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)

Appellees' Brief

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Arkansas has no compelling, or rational, reason to require voters to risk illness or death to sign initative petitions. The Supreme Court has repeatedly held that the First Amendment protects petition signing and circulating, and has repeatedly affirmed as-applied relief even where the government did not cause the circumstances warranting it. This forecloses the Secretary's primary arguments on appeal. Rather than confront that precedent, the Secretary dismisses the risk to Plaintiffs. But Plaintiff Allen is 73 and undergoing chemotherapy for stage IV cancer. Plaintiff Gray is 80 and her retirement community restricts visitors. They and thousands like them are unable to sign petitions because of the in-person witness and notarization requirements enforced by the Secretary.

Their First Amendment rights cannot be ignored because the Secretary says elected officials, not courts, should respond. That denies reality: it is impossible for the state constitution to be amended in time for relief. The law requires courts to enforce constitutional rights. The district court did just that, and did so by carefully enjoining the unlawful requirements. It "rewrote" nothing; it prescribed necessary language for forms to accord with its constitutional ruling.

Plainitiffs request that the Court schedule video or telephonic oral argument as soon as practicable, and believe 20 minutes per side is appropriate.

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STATEMENT OF THE ISSUES PRESENTED

1. Did the district court correctly find that restrictions on ballot petition signing and circulation implicate the First Amendment?

> **Apposite authority:** Ark. Const. art. 5, sec 1; Ark. Code Ann. §§ 7-9-103, 7-9-104, 7-9-108, 7-9-109; *Meyer v. Grant*, 486 U.S. 414 (1988), *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999); *Doe v. Reed*, 561 U.S. 186 (2010).

2. Did the district court correctly apply the *Anderson/Burdick* test to determine that Arkansas's in-person witness and notarization requirements, as applied during the COVID-19 pandemic, unconstitutionally burden Plaintiffs' First and Fourteenth Amendment rights?

> **Apposite authority:** Ark. Const. art. 5, sec 1; Ark. Code Ann. §§ 7-9-103, 7-9-104, 7-9-108, 7-9-109; *Burdick v. Takushi*, 504 U.S. 428 (1992); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

STATEMENT OF THE CASE

I. Constitutional and Statutory Framework

The Arkansas Constitution reserves for the people "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, § 1. The Constitution outlines procedures for ballot initiatives, and Arkansas has enacted additional laws, including ones that require canvassers to witness petition signatures in-person and attest to the validity of the signatures in the presence of a notary. Ark. Code Ann. §§ 7-9-103, 7-9-104, 7-9-108, 7-9-109.

As Arkansas's "chief elections officer," Defendant Secretary of State Thurston ("the Secretary") "is charged under the Arkansas Constitution with receiving filed petitions and determining the sufficiency of signatures" by enforcing these laws. APPX48.[1]

II. Factual Background

Arkansas Voters First ("AVF"), a registered ballot question committee, seeks to gather signatures supporting a ballot initiative for an independent redistricting process. Polling shows a majority of Arkansans support independent redistricting. APPX27.

[1] Plaintiffs refer to the Secretary's Appendix as "APPX," to the Secretary's Addendum as "ADD," to Plaintiffs' Appendix as "P-APPX."

AVF acted expeditiously. It hired staff, contractors, and volunteers with extensive experience handling petition drives. APPX27; APPX43-44. The campaign received approval to circulate its petition on March 16, 2020—more than two months ahead of the only two successful initiated ballot measures in 2018.[2]

As AVF's petitioning began, the COVID-19 pandemic escalated. Arkansas declared a state of emergency, advising citizens to take measures to "minimize person-to-person contact" and follow social distancing guidelines, prohibited gatherings of ten or more people, and criminalized violation of these directives. P-APPX002-03, 005-06, 008-09, 020-22, 024-27, 029-30; APPX32-33, 35-36, 38-41. Cities followed suit, imposing curfews, cancelling farmers' markets, and requiring social distancing. P-APPX010-18.

Plaintiffs Robert Allen and Adella Gray cannot comply with Arkansas's witness and notarization requirements without ignoring public health directives, their doctors' orders, and risking their own and their loved ones' health.

Plaintiff Allen is 73 and is undergoing intensive chemotherapy for stage IV bladder cancer. P-APPX035. He is immunocompromised and at high risk from COVID-19. On doctors' orders, Mr. Allen strives to "have contact with as few

[2] *See* Rachel Herzog & John Mortiz, Arkansas Attorney General Approves 4 Ballot Measures Hours After High Court's Ruling, Arkansas Democrat Gazette (May 23, 2018), https://www.arkansasonline.com/news/2018/may/23/arkansassupreme-court-ag-has-3-days-approve-or-re/?f=news-arkansas.

people as possible," *id.,* leaving home only for medical appointments and limiting in-person contacts to his wife and healthcare providers. *Id.*

Plaintiff Gray is 80 and lives with her husband in a continuing care residence with approximately 415 other seniors, "all of whom are at increased risk [of COVID-19] because of their age." P-APPX032. Her husband is her only in-person contact. *Id.* Her residence has closed all communal spaces, discouraged family visitation, and instituted no-contact grocery deliveries. P-APPX032-33. A canvasser thus could not access Mrs. Gray's community to witness her signature. P-APPX033.

Many Arkansans are in similar positions, and COVID-19 cases are spiking in Arkansas. While Governor Hutchinson has decided to ease some restrictions, his "decision came as the number of active cases and the number of hospitalizations, the figure Hutchinson has long said is the best indicator of the outbreak's severity, each hit an all-time high."[3]

Thus, signature gathering remains difficult and dangerous not only for would-be signers, but for canvassers too. Canvassers still cannot rely on large events or public gathering spaces to find signers, and must risk their own and the public health by continuing to attempt in-person contacts. APPX44-45.

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[3] Nyssa Kruse, *Arkansas to move to Phase 2 of reopening Monday, governor says; new cases at 288*, ARKANSAS DEMOCRAT GAZETTE (June 10, 2020), https://www.arkansasonline.com/news/2020/jun/10/watch-live-gov-state-health-officials-give-130-pm-/.

III. Procedural Background

Plaintiffs filed this lawsuit, challenging several Arkansas constitutional and statutory requirements—including the in-person witness and notarization requirements for petition signatures—as applied to the petitioning cycle for the November 2020 election. APPX20-21. Plaintiffs immediately sought a preliminary injunction. APPX23.

In the district court, Plaintiffs provided unrebutted evidence of the barriers to First Amendment-protected activity they face absent injunctive relief. The parties also filed a joint stipulation of facts. APPX48-52.

On May 25, the district court granted in part Plaintiffs' motion for a preliminary injunction. APPX79. The district court found that Plaintiffs had standing because "[c]ontinued application of the State's initiative petition requirements to Plaintiffs' initiative petition during a pandemic and despite State guidance and law that make complying with those initiative petition requirements inadvisable and impracticable substantially burdens Plaintiffs' First Amendment rights." APPX58. On the merits, the district court sought, for each state law requirement at issue, to "weigh the 'character and magnitude' of the burden the State's rule imposes on [First and Fourteenth Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden

necessary." APPX60 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Analyzing each state law requirement, the court considered the specific burdens imposed on Plaintiffs and the countervailing state interests asserted by the Secretary. Based on *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), the district court applied heightened scrutiny only where it found a burden on expressive conduct. *Compare* APPX61-62 (applying "the lowest level of review" to the required minimum number of signatures required to place AVF's initiative on the ballot, because "[t]his requirement does not prevent a canvasser from communicating to a potential supporter, nor does it prevent that potential supporter from communicating his or her actual support by becoming a petitioner and signing the initiative petition") *with* APPX64 (applying more stringent review to regulations "directly affect[ing] the method or manner of speech engaged in by petitioners and canvassers and restrict[ing] the ways in which they can communicate with one another and petition the State"). After a rigorous, fact-intensive review, the district court concluded that the in-person witness and notarization requirements severely burdened Plaintiffs First Amendment rights—triggering heightened review—and were not "not narrowly tailored to reasonably achieve" any state interest in preventing fraud. APPX68-69.

The district court tailored its injunction to minimize disruption of the State's system for processing signatures. Rather than compel use of electronic signatures, the district court merely directed the Secretary to process hand-signed, unwitnessed forms and to "accept an unsworn declaration made under penalty of perjury" in lieu of the notarized affidavit canvassers would otherwise submit. APPX75-78.

