreme Court has ever held that First Amendment scrutiny applies to state laws—like the in-person or affidavit requirements—that merely regulate the mechanics of legislating by initiative. And even if Plaintiffs' claim implicates the First Amendment, *Anderson/Burdick* does not empower courts to exempt Plaintiffs from otherwise constitutional requirements based on individualized or exigent circumstances.

1. Regulations of legislative mechanics do not implicate the First Amendment.

The First Amendment does not concern itself with the mechanics of initiated legislation. As Ohio put it in a brief for itself and ten other amici States supporting Arkansas's stay motion in this case, "no one thinks the constitutional provisions that govern the *process* by which legislation is made" by Congress or state legislatures "implicate the First Amendment." Br. of Ohio et al. 2. And for the same reason, First Amendment scrutiny does not apply to laws, like those at issue here, that govern only the mechanics of legislating by initiative. *See id.* 8-12.

Plaintiffs do not dispute that "the right to a state initiative process is not a right guaranteed by the United States Constitution." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). Because this "mechanism[] of direct democracy [is] not compelled by the Federal Constitution," the Supreme Court has left it "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). Insofar as Plaintiffs have a federal constitutional claim, therefore, it must be derivative of some other right. They look to the First Amendment. *See* APPX18-19.

Not all initiative regulations, however, "implicate the First Amendment." *Dobrovolny*, 126 F.3d at 1113. Only an initiative regulation concerning "the expression of a political view implicates a First Amendment right." *Doe*, 561 U.S. at 195. As this Court has said, a law triggers the First Amendment only when it regulates "the *communication of ideas* associated with the circulation of petitions." *Dobrovolny*, 126 F.3d at 1113 (emphasis added). If it does not regulate the communication of ideas, then it does not trigger the First Amendment. *See Wellwood v. Johnson*, 172 F.3d 1007, 1009 (8th Cir. 1999) ("[T]he statutes involved in this case in no way burden the ability of supporters . . . to make their views heard."). To borrow again from Ohio's brief, the First Amendment guarantees Plaintiffs "the right to engage in political speech during an initiative campaign or circulation drive" but "does not include the freedom to ignore rules governing the mechanics of the initiative process." Br. of Ohio et al. 5-6.

The in-person and affidavit requirements do not "implicate the First Amendment" because they do not impact "the communication of ideas associated with the circulation of petitions." *Dobrovolny*, 126 F.3d at 1113. Both challenged requirements relate only to the *form of the petition* ("each part of any petition shall have attached thereto the affidavit of the person circulating the same, that all signatures thereon were made in the presence of the affiant") and are indifferent to the ideas communicated on the petition or by its supporters and opponents. Ark. Const., art. 5, sec. 1. Plaintiffs claim that these requirements, in the COVID-19 context, "have made it difficult" to place an initiative on the ballot for the 2020 general election. *Dobrovolny*, 126 F.3d at 1113; *see* APPX13-15. But this Court was clear in *Dobrovolny* that "the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected." 126 F.3d at 1113. The district court ignored that holding. *See* ADD6.

Moreover, this Court isn't alone in holding that laws like the antifraud provisions at issue here do not trigger First Amendment scrutiny. The Tenth Circuit sitting en banc, for instance, has held that "[a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc) (McConnell, J.). There, Utah law contained a "supermajority requirement" for initiatives regarding a specific topic, "wildlife." *Id.* at 1098. The plaintiffs in that case made a similar argument to

Plaintiffs here—that Utah had "burden[ed] 'core political speech' by making it more difficult to secure passage of a wildlife initiative." *Id.* at 1099. The Tenth Circuit disagreed and rejected the argument that First Amendment scrutiny applies anytime a state regulates initiative petitioning. *Id.* at 1099-1100.

