No. 20-2095

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BONNIE HEATHER MILLER, *et al.*,
Plaintiffs-Appellees,

vs.

JOHN THURSTON,
Defendant-Appellant.

On Appeal From the United States District Court
for the Western District of Arkansas
Hon. P.K. Holmes, III
Case No. 5:20-cv-05070-PKH

BRIEF OF *AMICUS CURIAE* ARKANSAS STATE CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29 (a)(4)(A), the Arkansas State Chamber of Commerce discloses that it is a non-profit corporation organized under the laws of Arkansas. It has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF CONSENT TO FILE

Pursuant to Fed. R. App. P. 29 (a)(2), all parties have consented to the filing of the Chamber's amicus brief.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

The Arkansas State Chamber of Commerce ("Chamber") is a professional association created to promote commerce and to enhance the economic prospects of Arkansas. More than a thousand businesses are members of the Chamber. An important function of the Chamber in representing the interests of its members is to advocate for a legal and political climate that supports existing businesses and attracts new businesses to Arkansas. In carrying out that function, the Chamber works to protect, preserve, and enhance legislation that protects the business community.

The Chamber therefore has a strong interest in protecting the integrity of the voting process in Arkansas through enforcement of state laws governing the process for getting measures on the ballot. The Chamber seeks to protect that interest through participation in this case as an amicus curiae in support of the Arkansas Secretary of State and in support of reversing the district court's ruling.

Pursuant to Fed. R. App. P. 29 (a)(2), all parties have consented to the filing of this amicus brief.

STATEMENT REGARDING PREPARATION OF BRIEF

The Chamber's brief was not authored in whole or in part by counsel for any party to this appeal. Nor did any party or party's counsel contribute money that was intended to fund the preparation or submission of the Chamber's brief. And no person other than the Chamber contributed money that was intended to fund preparation or submission of this brief.

INTRODUCTION

The Chamber respectfully submits this brief as *amicus curiae* in support of the Appellant, Arkansas Secretary of State John Thurston.

When, as here, federal courts are asked to displace duly enacted state laws governing the ballot measure process, they "must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). While petitioning often ***entails*** political speech and expressive activities, *see Meyer v. Grant*, 486 U.S. 414, 422 (1988), the initiative is innately lawmaking process.

Heeding this distinction, federal courts have carefully distinguished direct restraints on the communicative components of petition circulation from neutral and generally applicable laws governing the manner and method of qualifying a measure for the ballot; the latter implicate no constitutionally cognizable interests, and thus are subject to (at most) rational basis review.

In applying the strict scrutiny facet of the so-called *Burdick* standard of review framework[1] to Arkansas's statutory mandates that petition circulators (or "canvassers") physically witness the affixation of petition signatures and swear the required verification before a notary public, *see* Ark. Code Ann. §§ 7-9-103(c)(7)-(8), 7-9-109, 7-9-126, the district court upended this carefully wrought dichotomy. If allowed to stand, the district court's ruling will erroneously subsume virtually

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[1] The *Burdick* (or *Anderson-Burdick*) test queries whether a given electoral statute or regulation exacts a "severe burden" on First Amendment rights. If so, it is subject to strict scrutiny. "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). Both strands of the *Burdick* rubric are more rigorous than rational basis. *See Pub. Integrity Alliance v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016).

every aspect of states' direct lawmaking into the auspices of the federal Constitution, in derogation of this Court's precedents and foundational federalism principles.

ARGUMENT

I. Arkansas's neutral and generally applicable requirements for the witnessing of signatures and the notarization of circulator verifications do not implicate federal constitutional rights.

