No. 20-2095

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

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

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

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Other Authorities

INTRODUCTION

Plaintiffs don't claim that the enjoined antifraud provisions or Arkansas's COVID-19 response severely burdened petitioning. Nor do they claim to have demonstrated an inability to comply with Arkansas law. Rather, Plaintiffs argue that this Court should affirm the district court's injunction because COVID-19 made petitioning trickier. But "just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs" face a severe burden or are entitled to an exemption from otherwise valid laws. *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) (staying injunction pending appeal), *application to vacate stay denied*, No. 19A1054, 591 U.S. — (June 25, 2020). Nor does COVID-19 empower district courts to rewrite state constitutions—sub silentio or otherwise. And Plaintiffs don't point to a single case holding otherwise.

Recognizing that, Plaintiffs' response effectively abandons any effort to defend the district court's order on its own terms. Plaintiffs instead focus on two individual plaintiffs with underlying medical conditions whom they insist cannot sign a petition in a canvasser's presence and would be virtually excluded from the petitioning process absent relief. But that claim defies logic since there is no reason a canvasser couldn't witness a signature from a safe distance or through a window. Indeed, countless family gatherings have occurred the same way. Nor could

such unique circumstances justify broadly enjoining Arkansas law. Thus, even Plaintiffs' latest argument falls flat, and this Court should reverse the judgment below.

ARGUMENT

I. Plaintiffs' claim fails on the merits.

A. Plaintiffs lack standing.

1. Plaintiffs' pleading errors stand in the way of redressability. They claim to have "challenged both the statutory and constitutional requirements" by enumerating specific statutory provisions and citing Article 5, Section 1, in general. *See* Br. 13-14. But Plaintiffs do not dispute that the almost two dozen subdivisions in that section—whether called "subsections" or "bolded headers," Br. 14 n.5—contain dozens of detailed regulations of the mechanics of the initiative process. And they never identify a place in their complaint where they even acknowledged the existence of the *constitutional* in-person and affidavit requirements.

Plaintiffs' pleading error is worse than simple oversight. They specifically challenge the signature threshold and deadlines in Article 5, Section 1. *See* APPX7, 20-21. Their inclusion of those specific requirements suggests they affirmatively chose not to challenge others. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law* 107-11 (2012) (discussing the negative-implication canon). Far from

a "hypertechnical argument," Br. 14, the point is simply that Plaintiffs failed to challenge relevant requirements.

Plaintiffs attempt to save themselves from this failure with a hypertechnical argument of their own. *See* Br. 15-16 (citing Fed. R. Civ. P. 15, 54). But Rules 15(b) and 54(c) simply make clear that a district court is not limited to precisely the relief demanded in the complaint. That is not the issue here; rather, the problem here is that Plaintiffs completely omitted any reference to the *constitutional* antifraud requirements and that meant that the district court too never cited those requirements. *See* ADD14-16, 20-30. Because neither Plaintiffs nor the district court ever acknowledged the existence of those constitutional requirements, it is unclear how the injunction can be interpreted to reach those requirements. *Cf.* Fed. R. Civ. P. 65(d)(1)(B) (requiring district courts to "state [injunctions'] terms specifically"). Regardless, Rules 15 and 54 "must be interpreted in keeping with Article III constraints"—including its redressability requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *see* Fed. R. Civ. P. 82. And there is no redressability where a plaintiff fails to challenge an independent, superseding requirement.

Finally, Plaintiffs are not correct that the Arizona plaintiffs disclaimed a challenge to that State's constitutional requirements any more clearly than Plaintiffs did here. Br. 16. Although the Arizona district court's order does not quote

the plaintiffs' concession verbatim, that concession appears to have amounted to little more than an acknowledgment that—like the complaint here—the Arizona complaint did not challenge the relevant constitutional provisions. *See Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *2 (D. Ariz. Apr. 17, 2020). Plaintiffs attempt to distinguish that case thus falls flat.

2. Plaintiffs admit (Br. 16-17) that Article III requires them to plead "causation—a fairly traceable connection between [their] injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). But they don't point to anything Arkansas did to cause their alleged injury.