Instead, citing this Court's decision in *Wellwood*, the Tenth Circuit distinguished "laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum" from other "laws that determine the process by which legislation is enacted." *Id.* at 1100; *see Wellwood*, 172 F.3d at 1009 (upholding increased signature threshold for initiatives on certain subjects and not others because requirement "in no way burden[s] the ability of supporters . . . to make their views heard"). Because Utah's supermajority requirement did not "regulate[] the process of advocacy itself," it did not trigger First Amendment scrutiny. *Walker*, 450 F.3d at 1099. So, too, with the requirements challenged here. Requiring proponents of a ballot initiative to abide by certain formal requirements for their petitions merely "determine[s] the process by which legislation is enacted." *Id.* at 1100.

The D.C. Circuit "ha[s] drawn the same distinction." *Id.* It rejected a First Amendment challenge to a content-based limitation on the District of Columbia's initiative process prohibiting initiatives that would reduce marijuana penalties. *Marijuana Policy Project v. United States*, 304 F.3d 82, 84-85 (D.C. Cir. 2002). In so holding, that court explained the challenged content limitation "restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties." *Id.* at 85. The court found no precedent "establishing that limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment." *Id.* "This is not surprising," it continued, "for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* Likewise, because the requirements challenged here do not concern *advocacy* related to the initiative process, no heightened First Amendment scrutiny applies.

Moreover, underscoring the point, when the Supreme Court or this Court has applied First Amendment scrutiny to ballot-initiative laws, it has always been in response to laws that "specifically regulated the process of advocacy itself" whether by "dictat[ing] *who* could speak . . . or *how* to go about speaking." *Walker*, 450 F.3d at 1099. For example, in *Doe v. Reed*, the Supreme Court held that a law that "compelled disclosure of signatory information on referendum petitions . . . . implicate[d] a First Amendment right" not because it regulated the mechanics of the initiative process but because it regulated "the expression of a political view." 561 U.S. at 194-95. The same was true of laws prohibiting payments to canvassers, *Meyer v. Grant*, 486 U.S. 414, 416 (1988), or requiring that canvassers be registered voters and wear name tags, and that initiative proponents report paid canvassers' names and addresses to the State, *Buckley v. Am. Const'l Law Found., Inc.*, 525 U.S. 182, 186 (1999). And consistent with those principles, this Court applied First Amendment scrutiny to a requirement that canvassers be in-state residents and a prohibition on "per signature" payments, although it ultimately upheld those provisions. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001).

The district court refused to grapple with the distinction between legislation and public debate about legislation. But that distinction is critical and resolves this case. Because Arkansans act as legislators through the initiative process, rules governing the mechanics of that process are rules governing the legislative process and do not trigger First Amendment scrutiny. The district court erred as a matter of law in concluding otherwise.

2. Regardless, the First Amendment does not require Arkansas to create exigent-circumstances exemptions to its laws.

Plaintiffs do not bring a traditional *Anderson/Burdick* claim. They make no claim, for instance, that in the absence of COVID-19 the challenged requirements would be unconstitutional. *See* APPX19 (claiming only that they have become unconstitutional "due to the COVID-19 pandemic"). Nor do they really claim that

Arkansas has done anything to burden their signature-collection efforts. For example, although Plaintiffs vaguely allege that an undefined "combination" of "federal and state guidance and orders" somehow "preclude[d]" them from petitioning, APPX18, they never point to any state action impairing collection. That's not surprising. As already discussed, Arkansas never imposed a stay-at-home order or any other COVID-19 response measure that restricted signature collection.

What Plaintiffs seek, then, is an exemption from Arkansas's otherwise valid ballot-initiative regulations on account of COVID-19. But *Anderson/Burdick* was designed to test the constitutionality as a general matter of a ballot-access law, not to answer the question whether the Constitution entitles a given candidate or initiative proponent to an exigent-circumstances exemption from an otherwise constitutional law. *See Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 693 (8th Cir. 2011); *Green Party of Ark. v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011). Indeed, Plaintiffs have yet to cite a single decision that used the *Anderson/Burdick* framework to create an exigent-circumstances exemption.[3]

