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

BONNIE HEATHER MILLER, ROBERT WILLIAM ALLEN, ADELLA DOZIER GRAY, and ARKANSAS VOTERS FIRST — PLAINTIFFS

v. Case No. 5:20-cv-05070-PKH

JOHN THURSTON, in his official capacity as Secretary of State of Arkansas — DEFENDANT

DEFENDANT'S BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Comes the Defendant, John Thurston, in his official capacity as Secretary of State of Arkansas, by and through his attorneys, Attorney General Leslie Rutledge and Senior Assistant Attorney General William C. Bird III, and for his Brief in Opposition to Motion for Preliminary Injunction, states as follows:

INTRODUCTION

The COVID-19 pandemic has burdened Plaintiffs, who seek to place a state ballot initiative on the ballot for the 2020 general election, just like it has burdened billions worldwide. They challenge certain Arkansas ballot initiative laws but make no argument that these laws violate the First Amendment under normal circumstances. Instead, they argue that the First Amendment requires Arkansas to give Plaintiffs a special exemption from the normal rules for collecting petition signatures. Yet Plaintiffs assembled their ballot initiative organization less than two months ago, while other organizations have been collecting signatures for nearly a year. Whatever burdens Plaintiffs face, they are caused either by COVID-19,

Plaintiffs' own delay, or both—not the Secretary of State or any other Arkansas official. Plaintiffs' alleged injuries are not traceable to any official action. Thus, they lack standing to bring this lawsuit.

Despite making no claim that Arkansas law has injured them, Plaintiffs ask this Court to grant extraordinary, unprecedented relief that would involve rewriting various Arkansas Constitutional provisions and statutes and affirmatively ordering the Secretary of State to implement—from the ground up—a brand new mechanism by which electronic signatures could be gathered and validated. But they offer no evidence that the Secretary could design and implement such a mechanism, which Arkansas has never employed, in time for the November 2020 general election, just six months from now. The requested injunctive measures would throw into turmoil Arkansas' interrelated election calendar and further would enjoin enforcement of the procedures by which the State protects the integrity of the initiative process.

Plaintiffs' lack of standing and the unprecedented nature of their requested injunction give this Court plenty of reason to deny their motion for a preliminary injunction. Denying their motion would put this Court in line with other district courts around the country that have denied requests similar to Plaintiffs'. They are not the first proponents of a state ballot initiative to seek relief from a federal court of the burdens that COVID-19 has created for the signature-gathering process. *See Bambenek v. White, et al.*, Case No. 3:20-CV-3107-SEM-TSH, Doc. 24 (C.D. Ill. May 1, 2020); *Morgan v. White*, Case No. 1:20-CV-2189, Doc. 24 (N.D. Ill. Apr. 17, 2020)*; see also Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL

1905747, at *1 (D. Ariz. Apr. 17, 2020). But federal courts in those other cases have rejected those plaintiffs' claims. *See Bambenek*, Doc. 24 at 5-7. For these reasons and those detailed below, this Court should follow suit and deny the motion for a preliminary injunction.

BACKGROUND

For purposes of placing a proposed constitutional amendment on the ballot for the November 2020 election, initiative proponents in Arkansas must satisfy various constitutional and statutory requirements. Arkansas law provides for various procedural and administrative measures governing the ballot initiative process. Plaintiffs challenge the constitutionality of several of these measures, arguing that in light of the COVID-19 pandemic, they cannot comply with the requirements in order to place their desired initiative on the ballot. At issue in this case are the following provisions:

- The constitutional requirement that Plaintiffs gather a number of petition signatures equal to at least 10% of the total votes cast for the office of governor in the last gubernatorial election. *See* Ark. Const. art. 5, § 1 (Plaintiffs request the Court enjoin this provision and require signatures equal to only 6%);

- The constitutional requirement that initiative petitions be filed with the Secretary of State "not less than four months before the election." Ark. Const. art. 5, § 1 (Plaintiffs request the Court enjoin this provision and extend the filing deadline to not less than two months before the election);

- The statutory requirement that petition signatures be handwritten—and not electronically collected. Ark. Ann. Code §§ 7-9-103(a)(1)(A), 7-9-104(c)(1) (Plaintiffs request the Court enjoin this provision and order the Secretary of State to accept electronic signatures);

- The statutory requirement that a canvasser submit an affidavit certifying "that all signatures appearing on the petition part were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine and each person signing is a registered voter." Ark. Ann. Code § 7-9-108(b) (Plaintiffs request the Court enjoin this provision and eliminate the in-person witnessing requirement); and

- The statutory requirement that a canvasser sign this affidavit in presence of a Notary Public. Ark. Ann. Code §§ 7-9-108, 7-9-109 (Plaintiffs request the Court enjoin this provision and eliminate the in-person notarization requirement).

Plaintiffs organized as a ballot question committee on March 10, 2020, and delayed filing the proposed amendment with the Secretary of State until March 16, 2020. Compl. Doc. 2, ¶¶ 17, 21. At that point, COVID-19 already had emerged in Arkansas. Plaintiffs suspended signature-gathering efforts within a week of beginning, and as a result, have collected fewer than 100 signatures. *Id.*, ¶ 23.

Plaintiffs then waited another five weeks before filing this action on April 22, 2020.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (reversing preliminary injunction when movant did not establish irreparable injury was likely in the absence of an injunction.). Plaintiffs bear the burden of establishing the propriety of a preliminary injunction, and they must make "a clear showing" they have carried that burden. *Id.* at 22; *see Watkins, Inc. v. Lewis,* 346 F.3d 841, 844 (8th Cir. 2003). Plaintiffs are only entitled to a preliminary injunction upon showing that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in

the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 24-25; *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). "As is always true when weighing these factors to determine whether the extraordinary relief of a preliminary injunction should be granted, no single factor is in itself dispositive." *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993).

