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8
 9 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

10
 11 FAIR MAPS NEVADA, *et al.*,
 12 Plaintiffs,
 13 vs.
 14 BARBARA CEGAVSKE, *et al.*,
 15 Defendants.

Case No. 3:20-cv-00271-MMD-WGC

**NEVADA SECRETARY OF STATE’S
 CONSOLIDATED MOTION TO
 DISMISS AND OPPOSITION TO
 MOTION FOR PRELIMINARY
 INJUNCTION**

16
 17 Defendant Barbara Cegavske, by and through counsel, Aaron D. Ford, Attorney
 18 General, Gregory L. Zunino, Deputy Solicitor General, and Craig Newby, Deputy Solicitor
 19 General, hereby submits its consolidated motion to dismiss and opposition to motion for
 20 preliminary injunction. Dismissal is sought pursuant to Rule 12(b)(1) of the Federal Rules
 21 of Civil Procedure on the ground that Plaintiffs have failed to state a claim over which the
 22 Court has subject matter jurisdiction.

23 DATED this 15th day of May, 2020.

24 AARON D. FORD
 Attorney General

25 By: Gregory L. Zunino
 26 GREGORY L. ZUNINO
 Deputy Solicitor General
 27 CRAIG NEWBY
 Deputy Solicitor General

28 *Attorneys for Secretary of State*

1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Fair Maps Nevada and its individual supporters seek to advance an
4 initiative petition addressing partisan gerrymandering. (ECF No. 1.1 at 4). Fair Maps
5 requests a federal court order compelling the Secretary to violate state law to address
6 Fair Maps' concerns over the state-law governed process for popular initiatives. (ECF No.
7 1 at 29:10–13). This case presents a question of state law, not federal law, because
8 Nevada's initiative process is governed by Article 19 of the Nevada Constitution and
9 various Nevada statutes, including NRS §§ 295.056 and .0575, and NRS § 293.12758.
10 There is no allegation, much less a provable fact, demonstrating that the Secretary has
11 done anything other than adhere to Nevada law.

12 To overcome this deficiency in its case, Fair Maps claims that the Secretary must
13 actually violate state law in order to facilitate Plaintiffs' exercise of rights allegedly
14 granted by the First and Fourteenth Amendments to the U.S. Constitution. But the First
15 and Fourteenth Amendments say little about the *process* for advancing legislation
16 through popular initiative. As a means of advancing and enacting legislation, the popular
17 initiative process is governed by state law, but it is admittedly subject to the requirement
18 of the Equal Protection Clause that limitations on signature gathering be facially neutral
19 and nondiscriminatory. *See Angle v. Miller*, 673 F.3d 1122, 1127 (2012). “[W]hen a state
20 chooses to give its citizens the right to enact laws by initiative, it subjects itself to the
21 requirements of the Equal Protection Clause.” *Id.* (internal citations and quotations
22 omitted).

23 However, the federal courts have no power to modify provisions of state law when
24 those provisions apply fairly and equally to all petition proponents. “When a state
25 election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the
26 First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory
27 interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S.
28 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *see also*

1 *Arizona Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016). This case is unique,
2 moreover, because it involves a challenge to facially neutral, nondiscriminatory provisions
3 of state law governing Nevada’s popular initiative process.

4 As the U.S. Supreme Court has observed, “[d]irect lawmaking by the people was
5 ‘virtually unknown when the Constitution of 1787 was drafted.’” *Arizona State*
6 *Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, ___, 135 S.
7 Ct. 2652, 2659 (2015) (quoting Donovan & Bowler, *An Overview of Direct Democracy in*
8 *the American States*, in *Citizens as Legislators 1* (S. Bowler, T. Donovan, & C. Tolbert
9 eds. 1998)). Because it is akin to a legislative process, Nevada’s popular initiative
10 implicates “the structure of its government, and the character of those who exercise
11 government authority.” *Id.* at 2673 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111
12 S. Ct. 2395, 115 L.Ed.2d 410 (1991)). In summary, it is one method by which Nevada
13 “defines itself as a sovereign.” *Id.* Here, Fair Maps asks the Court to modify Nevada’s
14 sovereign process for advancing a legislative proposal through electoral processes. Since
15 the initiative process involves voting once a legislative proposal has qualified for the
16 ballot, the electoral process from that point forward is undoubtedly governed by the body
17 of federal case law that addresses voting rights under the First and the Fourteenth
18 Amendments to the U.S. Constitution.