Recognizing they could never show traceability under the doctrine as we understand it today, Plaintiffs rely on outdated precedent to suggest that even the most "attenuated line of causation" suffices. Br. 17 (quoting *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 688 (1973)). Indeed, that approach has long since been rejected. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (*SCRAP*'s "expansive expression of what would suffice for § 702 review under its particular facts has *never since been emulated by this Court*" (emphasis added)); *Whitmore v. Arkansas*, 495 U.S. 149,

158 (1990) (calling *SCRAP* "the *most* attenuated injury conferring Art. III standing" (emphasis added)); *Sierra Club v. Peterson*, 185 F.3d 349, 361 n.13 (5th Cir. 1999) ("[I]t seems safe (and sage) to note that [*Lujan*, 497 U.S. 871,] likely eviscerated certain prior cases that afforded procedural rights plaintiffs standing where the three-part test was not met, *see, e.g.*, [*SCRAP*].").

Nor is Plaintiffs' citation to inapt precedent from this Court any more convincing. Contrary to Plaintiffs' claim, this Court has not held traceability exists whenever a defendant has "'some connection with the enforcement of' a challenged law." Br. 17 (quoting *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006)). The passage Plaintiffs quote from *Bruning* was instead about whether the defendant state officials were properly sued under the exception to Eleventh Amendment immunity established in *Ex Parte Young*, 209 U.S. 123 (1908). *See Bruning*, 455 F.3d at 864.

Along the same lines, Plaintiffs also claim that it is "irrelevant" that their alleged injury is self-inflicted. Br. 17. That ignores the Supreme Court's command that "self-inflicted injuries are not fairly traceable to the Government's purported activities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). It also makes no difference that no ballot initiatives have yet qualified for the ballot; the July 3 deadline to submit petitions has not yet passed. *See* APPX50. Nor does it

make any difference that Plaintiffs filed "two months ahead of the schedule followed by" others "in 2018." Br. 17 (emphasis omitted); *see* Br. 3. Well in advance of their March 16 filing, Plaintiffs knew COVID-19 would likely make petitioning trickier this year. *See* APPX8-9. Their failure to act once that fact became clear is the cause of their alleged injuries, not any action by Arkansas.

Ultimately, unable to point to anything that Arkansas did to cause their alleged injuries, Plaintiffs largely resort to simply quoting the district court's unreasoned assertion that they have standing. *See* Br. 18-19. Indeed, beyond that, Plaintiffs do little more than vaguely assert that Arkansas burdened petitioning through gubernatorial "directives—enforceable by criminal penalties—that sharply limited how many, and where, people could congregate." Br. 19. But Plaintiffs do not explain which "directives" supposedly burdened them or how those directives supposedly burdened petitioning.

Instead, to avoid having to explain that claim, Plaintiffs simply lump a variety of documents into a single string citation and declare them burdensome. *See* Br. 3 (citing P-APPX002-03, 005-06, 008-09, 020-22, 024-27, 029-30; APPX32-33, 35-36, 38-41). That's not surprising since even the barest scrutiny belies their assertion. For instance, they cite:

- Governor Asa Hutchinson's initial emergency declaration, APPX32-33;
- His suspension of certain telemedicine rules, P-APPX002-03;

- His relaxation of certain absentee-voting rules in the March 31 primary run-off elections, P-APPX005-06;

- His extension of the state tax-return deadline, P-APPX008-09;

- His March 26 prohibition of "gatherings" exceeding ten people in "confined" spaces "outside a single household," APPX35-36;

- His relaxation of certain rules for notaries public, P-APPX020-22, 24-27;

- His closure of gyms, barbershops, casinos, and other establishments, and limitations on dine-in service restaurants, APPX38-41; and

- His suspension of the prohibition on remote annual shareholder meetings, P-APPX029-30.

It is not at all clear how those limited, targeted measures (even if violating them were a misdemeanor (*see, e.g.*, APPX41) affected Plaintiffs' ability to collect signatures.[1] And Plaintiffs' failure to explain how they supposedly did demonstrates that they lack standing.

B. The First Amendment does not apply here.

Plaintiffs do not claim a constitutional right to propose or enact legislation by initiative. *See* Br. 22-24. For good reason: This Court and many others have long made clear that "the right to a state initiative process is not a right guaranteed by the United States Constitution." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997); *see, e.g.*, *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937

[1] Plaintiffs also refer to the Little Rock mayor's actions, but they don't explain how a mayor's actions are attributable to the Secretary, the Governor, or any other State official. *See* Br. 3 (citing P-APPX010-18).