A. Regulations of the non-expressive aspects of the ballot measure process are not subject to heightened scrutiny.

The district court erroneously imputed federal constitutional significance to a state legislative process, which misconstrues controlling precedents and undermines a pillar of federalism. At the outset, it is important not to conflate ballot access for candidates and political parties with procedures for qualifying initiative measures. Candidate elections are essential to the functioning of republican government on both the federal and state levels. In addition, the ballot is the nexus by which voters can associate with the candidates whom they wish to represent them. For that reason, burdens on candidates' and political parties' ballot access directly implicate voters' First and Fourteenth Amendment rights. *See generally Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (states may not "unreasonably interfere with the

right of voters to associate and have candidates of their choice placed on the ballot"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively."); *Libertarian Party of Arkansas v. Thurston*, -- F.3d --, 2020 WL 3273239, at *5 (8th Cir. June 18, 2020) ("Ballot access restrictions implicate ... the rights of potential candidates for public office ... [and] the First and Fourteenth Amendment rights of voters to cast their ballots for a candidate of their choice and to associate for the purpose of advancing their political beliefs." (quoting *Moore v. Martin*, 854 F.3d 821 (8th Cir. 2017)).

By contrast, state ballot measure processes are not protected rights or even cognizable interests under the federal constitution. To the contrary, "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." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) ("[T]he right to initiate legislation is a wholly state-

created right, [and] we believe that the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation.").

While regulatory restrictions on speech that is *incidental* to a petition effort can engender constitutional concerns, there remains a key distinction between the ballot measure process itself and speech or expressive conduct entailed in circulating a petition. The latter is squarely within the ambit of the First Amendment, *see Buckley v. Am. Const. Law Foundation*, 525 U.S. 182 (1999) (applying heightened scrutiny to statutes limiting petition circulation to registered voters in the state and imposing certain disclosure mandates on circulators), but the mechanics of qualifying measures for the ballot are not. *See Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001) (Arkansas's statute providing that only registered voters could validly sign initiative petition "is content neutral and merely regulates who qualifies to legally sign an initiative petition, a restriction which does not violate the First Amendment"); *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006) (en banc) (holding that supermajority approval requirement for certain initiatives did not

burden political speech, emphasizing the difference "between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process which legislation is enacted, which do not"); *cf. Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (commenting with respect to voter registration regulations that "not every procedural limit on election-related conduct automatically runs afoul of the First Amendment. The challenged *law* must restrict political discussion or burden the exchange of ideas").

For that reason, this Court has joined other Circuits in holding that state regulations of non-expressive components of the ballot measure process either do not present cognizable constitutional questions or are subject to no more than rational basis review. *See Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 675 (8th Cir. 2012) (noting in ballot measure context that "[w]here no restriction on speech has been shown, courts have refused to apply exacting scrutiny"); *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019) (emphasizing that "'laws that determine the process by which legislation is enacted' do not implicate the First Amendment" (internal

citation omitted)); *Biddulph v. Mortham*, 89 F.3d 1491, 1500 & n.10 (11th Cir. 1996) (declining to extend First Amendment scrutiny to regulations of the ballot measure process, as long as they are content and viewpoint neutral and not discriminatorily applied, adding that "this case involves an initiative's access to the ballot, not a candidate's. This difference is material because . . the right to place an initiative on the ballot is a right created by the state"); *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) ("Even if plaintiffs are correct that the enactment of Local Law 51 will make it more difficult for plaintiffs to organize voter initiatives and referenda in the future, 'the difficulty of the process alone is insufficient to implicate the First Amendment'" (quoting *Dobrovolny*, 126 F.3d at 1113); *see also Schmitt v. LaRose*, 933 F.3d 628, 649 (6th Cir. 2019) (Bush, J., concurring) ("I question whether that [*sic*] the election-mechanics statutes at issue [relating to qualification of initiative measures] are even within the purview of the First Amendment. However, even assuming that they are, these statutes are constitutional under the rational-basis review [standard]."); *Bambenek v. White*, 3:20-CV-3107, 2020 WL 2123951, at *2 (C.D. Ill. May 1, 2020) (declining to judicially revise Illinois ballot access

requirements for initiatives in light of COVID-19 pandemic, emphasizing the "distinction . . . 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").