[3] Though it is unsupported by case law, Plaintiffs' claim that they are entitled to an exigent-circumstances exemption from otherwise constitutional ballot-access laws isn't unique. At least two other currently pending district court cases in this Circuit present the same issue. *See Whitfield v. Thurston*, No. 4:20-CV-00466-KGB (E.D. Ark. bench trial held May 27, 2020); *Sinner v. Jaeger*, No. 3:20-CV-00076-PDW-ARS (D.N.D. preliminary injunction denied June 15, 2020), ECF#32. And a leading election-law scholar has described a nationwide trend of district courts concluding "that laws which are completely constitutional under normal circumstances

This Court should reject Plaintiffs' novel theory, not least because it attributes to the State burdens beyond its control. *Cf. Thompson*, 959 F.3d at 810 ("First Amendment violations require state action."); *Tex. Democratic Party,* 2020 WL 2982937, at *19 (Ho, J., concurring) ("[E]xpanding access to mail-in voting to redress personal hardship—as opposed to state action—is a policy matter for the Legislature, not the courts." (citation omitted)). There is also no principled way to determine, under the First Amendment, which exigencies warrant exemptions. Consider, for instance, a hypothetical ballot question committee that stores its signed petitions in its lawyer's office. If a pipe bursts and destroys 15% of the signed petitions shortly before the deadline, would that exigency entitle the committee to a 15% reduction in the State's signature requirement? The Constitution does not provide any meaningful standards for resolving such questions, thus rendering them nonjusticiable. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (holding that electoral questions are nonjusticiable where courts "lack judicially discoverable and manageable standards for resolving them" (quotation marks and brackets omitted)).

become unconstitutional under the conditions of the pandemic." Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts* 3 (June 12, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356. This case is an opportunity to definitively resolve this "dramatic" and "controversial" assertion by district courts of generalized "emergency powers." *Id.* at 6.

Indeed, embracing Plaintiffs' exigent-circumstances theory would mean that anytime something unusual occurs, federal courts would suddenly enjoy a "roving commission to rewrite state election codes." *Tex. Democratic Party*, 2020 WL 2982937, at *1. That ignores the fact that the Constitution vests States with primary authority to regulate elections, particularly regarding legislation by initiative. *See* U.S. Const. art. I, sec. 4. And even in the present circumstances, Plaintiffs ignore the fact that elected officials—not federal courts—are best situated to respond to the facts on the ground and determine how best to balance safety and public-health concerns. *See In re Rutledge*, 956 F.3d at 1027; *see also Thompson*, 959 F.3d at 812 ("The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections."). Therefore, Plaintiffs' *Anderson/Burdick* claim fails before it even begins.

3. Under the correct legal standard, the challenged requirements are constitutional.

The upshot of the analysis above is that neither the in-person nor affidavit requirements trigger First Amendment scrutiny. Rather, because the right to initiate legislation by petition is "created by state law," the challenged provisions are at most subject to rational-basis review. *Dobrovolny*, 126 F.3d at 1113; *see Jones v.*

Markiewicz-Qualkinbush, 892 F.3d 935, 938 (7th Cir. 2018) (Easterbrook, J.) (applying rational-basis review to initiative-process regulation that did not implicate First Amendment).

Both provisions easily survive that standard. Arkansas has a "paramount" interest in "the integrity of its initiative process." *Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001). Requiring petitioners to sign an initiative petition in the presence of a canvasser and requiring canvassers to attest to that fact before a notary protects the process's integrity, not least by making it difficult for those signing and canvassers alike to use assumed names when engaging in the initiative process. That is enough to prove the challenged requirements constitutional. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

C. Even under the district court's incorrect standard, Plaintiffs' claim must fail.

For the reasons just discussed, the district court's uncritical choice to apply the *Anderson/Burdick* framework was reversible legal error from the get-go. Along with that error, the district court committed other reversible errors at each of the two key junctures in the *Anderson/Burdick* analysis: first, that the challenged requirements severely burden Plaintiffs; and second, that the requirements are not narrowly tailored to Arkansas's compelling interests. Either error additionally suffices to reverse the judgment below.