At the parties' joint request, the district court converted its preliminary injunction to a permanent injunction. APPX80-81. The district court subsequently denied a stay pending appeal. APPX90. In so doing, the court reaffirmed its previous finding that the regulation requiring "signatures to be made in-person and those signature pages to be supported by affidavits sworn in person goes beyond regulation of the mere mechanics of the process, [] into dictating the manner in which the attendant core political speech is communicated." APPX93. It also distinguished the Sixth Circuit's decision in *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), because in this case—unlike *Thompson*—the narrowly drawn injunction provided relief "without affecting the mechanics of the Secretary of State's duties or disregarding the State's interests following the filing of an initiative petition." APPX95.

To comply with the injunction, the Secretary approved print-at-home, no-witness petition forms for circulation. Hundreds of supporters have since used this form to sign AVF's petition at home without a canvasser present, and thousands

more have requested no-witness forms from AVF. Meanwhile, the Secretary appealed the district court's judgment and asked this Court for a stay pending appeal. This Court granted an administrative stay.

With the district court's judgment on hold, AVF is trying to gather as many signatures as possible in compliance with Arkansas's witness requirement and submit them to the Secretary with a notarized affidavit. However, the facts necessitating injunctive relief have not changed. The witness and notarization requirements still prevent Plaintiffs Allen and Gray—and those like them—from signing AVF's petition and severely burden Plaintiffs Miller and AVF's ability to circulate AVF's petition and gather qualifying signatures.

SUMMARY OF THE ARGUMENT

The district court carefully examined the evidence and applied binding precedent in concluding that, as applied during the COVID-19 pandemic, Arkansas's in-person witness and notarization requirements violated Plaintiffs' First Amendment rights. That decision should be affirmed.

First, the Secretary's standing arguments are meritless. The Secretary objects, for the first time on appeal, that Plaintiffs omitted a citation to the Arkansas Constitution in their Prayer for Relief. But Plaintiffs specifically cited the constitutional provision *five* times challenging the in-person witness and notarization requirements in their Complaint. In any event, this argument is foreclosed by the

Federal Rules, which reject the hypertechnical pleading standard advanced by the Secretary. Likewise, the Secretary is wrong to contend that Plaintiffs' injury is traceable to their purported delay and to COVID-19, not the Secretary. If the Secretary stopped enforcing the challenged requirements, Plainitiffs' injury would disappear. That defines "traceable." Regardless, the evidence shows Plaintiff AVF did not delay, and it is legally irrelevant that the Secretary did not cause COVID-19. The Supreme Court has rejected this precise argument in decades of precedent affirming as-applied challenges arising from privately-caused circumsances.

Second, the First Amendment protects Plaintiffs' right to sign and circulate petitions without jeopardizing their health and life through in-person interactions during a deadly pandemic that spreads through in-person interactions. The Secretary and *amici* Ohio and the Chamber of Commerce wrongly contend that the in-person witness and notarization requirements are mere mechanical procedures of legislating and do not burden Plaintiffs' speech rights. But the Supreme Court has rejected this precise argument and has repeatedly invalidated initiative regulations that function to limit who may speak and how. Arkansas's law does just that—only those able to speak in the presence of another person may do so. Those like Plaintiffs Gray and Allen cannot risk their life to sign a petition, and so they are excluded. Also wrong is the Secretary's contention that courts are powerless to grant as-applied relief for exigent circumstances. The Supreme Court has repeatedly emphasized the important

role as-applied challenges play in constitutional jurisprudence, and has never created a lone election-law exception. Indeed, this Court has expressly permitted such challenges. And courts have granted such relief in the context of COVID-19.

Third, the district court correctly concluded, applying the *Anderson/Burdick* framework, that the in-person witness and notarization requirements were unconstitutional as-applied. The requirements severely burden voters like Plaintiffs Gray and Allen, whose age and health puts them at grave risk for in-person interactions. And they severely burden circulators like Plaintiff Miller, who face similar risks, and must in any event gather signatures in the absence of public events. The Secretary offered no evidence of any compelling interest, nor demonstrated narrow tailoring. Now the Secretary invokes fraud prevention. But the Supreme Court has repeatedly held that fraud prevention carries less weight at the petition, as opposed to voting, stage, and so has required a more substantial showing. The district court correctly concluded the challenged requirements were not narrowly tailored and that other existing mechanisms guard against fraud. Moreover, even if rational basis applied—it does not—it is not rational to condition speech on the willingness to risk severe illness or death.

The Secretary is also wrong to contend (again) that COVID-19, and not Arkansas, caused Plaintiffs' severe burden. It is legally irrelevant that Arkansas did not cause the pandemic. The Secretary has severely burdened Plaintiffs by enforcing

the in-person witness and notarization requirements in the context of the pandemic. The Supreme Court has expressly rejected this argument before, in affirming as-applied relief in a host of contexts. Even where laws are facially valid, private circumstances may render them unconstitutional as-applied.

Fourth, the remaining injunction factors favor Plaintiffs. Any violation of a constitutional right—particularly a First Amendment right—causes irreparable injury. This is especially so with respect to AVF's petition, which relates to once-a-decade redistricting. The district court crafted relief that would have little if any effect on the Secretary's process for confirming petition signatures, and the public interest favors protecting constitutional rights.

Fifth, the district court did not abuse its discretion in crafting its remedy. The court enjoined the two infirm requirements and ordered the State to adjust the forms accordingly. This was not an intrusion on sovereignty. And the court did not abuse its discretion by applying its injunction to all initiative campaigns; the Supreme Court and this Court have held that courts may apply their relief in this manner. In any event, even if this Court concludes otherwise, it must tailor the injunction to Plaintiff AVF's petition or to those like Plaintiffs Gray and Allen who face serious risk from in-person interactions.

The district court's ruling should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews a district court's grant of a permanent injunction for "abuse of discretion." *Oglala Sioux Tribe v. C & W Enterprises. Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). "An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Id.* The district court's legal conclusions are reviewed *de novo*. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002). In a First Amendment case, this Court must "make an independent examination of the whole record" to ensure that the district court's judgment "does not constitute a forbidden *intrusion* on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted) (emphasis added).[4] But this review is functionally equivalent to Rule 52(a)'s clear error standard, and "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony." *Id.* at 499-500.

[4] Neither party contends the district court's judgment intruded on their First Amendment rights.

II. The District Court Correctly Concluded that Plaintiffs Prevail on the Merits.

A. Plaintiffs Have Standing.

Plaintiffs have standing to challenge the Secretary's enforcement of Arkansas's in-person witness and notarization requirements. Plaintiffs establish standing "by showing that [they] ha[ve] suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by the relief [they] seek[ ]." *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017). The Secretary concedes Plaintiffs' injury, but contends that it is not redressable and is traceable to delay and COVID-19, not the Secretary. These arguments fail.

1. Plaintiffs' Injuries Are Redressable.

An injury is redressable if there is "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation marks omitted). For the first time, the Secretary contends that "[b]ecause of how they pled this case, Plaintiffs cannot obtain redress." Br. at 17. According to the Secretary, Plaintiffs challenged the statutory but not the constitutional in-person witness and notarization requirements. *Id.* This is wrong as a matter of fact and law.

First, Plaintiffs explicitly challenged both the statutory and constitutional requirements. The in-person witness and notarization requirements—along with all other initiative requirements—appear in one section of the Arkansas Constitution.

See Ark. Const. art. 5, § 1.[5] Two statutes implement the in-person witness and notarization requirements. *See* Ark. Code Ann. §§ 7-9-108(b), 7-9-109. Plaintiffs expressly challenged all three. APPX19 ("As applied in the current emergency circumstances due to the COVID-19 pandemic, the requirements of ***Ark. Const. Art. 5, § 1***, Ark. Ann. Code § 7-9-108(b), [and] Ark. Ann. Code § 7-9-109 . . . . are not narrowly tailored" or "sufficiently important to justify the burdens on Plaintiffs' First and Fourteenth Amendment rights." (emphasis added)). Plaintiffs reiterated this four more times. APPX2, 3, 14, 15.

Ignoring this, the Secretary makes the hypertechnical argument that Plaintiffs lack standing because they did not repeat the phrase "Ark. Const. art. 5, § 1" *again* in their Prayer for Relief. Br. at 17-18. But Plaintiffs specifically asked the district court for declaratory judgment that "the requirements of Arkansas law described herein and as applied to Plaintiffs" were unconstitutional, encompassing the constitutional provision. APPX19-20. Moreover, Plaintiffs sought injunctive relief against "any other provision of Arkansas law necessary to effectuate the relief sought herein" and "any additional relief the Court deems just, proper, and appropriate."