B. Arkansas's signature witnessing and notarization requirements do not restrict political speech or expressive conduct.

The district court erred in applying the *Burdick* framework to Arkansas's statutory mandates that circulators physically witness the affixation of petition signatures and swear the accompanying verification before a notary public. While acknowledging in principle that the First Amendment does not envelope all facets of the initiative process, the district court nevertheless reasoned that these requirements—as implemented in the context of the COVID pandemic—"substantially restrict political discussion." Op. at 7.

This reasoning, however, confounds burdens on the *ability to qualify an initiative* with burdens on *speech itself*. The distinction is subtle but pivotal. It may well be the case that the witnessing and notarization mandates are significantly impeding the Appellees' signature collection efforts. But neutral and generally applicable procedural prerequisites to qualifying an initiative are not

constitutionally suspect merely because they "may make it more difficult to have an issue placed on the ballot." *Hoyle*, 265 F.3d at 703. Rather, a statute sounds a constitutional tocsin only when it "limit[s] the number of people who can circulate petitions in favor of a proposed amendment, restrict[s] the speech they use in doing so, or regulate[s] how many others they may approach in an attempt to garner support." *Missouri Roundtable*, 676 F.3d at 676.[2]

Arkansas's signature witness and circulator affidavit requirements do not transgress any of these boundaries. Those requirements do not dictate who is permitted to circulate a petition, *contrast Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001) (applying heightened scrutiny to—but ultimately upholding—circulator residency requirement); constrain what they may say in soliciting signatures or where they may say it, *contrast Initiative & Referendum Institute v. United States Postal Serv.*, 417 F.3d 1299

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[2] Although not relevant here, the compelled disclosure of identifying or financial information relating to circulators also has, under narrow circumstances, been held to trigger "exacting" scrutiny. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-202 (1999) (applying exacting scrutiny rubric to requirements that circulators wear a name ID badge while in the field and that petition sponsors file "detailed monthly disclosures" of payments to circulators).

(D.C. Cir. 2005) (invalidating prohibition on petition circulation on Postal Service property); or obtrude government mandates into the dealings between petition sponsors and circulators, *contrast Meyer*, 486 U.S. at 426-27 (deeming unconstitutional a ban on payments to circulators).

In maintaining that burdens on the qualification of an initiative are tantamount to burdens on speech, the district court indulged the fallacy that this Court has repeatedly repudiated. Like the signature witnessing and affidavit notarization requirements, statutes that restrict petition signing only to registered voters inevitably hinder initiative proponents' ability to garner support and qualify their measure for the ballot. But this Court recognized that such laws "regulating the initiative procedure do[] not restrict political speech." *Hoyle*, 265 F.3d at 704. Similarly, compelling initiative proponents to print on their petition packets descriptive statements prepared by government officials may frustrate the campaign's objectives, but it does not inflict any actual "restriction on [the proponents'] ability to circulate petitions or otherwise engage in political speech." *Missouri Roundtable*, 676 F.3d at 676.

In this vein, Arkansas has neither prohibited anyone from circulating a petition nor constrained advocacy in support of it. Merely directing that an individual wishing to sign a petition do so in the presence of a circulator "in no way impede[s[] the supporters of a measure from circulating a petition or from expressing their views." *Hoyle*, 265 F.3d at 704. Indeed, witnessing signatures is the constitutive attribute of petition circulation itself. The notion—implicit in the district court's opinion—that merely requiring the existence of a circulator in whose presence signatures are affixed precipitates federal constitutional questions is untethered from this Court's precedents.