1. The challenged requirements do not severely burden Plaintiffs and are justified by Arkansas's important regulatory interests.

The district court invalidated the challenged provisions because it believed that they are not narrowly tailored to Arkansas's indisputably compelling interest in keeping fraud out of each step in the process of legislating by initiative. *See* ADD14-16. But under a proper application of *Anderson/Burdick*, the district court should never have reached the question of tailoring. To the contrary, Plaintiffs needed to present "evidence" sufficient to "quantify . . . the magnitude of the burden" on them. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (op. of Stevens, J.). And their failure to present any evidence that the State—as opposed to a pandemic—severely burdened their petitioning efforts means that Arkansas's important regulatory interests suffice to justify the challenged requirements. Plaintiffs' claim thus fails.

a. The Constitution vests States with a "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). And elections are ultimately about picking winners and losers, not creating a forum for self-expression about candidates or issues; "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick*, 504 U.S. at 438. As a result, the Supreme Court has made clear that strict scrutiny does not apply to election regulations, including ballot-access regulations. *Id.* at 432.

Courts instead apply a sliding-scale analysis. To "discern the level of scrutiny required," courts "analyze the burdens imposed" by a regulation. *Martin*, 649 F.3d at 681. Where it "imposes only modest burdens, . . . the State's important regulatory interests" in managing "election procedures" suffice to justify it. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Alternatively, a more exacting standard—requiring a compelling interest and tailoring—applies to *severely* burdensome requirements. *See Martin*, 649 F.3d at 680. Hence, Arkansas "need[ed] not assert a compelling interest" because Plaintiffs did not first establish that Arkansas rather than the pandemic itself had burdened their constitutional rights at all—let alone severely. *Wash. State Grange*, 552 U.S. at 458.

b. Plaintiffs effectively concede their claim would fail but for the pandemic. *See, e.g.*, APPX19 (seeking injunction only "[a]s applied in the current emergency circumstances due to the COVID-19 pandemic"). That's not surprising. The Supreme Court and this Court have long upheld similar regulations. *See Am. Party of Tex. v. White*, 415 U.S. 767, 787 (1974) (notarization requirement); *Hoyle*, 265 F.3d at 703-04 (signers must be registered voters); *Jaeger*, 241 F.3d at 618 (canvassers must be state residents; no commission payments to canvassers); *Wellwood*, 172 F.3d at 1008-09 (content-based signature threshold); *Dobrovolny*, 126 F.3d at 1112 (signature threshold of 10% of registered voters on date petition submitted); *see also Tripp v. Scholz*, 872 F.3d 857, 869 (7th Cir. 2017) ("[A]lthough Illinois's notarization requirement certainly imposes some logistical burden on plaintiffs' ballot access rights, it cannot be fairly characterized as 'severe.'").

Yet instead of requiring Plaintiffs to put on *evidence* quantifying the alleged burdens Arkansas has imposed, *see Crawford*, 553 U.S. at 200 (op. of Stevens, J.), the district court's burdensomeness analysis rested primarily on a single assertion. It simply announced that the challenged "requirement[s] impose severe burdens on Plaintiffs' core political speech, especially in light of the State-recognized need for social distancing during this pandemic." ADD14. At most, the district court suggested that the desire to reduce viral transmission through social distancing "affect[s] the method or manner of speech engaged in by petitioners and canvassers." ADD10. True as that may be, it did not identify any action by Arkansas or its elected officials that precluded Plaintiffs from circulating their petitions. *See* ADD10-11. Nor did it cite any case suggesting that regulations like those challenged here are severely burdensome based on factors beyond a State's control. *See* ADD14-16.