(7th Cir. 2018) (collecting citations, including to *Dobrovolny*, that support proposition that "many courts have held that private citizens lack a right to propose referenda or initiatives for any ballot"). As such, "the procedures involved in the initiative process . . . are state created and defined," and the Constitution is indifferent to the mechanics of Arkansas's process for legislating by initiative. *Dobrovolny*, 126 F.3d at 1113; *see Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("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." (emphasis added)). First Amendment scrutiny does not apply here.

To avoid that conclusion, Plaintiffs claim that the "in-person witness and notarization requirements regulate expressive conduct." Br. 22. But Plaintiffs cannot claim that the challenged requirements burden expression about "the merits of the underlying law" or "the political view that the question should be considered 'by the whole electorate.'" *Doe*, 561 U.S. at 195 (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). Arkansas law does not limit anyone's ability to stump for the merits of redistricting reform or to promote Plaintiffs' petition campaign by, for instance, directing people to Plaintiffs' social distancing-compliant "Drive & Sign" events this weekend. *See Drive & Sign to End Gerrymandering: Find a Location Near You*, Ark. Voters First (visited June 23, 2020), https://bit.ly/3dquDsc.

Indeed, in every sense, Plaintiffs "remain free to lobby, petition, or engage in other First Amendment-protected activities" related to redistricting reform. *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). And they do not explain how limiting legally effective petitions to those that comply with the antifraud requirements burdens anyone's expression. *See* Br. 23-24. That is enough to establish that the challenged requirements do not trigger the First Amendment. *See Wellwood v. Johnson*, 172 F.3d 1007, 1009 (8th Cir. 1999) (noting that "the statutes involved in this case in no way burden the ability of supporters of local-option elections to make their views heard").

The Supreme Court's cases underscore the point. The two leading Supreme Court cases on initiative petitions struck down Colorado's ban on paid circulators, *Meyer*, 486 U.S. at 416, and that State's identification requirements for circulators, *Buckley v. Am. Const'l Law Found.*, 525 U.S. 182, 186 (1999). Those laws triggered First Amendment scrutiny because they limited who could circulate, whether by banning payment or requiring state registration. *See Buckley*, 525 U.S. at 186 ("Petition circulation, we held, is 'core political speech,' because it involves 'interactive communication concerning political change.'" (quoting *Meyer*, 486 U.S. at 422)). By contrast, Arkansas's in-person and affidavit requirements do not limit anyone's ability to circulate or speak. They merely provide that—whoever circulates—signatures are not effective for legislative purposes unless they are collected

in person and accompanied by an affidavit attesting that the signatures were collected in person. As such, those requirements don't trigger First Amendment scrutiny.

Dobrovolny likewise illustrates why Arkansas's requirements do not implicate the First Amendment. The law at issue there regulated the mechanics of the initiative process by conditioning a petition's legal effectiveness on whether that petition satisfied a formal requirement—namely, whether it contained a certain number of signatures. *Dobrovolny*, 126 F.3d at 1112. Similarly here, Arkansas law conditions a petition's legal effectiveness on different formal requirements—whether it was signed in the canvasser's presence and is accompanied by an appropriate affidavit. *See* Ark. Const. art. 5, sec. 1. These formal requirements relate to "the difficulty of the process alone" and are "insufficient to implicate the First Amendment." *Dobrovolny*, 126 F.3d at 1113. Just like *Dobrovolny*, heightened scrutiny does not apply here because the challenged provisions do not limit political speech. Instead, they merely set formal requirements for legal effectiveness.

At bottom, Plaintiffs' true argument is really that the challenged requirements burden expressive conduct because they limit the *effectiveness* of initiative-related speech. *See* Br. 22-23. Other plaintiffs have tried this argument and similar ones. And other courts have rejected it. The Supreme Court, for example, rejected a city councilmember's argument that the First Amendment shielded him

from a state statute requiring his recusal from voting upon or advocating for a measure due to a conflict of interest. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 119-20, 125-28 (2011). That was because the First Amendment confers no positive "right to use governmental mechanics to convey a message." *Id.* at 127.