Obtaining a preliminary injunction is never easy. But two aspects of this lawsuit make Plaintiffs' task here particularly difficult. First, because Plaintiffs' requested injunction would prevent "implementation of a duly enacted state statute," and disrupt the status quo a movant must first make a "*more rigorous* showing" than usual "that it is 'likely to prevail on the merits.'" *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (emphasis added) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). That requirement guards against attempts to "thwart a state's presumptively reasonable democratic processes." *Rounds*, 530 F.3d at 733. "A more rigorous standard 'reflects the idea that government policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. U.S.*, 44 F.3d 128, 131 (2nd Cir. 1995) (per curiam)). Second, Plaintiffs burden "is a heavy one where, as here, granting the preliminary injunction will give

[Plaintiffs] substantially the relief it would obtain after a trial on the merits." *Id.* (citing *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991)).

Plaintiffs' motion for preliminary injunction should be denied because they have not met the threshold requirement of establishing standing to bring their claims. In addition, Plaintiffs have not met the heavy burden of showing they are entitled to the extraordinary relief they seek and each of the relevant factors weigh against granting the motion.

ARGUMENT

The overwhelming weight of Eighth Circuit precedent concerning ballot initiative measures requires this Court to deny Plaintiffs' requested relief. As will be more fully developed below, Plaintiffs ignore the critical distinction between cases involving *ballot initiatives* and cases involving *candidate or political party* access to the ballot. Plaintiffs erroneously rely on cases involving candidate or political party access to the ballot—not ballot initiative cases—and in so doing, apply the wrong legal standard.

Plaintiffs are not entitled to their requested preliminary relief for a number of reasons. *First*, Plaintiffs lack standing to bring their claims because their alleged injuries are fairly traceable to COVID-19 and their own inaction—not to the Defendant. *Second*, Plaintiffs are unlikely to succeed on the merits because they have no federal right to place an initiative on the ballot and Arkansas' ballot initiative laws are non-discriminatory, content-neutral, procedural laws that do not inhibit speech about the initiative. *Third*, given Plaintiffs' broad and administratively-burdensome

requests for relief, the hardship to the Defendant far outweighs any harm to Plaintiffs if no injunction issues. *Finally*, the public interest is not furthered by Plaintiffs' requested relief.

For these reasons, the Court should deny Plaintiffs' request for entry of preliminary injunctive relief.

I. Plaintiffs lack standing to bring their claims

First, Plaintiffs have no standing to pursue the claims at issue in this case. Plaintiffs have suffered no injury at the hands of the Secretary of State, or any other Arkansas official. Instead, any alleged injury is the result of Plaintiff's own inaction, as well as the result of the COVID-19 pandemic. Article III does not grant them standing to sue based on injuries not suffered at the hands of the Secretary of State.

To establish standing, Plaintiffs must show not just a concrete injury that this Court can redress—and as discussed below, they cannot show such injury, because the Defendant has not violated the First Amendment—but also that their alleged injury is "fairly traceable to the challenged action." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). In other words, "there must be 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 Environment*, 523 U.S. 83, 103 (1998). Here that means Plaintiffs must show both that their First Amendment rights have been violated and that the violation was "*caused by* private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (emphasis added).

To the extent Plaintiffs have been injured—that is, prevented from placing an initiative on the ballot in a way that offends the First Amendment—no action by the Secretary of State caused that injury. To the contrary, if any such injury incurred, it is fairly traceable to the COVID-19 pandemic and also to Plaintiffs' lack of diligence in timely pursuing its ballot initiative.

A. Plaintiffs' alleged injuries are fairly traceable to COVID-19 and not the Defendant

First, Plaintiffs' alleged injuries are not fairly traceable to the Secretary of State because whatever injuries they may have suffered result from conditions wholly outside the control of the Secretary—namely the COVID-19 pandemic itself. Plaintiffs do not claim that Arkansas law is unduly burdensome as a general matter. Instead, they claim that "*the pandemic has made* the signature-gathering process under Arkansas law unduly burdensome." Compl., Doc. 2, p.13 (emphasis added) (capitalization altered). Their briefing also suggests that even they view COVID-19 as the cause of any alleged burden, not any action by the Defendant or any other Arkansas official. Brief, Doc. 7, p. 15 (arguing that "*the COVID-19 pandemic* and response *has created severe burdens*") (emphasis added) (capitalization altered).

Just last month, the United States District Court for the Eastern District of Arkansas ruled that certain plaintiffs lacked standing to bring an election-law claim based on injuries caused by COVID-19. Those plaintiffs challenged Arkansas laws governing the acceptance of absentee ballots. *Mays v. Thurston, et al*, No. 4:20-cv-341-JM, 2020 WL 1531359, at *1-2 (E.D. Ark. March 30, 2020). There, plaintiffs sought a temporary restraining order requiring the Secretary of State and Governor

to accept absentee ballots postmarked before or on Election Day that arrive within 10 days of Election Day. *Id.* at *1. But they did not allege that Arkansas's absentee-ballot deadline was unconstitutional as a general matter. *Id.* at *2. They argued only that COVID-19 made that deadline more burdensome to comply with. *See id.* So the Court denied the requested relief finding that the plaintiffs lacked standing, in part, because their alleged injuries "*are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic*." *Id.* (emphasis added).

Because Plaintiffs here similarly claim only that COVID-19 has made compliance with otherwise constitutional laws more difficult, their alleged injuries are not fairly traceable to the Defendant's actions. Plaintiffs lack standing.