Contrary to the district court's conclusory assertion, COVID-19 does not simply render otherwise valid antifraud provisions severely burdensome. Rather, only state actions that "exclude[] or virtually exclude[]" Plaintiffs' "initiatives from the ballot" are severely burdensome. *Thompson*, 959 F.3d at 809; *see also id*. at 810 ("[W]e must remember, First Amendment violations require state action."). COVID-19 certainly doesn't meet that standard. Indeed, as the Sixth Circuit recently held in rejecting the same argument that the district court adopted here, "just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot." *Id*. at 810. And that makes sense since to hold otherwise would effectively penalize the State for COVID-19 and private responses to the pandemic. *See id*. Yet that is exactly what the district court did here when it announced a severe burden because the "*pandemic* . . . necessitates social distancing" and "precludes in-person contact and communication." ADD10-11 (emphasis added).

Plaintiffs haven't done any better. Like the district court, they have never pointed to any official action that "changed the status quo on the activities Plaintiffs could engage in to procure signatures." *Thompson*, 959 F.3d at 809. For instance, because Arkansas did not impose any stay-at-home orders, unlike plaintiffs in other cases, they cannot show that Arkansas "abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point." *Id.* Indeed, even if fewer people were out-and-about, Plaintiffs could have "advertise[d] their initiatives within the bounds of our current situation" and collected signatures "through social or traditional media inviting interested electors to contact them and bring the petition to the electors' homes to sign." *Id.* at 810. And particularly relevant here, "Plaintiffs could [have] br[ought] their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures." *Id.*

Thus, Plaintiffs claim "effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds)" as expected. *Id.*; *see* APPX2-3, 13-15, 18-19. And as *Thompson* concluded, that is not a severe burden. *See Thompson*, 959 F.3d at 809-11.

Nor do any unique burdens faced by the individual plaintiffs change the analysis. *See* APPX3-4. The Supreme Court's "precedents refute the view that individual impacts are relevant to determining the severity of the burden [a law] imposes." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment).[4] What Plaintiffs view as the challenged provisions' "several light and heavy burdens are

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[4] Although labeled a concurrence, Justice Scalia's *Crawford* opinion garnered the same number of votes as Justices Stevens's opinion. *See* 553 U.S. at 184, 204.

no more than the different *impacts* of the single burden that the law uniformly imposes on all [initiative proponents]." *Id.* The Supreme Court has never "consider[ed] the peculiar circumstances of individual voters or candidates"—or in this case, ballot-initiative proponents—when "grappl[ing] with the magnitude of burdens." *Id.* at 206. That is why the Sixth Circuit refused to "hold private citizens' decisions to stay home for their own safety against the State." *Thompson*, 959 F.3d at 810. Plaintiffs' individualized choices about how best to protect themselves from COVID-19 does not invalidate Arkansas's modest regulations of the mechanics of initiated legislation.

Finally, even if Plaintiffs had put on evidence that the State somehow restricted their ability to collect signatures at one time, that is certainly not the case now. As was also true in *Thompson*, Arkansas's decision to begin lifting its pandemic-response measures well in advance of Plaintiffs' July 3 submission deadline fatally "undermines Plaintiffs' argument that the State has" imposed a severe burden and "excluded them from the ballot." *Id.; see* Executive Order 20-25 (May 5 order relaxing some restrictions). Indeed, even after the district court's order, Arkansas has continued to relax its pandemic response measures, including those that briefly limited gatherings outside the home. *See* Nyssa Kruse, *Arkansas to move to Phase 2 of reopening Monday, governor says; new cases at 288*, Ark. Democrat-Gazette (June 10, 2020, 3:23 PM), https://bit.ly/3ebvPkd. And the events of the past two weeks where hundreds—perhaps thousands—have gathered across Arkansas to protest underscore just how little burden Plaintiffs bore. *See* Tom Sissom, *Thousands protest peacefully in Fayetteville*, Ark. Democrat-Gazette (June 2, 2020, 11:27 PM), https://bit.ly/3ecWwoO. Thus, "[c]onsidering all opportunities Plaintiffs had, and still have, to exercise their rights," Plaintiffs' burden is not severe. *Thompson*, 959 F.3d at 810.