19 However, this case is not about voting. Fair Maps challenges only the process for
20 qualifying an initiative proposal to appear on the ballot before anyone could cast a vote.
21 As a matter of state sovereignty, the process for qualifying an initiative proposal is
22 analogous to rules governing legislative committee assignments or floor debate. So long
23 as the process is facially neutral and nondiscriminatory, the Secretary’s adherence to that
24 process passes muster under rational basis scrutiny, as well as under the *Anderson-*
25 *Burdick* balancing test as traditionally applied to election cases. *See, e.g., Public Integrity*
26 *Alliance, Inc. v. City of Tucson*, 863 F.3d 1019, 1027 (9th Cir. 2016) (upholding, under the
27 *Anderson-Burdick* analysis, Tucson’s hybrid system for electing members of its city
28 council despite the city’s request for application of rational basis scrutiny).

1 There has been no differential treatment. At all. To the extent Fair Maps claims
2 that it has been treated differently than the electorate as a whole, allegedly because of the
3 Secretary’s decision to implement an all-mail primary election for June 9, 2020, its claim
4 has no factual or legal basis. Just as the Secretary adhered to the letter of the law in
5 implementing the all-mail primary election, the Secretary adhered to the letter of the law
6 in reaching her decision to enforce the statutory deadline for gathering signatures, *see*
7 NRS § 295.056(3), and the statutory requirements for “ink” signatures and percipient
8 witnesses, *see* NRS § 293.12758(4) and NRS § 295.0575(1) and (5).

9 Indeed, the Court has already concluded that the Secretary followed Nevada law
10 with respect to the implementation of the all-mail primary election. *See Paher v.*
11 *Cegavske*, ___ F. Supp.3d ___, 2020 WL 2089813, at *9–10 (D. Nev. 2020). And here, it is
12 equally self-evident that the Secretary followed Nevada law as it pertains to the popular
13 initiative process. Adherence to the rule of law serves as the rational basis and lawful
14 justification for the Secretary’s decision to deny Fair Maps’ request for extralegal
15 accommodations as its supporters gather signatures for their legislative proposal.

16 The motion must be denied and this case should be dismissed with prejudice.

17 **II. BACKGROUND**

18 **A. Statement of Undisputed Facts**

19 The relevant facts of this case are undisputed. The only disputes in this case
20 concern: (1) the scope of the Secretary’s authority to modify statutory requirements for
21 qualifying a popular initiative to appear on Nevada’s ballot (ECF No. 1 at 14:13–18); (2)
22 the legality of actions taken by the Secretary to implement an all-mail primary election
23 for June 9, 2020 (ECF No. 1 at 13:3–8); and (3) the nature of the State of Nevada’s role in
24 creating the conditions that are alleged to have hindered Plaintiffs’ signature gathering
25 efforts in support of their legislative proposal (ECF No. 1 at 11:26–28).

26 As noted above, Fair Maps and its supporters are public policy advocates who
27 express concern about partisan gerrymandering. (ECF No. 1.1 at 4). Fair Maps is a
28 Nevada Committee for Political Action Advocating Passage or Defeat of a Ballot Question

1 registered pursuant to NRS § 294A.230 (ECF No. 1 at 3:14–15), and has filed the
2 initiative and is advocating for its passage (ECF No. 1 at 3:15–16). Fair Maps is
3 responsible for circulating the initiative for signature and otherwise qualifying it for the
4 ballot. (ECF No. 1 at 3:16–17).

5 Plaintiff Dr. Sondra Cosgrove, a duly registered Nevada voter and resident of Las
6 Vegas, Nevada, has voted in every election in Nevada since 1988, including voting on
7 ballot questions, and she has signed the initiative. (ECF No. 1 at 3:22–24). Plaintiffs
8 Robert McDonald and Douglas Goodman are similarly situated to Dr. Cosgrove. (ECF
9 No.1 at 4:1–11). The COVID-19 pandemic has hindered their efforts to gather signatures
10 in support of their initiative proposal.

11 The Secretary, named as a defendant in her official capacity, is the Chief Officer of
12 Elections for the State of Nevada. NRS § 293.124(1). (ECF No. 1 at 4:12–14). Her
13 responsibilities include, but are not limited to, execution and enforcement of all provisions
14 of state and federal law relating to elections, including NRS § 295.056 and NRS §
15 295.0575. (ECF No. 1 at 4:14–16). Pursuant to NRS § 293.247(4), the Secretary is further
16 authorized to “provide interpretations and take other actions necessary for the effective
17 administration of the statutes and regulations governing the conduct of primary, general,
18 special and district elections in this State.” (ECF No.1 at 4:17–19).

19 Fair Maps requested that the Secretary extend the statutory deadline for gathering
20 signatures in support of its initiative petition. (ECF No. 1 at 14:16–17). This statutory
21 deadline is set forth at NRS § 295.056(3). Fair Maps requests that this statutory deadline
22 be extended “by at least six weeks.” (ECF No. 1 at 14:17). Predictably, Fair Maps does
23 not address the constitutional deadline set forth at Article 19, § 2 of the Nevada
24 Constitution. This constitutional deadline makes it impossible to extend the statutory
25 deadline by more than 6 weeks without a constitutional amendment.