B. Plaintiffs' alleged injuries largely are self-inflicted

Second, Plaintiffs cannot establish a showing of standing if they caused their own alleged injuries. "[S]elf-inflicted injuries are not fairly traceable to the Government's purported activities." *Clapper*, 568 U.S. at 418; *see also Mays,* 2020 WL 1531359, at *2 ("Plaintiff's injury, if any, will occur only if they did not follow the absentee voting requirements as loosened by the Governor or if they do not show up to vote at a designated voting place exercising social distancing and other protections suggested by the State and federal government.").

Under Arkansas law, there is no "start date" for Ballot Question Committees (BQC) to organize in anticipation of placing an initiative on the ballot in an upcoming general election. Arkansas law permits a BQC to begin raising money, to begin campaigning in support of its measure, and to begin collecting petition signatures as

early in advance of a general election as it desires. The only timing requirement relates to a committee's obligation to file a statement of organization within five (5) days of receiving contributions or making expenditures exceeding $500. Ark. Code Ann. § 7-9-404(a). A BQC conceivably could organize tomorrow for the purpose of placing an initiative on the ballot in 2028.

Waiting nearly a year after beginning to explore the possibility of organizing a BQC, Plaintiffs were the last BQC organized for the 2020 election. Plaintiffs assert they became interested in redistricting reform as early as 2017, Doc.7-17, ¶2, and began exploring a ballot initiative supporting independent redistricting as early as May 2019, Doc.7-1, ¶ 1, but they nevertheless waited until March 10, 2020, to organize as a BQC. Compl., Doc. 2, ¶ 17. This was the latest date upon which any BQC organized for the 2020 general election.[1] In contrast, the earliest BQC seeking to place an initiative on the November 2020 ballot organized in March 2019. *Id*. In total, 10 of the 13 BQCs organized prior to December 31, 2019. *Id.* Because of their diligence, each of those other BQCs had months to collect signatures—some almost a year—before the pandemic began here in earnest.

After organizing, Plaintiffs delayed filing the proposed amendment with the Secretary of State until March 16, 2020. Compl., Doc. 2, ¶ 21. Only then, in accordance with Arkansas law, could Plaintiffs begin to collect signatures. At the time the COVID-19 outbreak began to emerge days later, Plaintiffs assert they had not yet collected even 100 signatures. *Id.*, ¶ 23. In other words, while Plaintiffs could have

[1] https://www.uaex.edu/business-communities/voter-education/state-ballot-issues.aspx.

spent all of last year collecting signatures, they chose not to even start until COVID-19 had already come to Arkansas.

At the time Plaintiffs first began to collect signatures on March 16, 2020, the Centers for Disease Control (CDC) already had advised that no gatherings of 50 or more people occur over the next eight weeks (through May 10, 2020), including weddings, festivals, parades, concerts, sporting events, and conferences. Compl, Doc. 2, ¶ 46. Despite numerous other forecasts from national, state and local authorities indicating the pandemic would likely continue until at least early May, *see id.*, ¶¶ 35-59, Plaintiffs delayed an additional five weeks before filing this action on April 22, 2020.

The time period in which COVID-19 likely impacts Plaintiffs' signature-gathering efforts represents a mere fraction of the total window of time Plaintiffs had available to qualify their initiative for the ballot. Plaintiffs could have begun their efforts at literally *any* point in the preceding months and years but chose to wait until just months prior to the filing deadline even to organize as a BQC. In comparison, the earliest BQC organizer—Arkansas Term Limits BQC—filed its proposed amendment with the Secretary of State on March 14, 2019,[2] giving it approximately 16 months in which to gather signatures. Due to Plaintiffs' own choices, they have only 4 months. Insofar as they cannot comply with Arkansas law, it is because of those choices not because of any burdens Defendant has created.

[2] *See* fn. 1.

It certainly is at Plaintiffs' discretion to organize and pursue its ballot initiative on whatever timeline it chooses. Nevertheless, in light of the extraordinary relief Plaintiff seeks, Plaintiffs' lack of diligence in pursuing its ballot initiative cannot be ignored. *See, e.g.*, *Arizonans for Fair Elections,* 2020 WL 1905747 *19-21 (considering Arizona ballot committee's lack of diligence in denying request for a COVID-19 related preliminary injunction). Plaintiffs chose to wait until the latest possible date to begin their efforts—giving themselves no room for error. Consequently, any resulting difficulties in Plaintiffs' attempt to place their initiative on the ballot are self-inflicted. Plaintiffs have caused their own injuries, which are not therefore traceable to the Defendant.

This Court should deny the motion for a preliminary injunction because Plaintiffs lack standing.

II. Plaintiffs are Unlikely to Succeed on Their First Amendment Claims[3]

Even if the Court determines that Plaintiffs have standing to proceed, Plaintiffs' request for injunctive relief nevertheless fails because they cannot establish a likelihood of success on the merits. A preliminary injunction is not warranted unless Plaintiffs can clearly establish that they are likely to succeed on the merits of their claims. *Mazurek*, 520 U.S. at 972. Because a preliminary injunction

[3] Plaintiffs' alleged Fourteenth Amendment claim is not addressed or analyzed in their Brief in Support of Motion for Preliminary Injunction, and the Complaint contains no facts supporting a Fourteenth Amendment claim. Defendant does not address it here.

would enjoin the operation of state law and direct Defendant to take affirmative action, the burden here is even more rigorous than the typical showing. *Rounds*, 530 F.3d at 732–33.