c. Because Plaintiffs have not demonstrated a severe burden, Arkansas "need not assert a compelling interest." *Martin*, 649 F.3d at 685 (quoting *Wash. State Grange*, 552 U.S. at 458). Instead, Arkansas's "important regulatory interests" in managing "election procedures" are sufficient to sustain the challenged provisions. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted); *see* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 331 (2007) (explaining that review "in nonsevere-burden cases," like here, is "something like rational basis review"). The challenged provisions clearly "protect the state's initiative process from abuse," and Arkansas unquestionably has a "paramount" interest in "protecting the integrity of its initiative process." *Hoyle*, 265 F.3d at 704; *see Thompson*, 959 F.3d at 811 (holding that Ohio's "compelling and well-established interests in administering its ballot initiative regulations" justified the requirements in that case).

2. The challenged requirements would survive heightened scrutiny.

Although Arkansas need not show any compelling interest to which the challenged requirements are narrowly tailored, *see Wash. State Grange*, 552 U.S. at 458, the district court also committed legal error in its tailoring analysis, *see* ADD15-16. This is yet another reason for this Court to reverse.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (citation omitted); *see Hoyle*, 265 F.3d at 704 (making similar statement specifically regarding initiative process). The district court thus had to acknowledge Arkansas's compelling interest in maintaining the integrity of the initiative process and preventing fraud. ADD11. Yet it concluded Arkansas's century-old antifraud provisions were not narrowly tailored because it believed there were "less burdensome alternatives" that are "equally effective at achieving the State's interest." ADD15.

To reach that conclusion, the district court held Arkansas to an improper evidentiary standard. *See* ADD11. While Plaintiffs needed to present evidence quantifying their alleged burdens, Arkansas faced no such evidentiary hurdle in establishing its compelling interest. *See* Amicus Br. of Honest Elections Project in Supp. of Stay Mot. (Honest Elections Br.) 8-10 (collecting citations for this proposition). That is because States "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v.*

Socialist Workers Party, 479 U.S. 189, 195 (1986). So although the lead *Crawford* opinion found "no evidence of extensive fraud in U.S. elections or of multiple voting," it acknowledged that "both occur" and "could affect the outcome of a close election." 553 U.S. at 194 (quoting Building Confidence in U.S. Elections sec. 2.5 (Sept. 2005)). To "inspire public confidence" in the electoral system, States like Arkansas can prophylactically enact "safeguards" that "deter or detect fraud or [that] confirm the identity of voters." *Id.* (quoting Building Confidence in U.S. Elections sec. 2.5).

The district court's application of an improper evidentiary standard led it to incorrectly—and all too quickly—assume that Arkansas could have adopted less burdensome antifraud requirements. *See* ADD15-16. But this Court has long held that even when *Anderson/Burdick* heightened scrutiny applies, the fit need not be perfect but depends on the interest. *See Libertarian Party of N.D.*, 659 F.3d at 694-95 (making clear this is an "undue burden" test rather than traditional strict scrutiny); *id.* at 698 ("the mere identification of a less burdensome alternative is not dispositive in election cases"); *see also Burdick*, 504 U.S. at 432 (rejecting "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny").

Regarding the affidavit requirement, the district court found that requirement was not sufficiently tailored because Arkansas allows certain unsworn declarations to take the place of a notarized statement. ADD15. Its reasoning on this point resembles the district court's reasoning in *Democratic Nat'l Committee v. Bostelmann*. The court there enjoined Wisconsin's witness requirement for absentee ballots as applied to the "immunocompromised or elderly." No. 20-CV-249, 2020 WL 1638374, at *20 (W.D. Wis. Apr. 2, 2020). It thought the burdens on them were "not overcome by the state's general anti-fraud goals." *Id.* The Seventh Circuit disagreed. It stayed that district court's order, holding that it "did not give adequate consideration to the state's interests." Order, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1539 (7th Cir. Apr. 3, 2020), ECF#30 at 3, *add'l relief granted on other grounds sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).