26 Furthermore, Fair Maps’ request for six weeks of additional time to gather
27 signatures would seriously impact preparations for the November 3 general election,
28 possibly even forcing the Secretary and the county clerks to violate federal law. As stated

1 in the Declaration of Kathy Lewis, Douglas County Clerk and Treasurer (ECF No. 20 at ¶
2 5), ballots must be printed by mid-August so that they can be timely mailed to overseas
3 military members as required by the Uniformed and Overseas Citizens Absentee Voting
4 Act of 1986. *See* 52 U.S.C. § 20302(a)(8)(A). As discussed in greater detail below, the
5 September 19 deadline for mailing ballots to overseas military members cannot be met if
6 Fair Maps is afforded an additional six weeks to gather signatures in support of its
7 legislative proposal.

8 B. Overview of Popular Initiative and Powers of the Secretary of State

9 *Statutory and Constitutional Requirements*

10 The deadlines to gather the required number of signatures for a petition for
11 initiative proposing to amend the Nevada Constitution are set forth at NRS § 295.056(3)
12 and Article 19, § 2 of the Nevada Constitution. The constitutional provision requires that
13 petition proponents submit their signatures for verification not less than 90 days before
14 any regular general election at which the question of approval or disapproval of such
15 amendment may be voted upon by the voters of the entire State. In 2020, the
16 constitutional deadline falls on August 5.

17 Further, Article 19, § 3 of the Nevada Constitution authorizes the Legislature to
18 establish an earlier deadline by as many as 65 days to provide ample time for verification
19 of initiative signatures. Pursuant to that constitutional authority, the Legislature
20 adopted NRS § 295.056(3), which requires petition proponents to submit their signatures
21 for verification not later than the 15th day following the primary election. In 2020, the
22 statutory deadline falls on June 24, 2020. Because the constitutional provision authorizes
23 the Legislature to establish an earlier deadline for submitting signatures, the statutory
24 deadline governs here.

25 By letter dated April 20, 2020, Fair Maps, through counsel, made on open-ended
26 request of the Secretary that she extend the June 24, 2020 statutory deadline “by at least
27 six weeks, or longer if the current state of emergency is extended and traditional
28 signature gathering methods remain unavailable.” (ECF No. 1.25 at 1–4). Fair Maps did

1 not mention the August 5 constitutional deadline, nor did it identify the source of the
2 Secretary's authority to modify NRS § 295.056(3), or amend Article 19, § 2 of the Nevada
3 Constitution. Although NRS § 293.127565(3) gives the Secretary the authority to extend
4 the statutory deadline when petition gatherers are denied access to public buildings, it is
5 inapplicable for the extension Fair Maps desires. This provision states that the statutory
6 deadline "must be extended for a period equal to the time that the person was denied the
7 use of a public building for the purpose of gathering signatures on a petition, but *in no*
8 *event may the deadline be extended for a period of more than 5 days.*" NRS §
9 293.127565(3) (emphasis added). Fair Maps does not specifically allege that its
10 supporters were denied access to a public building, nor does it correlate the requested
11 extension with a specific 5-day time frame as required by NRS § 293.127565(3).

12 In addition to meeting deadlines, initiative proponents must satisfy statutory
13 requirements governing the form of signatures and signature verification by affidavit.
14 NRS § 295.0575 states that "[e]ach document of a petition must have attached to it when
15 submitted an affidavit executed by the circulator thereof stating . . . [t]hat the circulator
16 personally circulated the document [and] that all the signatures were affixed in the circulator's
17 presence." NRS § 295.0575(1) and (5). Furthermore, NRS § 293.12758(4) states that "[e]ach
18 signature on the petition must be signed in ink." Designed to prevent initiative proponents
19 from fraudulently procuring ballot access, these requirements cannot be satisfied through
20 the use of electronic signatures and remote observation technology.

21 *Powers of the Secretary of State*

22 Secretary Cegavske has no power to make the statutory modifications requested by
23 Fair Maps. Regarding the powers of constitutional officers, including the Secretary of
24 State, the Nevada Supreme Court has stated:

25 Every constitutional officer derives his power and authority
26 from the constitution, the same as the legislature does, and the
27 legislature, in the absence of express constitutional authority, is
28 as powerless to add to a constitutional office duties foreign to
that office, as it is to take away duties that naturally belong to
it. ... It is well settled by the courts that the legislature, in the
absence of special authorization in the constitution, is without

1 power to abolish a constitutional office or to change, alter, or
2 modify its constitutional powers and functions.

3 *State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 765, 32 P.3d 1263, 1270
4 (quoting *State v. Douglass*, 33 Nev. 82, 92-93, 110 P. 177, 180 (1910)).