A. Plaintiffs apply the wrong legal standard

Before determining whether Plaintiffs can make a "rigorous showing of a likelihood of success on the merits," it is first necessary to identify the correct test governing Plaintiffs' claims. Legal standards governing ballot initiative laws are different from those governing a candidate or political party's ballot access rights. But Plaintiffs wholly ignore this critical distinction. As a result, they apply the wrong legal standard.

i. Ballot initiatives vs. candidate/political party access

As a starting point, it is critical to distinguish between ballot access cases involving initiatives and ballot access cases involving candidates or political parties. These two categories of cases are not the same. The legal standards governing each process are different and cannot be applied interchangeably. This case involves a ballot initiative; not candidate or political party access.

The fundamental difference between the two categories is apparent. The right to place an initiative on the ballot is a state-created right and is not a right guaranteed by the United States Constitution. *See, e.g., Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). In contrast, candidate/political party access to the ballot is protected by the First Amendment. *Bullock v. Carter,* 405 U.S. 134, 143 (1972) ("the impact of candidate and political party eligibility requirements on voters

implicates fundamental First Amendment rights because the tendency of ballot access restrictions is to limit the field of candidates from which voters might choose."). Consequently, the protection given to a state-created right to a ballot initiative is less than that afforded to a federal constitutional right to candidates' ballot access, which clearly implicates the First Amendment. *See Bernbeck v. Gale*, 829 F.3d 643, 648–49, n.4 (8th Cir. 2016) ("what may constitute the invasion of a deeply fundamental, constitutionally recognized right to vote cannot be assumed to apply interchangeably with the state-created, nonfundamental right to participate in initiatives and referenda"); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993) ("The plaintiffs do not cite to us nor does our research identify any decision of the Supreme Court or a lower federal court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote"). For this reason, ballot initiative provisions and candidate/political party access provisions are analyzed under two different frameworks.

Laws governing candidate/political party ballot access *inherently* implicate the First Amendment. In this context, courts apply a sliding standard of review to balance the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seek to vindicate against the precise interests forward by the state as justifications for the burden imposed by its rule. *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (the "*Anderson/Burdick*" test). Severe burdens on speech trigger an

exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review. *Id.*

The *Anderson/Burdick* test has no application here. The present case does not involve candidates or political parties—it involves a ballot initiative—and consequently, does not inherently implicate the First Amendment. Yet Plaintiffs proceed on the incorrect assumption that the *Anderson/Burdick* test is appropriate for analyzing their claims. Thus, Plaintiffs' framing of the issues, case law analysis, and motion for injunctive relief wholly ignore the distinction between ballot initiative and candidate access cases. Consequently, Plaintiffs apply the wrong legal standard in analyzing the ballot initiative provisions at issue in this case.

ii. The appropriate standard of review for ballot initiative cases

Courts consistently have recognized that "the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *See Dobrovolny*, 126 F.3d at 1113 (citing *Kendall v. Balcerzak*, 650 F.3d 515, 522–23 (4th Cir. 2011)); *see also Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210–11 (10th Cir. 2002); *Taxpayers United for Assessment Cuts*, 994 F.2d at 296; *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018). Procedures to gain ballot access for initiatives—a wholly state-created right—are subject only to rational basis review so long as the challenged regulations do not distinguish by viewpoint or content. *See Jones,* 892 F.3d at 938 ("Because the [challenged ballot-initiative rule] does not distinguish by viewpoint or content, the answer depends on

whether the rule has a rational basis, not on the First Amendment."); *see also Taxpayers United*, 994 F.2d at 297.

States that allow ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative, as they have with respect to election processes generally. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). But where a State provides a means for direct democracy through ballot initiative, it cannot place "undue hindrances to political conversations and the exchange of ideas" on those advocating ballot initiatives. *Id.* at 192. The First Amendment is implicated by a ballot initiative regulation only where the regulation becomes "invalid interactive speech restrictions." *Id.*; *see also Semple v. Griswold*, 934 F.3d 1134, 1142 (10th Cir. 2019) (recognizing distinction between laws regulating or restricting communicative conduct versus laws that govern the process by which legislation is enacted). To be clear, although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006). Put another way, the First Amendment is not implicated by the state's creation of an initiative procedure but "only by the state's attempts to regulate speech *associated with* an initiative procedure." *Id.* at 1099 (citing *Save Palisade FruitLands,* 279 F.3d at 1211).

In this case, Plaintiffs challenge *only* laws governing the process by which initiatives are placed on the ballot. *See* Compl. Doc. 2 at 20-21 (challenging number of signatures, deadline for submitting those signatures, and other aspects of

petitioning process). None of the provisions challenged by Plaintiffs relate in any way to their communicative conduct—much less in a way that is content-based or viewpoint-discriminatory. Therefore, heightened First Amendment scrutiny does not apply to Plaintiffs' claims. *See Jones,* 892 F.3d at 938.

That conclusion is buttressed by precedent from the Eighth Circuit. In ballot initiative cases where the challenged regulations are "administrative or procedural" in nature and not aimed at regulating speech—*i.e.*, in cases like this case—the Eighth Circuit and courts bound by it have found no intrusion on First Amendment rights and have refused to subject such regulations to heightened scrutiny. *See Dobrovolny,* 126 F.3d 1111 ("[a]bsent some showing that the initiative process substantially restricts political discussion...*Meyer* [strict scrutiny] is inapplicable"); *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 675 (8th Cir. 2012) ("where no restriction on speech has been shown, courts have refused to apply exacting scrutiny"); *Bernbeck v. Gale*, 58 F. Supp. 3d 949, 954–56 (D. Neb. 2014) (signature and geographic distribution requirements were "no hindrance on the ability to speak, organize, or circulate petitions, and thus the Eighth Circuit instructs that strict scrutiny does not apply"), *vacated and remanded on other grounds*, *Bernbeck*, 829 F.3d 643.