That is equally true here. Like the Wisconsin district court, the court below improperly discounted Arkansas's interest in preserving its electoral processes through the affidavit requirement. It makes no difference that Arkansas allows unsworn declarations executed in a foreign country as a substitute for a notarized affidavit in certain circumstances. *See* ADD15. People "physically located outside the geographic boundaries of the United States," Ark. Code Ann. 16-2-206, often find it difficult to locate notaries. In recognition of that difficulty, Arkansas relaxes its notarization requirement for declarations executed abroad. That accommodation does not render the affidavit requirement not narrowly tailored.

The district court's contrary conclusion ignored key differences between a notarized affidavit and an unsworn declaration that make affidavits more useful in fraud deterrence. *See Tripp*, 872 F.3d at 866-70. Unlike affidavits, an unsworn declaration "could still be submitted without pain of an identification check, and thus provide less of a chance for law enforcement authorities to trace down the true origin of fraud." *Id.* at 870 (quotation marks omitted). The district court incorrectly concluded that the affidavit requirement was not narrowly tailored to Arkansas's compelling antifraud interest.

Regarding the in-person requirement, the district court held that it was not sufficiently tailored because fraud is a crime. *See* ADD15-16. But a petition-fraud prosecution is necessarily an after-the-fact endeavor and hardly an adequate substitute for the in-person requirement. The district court ignored Arkansas's compelling interest in having the canvasser serve as "the sole election officer, in whose presence the citizen exercises his right to sign the petition." *Sturdy*, 143 S.W.2d at 551. In contrast to a fraud prosecution—which depends on any number of factors and might not occur until well after the fraud has succeeded—the in-person requirement prophylactically addresses the potential for petition fraud by deputizing canvassers to monitor who signs their petitions.

Criminal penalties for perjury or petition fraud do not address threats to election integrity posed by persons who, due to negligence or recklessness, lack the *mens rea* necessary to prove criminal intent. "The State's interest is particularly strong with respect to efforts to root out fraud," but it also "extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State." *Doe*, 561 U.S. at 197-98. The district court's analysis ignored this dimension of the State's interest in preserving the integrity of the initiative process.

Lastly, the district court's undervaluation of Arkansas's compelling interests in preventing fraud and otherwise preserving the integrity of the initiative process led it to also undervalue the requirements that signature pages must contain the canvasser's affidavit and be affixed to the initiative—provisions Plaintiffs did not even challenge. ADD17-18. As the district court noted, its injunction enables signature pages to be individually received by mail, the internet, magazines, and community bulletin boards, ADD17—appreciably compounding prospects that an individual who signs a petition may not fully understand the initiative process or the significance of signing a petition.

The canvasser and a notary are in the best position to ensure that invalid signatures do not make their way onto the petitions on the front end of the process. The district court's injunction removes these safeguards from the signature-collection process. As a result, this Court should reverse.

III. None of the other factors support the district court's injunction.

Because Plaintiffs' claim fails on the merits, this Court need not consider whether the district court also erred in applying the remaining injunction factors. *Oglala Sioux Tribe*, 542 F.3d at 229. But the district court's misapplications of those other factors too would warrant reversal.

To start, the district court's reliance on the supposed harm that Plaintiffs would face absent an injunction ignores the fact that their alleged harm is entirely self-inflicted. Had they not chosen to delay starting their petition drive until a few months before the July 3 deadline—sitting idly by while COVID-19 began to re-shape American life—Plaintiffs could already have hit the Arkansas Constitution's signature threshold. Moreover, had Plaintiffs engaged in any of the signature collection strategies discussed by the Sixth Circuit in *Thompson*, there is little doubt they would either have already collected—or would be on the verge of collecting—sufficient signatures.

Hence, Plaintiffs' alleged difficulty in complying with Arkansas law is of their own making. And such "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d

Cir. 1995). The district court erred as a matter of law in concluding otherwise. That is reason enough to reverse the judgment.