[5] The Secretary incorrectly characterizes Article 5, § 1 has having "different subsection[s]," Br. at 18. The provision contains bolded headers, but no subsections. Notably, the Secretary does not list any subsections in his Table of Authorities. Br. at vii.

APPX21.[6] It is not possible to read Plaintiffs' Complaint as condoning the Constitution's in-person witness and notarization requirements.

Second, even if the issue were not so clear, Federal Rule 54(c) provides that a "final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings.*" Fed. R. Civ. P. 54(c) (emphasis added).

Moreover, even though Plaintiffs introduced evidence of the severe burden imposed by the in-person witness and notarization requirements, and sought relief from those requirements, the Secretary never objected that the Complaint's Prayer for Relief did not specifically cite "Article 5, § 1." To the contrary, during oral argument, the State's counsel characterized Plaintiffs' challenge as encompassing "all of these various statutes and constitutional provisions." P-APPX078-79. The Secretary therefore impliedly consented to treating those provisions as within the scope of requested relief. Under Rule 15(b)(2), issues tried by the parties' "implied consent . . . must be treated in all respects as if raised in the pleadings," and a party may move for an amendment to conform the pleadings to the evidence at any time

[6] The Secretary wrongly characterizes this request as "a vague catchall" and "boilerplate." Br. at 18. These requests satisfy Rule 8's notice pleading requirements. *See, e.g.*, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (citing request for "such other and further relief as the Court may deem just, proper, and equitable" to convert as-applied to facial challenge).

"even after judgment," but "*failure to amend does not affect the result* of the trial on that issue." Fed. R. Civ. P. 15(b)(2) (emphasis added). "[C]onsent may be implied when evidence relevant to an unpleaded issue has been introduced at trial without objection." *Am. Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 348 (8th Cir. 2013) (quotation marks omitted). Even if Plaintiffs had failed to plead a claim against Article 5, § 1, "the proceedings . . . had the legal effect of amending the complaint to conform to the proof." *Troutman v. Modlin*, 353 F.2d 382, 385 (8th Cir. 1965).

Finally, the lone case the Secretary cites does not support his argument. In *Arizonans for Fair Elections v. Hobbs*, the plaintiffs *disclaimed* any challenge to the in-person witness requirements of the Arizona Constitution. No. CV-20-00658-PHX-DWL, __ F. Supp. 3d __, 2020 WL 1905747, at *4 (D. Ariz. 2020), *appeal dismissed*, Order, No. 20-15719 (9th Cir. May 19, 2020), ECF No. 40. They instead argued that the requested relief—use of electronic signatures—"could be deemed 'substantial compliance'" with the Arizona Constitution. *Id.* at *2. Throughout the district court proceedings, Plaintiffs made clear that they expressly challenge the constitutional provision. Thus, redressability is not in issue.

2. Plaintiffs' Injuries Are Traceable to the Secretary.

The Secretary caused Plaintiffs' injuries. "Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control*

Components, Inc., 572 U.S. 118, 134 n.6 (2014); *see Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1029 (D. Minn. 2016) (standing "does not require sole or direct causation"); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006), *abrogated on other grounds*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (causation satisfied where state actors have "some connection with the enforcement of" a challenged law). The Supreme Court has found standing even where there was an "attenuated line of causation to the eventual injury." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973).

The Secretary enforces Arkansas's in-person witness and notarization requirements. Plaintiffs have testified that they cannot safely sign, circulate, and notarize petitions pursuant to those requirements. This far surpasses "fairly traceable." Yet the Secretary contends that (1) Plaintiff AVF's injury is caused by its failure to begin collecting signatures sooner, and (2) COVID-19, not state action, caused Plaintiffs' injuries. Neither argument has merit.

First, the Secretary's claim that "Plaintiffs caused their own alleged injury" because of "their own choices" and "delay" is both contrary to the unrebutted facts and irrelevant. AVF conducted its campaign expediently. AVF sought clearance to gather signatures *two months* ahead of the schedule followed by the only two initiated measures to make the ballot in 2018. *See supra* note 2.

The Secretary nevertheless asserts that AVF should have emulated "[o]ther ballot-question committees [that] began the process much earlier." But to preserve its constitutional rights, AVF did not have to anticipate an unforeseeable global pandemic. Even if AVF had this preternatural foresight, it is unclear circumstances would be different. As at least one court has recognized, signature gathering in Arkansas is difficult in colder months well before Election Day. *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690, 692, 698 (E.D. Ark. 1996). Of the eight ballot initiatives filed with the Arkansas Ethics Commission for this election, *none* has qualified for the ballot.[7] By contrast, in *Hobbs*, the plaintiff's ballot campaign lagged significantly behind other campaigns. 2020 WL 1905747, at *11.

Second, the Secretary's contention that Plaintiffs lack standing because COVID-19 caused their injury is specious. As the district court explained, the "[c]ontinued application of the State's initiative petition requirements to Plaintiffs' initiative petition during a pandemic and despite State guidance and law that make complying with those initiative petition requirements inadvisable and impracticable substantially burdens Plaintiffs' First Amendment rights." APPX58. Plaintiffs cannot sign and circulate petitions in compliance with those requirements without

[7] *Arkansas 2020 Statewide Ballot Issues and COVID-19*, Univ. of Arkansas Div. of Agriculture: Research & Extension, https://www.uaex.edu/business-communities/voter-education/state-ballot-issues.aspx.

violating State directives and endangering their health—especially now that COVID-19 cases are rising in Arkansas.

The Secretary's argument that the injury is not traceable to him also fails because, if he stopped enforcing the in-person witness and notarization requirements, Plaintiffs would no longer be injured. Where a change in the defendant's behavior eliminates the injury, the injury is traceable to the defendant. For the same reason, and as discussed below, *see infra* Part II.C.2, the Supreme Court has routinely affirmed as-applied relief from government regulations based upon private circumstances not caused by the government. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (requirement to pay appellate transcript fee is unconstitutional as applied to indigent criminal defendant); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006) (parental notification law is unconstitutional as applied to pregnant minor facing medical emergency); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (campaign finance disclosure laws may be unconstitutional as applied to minor parties who prove risk of private harassment). In these cases the plaintiffs had standing because the state enforced the law notwithstanding their extenuating circumstances. The same is true here.

In any event, even if the Governor did not *ban* people from leaving their homes, Br. at 20, he issued directives—enforceable by criminal penalties—that sharply limited how many, and where, people could congregate. APPX36. These

measures plainly burden signature collection. Even under the Secretary's cramped conception of traceability, Plaintiffs' injuries flow from state action.[8] Social distancing guidelines aside, States cannot enact or enforce laws divorced from the context in which they operate; however neutral or reasonable a legal regime may appear on paper, the State must ensure that its citizens can, in fact, use that system to vindicate their constitutional rights. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (extending voter registration deadline because of Hurricane Matthew). The Secretary's standing arguments are meritless.

B. The First Amendment Protects Plaintiffs from Unduly Burdensome Regulations of the Petition Signing Process.

The district court followed binding Supreme Court and Circuit precedent holding that the First Amendment protects individuals from unduly burdensome regulations of the petition-signing process, and likewise adhered to Supreme Court and Circuit precedent in assessing, under the *Anderson/Burdick* framework, the burden of those regulations as applied to Plaintiffs during the exigent circumstances of the COVID-19 pandemic.

[8] The Secretary's citation to *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), for his standing argument, Br. at 21, is misplaced. *Thompson* did not conclude the plaintiffs lacked standing, but rather considered the lack of state action as bearing on the merits of plaintiff's claim. Although that is wrong, *see infra* Part II.C.2, it does not support the Secretary's standing argument.

1. Arkansas's In-Person Witness and Notarization Requirements Implicate Plaintiffs' First Amendment Rights.

Arkansas's in-person witness and notarization requirements implicate Plaintiffs' First Amendment rights. The Supreme Court has held that "[a]n individual expresses a view on a political matter when he signs a petition" supporting an initiative or referendum. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). "Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.' In either case, the expression of a political view implicates a First Amendment right." *Id.* at 195 (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). As such, "[t]he State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.'" *Id.* (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (second brackets in original)). This is so regardless of whether "signing a petition is a legally operative legislative act." *Id.*

The First Amendment also protects those who circulate petitions. "The circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). In *Meyer*, the Court invalidated a Colorado law prohibiting paid circulators, reasoning that the law "restricts political expression"

because it "limit[ed] their ability to make the matter the focus of statewide discussion." *Id.* at 422-23.