Hoyle v. Priest, a case from the Western District of Arkansas, is particularly instructive. 59 F. Supp. 2d 827, 830 (W.D. Ark. 1999), *affirmed by Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001). There, sponsors of a statewide initiative petition brought First and Fourteenth Amendment challenges to an Arkansas law requiring

that petition signers be fully registered voters at the time they sign an initiative petition. Plaintiffs contended that such a requirement constituted a restriction on core political speech, and consequently, was subject to a heightened, strict scrutiny standard. *Id.* at 835. The court rejected this assertion finding that, though the circulation of initiative petitions is core political speech, state laws that are content neutral and merely regulate who may sign a petition do not violate the First Amendment. *Id*.

In reaching this conclusion, the *Hoyle* court first revisited *Meyer v. Grant,* 486 U.S. 414 (1988), to draw a clear line between ballot initiative laws that substantially restrict protected political discussion and those laws that do not. *Hoyle*, 59 F. Supp. 2d at 835. In *Meyer*, the Supreme Court held unconstitutional a Colorado statute prohibiting the use of paid petition circulators. There the Court found that the law restricted core political speech by limiting the "number of voices" who could convey the petitioner's message, and thus the size of the audience they could reach, making it less likely to garner the number of signatures necessary to place the matter on the ballot. *Meyer,* 486 U.S. at 420, 108 S. Ct. at 1891–92. The *Hoyle* court noted that "the decision in *Meyer* hinged upon the finding that the Colorado statute substantially restricted protected political discussion"—in contrast to the Arkansas law which impacted only who could sign a petition. 59 F. Supp. 2d at 836.

The holding in *Hoyle* also relied heavily upon the Eighth Circuit's holding in *Dobrovolny*, a case involving a constitutional challenge to a Nebraska law requiring that an initiative petition contain, at the time of filing, the signatures of registered

voters equal to 10 percent of the number of registered voters in Nebraska. 126 F.3d 1111 (8th Cir. 1997). There the Eighth Circuit found that the constitutional provision at issue "does not in any way impact the communication of appellants' political message or otherwise restrict the circulation of their initiative petitions or their ability to communicate with voters about their proposals…nor the content of appellants' political speech." *Id*. at 1112-1113. Importantly, the *Dobrovolny* court further held that "[w]hile the Nebraska provision may have made it difficult for appellants to plan their initiative campaign and efficiently allocate their resources, *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*." *Id*. at 1113 (emphasis added).

The *Hoyle* court held that Arkansas laws requiring that petition signers be fully registered voters at the time they sign an initiative petition do not involve a restriction on core political speech, and consequently, do not implicate First Amendment rights. 59 F. Supp. 2d at 836. Similarly, the claims in this case—that compliance with Arkansas's signature requirements and deadlines for ballot initiatives is difficult because of COVID-19—receive no heightened scrutiny. *See Dobrovolny*, 126 F.3d at 1113.

In fact, the Eighth Circuit has made clear elsewhere that numerical signature requirements do not run afoul of the First Amendment. In *Wellwood v. Johnson,* 172 F.3d 1007, 1008–09 (8th Cir. 1999), the Eighth Circuit found that an Arkansas law requiring a larger number of signatures to place initiatives on the ballot for laws that

would change a county from "wet" to "dry" or vice versa did not violate the First Amendment because it "in no way" prevented proponents' views from being heard. The law in question—which simply set a numerical signature requirement—was not subject to strict scrutiny and did not violate the First Amendment because it did not decrease the speech available to initiative proponents. *Id.* at 1009.

Courts from other federal circuits likewise consistently have treated differently those laws that regulate or restrict the *communicative conduct* of persons advocating for a ballot initiative from those laws that are administrative or which govern only the process by which legislation is enacted. The former are subject to heightened scrutiny; the latter are not. *See, e.g., Save Palisade FruitLands*, 279 F.3d at 1211 (10th Cir.); *Taxpayers United for Assessment Cuts*, 994 F.2d at 297 (6th Cir.); *Jones*, 892 F.3d at 938 (7th Cir.) ("because the [provision] does not distinguish by viewpoint or content, the answer depends on whether the rule has a rational basis, not on the First Amendment"); *Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) ("[a]bsent some showing that the initiative process substantially restricts political discussion of the issue [petitioner] is seeking to put on the ballot, *Meyer*['s application of strict scrutiny] is inapplicable").

Because the laws that Plaintiffs challenge do not regulate the communicative conduct incident to ballot initiatives, these laws do not receive heightened scrutiny. Arguing otherwise, Plaintiffs ask this Court to misapply clear precedent from the Eighth Circuit and around the country.

iii. Recent ballot initiative challenges in light of COVID-19

Cases challenging ballot initiative procedures in light of the COVID-19 pandemic have emerged in recent weeks. These cases remain consistent in maintaining the distinction between ballot initiative cases and candidate access cases. *See Bambenek*, Case No. 3:20-CV-3107, Doc. 24 (C.D. Ill. May 1, 2020); *Arizonans for Fair Elections,* 2020 WL 1905747 at *19-21 (D. Ariz. Apr. 17, 2020).

For example, just last week a federal district court in Illinois drew this precise distinction in denying injunctive relief to a plaintiff challenging Illinois' ballot initiative procedures in the midst of the COVID-19 pandemic. *Bambenek*, Case No. 3:20-CV-3107, Doc. 24 (C.D. Ill. May 1, 2020). The challenged provisions and requested relief at issue in *Bambenek* were materially indistinguishable from the present case.