5 The constitutional powers of the Secretary of State are set forth at Article 5, §§ 19
6 and 20 of the Nevada Constitution. Section 19 sets the qualifications for holding the
7 office of Secretary of State, and establishes a term limit for holding the office, while
8 section 20 gives the Legislature broad latitude to confer powers upon the Secretary of
9 State in regards to record keeping, elections, commercial recordings and various other
10 matters. However, the Legislature has not conferred emergency powers upon the
11 Secretary of State, such that the Secretary would be authorized to make the statutory
12 modifications requested by Fair Maps. The deadlines for gathering signatures are firmly
13 established in statute and the Nevada Constitution. And the statutes governing
14 signatures and witnesses explicitly require that signatures be signed in ink, *see* NRS §
15 293.12758(4), and that signatures be affixed in the circulator's presence, *see* NRS §
16 295.0575(5). Construed as whole, these provisions foreclose the use of electronic
17 signatures and remote observation technology. There is nothing express or implied in the
18 Statutes of Nevada that would authorize the Secretary of State to modify firm statutory
19 and constitutional deadlines and requirements related to the process for qualifying an
20 initiative proposal to appear on the ballot.¹

21 But extending the deadline for gathering signatures would be fraught with
22 practical and logistical concerns. An extension of petition deadlines would likely impact
23 election readiness and/or preparations for the 2021 legislative session. These practical
24 and logistical concerns, as well as the ultimate legal question concerning the scope of the
25 Governor's emergency powers, are most appropriately addressed by state and local elected
26 officials as opposed to the federal judiciary. *See, e.g., New York v. U.S.*, 505 U.S. 144, 155
27 (1992) (“[T]he task of ascertaining the constitutional line between federal and state power

28 ¹ While the Governor has emergency powers pursuant to NRS Chapter 411, which
arguably includes the power to modify statutory deadlines under appropriate
circumstances, the Governor is not a party to this case.

1 has given rise to many of the Court’s most difficult and celebrated cases.”) As noted
2 above, the relief requested by Fair Maps would force the Secretary and the county clerks
3 to violate the federal September 19 deadline for mailing ballots to overseas military
4 members. *See* 52 U.S.C. § 20302(a)(8)(A). Accordingly, the requested relief effectively
5 places the Court in the position of possibly having to modify federal law in order to
6 accommodate a state-created right to advance legislation through the initiative process.
7 To avoid this situation, Nevada’s state courts should be tasked in the first instance with
8 deciding whether the Nevada Constitution requires the requested accommodation for
9 initiative proponents.

10 **III. LEGAL STANDARDS**

11 **A. The Standard of Review for Dismissal**

12 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows defendants to seek
13 dismissal of a claim or action for a lack of subject matter jurisdiction. Dismissal under
14 Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts
15 on its face that are sufficient to establish subject matter jurisdiction. *In re Dynamic*
16 *Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir.
17 2008).

18 Although the defendant is the moving party in a motion to dismiss brought under
19 Rule 12(b)(1), the plaintiff is the party invoking the court’s jurisdiction. As a result, the
20 plaintiff bears the burden of proving that the case is properly in federal court. *McCauley*
21 *v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors*
22 *Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Federal courts are courts of limited
23 jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). A federal
24 court is presumed to lack jurisdiction in a particular case unless the contrary
25 affirmatively appears. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*,
26 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must exist
27 at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F.
28 Supp. 2d 949, 952 (D. Nev. 2004).

1 As discussed below, Fair Maps has not stated a cognizable claim under federal law.
2 At best, Fair Maps has stated claims alleging that certain Nevada statutes are
3 inconsistent with rights granted by the Article 19, § 2 of the Nevada Constitution.

4 B. The Standard of Review for Preliminary Injunction

5 To obtain a preliminary injunction, Fair maps must demonstrate that (1) it is likely
6 to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of
7 preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in
8 the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This
9 traditional test applies absent Fair Maps' ability to demonstrate that the balance of
10 equities tips sharply in its favor. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060,
11 1066 n.2 (9th Cir. 2014).

12 Fair Maps cannot meet this burden because it is unlikely to succeed on the merits,
13 having novel claims that are not cognizable under federal law. Furthermore, as discussed
14 below, Fair Maps will not suffer irreparable harm, and the balance of equities and the
15 public interest weighs heavily in favor upholding the rule of law.

16 C. The Legal Standard for Evaluating Fair Maps' Claims

17 As an initial matter, the Court must determine whether this case presents a
18 question about voting rights or a question about legislative process. If it is the former, the
19 *Anderson-Burdick* balancing test/line of cases provide the applicable analytical
20 framework. Fair Maps argues that Nevada law, if enforced according to its plain
21 language, "impose[s] a severe burden on Plaintiffs' First Amendment Rights by impeding
22 their ability earn a place on the ballot." (ECF No. 2 at 13:19–21). But they cite not a
23 single case from *Anderson-Burdick* which stands for the proposition that federal law gives
24 them a right, in the midst of a pandemic, to demand judicial modifications to Nevada's
25 firmly-established process for qualifying an initiative petition to appear on the ballot.