The mandate that canvassers swear the verification on each petition sheet in the presence of a notary public bears an even more attenuated nexus to the First Amendment. The execution of the affidavit occurs *after* voters have signed the sheet, and thus does not even concern—let alone encumber—the circulation process or communication with prospective signers. *See* Ark. Code Ann. § 7-9-126(b)(6) (requiring the disqualification of a petition sheet if the verification is executed prior to circulation). Further, notarization is a purely ministerial act; it does not entail political advocacy or partake of

any expressive conduct whatsoever. While the notarization requirement may well impose logistical difficulties and thereby jeopardize the Appellees' prospects for ballot placement, it does not in any way regulate or restrict speech. If the discharge of this post-circulation rote administrative function implicates a cognizable First Amendment interest, then the district's court's "approach would embroil the federal courts in nearly every procedural hurdle imposed by state legislators on the citizen initiative process," *Semple*, 934 F.3d at 1143—an entanglement that this Court has correctly eschewed.

II. The district court's ruling will improperly ensnare federal courts in the administration of states' internal lawmaking processes.

By subjecting neutral, non-discriminatory regulations of non-expressive conduct to heightened scrutiny, the district court's ruling essentially federalizes a state lawmaking process. The statutory provisions at issue in this case (*i.e.*, the manner of signing initiative petitions and executing circulator verifications) lie at the crux of the state's internal lawmaking functions. For a federal court to unilaterally abridge these directives is an invasive incursion into state's sovereign affairs. *See Arizonans for Fair Elections v. Hobbs*, CV-20-00658-PHX-DWL, 2020 WL 1905747, at *3 (D. Ariz. Apr. 17, 2020) (declining to

invalidate Arizona's requirement of ink petition signatures witnessed by the circulators, and expressing unease with the "array of granular policy choices this Court would need to make in order to effectively implement that relief. Such an approach would raise significant separation of powers and federalism concerns").

Indeed, the expansive repercussions of this intermeddling are already apparent. As the district court tacitly realized, its ruling is not easily contained. The court's cancelation of the signature witnessing requirement effectively rendered inoperative Arkansas's independent mandate that the full text of initiative measure be physically attached to each signature sheet while in circulation. *See* Ark. Code Ann. § 7-9-106. Although the constitutional soundness of Section 7-9-106 itself is not subject to credible dispute, *see Missouri Roundtable*, 676 F.3d at 675-76 (requirements concerning the contents of petition packets did not burden any First Amendment right), the district court nevertheless arrogated to itself the legislative function of revising the statute to fashion bespoke exceptions permitting the transmission of the initiative text "by means alternative to in-person delivery" and allowing

canvassers to "consolidate" signature pages "as attachments to the appropriate petition part." Op. at 17.

To be sure, the district court stressed that its order was born of specific circumstances presented by the COVID pandemic. But there is no limiting principle that would prevent federal courts from being enmeshed in similar disputes whenever some putative exigency (*e.g.*, severe weather events or an economic recession) makes it onerous to comply with neutral and non-discriminatory ballot access laws. Federal courts would become roving monitors of internal state lawmaking processes, decreeing *ad hoc* modifications to an array of duly enacted state statutes and corroding vital federalism strictures.

The Court should accordingly reaffirm the principle encapsulated in *Dobrovolny*, *Hoyle,* and *Missouri Roundtable*—*i.e.*, neutral and generally applicable laws that govern the mechanics of qualifying an initiative or referendum from the ballot (rather than regulate speech or express activities incidental to petition circulation) do not implicate First Amendment interests and thus are not subject to heightened scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit requirements of Fed. R. App. P. 32(a)(7)(B) because, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,882 words. This certificate was prepared in reliance on the word count of the word processing system (Microsoft Word 2019) used to prepare this brief.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook.

3. The undersigned further certifies that the electronic version of this document has been scanned for viruses and is virus-free.

/s/ Gary D. Marts, Jr.
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CERTIFICATE OF SERVICE

On June 22, 2020, I filed this brief using the CM/ECF system, which will serve a copy on all counsel of record in this case.

/s/ Gary D. Marts, Jr.
Gary D. Marts, Jr.