Like Plaintiffs here, the plaintiff in *Bambenek* erroneously relied upon cases concerning placing a candidate—not an initiative—on the ballot. *Id.* at 5-6 (plaintiff relying on *Libertarian Party of Illinois v. Pritzker*, Case No. 20-CV-2112 (N.D. Ill. Apr. 23, 2020)). The court found the candidate access case "inapposite," observing that "placing candidates on the ballot…implicates unique constitutional concerns, as opposed to this case, which involves placing a proposed constitutional amendment and various referenda on the ballot and therefore does not implicate precisely the same constitutional concerns." *Id.* at 5; *see also Morgan*, Case No. 20-CV-2189 (N.D. Ill. Apr. 17, 2020) (distinguishing between a federal constitutional right to candidates' ballot access, which clearly implicates First Amendment rights, and a state-created

right to non-binding ballot initiatives). The *Bambenek* court found the plaintiff unlikely to succeed on the merits as no First Amendment rights were infringed upon and the hardships endured by the state far outweighed any harm to the plaintiff. *Id.* at 6-7.

iv. Plaintiffs rely almost exclusively on candidate/party access cases

It cannot be ignored that Plaintiffs' request for relief relies most heavily upon a recent holding in a *candidate access* case—*Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, Doc. 23 (E.D. Mich. Apr. 20, 2020). Indeed, Plaintiffs even attached the opinion as an exhibit to its Brief. For all of the reasons previously set forth herein, because *Esshaki* is a candidate access case, it has no application here.

Going a step further, the substantive analysis of Plaintiffs' brief supporting its motion for injunctive relies *almost exclusively* on candidate or political party access cases. *See* Brief, Doc. 7, pp. 12-14. Plaintiffs fail to apply a single ballot initiative case in support of its request.

B. The Arkansas ballot initiative laws at issue are nondiscriminatory, content-neutral regulations in no way aimed at regulating speech related to the petition process

Against the very clear analytical framework set forth by the Eighth Circuit, we turn to the specific laws at issue in this case. The constitutional and statutory requirements of which Plaintiffs complain are not laws directed at regulating speech associated with a ballot initiative procedure. To the contrary, each of the provisions at issue is a nondiscriminatory, content-neutral provision aimed at regulating the *process* by which initiatives appear on the ballot. Therefore, the challenged laws here

are wholly unlike restrictions that other courts have deemed unconstitutional. *See, e.g., Meyer*, 486 U.S. at 428 (statute prohibiting payment of petition circulators imposed unjustifiable burden on political expression); *see also Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011) (finding a ban on out-of-state canvassers unconstitutional). Consequently, each is subject only to rational basis review.

Plaintiffs argue that the Court should consider the "combined effect of the statutory requirements" and conclude that they "operate to freeze the political status quo." *See* Brief, Doc. 7, p. 12 (citing *Green Party of Arkansas v. Martin*, 649 F.3d 675, 685 (8th Cir. 2011). This argument is misplaced because such analysis has no application in ballot initiative cases. Instead, such analysis is employed only in candidate/party access cases where fundamental First Amendment voting rights are at stake. *Id.* This is demonstrated by the *Green Party* case, which concerned a political party's efforts to get candidates on the ballot. 649 F.3d at 675. Plaintiffs' claims do not implicate the right to vote in the same way as the claims in the *Green Party* case.

In the context of a ballot initiative case, a constitutional provision that regulates only the *process* of the initiative cannot be rendered unconstitutional because a separate, different law arguably impacts communication about the petition. Similarly, neither can the conditions of a pandemic suddenly transform a reasonable ballot access provision into an attempt by the state to restrict "communicative conduct." *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006). This holds true even when a procedural or administrative law has the indirect effect of making it more difficult to get an initiative on the ballot. *See*

Dobrovolny, 126 F.3d at 1113 ("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."). For this reason, the Court must separately assess the constitutionality of each challenged ballot initiative provision and must not consider any perceived "combined effect" of the statutes.

Arkansas' requirements as to handwritten signatures (Ark. Ann. Code §§ 7-9-103(a)(1)(A), 7-9-104(c)(1)), the number of signatures required for ballot access (Ark. Const. art. 5, § 1), and the distribution of signatures from at least 15 counties (Ark. Const. art. 5, § 1) are inarguably "a step removed from the communicative aspect of petitioning," and subject only to rational basis review. *Kendall v. Balcerzak*, 650 F.3d 515, 526 (4th Cir. 2011); *see also Jones*, 892 F.3d at 937–38.

Indeed, on a number of prior occasions, courts have found that nearly identical provisions do not implicate the First Amendment. *See Dobrovolny,* 126 F.3d at 1113 (finding that provision governing number of required signatures for placement of initiative on ballot "does not in any way impact the communication of appellants' political message"); *Wellwood*, 172 F.3d at 1008 (finding that Arkansas law imposing 38 percent signature requirement for local-option elections did not infringe on ability to circulate petitions or otherwise engage in political speech); *Bernbeck,* 58 F. Supp. 3d at 956 (finding that Nebraska constitutional provision regarding geographic distribution of signatures "does not implicate the First Amendment"); *Hoyle,* 59 F. Supp. 2d at 836 (holding that a law requiring that petition signers be fully registered

voters at the time they affix their signatures to petition "do not involve a restriction on core political speech").

Because no First Amendment concerns are implicated by the signature requirements, each is subject only to rational basis review. Here, each requirement is rationally related to legitimate interests of the State in conducting the initiative process. Number of signatures and signature distribution requirements are rationally related to the State's interest in "assuring that only measures supported by a significant percentage of citizens are placed before the electorate." *See Hoyle*, 59 F. Supp. 2d at 837. These signature requirements clearly survive rational basis scrutiny. And in any event, even were the First Amendment implicated, such requirements are justified given the importance of the state interests they advance in light of minimal alleged burdens on the Plaintiffs.