26 *Angle v. Miller, supra*, is instructive, but not directly on point. As the Court stated
27 in *Angle*, "[t]here is no First Amendment right to place an initiative on the ballot." 673
28 F.3d at 1133 (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). The general question

1 presented in *Angle* was whether a statutory restriction on signature gathering may,
2 consistent with the First Amendment, disproportionately burden certain categories of
3 speech or specific groups of speakers. *See id.* The Court acknowledged that the Equal
4 Protection Clause applies to the initiative process, *see id.* at 1127–28, but it did not hold
5 that the federal judiciary has the power to order modifications to state initiative laws that
6 are facially neutral and nondiscriminatory. To the contrary, the Court in *Angle* upheld
7 the challenged initiative provision, namely NRS § 295.012. That provision requires
8 initiative proponents to obtain petition signatures from a number of registered voters
9 equal to 10% of the votes cast in the previous general election in each of the state’s three
10 congressional districts. *Id.*

11 The Court upheld the provision precisely because it is facially neutral and
12 nondiscriminatory. As the Court stated, the provision “singles out no discrete or insular
13 minority for special treatment [and] also applies to all initiatives regardless of subject
14 matter, not solely to initiatives thought to be favored by a targeted segment of the
15 population.” *Angle*, 673 F.3d at 1132 (citing *Gordon v. Lance*, 403 U.S. 1, 5 (1971))
16 (internal quotations omitted). Here, the challenged statutory provisions meet those very
17 same criteria.

18 Nevada case law is also instructive, but not directly on point. In *University and*
19 *Community College System of Nevada v. Nevadans for Sound Government*, the Nevada
20 Supreme Court evaluated the propriety of specific government action that had restricted
21 the use of public facilities to specified zones for gathering signatures in support of an
22 initiative petition. 120 Nev. 712, 728, 100 P.3d 179, 191 (2004). There, the Court held
23 that the restrictions in question regarding the time, place, and manner of signature
24 gathering were “permissible restrictions related to legitimate government safety and
25 functional operating purposes.” *Id.* Clearly, the Governor’s directives serve the
26 similar purpose of protecting the health and safety of the public, but unlike the
27 restrictions in *Community College System of Nevada*, the directives here do not even
28 target political speech or assembly. Because they are content neutral and

1 nondiscriminatory, they are not causally related to any impermissible burden upon
2 rights guaranteed by the First and Fourteenth Amendments.

3 Fair Maps does not cite a single case which extends to its supporters a federal right
4 to require that the Secretary take affirmative action, in violation of Nevada law, to
5 facilitate signature gathering in furtherance of a legislative proposal. Furthermore,
6 because this lawsuit challenges legislative processes as opposed to electoral processes, *see*
7 *Arizona State Legislature*, 135 S. Ct. at 2659, judicial deference is warranted. For
8 example, in *National Association of Social Workers v. Harwood*, the First Circuit Court of
9 Appeals stated that when “a legislative body adopts a rule, not invidiously discriminatory
10 on its face, that bears upon its conduct of frankly legislative business, we think that the
11 doctrine of legislative immunity must protect legislators and legislative aides who do no
12 more than carry out the will of the body by enforcing the rule as a part of their official
13 duties.” 69 F.3d 622, 631 (1st Cir. 1995).

14 As noted above, the statutes at issue here are analogous to rules governing
15 legislative processes, and the role of the Secretary is comparable to that of a legislator
16 who merely enforces those rules. Although there is no judicial precedent for applying
17 legislative immunity in this context, principles of separation of powers and federalism
18 favor rational basis scrutiny over *Anderson-Burdick* scrutiny. *See id.* at 635 (“As a rule, a
19 legislature’s regulation of the atmosphere in which it conducts its core legislative
20 activities—debating, voting, passing legislation, and the like—is part and parcel of the
21 legislative process, and, hence, not subject to a judicial veto.”)

22 If the Court applies the *Anderson-Burdick* balancing test, the Court should not
23 apply strict scrutiny, but instead evaluate the “means-ends fit between the state’s
24 proffered justification and the rule employed.” *See Short v. Brown*, 893 F.3d 671, 676–77
25 (9th Cir. 2018). In *Crawford v. Marion County Election Board*, for example, the U.S.
26 Supreme Court noted that it has not “identif[ied] any litmus test for measuring the
27 severity of a burden that a state law imposes on a political party, an individual voter,
28 or a discrete class of voters. However slight that burden may appear, as *Harper* [*v.*

1 *Virginia Bd. Of Elections*, 383 U.S. 663 (1966)] demonstrates, it must be justified by
2 relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”
3 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-289 (1992)); *see*
4 *also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (“No bright
5 line separates permissible election-related regulation from unconstitutional
6 infringements.”). But, “[w]hen a state election law provision imposes only
7 ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth
8 Amendment rights of voters, ‘the State’s important regulatory interests are generally
9 sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*,
10 460 U.S. at 788); *see Crawford*, 553 U.S. at 189-90 (internal quotation and citations
11 omitted) (“[E]venhanded restrictions that protect the integrity and reliability of the
12 electoral process itself are not invidious.”).