Next, the district court erroneously failed to consider the harm its injunction would inflict upon Arkansas and its citizens. Nor did the district court consider the public's interest in seeing election laws consistently enforced—even during a pandemic. Instead, the district court simply refused to consider those factors and simply declared that there "is really no harm at all" from including non-compliant initiatives since voters will ultimately decide whether an amendment is approved. *See* ADD19. That approach unequivocally conflicts with the Supreme Court's repeated conclusion that a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see Thompson*, 959 F.3d at 812.[5]

Nor did the district court consider that its injunction would threaten Arkansas's ability to "ensure elections are fair, honest, and orderly." *Libertarian Party of N.D.*, 659 F.3d at 693. Indeed, though "the November election itself may be

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[5] To the extent the district court suggested its harms analysis was consistent with Arkansas's law on "'substantial compliance,'" ADD19 (quoting *Fletcher v. Bryant*, 422 S.W.2d 698, 700 (Ark. 1968)), its claim is unsupported. *See Porter*, 839 S.W.2d at 522-23 (holding "where the signatures are gathered in areas and places while the canvasser is neither physically [n]or proximately present," even "substantial compliance is lacking"); *see also Arizonans for Fair Elections*, 2020 WL 1905747, at *5 (citing *Porter* and explaining that "it is difficult to see how non-compliance with the physical-presence requirement could be disregarded").

months away," other "important, interim deadlines that affect Plaintiffs, other ballot initiative proponents, and the State are imminent." *Thompson*, 959 F.3d at 813. And changing just one "procedure now will have inevitable, other consequences." *Id.*; *cf. Marston v. Lewis*, 410 U.S. 679, 680 (1973) ("States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds."). Thus, the district court erred as a matter of law when it failed to account for the Supreme Court's repeated admonishment that lower courts should avoid sowing chaos by "chang[ing] state election rules as elections approach." *Thompson*, 959 F.3d at 813 (citing *Republican Nat'l Comm.*, 140 S. Ct. at 1207). That failure too requires reversal.

IV. The district court exceeded its authority by rewriting Arkansas election law.

The district court literally rewrote Arkansas's initiative statutes, specifying new language that is to appear on petition signature pages and compelling Arkansas to accept unsworn canvasser declarations and signature pages not signed in the canvasser's presence. ADD22-24; ADD28-30. In so doing, it clearly exceeded its authority since "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Thompson*, 959 F.3d at 812 (quoting *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020) (unpub.)); *accord Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1301 (8th

Cir. 1995) ("Cognizant of our role as a federal court, we do not purport to advise Arkansas on the best means of rendering constitutional its election code: that decision rests with the sound judgment of the Arkansas legislature."). And COVID-19 did not alter that principle. *See Tex. Democratic Party*, 2020 WL 2982937, at *1; *Thompson*, 959 F.3d at 812.

Further, the injunction here was even more problematic because it barred the enforcement of laws that Plaintiffs did not even challenge and with respect to non-parties. For instance, the district court effectively enjoined the enforcement of state *constitutional* provisions that Plaintiffs did not challenge. *See* ADD28-30. Not to mention Arkansas's requirements that signature pages contain a canvasser's affidavit and be affixed to the initiative—which the district court enjoined despite Plaintiffs' failure to challenge them. *See* ADD17-18. And even though it expressly acknowledged that "Plaintiffs move[d] for preliminary injunctive relief only for themselves," the district court made its injunction universal. ADD19-20.

Thus, even if Plaintiffs could prevail on the merits (and they certainly cannot), reversal would still be required because the district court's final order exceeded its authority.

CONCLUSION

For these reasons, this Court should reverse the district court's judgment and remand the case to the district court with instructions to dissolve its permanent injunction and dismiss Plaintiffs' claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,221 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) and 8th Cir. R. 28A(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word.

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/s/ Nicholas J. Bronni
Nicholas J. Bronni

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I certify that on June 18, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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