"The state's interest in protecting the integrity of its initiative process is paramount." *Hoyle*, 265 F.3d at 704. The handwritten signature requirement clearly is reasonably related to furthering this interest as it is aimed at combatting fraud by petition circulators and unknown signers, as well as ensuring that signatures are genuine as contemplated by the Arkansas constitution. *See Hargis v. Hall*, 196 Ark. 878, 120 S.W.2d 335, 339 (1938). Further, handwritten signatures are a critical component in enabling the Secretary of State to perform his statutory duty of validating signatures. *See, e.g.*, Ark. Code Ann. § 7-9-126(c)(2). The handwritten signature requirement clearly survives rational basis scrutiny.

Similarly, Plaintiffs also seek to enjoin the application of certain state statutes requiring that each voter signature be witnessed by a canvasser (Ark. Code Ann. § 7-9-108(b)) and that a canvasser's affidavit be notarized (Ark. Code Ann. § 7-9-109). These so-called "in-person" witnessing and notarization requirements—like the signature requirements—do not inhibit speech associated with a ballot initiative procedure. In fact, the in-person requirements of Ark. Code Ann. §§ 7-9-108 and 109 affirmatively *promote* speech related to ballot initiatives by requiring initiative canvassers to directly interact with registered voters throughout the state. A content-neutral, nondiscriminatory statute, which governs ballot initiative *procedures* and which does not regulate *speech* related to a ballot initiative, is not suddenly rendered unconstitutional by the presence of a public health risk. Similar to the handwritten signature requirement, "in-person" witnessing and notarization requirements are rationally related to the State's interest in protecting the integrity of its initiative process. *See Hoyle*, 265 F.3d at 704. As courts have recognized, election fraud is a legitimate concern for state governments around the country. Arkansas' efforts to prevent fraud in the initiative process by requiring canvassers to personally witness signatures and requiring canvassers to attest before a notary advance important state interests in maintaining the integrity of the initiative process.

Finally, Plaintiffs also challenge the filing deadline for submission of initiative petitions as set forth in Ark. Const. art. 5, § 1. The filing deadline in no way impacts speech and unquestionably is an administrative/procedural provision. The filing deadline, which requires the filing of petitions with the Secretary of State no later

than four months prior to election day, is rationally related to the State's interest in ensuring that sufficient time is allotted to permit statutory challenges to the validity of petition signatures, as well as enabling election officials to timely comply with various other, interrelated election deadlines. *See, e.g.,* Ark. Code § 7-5-204(a) (deadline for Secretary to certify any proposed measures, questions, or amendments to the Arkansas Constitution to the county boards of election commissioners); Ark. Code § 7-5-407(a)(1) (deadline for county boards of election commissioners to deliver absentee ballots to the county clerk for mailing to all qualified applicants); Ark. Code § 7-5-407(a)(2) (deadline for county clerks to deliver ballots to those absentee voters who made timely application under § 7-5-406 [members of uniformed services and other citizens residing outside the United States]); Ark. Ann. Code § 7-9-111(a) (Secretary of State must verify submitted signatures within 30 days of receipt); Ark. Ann. Code §§ 7-9-111-112 (State Board of Election Commissioners must certify the ballot title and popular name within 30 days of submission by Secretary of State); Ark. Ann. Code § 7-9-111(d)(1); Ark. Const. art. 5, § 1 (allowing for 30 days in which to gather additional signatures if petition has insufficient signatures but at least 75% of required signatures are valid).

For these reasons, Arkansas' filing deadline for petitions survives rational basis scrutiny.

Even if each of these provisions implicated First Amendment scrutiny, they would be constitutional. The State retains its interests in preventing fraud and maintaining the integrity of the ballot initiative process even in—perhaps, *especially*

in—the middle of a pandemic. And the handwritten signature requirement, the witnessing and notarization requirements, and the filing deadline all serve those interests. With reasoning that supports this conclusion, a district court upheld Arizona's in-person signature requirement against a challenge similar to Plaintiffs' claim here. *See Arizonans for Fair Elections*, 2020 WL 1905747, at *1-3. The Ninth Circuit law governing that court's decision required it to apply a test similar to the *Anderson/Burdick* test to Arizona's requirement. *See id.* at *6-14. Even under that more stringent First Amendment standard, however, the district court held that COVID-19 did not render Arizona law unconstitutional. *See id.* Applying the Eighth Circuit's more lenient standard for content-neutral regulations of the ballot initiative process, this Court should also reject Plaintiffs' claims.

III. Plaintiffs Have Not Demonstrated They are Likely to Suffer Irreparable Harm Absent an Injunction

A preliminary injunction is not appropriate unless Plaintiffs show a threat of irreparable harm that is likely to occur in absence of the injunction. *Winter*, 555 U.S. at 22. "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

Deciphering Plaintiffs' purported harm is a challenge. Plaintiffs repeatedly characterize their alleged injury in terms such as it being "impossible for Plaintiffs to meet these requirements to get the Proposed Amendment on the ballot" (Compl. Doc.

2, ¶ 4), rendering Plaintiffs "unable to collect the required 89,151 signatures prior to July 3, 2020 filing deadline" (Compl. Doc. 2, ¶ 71), or being effectively barred from getting the proposed amendment on the ballot. (Brief, Doc. 7, p. 26). As discussed above, however, Plaintiffs' inability to comply with these requirements is a result of their own choice not to begin collecting signatures sooner. Whatever their injury, then, it was self-inflicted. And "self-inflicted wounds are not irreparable injury" that will justify a preliminary injunction. *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).