13 As the U.S. Supreme Court did in *Crawford*, this Court should evaluate the
14 constitutionality of applicable Nevada law by focusing on the state's interests. *See id.* at
15 191. As a matter of principle, the state has an interest in adhering to the rule of law so
16 that deadlines and signature and witness requirements are applied uniformly to all
17 petition proponents.² It also has an interest in making sure that there is adequate
18 popular support for Plaintiffs’ initiative proposal to warrant its inclusion on the
19 ballot, and that signature gathering is completed well in advance of the November 3
20 general election. Finally, the state has an interest in ensuring that ballot access is
21 not fraudulently procured. These are indisputably compelling and longstanding
22 interests.

23
24
25
26 ² There are currently two petitions to amend the Nevada Constitution, and four
27 petitions to amends the Statutes of Nevada. The text of those petitions are posted at
28 <https://www.nvsos.gov/sos/elections/initiatives-referenda/2020-petitions>. There is also a
petition to recall Governor Sisolak. The proponents of the recall campaign have filed a
lawsuit making similar claims to those at issue here. *See Fight for Nevada v. Cegavske*, D.
Nev. Case No. 2:220-cv-00837-RFB-EJY (May 11, 2020).

1 **IV. ARGUMENT**

2 **Fair Maps is Unlikely to Succeed on the Merits.**

3 A. The Court Lacks Subject Matter Jurisdiction

4 As this Court very recently noted, “the states’ police powers over matters of public
5 health and safety and to act over the general welfare of their inhabitants is entrenched in
6 the rights reserved to the state under the Tenth Amendment to the United States
7 Constitution.” *Paher*, ___ F. Supp.3d ___, 2020 WL 2089813 at p. 7 (D. Nev. 2020) (citing
8 *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)). And though “the Equal Protection Clause
9 provides a check on such state authority, ‘our scrutiny will not be so demanding where we
10 deal with matters resting firmly within a State’s constitutional prerogatives.” *Gregory*,
11 501 U.S. at 462 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)).

12 The right to advance legislation through popular initiative exists under the Nevada
13 Constitution, not the U.S. Constitution. Accordingly, it is Nevada’s constitutional
14 prerogative to place reasonable, nondiscriminatory conditions upon the exercise of that
15 right. Nevada’s statutory deadline and its requirements for ink signatures and witnesses
16 are reasonable, nondiscriminatory conditions. Admittedly, Nevada now faces a public
17 health emergency that makes it difficult for signature gatherers to satisfy these
18 conditions, but this alleged “burden” on rights guaranteed by the First and Fourteenth
19 Amendments is the same burden that every other Nevadan now faces. Due to the COVID-
20 19 pandemic, Nevadans are not free to interact with their fellow citizens in the same way
21 that they did prior to the pandemic.

22 But a pandemic is not state action, and the Governor’s health-and-safety directives
23 are not discriminatory. Nor do they target political speech or assembly. The limits on
24 mobility and interpersonal contact resulted from the pandemic itself, as well as the health
25 and safety measures that were put in place to limit the spread of the COVID-19 illness.
26 Under the circumstances, the enactment of these health and safety measures was a
27 proper exercise of the powers reserved to the states under the Tenth Amendment.

28

1 In this context, given the absence of any discriminatory or targeted burdens upon
2 rights under the First and Fourteenth Amendments, Fair Maps' request for injunctive
3 relief amounts to nothing more than a demand that the Secretary take affirmative action
4 to facilitate the exercise of a right under the Nevada Constitution. In substance, this case
5 presents a question of state law, not federal law, because the state of Nevada has not
6 impermissibly burdened any rights under the U.S. Constitution. Therefore, the Court
7 lacks subject matter jurisdiction over Fair Maps' claims. Whether the Nevada
8 Constitution requires that state officials take affirmative steps to accommodate an
9 initiative petition signature drive is a question for Nevada's state district courts.³
10 Consequently, Fair Maps' complaint should be dismissed pursuant to Rule 12(b)(1) of the
11 Federal Rules of Civil Procedure.