In line with *Carrigan*, at least one other court of appeals has rejected Plaintiffs' precise expressive-conduct argument—that requirements limiting the legal effect of initiative-related speech implicate the First Amendment as burdens on expressive conduct. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099-1101 (10th Cir. 2006) (en banc) (McConnell, J.). As discussed in Arkansas's opening brief (at 24-27), *Walker* first rejected the argument that the First Amendment applied to a supermajority requirement simply because the requirement regulated the mechanics of initiative legislation. 450 F.3d at 1099-1101. But it then proceeded to reject the alternative argument that the requirement there burdened expressive conduct. *Id.* at 1101-03. Even the limited First Amendment protection for expressive conduct "does not apply to structural principles of government making some outcomes difficult or impossible to achieve." *Id.* at 1102.

Plaintiffs claim that the challenged requirements make their speech "less likely to produce results," *id.*; that is, less likely that their "proposal [will] get on the ballot," Br. 25. Yet just as "a legislator has no right to use official powers for

expressive purposes," *Carrigan*, 564 U.S. at 127, Plaintiffs have no right to ensure "their expression can help get AVF's petition on the ballot," Br. 23. *See Marijuana Policy Project*, 304 F.3d at 85 ("[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.").

Plaintiffs strangely suggest that the content-based requirements challenged in *Walker* and *Marijuana Policy Project* did not "limit public debate" incidental to the initiative process while Arkansas's generally applicable antifraud requirements do. Br. 26. Plaintiffs identify only one way that Arkansas's requirements supposedly limit public debate, however. According to them, the requirements "make it more difficult for AVF's proposal to get on the ballot." Br. 25. But under that reasoning, the requirements in *Walker* and *Marijuana Policy Project* also limited public debate on the topics to which they applied (wildlife and marijuana criminalization, respectively) by "mak[ing] it more difficult for [a] proposal" related to those topics "to get on the ballot" or ultimately pass into law. Br. 25. But as the Tenth Circuit explained in *Walker*, the First Amendment is not implicated simply because a requirement "makes particular speech less likely to succeed." 450 F.3d at 1100.

It makes sense that the mechanics of the initiative process receive no First Amendment scrutiny even when they make certain initiatives less likely to suc-

ceed. "Ballots serve primarily to elect candidates"—or, in this case, to enact legislation—"not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). So it is not surprising that the Constitution allows Arkansans, "acting in their sovereign capacity, to decide . . . how to permit legislation by popular action." *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring). And for a century, the people of Arkansas have chosen only to permit such legislation by petitions that satisfy the in-person and affidavit requirements. *See* Ark. Const. art. 5, sec. 1. That choice does not implicate the First Amendment.

Consequently, Arkansas's antifraud requirements are subject to, at most, rational-basis review, which they easily pass. This Court has previously concluded that Arkansas's "interest in protecting the integrity of its initiative process is" not just legitimate but "paramount." *Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001). Moreover, for more than half-a-century, courts have held those requirements are rationally related to that interest. *See, e.g.*, *Sturdy v. Hall*, 143 S.W.2d 547, 551 (Ark. 1940) (discussing canvasser's role in preventing fraud). And Plaintiffs only halfheartedly attempt to claim the contrary—ultimately just claiming Arkansas should have tailored those requirements to the COVID-19 pandemic. *See* Br. 10, 41. But Arkansas need not show any sort of tailoring to pass rational-basis review. Therefore, this Court should reverse the district court's judgment.

C. Plaintiffs seek a free-form, exigent-circumstances exemption from election laws.

Plaintiffs' claim is really "just" a claim that because "procuring signatures is now harder (largely because of a disease beyond the control of the State)," *Thompson*, 959 F.3d at 810, Arkansas was required to suspend the rules governing petitioning mechanics. Whether labeled a facial or an as-applied challenge, that claim ultimately fails because "First Amendment violations require state action" and "private citizens' decisions to stay home for their own safety" are not state action. *Id.* And while Plaintiffs breathlessly imagine that principle "would create a Constitution-free zone for election emergencies," Br. 30, such a requirement is typical in constitutional litigation, *cf.* Martin A. Schwartz, Fed. Judicial Ctr., *Section 1983 Litigation* 81 (2014) ("An essential ingredient of a § 1983 claim is that the defendant acted under color of state law."), https://bit.ly/2NoJGYV. Indeed, there is nothing at all "absurd" about holding States liable only for their official actions. *See* Br. 46 n.15. The lack of any challenged official action here alone suffices to resolve this case.