In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Supreme Court invalidated Colorado's requirements that circulators be registered voters, wear ID badges, and have their name and address publicly reported because these laws "significantly inhibit[ed] communication with voters about proposed political change," and would "discourage[ ] participation in the petition circulation process." *Id.* at 200; *see id.* at 210 (Thomas, J., concurring) (reasoning that the requirement that circulators be registered voters was subject to strict scrutiny even though it "does not *directly* regulate speech [because] . . . the requirement reduces the voices available to convey political messages") (emphasis in original).

This Court has likewise recognized that regulations burdening the signing and circulation of petitions warrant First Amendment scrutiny where they "limit the number of voices available to convey a particular political message, as well as the size of the audience that could be reached." *Dobrovolny v. Moore*, 126 F.3d 1111, 1112 (8th Cir. 1997).

Arkansas's in-person witness and notarization requirements regulate expressive conduct protected by the First Amendment. Under Arkansas law, the only way Plaintiffs Gray and Allen can "express a view on a political matter [by] . . . sign[ing] a petition," *Reed*, 561 U.S. at 194, is in the physical presence of a

circulator. That burden limits their ability to engage in expressive conduct. Likewise, the only way their expression can help get AVF's petition on the ballot—and thus the only way they can "make the matter the focus of statewide discussion," *Meyer*, 486 U.S. at 423, is if the circulator signs the affidavit in the presence of a notary. *See* APPX44 ¶ 12 (noting that requiring her and her volunteer circulators to be in the physical presence of others places them "at grave risk"). These regulations directly burden expressive activity protected by the First Amendment.

The burden is particularly acute because of COVID-19. Being in the physical presence of another risks exposure to the virus, which may result in serious illness and death. Both Plaintiffs Gray and Allen have explained that they only have physical contact with their spouse, and in the case of the latter, his doctor. P-APPX033 ¶¶ 7-8; P-APPX035 ¶ 6. By requiring Plaintiffs—and voters like them—to risk exposure to illness and death to support AVF's proposal, the in-person witness and notarization requirements "limit[ ] the number of voices who will convey" Plaintiffs' message, "limit[ ] the size of the audience they can reach," and make it "less likely that [they] will garner the number of signatures necessary . . . to make the matter the focus of statewide discussion." *Meyer*, 486 U.S. at 422-23; *Dobrovolny*, 126 F.3d at 1112. Conditioning the exercise of expressive conduct on willingness to risk illness or death burdens First Amendment rights.

Nonetheless, the Secretary, joined by *amici* Ohio and the Chamber of Commerce, contends that the First Amendment is not implicated because the "challenged requirements relate only to the *form of the petition*," Br. at 24 (emphasis in original), and "govern only the mechanics of legislating by initiative," *id.* at 22; Ohio Br. at 7; Chamber Br. at 6-13. Not so. The requirements limit the conditions under which voters can express their views by signing the petition—they may only do so in the physical presence of another person, and their speech only counts toward spurring statewide discussion if the circulator signs an affidavit before a notary. The requirements impose similar conditions on canvassers, who can only solicit in the physical presence of others. Particularly during the COVID-19 pandemic, where in-person interactions are impossibly unsafe for many—including Plaintiffs Gray and Allen—these requirements prevent signatories from expressing their views by signing a petition, and prevent canvassers from speaking by soliciting them to do so. In other words, Arkansas's requirements dictate "*how* to go about speaking," *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*) (emphasis in original)—*i.e.*, one may only speak in a manner that makes a difference if another person is physically present. And in the context of COVID-19, they indirectly limit "*who* [can] speak," *id.* (emphasis in original), by making it dangerous for those like Plaintiffs Gray and Allen to do so. The fact that the

witness's and notary's signatures must also appear on the petition paperwork does not transform it into a procedural requirement unrelated to expression.[9]

The Secretary also contends that the district court "ignored," Br. at 24, this Court's statement 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. But the communication of ideas *is* affected here—the danger to their life and health means that Plaintiffs Gray and Allen, and voters like them, cannot express their support for AVF's proposal by signing a petition. The in-person witness and notarization requirements reduce speech in the same way that the registration, name badge, and name and address publication did in *Buckley*.[10] The requirements make it more difficult for AVF's proposal to get on the ballot precisely because they reduce the amount of supportive speech. This case is thus unlike *Dobrovolny*, where

[9] The Secretary contends that Arkansas's requirements are permissible because they "are indifferent to the ideas communicated on the petition or by its supporters and opponents." Br. at 24. Notably, the Secretary concedes that petitions communicate ideas—a concession at odds with the central thrust of his argument on appeal. But the Secretary has the standard wrong. The laws invalidated in *Meyer* and *Buckley* were also content neutral, but yet unconstitutionally burdened speech.

[10] The Secretary says the laws invalidated by the Supreme Court in *Buckley* and *Meyer* are different, but does not explain why. Br. at 26-27. If anything, the requirements challenged here are a greater speech restriction than Colorado's invalidated law requiring circulators' names and addresses to be provided to the state. *See Buckley*, 486 U.S. at 203.

the plaintiffs were merely unsure *how much* speech was required to gain ballot access—that law did not burden who could speak or how they could speak.

The Tenth Circuit's decision in *Walker* is likewise inapposite, because Utah's supermajority requirement for wildlife-related initiatives dictated how much speech was necessary for electoral purposes. It did not impose any limits or burdens on "*how* to go about speaking." 450 F.3d at 1099 (emphasis in original). Arkansas does just that by requiring speech to occur in the physical presence of another. *Marijuana Policy Project v. United States*, 304 F.3d 82, 84-85 (D.C. Cir. 2002), is also off-point. The D.C. Circuit there upheld a subject matter limitation on initiatives reducing marijuana penalties. The court reasoned that "the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* Arkansas's in-person witness and notarization requirements limit public debate by reducing the number of voices signing and circulating petitions.

Amicus Ohio contends that it is "strange" that courts apply First Amendment scrutiny to laws regulating the gathering of initiative petition signatures, Ohio Br. at 2, that these decisions are "ill-conceived (and often-times unthinking)," *id.* at 3, and that "the results are unsatisfying" on the "rare occasion that courts show their work," *id.* at 8. In support of its attack on these courts, Ohio offers this: if Article I of the Constitution does not violate the First Amendment by limiting the permissible topics of federal legislation, requiring bicameral approval of legislation, and requiring tax

legislation to originate in the House, how could the First Amendment be implicated by state laws restricting the process by which Americans gather and sign initiative petitions? *See id.* at 2, 6.[11]

The Supreme Court has answered this question: "The State, having chosen to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles." *Reed*, 561 U.S. at 195 (quotation marks omitted) (ellipses in original). It does not matter that "signing a petition is a legally operative act . . . petition signing remains expressive even when it has legal effect in the electoral process." *Id.*[12]

[11] Ohio might profitably have checked *this Court's* precedent applying the First Amendment to initiative regulations before leveling its charges. *See Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001).

[12] Ohio accuses courts of being "unthinking" in concluding that people participating in the initiative process play dual roles as individual citizens with First Amendment rights and citizen-legislators. But Ohio appears not to have thought through its theory. Do petition signers and circulators now possess legislative immunity if subpoenaed for relevant documents? And may states restrict their right to *vote* on initiatives, because "restrictions upon legislators' voting are not restrictions upon legislators' protected speech"? *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011). The answer is no. "[V]oting by a legislator is different from voting by a citizen" because that is a "personal right" for citizens. *Id.* at 126. Citizen petition signing is also different from, say, bicameralism. Citizens retain their "personal right[s]" even if they simultaneously act as citizen-legislators.

2. Plaintiffs May Bring an As-Applied First Amendment Challenge During the COVID-19 Pandemic.

Plaintiffs may bring an as-applied challenge to Arkansas's in-person witness and notarization requirements during the COVID-19 pandemic. The Secretary contends that "*Anderson/Burdick* was designed to test the constitutionality as a general matter," and not whether the First Amendment requires "an exigent-circumstances exemption from an otherwise constitutional law." Br. at 28. The Secretary contends that Plaintiffs' claims are "nonjusticiable" because "[t]here is no principled way to determine, under the First Amendment, which exigencies warrant exemptions," *id.* at 29, and 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," *id.* at 30. The Secretary's arguments lack merit.