12 B. Fair Maps is Unlikely to Succeed on the Merits Regarding its Demanded
13 Waiver of the Signature Requirement

14 Nevada requires the use of ink for petition signatures. Specifically, NRS §
15 293.12758(4) requires that "[e]ach signature on the petition must be signed in ink." There
16 is no discretion under statute for what happens should a signature not be signed in ink.
17 NRS § 293.12758(4) mandates that the "county clerk shall disregard any signature which
18 is not signed in ink." Fair Maps makes no mention of this statute or how any Secretary of
19 State or county clerk would have discretion to contradict this plain, unambiguous statute.
20 Nevada's ink signature requirement is part and parcel to Nevada's statutory scheme to
21 allow citizens to exercise their legislative powers in an effective, valid, and informed
22 manner.

23
24
25 ³ Properly construed, Fair Maps' claims for injunctive and declaratory relief
26 amount to a request that this Court conform Nevada statutes to what Fair Maps assumes
27 to be the requirements of the Nevada Constitution. Accordingly, these claims are barred
28 by the Eleventh Amendment, as well as being outside of the Court's subject matter
jurisdiction. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106
(1984) ("[T]he principles of federalism that underlie the Eleventh Amendment" prohibit a
federal court from granting "relief against state officials on the basis of state law, whether
prospective or retroactive.")

1 Specifically, NRS § 295.0575 requires that “[e]ach document of a petition must
2 have attached to it when submitted an affidavit executed by the circulator.” The
3 circulator’s affidavit must state “[t]hat the circulator personally circulated the document
4 . . . all the signatures were affixed in the circulator’s presence . . . [and] each signer had
5 an opportunity before signing to read the full text of the act or resolution on which the
6 initiative or referendum is demanded.” NRS §295.0575(1), (5) and (6). Fair Maps does not
7 explain how it intends to truthfully comply with these affidavit requirements.
8 Specifically, subsection 5 requires affidavit support asserting that “all signatures were
9 affixed in the circulator’s presence.” NRS § 295.0575(5). Nothing within Fair Maps’
10 filings suggests how any circulator acting on its behalf could truthfully attest to this
11 requirement. Compliance with subsection 6 is more improbable, as it requires affidavit
12 support that “each signer had an opportunity before signing to read the full text of the act
13 or resolution on which the initiative or referendum is demanded.” NRS § 295.0575(6).
14 Again, nothing submitted by Fair Maps demonstrates how any circulator could truthfully
15 attest to having satisfied subsection 6.

16 These statutory requirements are not discretionary. The Nevada Supreme Court
17 has upheld these provisions of NRS § 295.0575. In *Las Vegas Convention and Visitors*
18 *Authority v. Miller*, 124 Nev. 669, 700 (2008), the Supreme Court affirmed a district court
19 ruling removing an initiative from the 2008 election for failure to provide verification
20 pursuant to NRS § 295.0575(6). There, the Supreme Court held that the requirements of
21 NRS § 295.0575 are constitutional, as they neither violated the First Amendment nor
22 substantive due process. *Id.* at 691-98.

23 The Supreme Court concluded that the *Anderson/Burdick* test applied to analyzing
24 NRS § 295.0575:

25 Here, the circulator affidavit merely requires the circulator to
26 make available a copy of the initiative’s full text to any potential
27 signer who wishes to review it and, after signatures have been
28 gathered, to count them and sign an affidavit with the
 circulator’s statement that he or she personally circulated the
 document and that the signatures were affixed in his or her
 presence, the total number of signatures gathered, and that the

1 signers had an opportunity to review the measure's full text
2 before signing. It does not restrict the overall quantum of
3 speech, and it is nondiscriminatory and reasonable. Accordingly,
the flexible balancing test, not strict scrutiny, applies.

4 *Id.* at 693-94.

5 For the identical reasons proffered above, and regardless of whether this Court
6 chooses to apply the *Anderson/Burdick* test or rational basis scrutiny, it must recognize
7 the Nevada Supreme Court's reasonable interpretation of NRS 295.0575's
8 constitutionality.

9 Further, this Court, in *Angle v. Miller*, 722 F. Supp.2d 1206, 1209-10 (D. Nev.
10 2010), recognized the validity of NRS § 295.0575 when overturning Nevada
11 Administrative Code provisions that were contrary to that statute. *Id.* Effectively here,
12 Fair Maps wishes to have this Court overturn or otherwise ignore this same statute.

13 Nevada's statutory signature requirements serve a significant government interest
14 in regulating valid, neutral exercise of the People's legislative power through the
15 initiative process. The Nevada Supreme Court "demand[s] strict adherence to the
16 authentication requirements of the Constitution governing an initiative petition."
17 *Lundberg v. Koontz*, 82 Nev. 360, 366 (1966). Stated differently, the Court held that "the
18 content of the verifying affidavit must satisfy designated requirements, and it must state
19 the truth." *Id.* "This principle is sound because the assurance that legal requirements
20 have been met rests upon the verity of the affidavit. If the affidavit is false, that
21 assurance is destroyed." *Id.*

22 Nevada, in similar contexts, recognizes the heightened risk of fraud absent
23 compliance with the statutory scheme. For instance, Nevada has a signature verification
24 process for ballot measures. *See* NRS §§ 293.1276-.1279. The signature verification
25 procedures have been upheld by the Nevada Supreme Court. *See Citizens for Honest &*
26 *Responsible Government v. Heller*, 116 Nev. 939, 950-51 (2000) (upholding statutes in
27 recall election context).