Desperate to avoid that conclusion, Plaintiffs now argue this is really a case about as-applied relief and that Arkansas's argument would render as-applied challenges categorically unavailable under *Anderson/Burdick*. *See* Br. 28-29. But that's not true. Arkansas has merely argued that Plaintiffs' claim isn't an as-applied challenge. Indeed, far from resting on Plaintiffs' unique circumstances, the

district court's injunction ultimately rests on a finding that COVID-19 rendered Arkansas's antifraud provisions unconstitutional for *everyone*—at least for this election. *See* ADD19-20. That's not an as-applied challenge as anyone has ever understood it, and Plaintiffs' approach would effectively abolish the distinction between as-applied and facial challenges. By ultimately falling back on an argument that the district court could have granted relief to those with unique medical conditions—like the named plaintiffs whom they unconvincingly claim are unable to sign in a canvasser's presence—Plaintiffs effectively concede as much. *See* Br. 56.

But more importantly, Plaintiffs' attempt to recast their claim underscores that they have no response to Arkansas's argument that the district court's approach to *Anderson/Burdick* is fundamentally unsound. Indeed, they don't contest that in practice their approach would effectively—as other courts of appeals have warned in rejecting similar arguments—empower federal district courts to intervene in state elections anytime something unusual happens. *See Tex. Democratic Party v. Abbott*, No. 20-50407, — F.3d —, 2020 WL 2982937, at *1 (5th Cir. June 4, 2020) (staying injunction because COVID-19 does not give the judiciary "a roving commission to rewrite state election codes"); *cf. In re 2016 Primary Election*, 836 F.3d 584, 585-86, 589 (6th Cir. 2016) (Sutton, J.) (vacating preliminary injunction that held polls open for additional hour based on anonymous caller's re-

port to district court that major interstate was closed). Nor do they really even attempt to deny that such an approach would be utterly unworkable or that there is no discernable, "manageable standard[]" for deciding what is and what is not a circumstance warranting judicial supervision. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (quotation marks omitted). And where no such standards exist, a question isn't justiciable. *See id.*

Instead, at best, Plaintiffs simply declare, without explaining how, that *Anderson/Burdick* answers all those questions and provides the relevant standard. But even if that were true in certain circumstances (and it isn't), that certainly isn't the case here. Indeed, nothing suggests the Supreme Court ever intended *Anderson/Burdick* to apply where "sensitive policy-oriented" decisions—like how best to balance electoral integrity and public health in response to a pandemic—are involved. *See Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment).

Nor are federal courts particularly well suited to make such decisions. Crises are best handled by the "state and local executive officials [who] are closest to the problems at hand," and who "as between different institutional actors, frequently possess the most flexibility in approach." Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 276 (2006). That's why, in another recent challenge to Arkansas's COVID-19 response, this Court—like its sister circuits in

other election cases—felt compelled to reiterate that federal courts must not "usurp[] the functions of the state government by second-guessing the State's policy choices in responding to the COVID-19 pandemic." *In re Rutledge*, 956 F.3d 1018, 1031 (8th Cir. 2020); *see Tex. Democratic Party*, 2020 WL 2982937, at *1.

Plaintiffs' only response is a suggestion that deference isn't warranted here because no state official could have given them the exact same relief that the district court gave them. *See* Br. 31. But that's irrelevant unless the district court's relief was the *only* constitutionally permissible response to COVID-19. *Cf. Thompson*, 959 F.3d at 812 ("[T]he federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections."). And that's certainly not the case.

Rather, Arkansas's targeted pandemic response underscores that—in contrast to many other States that imposed stay-at-home orders or barred petitioning—its elected officials carefully balanced public health and the ability to do other things, including petitioning. *See id.* at 809 (contrasting Ohio with Michigan, which "abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline"). Moreover, as discussed in Arkansas's opening brief (at 8), to the extent Arkansas's public-health measures ever impacted petitioning (and again, they did not), the State has begun lifting many of those measures. And Plaintiffs don't explain how that response was so unreasonable that the district

court was entitled to simply void century-old antifraud provisions. Thus, reversal is warranted.