First, this Court has recognized that plaintiffs may bring as-applied *Anderson/Burdick* challenges. *See Brakebill v. Jaeger*, 905 F.3d 553, 559, 561 (8th Cir. 2018) (noting that a "subset of voters might bring as-applied challenges against a regulation" under *Anderson/Burdick* and stating that "the courthouse doors remain open" to any such affected voter); *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (approving as-applied *Anderson/Burdick* relief because "[t]he right to

vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credential easily").[13]

Second, contrary to the Secretary's contention, Br. at 28-30, courts have applied *Anderson/Burdick* to invalidate election-related laws as applied during the exigent circumstances of the COVID-19 pandemic. A federal court, applying *Anderson/Burdick*, concluded that Wisconsin's absentee ballot application and ballot receipt deadlines were unconstitutional as applied during the pandemic and ordered them extended. *Democratic Nat'l Comm. v. Bostelmann*, __ F. Supp. 3d __, No. 20-cv-249-wmc, 2020 WL 1638374, at *17-18 (W.D. Wis. Apr. 2, 2020). The Seventh Circuit refused to stay that injunction. Order, *Democratic Nat'l Comm. v. Bostelman*, No. 20-1539 (7th Cir. Apr. 3, 2020), ECF No. 30. And the Supreme Court explained that the "extension was designed to ensure the voters of Wisconsin can cast their ballots and have their votes counted," and incorporated the extended deadline in its order. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020).

The Sixth Circuit refused to stay a decision granting as-applied relief under *Anderson/Burdick* from Michigan's ballot access requirements due to COVID-19.

[13] The Secretary cites the concurrence in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which three Justices expressed disapproval for as-applied challenges to election laws. *See* Br. at 36-37. But *six* Justices approved claims by uniquely affected persons. *See id.* at 199-203 (lead opinion); *id.* at 209, 212 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 237 (Breyer, J., dissenting)

See Esshaki v. Whitmer, __ F. App'x __, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020). The court concluded that "the district court properly applied the *Anderson/Burdick* test," and that in light of COVID-19, the state's ballot access requirements "are not narrowly tailored *to the present circumstances*" and were "unconstitutional as applied here." *Id.* (emphasis in original). Indeed, courts routinely respond to election emergencies, including by extending polling place hours due to unforeseen circumstances that jeopardize voting rights. If this Court were to "definitively" say such relief were unavailable, as the Secretary suggests, Br. at 29 n.3, it would create a Constitution-free zone for election emergencies.

Third, the Secretary's contention that Plaintiffs' claim is nonjusticiable because there are no "meaningful standards" for determining which emergencies warrant relief, Br. at 29, runs directly into *Anderson/Burdick*. It provides those standards, which courts routinely apply to exigent circumstances, specifically including COVID-19. A claim is not nonjusticiable merely because it requires fact-intensive, careful judging. Ohio likewise complains that *Anderson/Burdick* is a "dangerous tool" and a "quintessential balancing test." Ohio Br. at 11 (internal quotation marks omitted). Ohio's quarrel is with the Supreme Court. This Court has no power to declare nonjusticiable a claim the Supreme Court has instructed lower courts how to adjudicate merely because the test requires district court judges to exercise their sound judgment.

Fourth, the Secretary's contention that the district court should have declined to adjudicate Plaintiffs' claim because "elected officials" are best suited to "balance safety and public-health concerns," Br. at 30, is misplaced. There is no elected official in Arkansas with the power to change the Constitution's in-person witness and notarization requirements in time to respond to the COVID-19 pandemic, let alone in time for the July 2020 petition deadline. The constitutional amendment process requires adoption by the legislature, a six-month publication period, and a majority vote at the next general election. *See* Ark. Const. art. 19, § 22. In the meantime, Plaintiffs' First Amendment rights would wither. As the Supreme Court has explained, "[l]aw addresses itself to actualities." *Griffin*, 351 U.S. at 23. "It does not face actuality to suggest," *id.*, that the district court, whose job it is to enforce the U.S. Constitution, should have refrained from doing so because elected officials—all of whom are legally powerless to do anything to resolve Plaintiffs' injuries—know "how best to balance safety and public-health concerns." Br. at 30.

C. The District Court Correctly Concluded that the *Anderson/Burdick* Test Required Enjoining the In-Person Witness and Notarization Requirements.

The district court did not abuse its discretion by concluding that, under the *Anderson/Burdick* test, Arkansas's in-person witness and notarization requirements, as-applied during the COVID-19 pandemic, imposed severe burdens on Plaintiffs' First Amendment rights unjustified by a sufficient government interest. Likewise,

the Secretary's contention that relief is inappropriate because COVID-19, and not the State, is the cause of Plaintiffs' burden is meritless.

1. Arkansas's In-Person Witness and Notarization Requirements Are Unconstitutional As-Applied During the COVID-19 Pandemic.

The district court properly found the Secretary's continued enforcement of Arkansas's in-person witness and notarization requirements during the COVID-19 pandemic could not survive scrutiny under *Anderson/Burdick*.

The *Anderson/Burdick* framework provides a single, flexible standard to determine what level of scrutiny should apply in claims alleging election laws unconstitutionally burden Plaintiff's First or Fourteenth Amendment rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Initiative & Referendum Inst.*, 241 F.3d at 616 (noting "[t]he Supreme Court has developed a sliding standard of review" to balance the need for the "vigilance 'to guard against undue hindrances to political conversations and the exchange of ideas'" and the State's interest in having "considerable leeway to protect the integrity and reliability of the initiative process").

Under *Anderson/Burdick*, "the rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Thus, the Court must first "weigh 'the character and magnitude of the asserted

injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id*. Election laws that impose severe restrictions on Plaintiffs' First and Fourteenth Amendment rights will be subject to strict scrutiny review, while "the State's important regulatory interests are generally sufficient to justify" "'reasonable, nondiscriminatory restrictions' upon those rights." *Id.*

Following this binding precedent, the district court first properly determined that the continued enforcement of Arkansas's in-person witness and notarization requirements during the COVID-19 crisis "substantially and severely burden Plaintiffs' core political speech." APPX64-65. Because "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," *Anderson/Burdick* requires this determination be made in a rigorous, fact-intensive inquiry. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (there is no "litmus-paper test" or "substitute for the hard judgments that must be made" and "what the result of this process will be in any specific case may be very difficult to predict with great assurance").

Here, the district court considered a robust and unrebutted record showing that health officials, along with federal, state, and local governments, closed public

spaces, imposed social distancing mandates, and directed Arkansans—particularly those who are immunocompromised or elderly—to avoid person-to-person contact, P-APPX002-03, 005-06, 008-09, 020-22, 024-27, 029-30; APPX32-33, 35-36, 38-41; that Plaintiff Allen, who is immunocompromised and at extreme risk of contracting a severe case of COVID-19, cannot not sign AVF's petition in the presence of a canvasser because, pursuant to the State's directives and his doctor's orders, he can only leave his house for once weekly chemotherapy appointments and must limit his in-person contacts to his wife and healthcare providers, P-APPX035-36; that Plaintiff Gray lives in a community of hundreds of at-risk seniors that followed this guidance and imposed restrictive safety measures including bans on communal gathering, heavily restricted access for visitation, instituted no-contact grocery deliveries, and would not allow a canvasser to witness her signature, P-APPX032-33; and that Plaintiffs Miller and AVF stopped deploying canvassers both for fear of risking their health and also because they could no longer approach would-be signers in-person at farmers markets, town halls, or in other public spaces, APPX27-28, 43-45. There can be no question, then, that the district court appropriately determined that the challenged laws, as applied during the COVID-19 pandemic, impose a severe burden on Plaintiffs. For those like Plaintiffs Allen and Gray who must risk their lives to comply, Arkansas's laws constitute "virtual

exclusion" from petition signing. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019).

Under *Anderson/Burdick*, this finding triggers strict scrutiny. *Timmons*, 520 U.S. at 351 ("Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest."). Despite this finding, the Secretary and *amicus* HEP rely almost exclusively on cases in which a challenged law *did not* severely burden plaintiffs' rights and where strict scrutiny therefore did not apply. Br. at 48 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458 (2008) (holding "[b]ecause we have concluded that [the law] does not severely burden respondents, the State need not assert a compelling interest.")); *id.* at 49 (citing *Libertarian Party of N.D.*, 659 F.3d at 694-95 (finding strict scrutiny did not apply because the law did not impose an "undue or excessive" burden)). These cases are inapposite.