Plaintiffs characterize their cause of action as a First Amendment claim, yet these alleged injuries are not injuries to a protected federal constitutional right of the Plaintiffs. The First Amendment does not protect the right to make law, by initiative or otherwise. *Initiative & Referendum Inst.,* 450 F.3d at 1099. The First Amendment cannot protect Plaintiffs from difficulties in placing an initiative on a ballot, when those difficulties are brought about by unexpected public health emergencies, in combination with procedural provisions unrelated to regulating speech (not to mention Plaintiffs' own delay). *See Dobrovolny*, 126 F.3d at 1113.

Even assuming Plaintiffs articulated an alleged harm for which this Court could provide redress, Plaintiffs' alleged harm is too speculative and remote for purposes of granting injunctive relief. Because state and local restrictions are being lifted in increasing fashion each day, Plaintiffs alleged potential harms are

speculative at this juncture. Their petitions need not be turned in for two months. *See Bambenek*, at 7-8 (finding potential harm too speculative where three months remained to gather signatures, stay-at-home orders would remain in place only through end of May, and petitioner testified that signature collection efforts tend to ramp up in final weeks).

IV. The Harm to the State and the Public if an Injunction Issues Outweighs the Harm to Plaintiffs Absent an Injunction

The harm to the State of Arkansas and the public if an injunction is granted would weigh far more heavily than would the harm Plaintiffs allegedly would suffer absent an injunction.

Plaintiffs bear the burden of proving that "the balance of equities so favors [them] that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys., Inc.*, 640 F.2d at 113. Given Arkansas' interest in regulating its elections and the public interest in enforcing the law, the Plaintiffs cannot hope to meet this burden.

Here, Plaintiffs' requested relief would, among other things, involve the Court: 1) rewriting various Arkansas Constitutional provisions and statutes, 2) affirmatively ordering the Secretary of State to implement—from the ground up—a brand new mechanism by which electronic signatures could be gathered and validated, 3) setting aside state constitutional deadlines, thereby throwing the overall, interrelated election calendar into turmoil, and 4) enjoining enforcement of the procedures by which the State protects the integrity of the initiative process.

For instance, any alteration to the July 3, 2020 deadline mandated by the Arkansas Constitution could seriously jeopardize the State's ability to comply with other applicable deadlines imposed by state and federal law and ensure elections authorities print and mail ballots to overseas voters in accordance with federal deadlines. The current July 3, 2020 deadline provides the Secretary of State and State and county boards of election commissioners with sufficient time to perform their sizeable statutory duties following the filing of a proposed constitutional amendment, and would impose a serious burden on the State's resources. *See, e.g.,* Ark. Code § 7-5-204(a) (deadline for Secretary to certify any proposed measures, questions, or amendments to the Arkansas Constitution to the county boards of election commissioners); Ark. Code § 7-5-407(a)(1) (deadline for county boards of election commissioners to deliver absentee ballots to the county clerk for mailing to all qualified applicants); Ark. Code § 7-5-407(a)(2) (deadline for county clerks to deliver ballots to those absentee voters who made timely application under § 7-5-406 [members of uniformed services and other citizens residing outside the United States]); Ark. Ann. Code § 7-9-111(a) (Secretary of State must verify submitted signatures within 30 days of receipt); Ark. Ann. Code §§ 7-9-111-112 (State Board of Election Commissioners must certify the ballot title and popular name within 30 days of submission by Secretary of State); Ark. Ann. Code § 7-9-111(d)(1); Ark. Const. art. 5, § 1 (allowing for 30 days in which to gather additional signatures if petition has insufficient signatures but at least 75% of required signatures are valid). Additionally, the Secretary is bound by deadlines imposed by contractual obligations

with various vendors for election-related services (i.e., media, printing, programming, etc.)

Beyond the serious questions surrounding the constitutionality of ordering the State to undertake "open-ended and potentially burdensome obligations," *see Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 29 (1981), ordering the State to wholly rework its election processes so near to an election presents the distinct likelihood of confusion and disorder—something federal courts have been cautioned to avoid. The Supreme Court's decisions make clear that the State has an interest in "the stability of its political system," *Storer*, 415 U.S. at 736; and "in avoiding confusion, deception, and even frustration of the democratic process at the general election," *Jenness*, 403 U.S. at 442.

Additionally, granting an injunction in this scenario would not serve the public interest. As stated by the Supreme Court, a "[s]tate indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This interest, however, is not a uniquely governmental interest: the fairness of the election process is important to voter confidence, which is in turn "essential to the functioning of our participatory democracy." *Id.*

As explained above, the ballot initiative procedures that Plaintiffs challenge are safeguards against voter fraud and overly crowded ballots. These protections not only serve the State's interest, but also the voting public's interest. Tied in with these procedural safeguards, Arkansas' initiative process expressly allows individuals to challenge the validity of proposed constitutional amendments within certain

statutory timeframes. Plaintiffs' requested relief to modify the filing deadline for their initiative could adversely affect the public's right to challenge its validity.

More generally, Arkansas on behalf of the public has a strong interest in seeing its laws enforced. So the Court has also made clear that "the 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). Put differently by the Chief Justice, "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets omitted), *cited with approval by Abbott*, 138 S. Ct. at 2324 n.17; *accord Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

The harm that a preliminary injunction would cause the State and people of Arkansas outweighs any alleged harm that the Plaintiffs would suffer without an injunction.

CONCLUSION

For these reasons, the Secretary respectfully requests that the Court deny the Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: William C. Bird
Ark. Bar No. 2005149
Senior Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-1317
Fax: (501) 682-2591
Email: william.bird@arkansasag.gov

CERTIFICATE OF SERVICE

I, William C. Bird, hereby certify that on May 4, 2020, I electronically filed the foregoing with the Clerk of the Court using the NexGen system which shall send notice to all counsel of record.

William C. Bird