D. Applying *Anderson-Burdick*, Plaintiffs' claim likewise fails.

1. Plaintiffs have not shown a severe burden.

The district court did not really explain why it thought Arkansas's antifraud provisions imposed a severe burden. *See* ADD14-15. At best, it suggested that COVID-19 automatically rendered those requirements severely burdensome. Plaintiffs do no better, and all but concede that absent a severe burden, their claim fails.

Plaintiffs' severe-burden claim rests entirely on an assertion that unspecified aspects of Arkansas's pandemic response somehow burdened petitioning. *See* Br. 33-34. Rather than offer any specifics, however, Plaintiffs simply repeat the same string citation—discussed above—vaguely alluding to various gubernatorial orders. *Compare* Br. 34 (citing P-APPX002-03, 005-06, 008-09, 020-22, 024-27, 029-30; APPX32-33, 35-36, 38-41), *with* Br. 3 (citing those exact same page ranges from both separate appendices). In this brief's traceability discussion, Arkansas has already detailed Plaintiffs' failure to explain how any of those directives imposed a severe burden on petitioning. *See supra* Part I.A.

Suffice it to say, the *most restrictive* action that Plaintiffs cite is Governor Hutchinson's late-March order prohibiting gatherings of more than ten people but

only in "confined indoor and outdoor space[s]" that were "outside a single household." APPX35-36. But again, Plaintiffs make no effort to explain how that order—or any of the others they cite—burdened them. Nor could they, since "none of [Arkansas's] pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Thompson*, 959 F.3d at 809.

Moreover, whatever burdens Arkansas's pandemic response supposedly created, those burdens are decreasing by the day. *See, e.g.*, Ark. Dep't of Health, *Directive Regarding Large Outdoor Venues* (Phase 2 Revision eff. June 15, 2020), https://bit.ly/2BAgyes (providing guidance for outdoor venues to resume hosting events). Hence, even if Plaintiffs had shown an order burdened them, Arkansas's decision to begin rescinding its pandemic-response measures before "the deadline to submit an initiative petition undermines Plaintiffs' argument that the State has excluded them from the ballot." *Thompson*, 959 F.3d at 810.

Rather than explain how any action by Arkansas has created a severe burden, Plaintiffs try and "hold private citizens' decisions to stay home for their own safety against the State." *Id.* And they argue that the unique burdens on certain individual plaintiffs justify the district court's broad, universal injunction. Br. 34.

Thompson rejected a similar argument and held that the First Amendment does not hold States accountable for circumstances beyond their control. *See* 959

F.3d at 810 ("[J]ust because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot."). Moreover, the Supreme Court's "precedents refute the view that individual impacts" like the individual plaintiffs' unique medical conditions "are relevant to determining the severity of the burden [a law] imposes." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment). Indeed, the Supreme Court has never "consider[ed] the peculiar circumstances of individual voters or candidates"—or in this case, ballot-initiative proponents—when "grappl[ing] with the magnitude of burdens." *Id.* at 206.

Yet even if that did not resolve this case, Plaintiff have not shown that their individual circumstances combined with any action by Arkansas resulted in their "exclusion or virtual exclusion from the ballot." *Thompson*, 959 F.3d at 808. "There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' homes to sign." *Id.* at 810. Indeed, Plaintiffs themselves have come up with another option: running drive-through petition-signing events. *Drive & Sign to End Gerrymandering: Find a Location Near You*, Ark. Voters First (visited June 23, 2020), https://bit.ly/3dquDsc. That COVID-19 has required Plaintiffs to resort to such

creative efforts may have led to "frustration" on their part, but it does not amount to a severe burden. *Thompson*, 959 F.3d at 810.

The individual plaintiffs, of course, face significant personal hardships. *See* Br. 34. But Plaintiffs have offered no evidence that those hardships render it impossible for the individual plaintiffs to sign a petition in compliance with the in-person requirement. For example, transparent plastic barriers have become commonplace in American life over the last few months and countless family gatherings have occurred around windows. There is no reason that solution is not equally available here. Nor is there any reason a canvasser could not leave a sterile petition on the ground, witness an individual plaintiff's signature, and retrieve the petition, all while maintaining a safe distance from the individual plaintiff. *See Thompson*, 959 F.3d at 810 ("Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures."). The upshot is that Plaintiffs overstate the difficulty of complying with the in-person requirement when they suggest that it necessarily subjects them to severe illness.