The Secretary has also failed to demonstrate the challenged regulations could survive strict or even heightened scrutiny.[14] As the district court noted, "the Secretary of State [] put no supporting evidence of a compelling interest or narrow tailoring into the record, and [] offered only limited justification for the State's

[14] Although it appears he has reversed this position, the Secretary seemed to concede this point in his Motion to Stay Pending Appeal, arguing "under *any lesser scrutiny level*, the State's legitimate and compelling interest in preventing fraud survives scrutiny and would be found constitutional" P-APPX044.

initiative petition requirements" APPX65. The Secretary and *amicus* HEP nevertheless assert that the State's bare invocation of the word "fraud" should have ended the inquiry, and that the State's interest in fraud-prevention is so all-encompassing, no matter the context, courts must simply assume the State's interests outweigh the burden the law imposes on its citizens' First Amendment rights. Br. at 39 ("While Plaintiffs needed to present evidence quantifying their alleged burdens, Arkansas faced no such evidentiary hurdle in establishing its compelling interest"); HEP Br. at 9 (asserting that "States need not present 'any record evidence in support of [their] stated interests.'" (citation omitted)). But fraud is not a magic word that, once uttered, insulates challenged laws from meaningful review. *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J, concurring) ("[A]ny finding of a more severe burden would trigger more probing review of the justifications offered by the State.").

This Court cannot take on faith that the challenged laws work to further compelling or even important state interests sufficient to justify the significant burden they impose on Plaintiffs. The Supreme Court has twice held that the risk of fraud is remote for ballot initiatives, rendering the State's interest here less significant than it would be in, for example, the voting context. *Meyer*, 486 U.S. at 427-28 (holding that "the risk of fraud or corruption, or the appearance thereof, is

more remote at the petition stage of an initiative than at the time of balloting"); *Buckley*, 525 U.S. at 204.

Not only is the risk of fraud diminished here, fraud is less harmful in this context. As the Secretary rightly notes, the lead opinion in *Crawford* did not require the State to proffer "evidence of extensive fraud" because it was clear some isolated fraud occurred which "*could affect the outcome of a close election*." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008) (emphasis added). But election outcomes are not at stake here. Unlike the voter ID laws in *Crawford*, the primary purpose of signature gathering requirements is to ensure initiated measures have broad support before they are added to the ballot. If fraud were to occur and an initiated measure were wrongly placed on the ballot, the measure would ultimately lose if it truly lacked popular support.

Finally, the record does not support a finding that these particular regulations are necessary to support the State's asserted interests. *Buckley*, 525 U.S. at 204 (finding that challenged ballot initiative regulations did not "significantly advance[]" the "State's interest in preventing fraud"). While the Secretary now makes much out of Arkansas's need for "requirements designed to *prevent* fraud," Br. 10, and the specter of signers who may now negligently or recklessly sign petitions, 41-42, the State designed its ballot initiative procedures fully expecting petitions to include invalid signatures. The purpose of Arkansas's cure period—which initiated

measures regularly use—is to give campaigns an opportunity to correct defects of the kind the State highlights.

Below, the Secretary made no arguments that Arkansas's in-person witness and notarization requirements were narrowly tailored to further a compelling State interest. APPX93 (noting "[a] law imposing a substantial burden might still have been permissible if the Secretary of State demonstrated that the State's interests were compelling enough to justify the substantial burden and the State's law was appropriately tailored to the interest and burden," but "[t]he Secretary of State chose to attempt neither of those things"). Now, he faults the district court for allegedly ignoring the State's arguments that the challenged laws meet this standard. Br. 42-43. But the district court could not ignore arguments that were never presented.

These arguments should be considered waived. Generally, "this court will not consider arguments raised for the first time on appeal" except in rare instances "to prevent a miscarriage of justice." *Cole v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008). This is not one of those instances. The district court repeatedly pointed out the Secretary's failure to present evidence or argument on this issue and invited him to correct his mistake. Instead, the Secretary—apparently believing the record was complete—sought to convert the preliminary injunction into a final judgment.

Even if the Secretary's newly asserted arguments were properly before this Court, Plaintiffs' as-applied challenge to the witness and notarization requirements would still succeed on the merits. First, on the notarization requirement, the Secretary argues "[i]t makes no difference that Arkansas allows unsworn declarations executed in a foreign country as a substitute for a notarized affidavit." Br. 41. Not so. The fact that Arkansas provides this accommodation shows that notarization—while sometimes necessary—is not in contexts where, as the Secretary points out, people "find it difficult to locate notaries," for example if they are living abroad or through a global pandemic. Br. 41.

On the in-person witness requirement, the Secretary argues that "a petition-fraud prosecution is necessarily an after-the-fact endeavor and hardly an adequate substitute for the in-person requirement," Br. 41, but, in *Meyer*, the Supreme Court held that, to the contrary, provisions criminalizing petition fraud were "adequate to the task of minimizing the risk of improper conduct in the circulation of a petition," especially given the more remote risk of fraud occurring in this context. 486 U.S. at 427; *Reed*, 561 U.S. at 237 (Alito, J. concurring) (noting the penalties criminalizing petition fraud served as a sufficient safeguard against fraud). The Secretary further contends that deputizing canvassers to witness signatures and notarized "affidavits [are] more useful in fraud deterrence." Br. 42. But, again, even if this were true, the marginal benefit the State derives from imposing these requirements would not

outweigh the burden they impose on Plaintiffs, especially given the low risk of fraud, the lower stakes here, and the fact that the State anticipates receiving invalid signatures even with the notarization requirement.

The Secretary's argument that "the district court held Arkansas to an improper evidentiary standard," also falls flat. *Anderson/Burdick* requires that the State proffer justifications for the burden its election laws impose, *Burdick*, 504 U.S. at 434 (requiring the court to consider "the precise interests put forward by the State as justification for the burden imposed by its rule"), and the Secretary made a cursory at-best effort to justify the burden Arkansas's in-person witness and notary requirements impose and failed to meet his obligation under any evidentiary standard, APPX93-94. The district court nevertheless overlooked this failure and instead—"guided in large part by justifications and limitations that are the subject of other cases"—"assume[d]" the State could demonstrate compelling interests in fraud prevention and election integrity. APPX65.

The district court therefore gave more than adequate weight to the State's barely-asserted interests. The Secretary's invocation of *Democratic National Committee v. Bostelmann* is misplaced. No. 20-1539 (7th Cir. Apr. 3, 2020). In that case, the Seventh Circuit found the district court "did not give adequate consideration to the state's interests." Here, the district court not only considered the State's asserted interests, but went further and considered any other plausible

rationales that could justify the burden Arkansas law imposes on Plaintiffs here. Even after this searching and deferential review, the district court found Arkansas law imposed an unconstitutional burden.

Finally, the Secretary contends that the challenged requirements could survive rational basis review. Although strict scruinty applies here, there is nothing rational about the State continuing to mandate that its citizens comply with in-person witness and notarization requirements while simultaneously directing them to avoid person-to-person contact to mitigate the spread of a global pandemic. It is not rational to condition speech on risking illness or death.

2. That the State Did Not Cause COVID-19 or Ban Petition Gathering Is Irrelevant.

That the State did not cause COVID-19 and did not ban petition gathering does not salvage the in-person witness and notarization requirements from constitutional infirmity during the pandemic. The Secretary contends that the district court erred in its *Anderson/Burdick* analysis "because Plaintiffs did not first establish that Arkansas rather than the pandemic itself had burdened their constitutional rights" Br. at 33, and the State did not ban the gathering of petition signatures, *id.* at 35. The entire premise of the Secretary's and HEP's "state action" argument is misplaced.

Even if the State had done *nothing* to combat the spread of COVID-19, Plaintiffs would still be severely burdened by the enforcement of the in-person

witness and notarization requirements during the pandemic. This is so because it does not matter whether private circumstances or state action make a facially valid law unconstitutional as applied. The Supreme Court has long recognized that private circumstances—whether enduring or exigent—can make a facially valid law unconstitutional as applied to a particular categories of people or circumstances.

For example, the government might not cause people to be poor, but it violates the Constitution as applied to poor people to require them to pay transcript fees in order to file an appeal of a criminal conviction. *Griffin*, 351 U.S. at 19-20. In explaining why that is so, the Supreme Court explicitly rejected the argument the Secretary advances here: "Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that *it is not Illinois that is responsible* for disparity in material circumstances." *Id.* at 23 (emphasis added). Thus while the state "need not equalize economic conditions," it cannot "draw a line which precludes convicted indigent persons" from seeking an appeal. *Id.*

Here, the State did not cause COVID-19, and the State did not cause COVID-19 to be particularly dangerous and deadly for older Arkansans or those with preexisting health conditions. *But that doesn't matter*. Arkansas is not obligated to equalize Plaintiffs' health status to those who do not face these life-and-death risks, but Arkansas *is* obligated not to "draw a line which precludes," *id.,* those with health

risks from exercising their speech rights by conditioning the right to sign and circulate petitions on being physically proximate to other people who may be transmitting COVID-19.