All told, "the State has not excluded Plaintiffs from the ballot, [so] the burden imposed on them by the State's initiative requirements cannot be severe." *Id.* Consequently, at most, the challenged requirements impose an "intermediate burden on Plaintiffs' First Amendment rights" and are valid as long as Arkansas "has

legitimate interests" that "outweigh" the burden. *Id.* at 811. Applying that standard, just like "the witness and ink requirements" in *Thompson*, the in-person and affidavit requirements here "help prevent fraud by ensuring that the signatures are authentic." *Id.* These "compelling and well-established interests" outweigh any burden on Plaintiffs. *Id.* This Court should reverse the district court's judgment to the contrary.

2. Arkansas's requirements survive heightened scrutiny.

Even if Arkansas's requirements impose a severe burden, they are narrowly tailored to achieve a compelling interest. And Plaintiffs' arguments to the contrary fare no better than any of their other arguments.

Plaintiffs devote much of their energy to downplaying Arkansas's interest in the challenged requirements. *See* Br. 36-37. But even the district court recognized that "the prevention of fraud during the initiative process is a compelling interest." ADD14-15. And that is not surprising since Arkansas "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).

As a result, Plaintiffs' primary argument is that the Supreme Court has cast doubt on whether a State has a compelling interest in preventing fraud through the petitioning process. *See* Br. 36-37. But contrary to Plaintiffs' claims, the decisions

they cite simply allude to the relative risk of fraud at various points in the initiative process; neither holds that States lack a compelling interest in preventing initiative fraud. *See Meyer*, 486 U.S. at 427; *Buckley*, 525 U.S. at 203-04. And in any event, after both of those decisions, this Court clarified that Arkansas's compelling antifraud interest extends to the ballot-initiative process. *See Hoyle*, 265 F.3d at 704 (holding that "the state's interest in protecting the integrity of its initiative process is paramount").

Plaintiffs additionally argue that States should be required to tolerate some amount of fraud because, they believe, "fraud is less harmful in this context." Br. 37. If an initiative were to make the ballot through petitioning fraud, no harm done, say Plaintiffs—it "would ultimately lose if it truly lacked popular support." *Id.* Empirically, Plaintiffs cite no evidence supporting their assertion that fraudulently balloted initiatives will almost certainly not pass. And more importantly, Plaintiffs' claim that petitioning fraud is no big deal ignores the risk of undermining voters' confidence in the process. *See Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). If Arkansans lose confidence in the petitioning process, then they will have no assurance that any given initiative on which they must vote legitimately obtained its place on the ballot. Surely the State has a compelling interest in ensuring that only legitimate initiatives appear on the ballot.

Plaintiffs' tailoring argument fares no better.[2] With respect to the affidavit requirement, Plaintiffs do not address key differences between notarized affidavits and unsworn declarations. Br. 39. It is undisputed that because they are not notarized, unsworn declarations lack a key antifraud component, "an identification check." *Tripp v. Scholz*, 872 F.3d 857, 870 (7th Cir. 2017). And the mere fact that Arkansas is willing to forgo that added layer of fraud protection in certain other contexts does not mean the affidavit requirement is not narrowly tailored to fraud prevention in this context.

As for the in-person requirement, Plaintiffs largely just reassert their claim that fraud prevention isn't all that important. *See* Br. 39-40. Their reliance on *Meyer*, moreover, is misplaced because that case did not hold that a State cannot both seek to prevent fraud ex ante and criminally punish fraud ex post. Rather, *Meyer* held that Colorado's ban on paying canvassers did not meaningfully address the risk of fraud in the petitioning process because a paid canvasser was no "more

[2] Plaintiffs ask this Court not to reach this issue because they claim that Arkansas waived any argument on tailoring. *See* Br. 38. That claim defies logic. In opposition to Plaintiffs' preliminary-injunction motion and in support of Arkansas's own motion to dismiss, it argued that the challenged requirements would satisfy whatever standard the district court applied—be that rational basis or heightened scrutiny. *See* Opp'n to Mot. for Prelim. Inj., DE 31 at 27-28; Br. in Supp. of Mot. to Dismiss, DE 36 at 24-26. The issue also came up at the district court's hearing on the preliminary injunction. *See* P-APPX073-74. And Plaintiffs' own briefing effectively concedes this argument is preserved. *See* Br. 40.

likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Meyer*, 486 U.S. at 426. It was that disconnect between the law at issue and its purported goal that sunk Colorado's requirement. *Id.* at 426-27. That is not the case here where Plaintiffs do not seriously dispute that Arkansas's in-person requirement at least reduces the potential for fraud. Thus, Arkansas's requirements survive even heightened scrutiny.

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

Plaintiffs misidentify the relevant harm. The question is not merely how much more difficult it would be for the Secretary to comply with the district court's injunction versus the challenged requirements. *See* Br. 51. A State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the state" and, by extension, the public. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that "harm to the opposing party" and "the public interest . . . . factors merge when the Government is the opposing party"). And that's particularly true where, like here, an injunction effectively voids otherwise valid state constitutional provisions.

Plaintiffs try and undermine this principle with a new rule of their own design: The public interest is served by any injunction that makes it easier "to establish an independent redistricting commission." Br. 48. But they mainly support this redistricting-commission-specific rule with data from their own polls, which

supposedly show a bare majority of Arkansans support their proposal. *See* Br. 49 n.16. They offer no authority for the idea that a public-opinion poll should influence a court's exercise of its equitable powers.

Like the district court, Plaintiffs also assert that the injunction doesn't create a risk of electoral confusion because it could have enjoined other things. *See* Br. 50. But the consequences of allowing the district court's judgment are difficult to predict. For example, proponents of a referendum to repeal an act passed by the Arkansas General Assembly in 2019 collected signatures last summer seeking placement on the 2020 general election ballot. That referendum has already resulted in two separate Arkansas Supreme Court proceedings, one of which remains pending. *See Arkansans for Healthy Eyes v. Thurston*, No. CV-20-136 (Ark. scheduling order entered Apr. 15, 2020); *Safe Surgery Ark. v. Thurston*, 591 S.W.3d 293 (Ark. 2019). Given the amount of state-court litigation that often results from ballot initiatives, it is unclear just how disruptive the district court's injunction would ultimately prove to be. And that is precisely why the Supreme Court has repeatedly admonished lower courts not to "change state election rules as elections approach." *Thompson*, 959 F.3d at 813.

The district court should not have "alter[ed] [Arkansas's] election rules on the eve of an election," and its decision to do so should be reversed. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

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

Plaintiffs seem to think that because the district court could have entered a *more invasive* injunction, the injunction that it entered did not exceed its authority. *See* Br. 54. According to Plaintiffs, anything short of "compel[ling] the use of electronic signatures" is a minor disruption of Arkansas's long-established petitioning process. Br. 7. But they admit that the district court literally rewrote the form used for petitioning in Arkansas. Br. 53-54. And they do not dispute that approach usurped Arkansas's "ability to choose among many permissible options when designing elections." *Thompson*, 959 F.3d at 812; *see In re Rutledge*, 956 F.3d at 1031.

In the end, even Plaintiffs appear to concede that the district court went too far here. They close their brief with a strategic retreat, suggesting that this Court could narrow the district court's injunction so that it applies only to the individual plaintiffs. Br. 56; *see* Br. 11. That retreat is particularly telling because it is effectively a concession that this lawsuit is—as Arkansas has maintained all along—about whether certain individuals are entitled to exemptions from otherwise valid election laws because of their unique medical conditions. And such unique circumstances cannot possibly justify the kind of broad, sweeping injunction that the district court entered below. This Court should reverse the judgment.

CONCLUSION

For these reasons, those in the Appellant's Brief, and those in the papers regarding the stay motion, this Court should reverse the district court's judgment and remand the case to the district court with instructions to dissolve its permanent injunction and dismiss Plaintiffs' claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,197 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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

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

/s/ Nicholas J. Bronni

Nicholas J. Bronni

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I certify that on June 25, 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/ Nicholas J. Bronni
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