The Supreme Court has likewise held that an individual's exigent health circumstances may make a facially valid law unconstitutional as applied to persons with certain medical conditions. For example, although the government does not *cause* a pregnant minor to experience a medical emergency necessitating an abortion, it cannot constitutionally enforce a facially valid parental notification law as to that minor. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006); *see also Gonzales v. Carhart*, 550 U.S. 124, 167, 168 (2007) (noting that "[a]s-applied challenges are the basic building blocks of constitutional adjudication" and that "[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack" (internal quotation marks omitted)). Relief in such an as-applied challenge extends not just to the individual plaintiff, but to those with "a particular condition." *Gonzales*, 550 U.S. at 167.

Moreover, the Supreme Court has instructed that a facially valid law may violate the First Amendment as applied to particular persons or circumstances, even where private parties and not the government are the cause of the circumstance rendering the law infirm. For example, campaign finance disclosure laws are facially

constitutional, but minor political parties may seek as-applied relief from those requirements if they prove that "compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from *either* Government officials *or private parties*." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (emphasis added). In *Reed*, the Court facially upheld Washington's petitioner disclosure law, but remanded the case for further proceedings on the plaintiff's alternative as-applied challenge on the basis of threats, harassment, or reprisals. 561 U.S. at 201-02. It does not matter that the government does not cause "private parties" to subject referendum supporters to threats or harassment.

Furthermore, courts universally examine the context in which laws operate—regardless of whether the government caused particular circumstances—in assessing the severity of the burden imposed by a regulation under the *Anderson/Burdick* test. Just last week this Court examined a variety of factors unrelated to any state action in concluding that Arkansas's new law advancing the deadline and increasing the signature requirement for minor political parties was likely unconstitutional. *See Libertarian Party of Arkansas v. Thurston*, __ F.3d __, No. 19-2503, 2020 WL 3273239 (8th Cir. June 18, 2020). For example, the government is not responsible for people losing interest in politics when elections are far away, yet this Court considers "deadlines far before election day [ ] problematic because of the general disinterest of potential voters so far removed from elections." *Id.* at *6. The

government is not responsible for the political reality that "most voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties," *id.* (quoting *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980)), yet this Court considers that reality in determining the severity of the burden imposed by a deadline for minor party ballot access. Nor is the government responsible for the fact that, far in advance of a primary election, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983)). Yet those are important considerations in characterizing the burden of a law under *Anderson/Burdick*.

Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020), cannot undermine this logic. The *Thompson* court emphasized that "procuring signatures is now harder . . . largely because of a disease beyond the control of the State" and reasoned that "we must remember, First Amendment violations require state action. So we cannot hold private citizens' decisions to stay home for their own safety against the State." *Id.* at 810. This makes no sense. The state action is the enforcement of the challenged law notwithstanding the pandemic. And the Supreme Court's precedent teaches that courts are to assess the severity of the burden as applied to private circumstances regardless of whether the government is responsible for those circumstances. *See*

supra. *Thompson*'s approach contravenes Supreme Court precedent, and this Court should not follow it. *See, e.g.*, *Griffin*, 351 U.S. at 23.[15]

This case is also factually distinct from *Thompson*. None of the *Thompson* plaintiffs claimed that *they* faced substantial medical risk from close in-person interactions; rather they were circulators who focused solely on the difficulty of reaching voters to sign the petitions. *Thompson*, 959 F.3d at 810; *Thompson v. DeWine*, No. 2:20-CV-2129, 2020 WL 2557064, at *4-5 (S.D. Ohio May 19, 2020). Here, Plaintiff Allen is immunocompromised by aggressive chemotherapy treatments for stage IV cancer. Plaintiff Gray is 80 and lives in retirement community that bars visitors. For them and voters like them wishing to sign AVF's petition, this is about much more than "frustration," as the *Thompson* court characterized the claims of the plaintiffs there. 959 F.3d at 810. The issue is whether Arkansas can make them risk their lives to exercise their speech rights.

For this reason, the Secretary's flippant comment that recent protests "underscore just how little burden Plaintiffs bore," Br. at 38, is startling. How do

[15] To illustrate the flaw in the Secretary's and the *Thompson* court's reasoning, imagine two neighboring states with the same in-person witness and notarization requirements. But the governor of state A requires social distancing, while the governor of state B calls COVID-19 a "hoax" and does not. Those at higher risk of COVID-19 would face a greater burden if they live in state B because of the increased spread of the disease, yet under the Secretary's and the *Thompson* court's reasoning, only those in state A could obtain relief from the in-person witness and notarization requirements. The law does not require such absurd results.

protests by other, mostly young, healthy people say anything about how much it burdens Plaintiff Allen to preclude him from exercising his First Amendment rights if he is unwilling to physically interact with another person while he is immunocompromised? How does it say anything about Plaintiff Gray's burden as an 80 year old in a retirement community? Or the burden of thousands of Arkansans of a similar age and with similarly risky health conditions? Is this an example of an "elected official[ ] . . . determin[ing] how best to balance safety and public-health concerns"? Br. at 30.

III. The Other Injunctive Factors Weigh Heavily in Plaintiffs' Favor.

In addition to succeeding on the merits, Plaintiffs' claim satisfies the other factors for an injunction. Without the injunction, Plaintiffs would be irreparably injured and the public interest would suffer.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1101 (8th Cir. 2013) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). Plaintiffs' injury is especially acute because, if the State's restrictions prevent the Proposed Amendment from appearing on the November 2020 ballot, that result could delay redistricting reform in Arkansas until 2030. Like other states, Arkansas will redraw its state legislative and congressional maps in

2021 following the 2020 Census, Ark. Const. art. 8, § 4, and these maps will likely last the decade.

The Secretary's only response is to accuse Plaintiffs of causing their own irreparable injury by failing to start collecting signatures earlier. As already discussed, *supra* Part II.A.2, this argument is meritless. AVF sought to gather signatures on a substantially *more* expedited schedule than the only two initiated measures to make the ballot in 2018. It is of no moment that AVF might have moved even faster if it had clairvoyant foresight of the COVID-19 pandemic.

The balance of harms and the public interest also support the district court's injunction. These factors merge in cases against the government, such as this one. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"[I]t is always in the public interest to protect constitutional rights," and "[t]he balance of equities . . . generally favors the constitutionally-protected freedom of expression." *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (citation omitted). The public interest in protecting the First Amendment right to circulate and sign petitions is especially pronounced here, where the people of Arkansas have reserved to themselves the right to amend their constitution by precisely these means. Moreover, there is a particularly strong public interest in enjoining restrictions that would prevent AVF and its supporters from effectively seeking to establish an independent redistricting commission through a ballot initiative. As the Supreme

Court recognized in closing the door to partisan gerrymandering claims under the federal Constitution, one of the remaining ways for states to reduce partisanship in redistricting "is by placing power to draw electoral districts in the hands of independent commissions." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Both nationwide and in Arkansas, nonpartisan redistricting commissions are extremely popular across party lines.[16] The people of Arkansas have a strong interest in preserving the opportunity to vote on this important issue.

While protecting the public's First Amendment interests, the district court's injunction would cause little, if any, harm to the State. The record belies the Secretary's claim that the injunction "would threaten Arkansas's ability to ensure elections are fair, honest, and orderly." Br. 45 (citation omitted). Despite the Secretary's persistent litigation position, there remains no evidence that Arkansas would face any pattern of petitioning fraud without the in-person witness and notarization requirements. The Secretary's suggestion that the injunction risks "sowing chaos" in the election process, Br. at 46, is not only unsupported, but also

[16] Nationwide, at least 60 percent of Democrats, Independents, and Republicans support creating independent redistricting commissions. *See New Bipartisan Poll Shows Support for Supreme Court to Establish Clear Rules for Gerrymandering*, CAMPAIGN LEGAL CTR. (Jan. 28, 2019), https://campaignlegal.org/update/new-bipartisan-pollshows-support-supreme-court-establish-clear-rules-gerrymandering. In Arkansas, at least 54% of Democrats, Independents, and Republicans say they would support the amendment creating the Arkansas Citizens Redistricting Commission. APPX27.

hyperbolic. While the Secretary asserts that "changing just one 'procedure now will have inevitable, other consequences,'" *id.* (quoting *Thompson*, 959 F.3d at 813), he offers no explanation of what those "consequences" might be. Nor could he. The injunction below changed no deadlines and left in place Arkansas's procedures for petitioning, placing measures on the ballot, and voting, with the narrow exception of suspending the in-person witness and notarization requirements.[17]

Moreover, the district court took meticulous care to preserve the State's ability to enforce its laws consistent with the Constitution. "From the Secretary of State's perspective, the process as enjoined is indistinguishable from the original process." APPX95. The injunction does not change the Secretary's longstanding process of using "[a]n analysis of handwritten personal information and signatures . . . to determine that an initiative has actual support from a substantial number of actual registered voters." APPX75. It merely requires the Secretary to "review the typical

[17] Indeed, as the district court noted, "the injunction does not interfere with the State's elections" at all. APPX95. "The injunction reaches only the initiative petition process," which precedes the election. *Id.*

The Secretary never contended in the district court that it was too close to an election deadline to enter an injunction. Nor did he in his opening brief on appeal. The only time the Secretary has done so is in his stay motion and reply in this Court, citing the Supreme Court's *Purcell* doctrine. By not raising this argument in the district court, or in his opening brief, the Secretary has waived it. *Cole*, 533 F.3d at 936; *FTC v. Neiswonger*, 580 F.3d 769, 775 (8th Cir. 2009). Regardless, there will be no confusion. If the injunction is affirmed, the unwitnessed signatures will count. Otherwise, they will not.

number of handwritten signatures, though spread across substantially more pages than is typical." APPX76. The injunction similarly respects Arkansas's policy of making canvassers attest to the validity of the signatures they submit. In place of notarized affidavits, the district court required declarations under penalty of perjury because *Arkansas itself* recognizes that such declarations serve the same function as notarization. APPX69, APPX76. By adhering to Arkansas law as much as possible, the district court minimized any harm to the Secretary.

It would not serve the public interest to suppress Plaintiffs' expressive activity and put AVF's ballot initiative at risk of missing the November ballot, just to spare the Secretary from small adjustments to Arkansas's petitioning regulations. Indeed, if AVF's initiative qualifies for the ballot through the procedures allowed by the injunction, "the voters remain free to . . . reject [the] initiative" as punishment for obtaining judicial relief. APPX95. In other words, if it is really in the public interest for otherwise valid ballot initiatives to die for the sake of the in-person witness and notarization requirements, the public itself can vindicate that interest at the ballot box. *See* APPX73.

IV. The District Court Did Not Abuse its Discretion in Crafting a Remedy.

Having correctly determined that an injunction was warranted, the district court acted within its sound discretion in choosing the terms of that injunction. The Secretary's contention that the district court improperly "rewrote Arkansas's

initiative statutes," Br. 46, mischaracterizes what the court did and rests on an unduly cramped view of the court's remedial power.

District courts exercising their equitable authority have broad discretion to "mould each decree to the necessities of the particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). In crafting injunctive relief for constitutional violations, district courts often properly order the government not only to stop violating the Constitution, but also to take specific steps to remedy the harm. *Smith v. Ark. Dep't of Corrections*, 103 F.3d 637, 642, 646 (8th Cir. 1996) (upholding injunction requiring government to "station at least two correctional officers" in certain open prison barracks, "document and record all entries and exits of prison personnel into or out of the open barracks," and "make periodic progress reports" to remedy Eighth Amendment violation); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 931 (8th Cir. 2004) (district court did not err in requiring, as due process remedy, that government complete a study before terminating certain Medicaid payments). Such affirmative injunctive relief is often especially appropriate in election cases, where there is a time-sensitive need for a settled rule that comports with the Constitution. *See Perry v. Perez*, 565 U.S. 388, 392 (2012) (*per curiam*) (where redistricting plan becomes unconstitutional and there is insufficient time for a legislative solution before next elections, district court must draw an interim plan for the state); *Scott*, 215 F. Supp. 3d at 1258-59 (extending

imminent voter registration deadline due to hurricane to prevent as-applied constitutional violation).

The Secretary claims the district court acted as if it had "a roving commission to rewrite state election codes." Br. i (quoting *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937, at *1 (5th Cir. June 4, 2020)). This accusation is baseless. As explained above, *see supra* Part III, the district court preserved Arkansas law except as necessary to remedy a proven constitutional violation. As the Secretary notes, Br. 46-47, the district court specified new language for petition signature pages, removed the canvasser's affidavit from the form, allowed signature pages that are not affixed to the initiative, and directed Arkansas not to reject signatures based on the witness and notarization requirements. While the Secretary argues that these steps were improper, he cannot dispute that they were *necessary* to remedy the adjudicated constitutional violation—*i.e.*, the application of the in-person witness and notarization requirements during the pandemic. A remedy in this case simply would not work if it left the text and formatting of Arkansas's signature pages unaltered.[18]

[18] For the same reason, the Secretary's argument that Plaintiffs failed to plead a specific challenge to "Arkansas's requirements that signature pages contain a canvasser's affidavit and be affixed to the initiative," Br. 47, is irrelevant. The district court properly enjoined everything necessary to suspend the in-person witness and notarization laws, including these technical requirements. As already explained, this was consistent with Plaintiffs' complaint and in no way prejudicial to the Secretary. *See supra* Part II.A.1.

Nor did the district court abuse its discretion by providing new form language, rather than wait for the Secretary to propose edits that would have been substantively identical (or else unconstitutional). Such a needless delay would do nothing but risk leading to the kind of last-minute, pre-election change that the Secretary claims to abhor. Br. 45-46. Indeed, the Secretary has tacitly conceded that he has no objection to the specific language the district court chose for the modified forms. The district court invited the parties to bring to its attention any issue with the preliminary injunction caused by "oversight, misunderstanding, inartful drafting," APPX79. The Secretary raised no such issue, and subsequently agreed to have the preliminary injunction made permanent. APPX80-81.

The Secretary relies principally on *Thompson* to impugn the district court's exercise of remedial discretion. As the district court recognized, APPX95, that case is inapposite. In *Thompson*, the Sixth Circuit stayed an injunction that "drastically alter[ed] Ohio's election procedures." 959 F.3d at 812. Unlike here, the district court in *Thompson* extended the deadline for submission of signatures and required Ohio to accept electronic signatures. *Id.* at 807. The district court here was far more careful to enjoin only what was necessary to fix the constitutional violation it identified.

This Court's decision in *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995), is also off-point. That case stands for the unquestioned proposition that federal courts should ordinarily defer a state's choice between

multiple permissible ways of bringing its election code into compliance with the Constitution. There, the constitutional violation consisted of Arkansas's "dual requirements that parties both conduct and fund primary elections as a condition of ballot access." *Id.* at 1301. The state could fix this violation with (at least) two policy choices: allow parties to forego primaries, or fund primaries with public money. Here, by contrast, Arkansas could comply with the Constitution only by suspending both the in-person witness and notarization requirements and using accordingly modified forms.

Finally, the district court did not abuse its sound discretion in making its injunction applicable to all ballot petitions this year. This Court recently held that "it was well within the broad discretion of the district court to grant . . . a statewide preliminary injunction" against an Arkansas law that likely violated the First Amendment, rather than limit relief to the plaintiffs. *Rodgers*, 942 F.3d at 459. This is particularly true where, as here, "the potential for harm extends beyond the parties." *Id.* Moreover, the district court identified another factor supporting statewide relief here: granting relief only to Plaintiffs could create an impression of judicial "viewpoint discrimination" in favor of AVF's initiative. APPX73.

The Secretary does not address these sound reasons for a statewide injunction, but suggests that the district court should have limited relief to Plaintiffs because "Plaintiffs move[d] for preliminary injunctive relief only for themselves." Br. 47.

No rule requires courts to limit an injunction to the moving parties when they do not expressly request broader relief. *See Whole Woman's Health*, 136 S. Ct. at 2307 ("Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims" if the challenged law is unconstitutional as applied to everyone); *Rodgers*, 942 F.3d at 458 (noting it "cannot be the law" that "every plaintiff seeking statewide relief from legislative overreach [must] file for class certification"). The district court appropriately vindicated the First Amendment rights of all Arkansans by enjoining only the requirements that unduly burden petitioning during the pandemic.

But even if this Court agrees with the Secretary that the district court's relief was too broad, the remedy is to order narrower relief, either to apply to just AVF's petitions, or to, *e.g.*, permit those Arkansans with a reasonable fear of in-person interactions to sign petitions without the circulator present as a witness, and circulators to sign the affidavit without a notary present. At the very least, Plaintiffs Gray and Allen have far exceeded their burden to show that *they* are severely burdened by the in-person witness requirements.

CONCLUSION

For the foregoing reasons, the district court's injunction should be affirmed.

Dated June 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(2)(A) because it contains 12,950 words, not including sections that are exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word.

I further certify that this PDF document was scanned for viruses, and no viruses were found on the file.

/s/ Paul M. Smith
Paul M. Smith

CERTIFICATE OF SERVICE

I certify that on June 22, 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.

/s/ Paul M. Smith
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