1 In *Busefink v. State*, 128 Nev. 525, 532-33 (2012), the Nevada Supreme Court
2 upheld the constitutionality of a criminal statute prohibiting payment by ACORN to
3 canvassers based on the number of voters registered. *Id.* There, the Court recognized
4 that Nevada had an important regulatory interest in preventing fraud. *Id.* Nevada has
5 similar interests in preventing fraud in the initiative process, to prevent fraud from
6 overtaking the People’s legislative power. These interests are expressed by Nevada’s
7 criminalization of submitting false petition signatures. *See* NRS § 205.125.

8 Fair Maps provides only speculation as to whether or how to verify “electronic
9 signatures,” even presuming there would be sufficient time for such a task. (ECF No. 20
10 at ¶ 5). First, Fair Maps speculates that the Secretary could use the same process used to
11 verify voter registrations made automatically at the Department of Motor Vehicles.
12 However, this argument highlights the extremeness of Fair Maps’ requested relief.
13 There, unlike here, officials at the Department of Motor Vehicles personally verify the
14 identity of the person before them who is conducting DMV business. *See, e.g.*, NRS §
15 483.290. The requirement for obtaining a driver’s license or identification card is akin to
16 the NRS § 295.0575(5) requirement Fair Maps seeks to skirt in this proceeding. There
17 would be no automatic way to verify that a particular person wanted to “electronically
18 sign” an initiative except by contacting them (if possible). That would be burdensome to
19 the State.

20 Second, Fair Maps seeks to juxtapose usage of e-signature in regulated industries,
21 such as legal practice and corporate filings, to the exercise of the People’s legislative
22 power by nearly 100,000 Nevadans. (ECF No. 2 at 15:8–16). Should someone submit a
23 false e-signature to a court, such as on a stipulation, verifying what happened in that
24 individual instance is simple. The e-filer has an account with a court and can be readily
25 asked about the circumstances of such a filing. Similarly, should someone submit a false
26 e-signature for a Nevada corporate filing, it is tied to a filing account with the Nevada
27 Secretary of State, which easily allows verification of what happened in that individual
28 circumstance.

1 In contrast, verification of petition signatures requires sampling to make the work
2 feasible in any way, shape, or form. There simply is not the time to verify each and every
3 signature provided to the Secretary and the county clerks, which necessitates sampling to
4 double-check a statistically significant portion of the signatures, while rely on the truthful
5 affidavits submitted in accordance with NRS § 295.0575.

6 In short, Nevada has significant government interests in the signature and
7 affidavit requirements for initiatives. These interests make it unlikely that Fair Maps
8 would succeed on the merits of its claim that these existing statutes violate the
9 Constitution during this emergency.

10 C. Fair Maps is Unlikely to Succeed on the Merits of its Claim for a Waiver
11 of the Statutory and (Potentially) the Constitutional Deadline

12 Plaintiffs seek a minimum extension of the statutory deadline of six weeks,
13 ignoring the State's legitimate interest in verifying signatures and the constitutional
14 deadline for submitting initiatives for the ballot. The Nevada Supreme Court generally
15 set forth the timeline for submitting and verifying initiative signature submissions in *Las*
Vegas Convention and Visitors Authority v. Miller, 124 Nev. 669, 680-81 (2008).

16 The Nevada Constitution sets a deadline of not less than 90 days prior to the
17 election for filing any initiative with the Secretary. NEV. CONST. art. 19, § 2(4). Further,
18 the Nevada Constitution authorizes the Legislature to move the constitutional deadline
19 up an additional 65 days earlier to provide for verification of initiative signatures. NEV.
20 CONST. art. 19, § 3(2). In total, per the Nevada Constitution, there is a minimum 90-day
21 and a maximum 155-day deadline from election day for filing an initiative with the
22 Secretary. *See We the People ex rel. Angle v. Miller*, 124 Nev. 874, 888-89 (2008). Fair
23 Maps' "minimum extension" seeks the minimum constitutional deadline provided,
24 ignoring the Constitution's provision for additional time to verify initiative petitions.

25 Pursuant to this constitutional authority, the Legislature has established the
26 deadline for submitting initiative signatures as the fifteenth day after the primary
27 election, which is Wednesday, June 24th of this year. NRS § 295.056(3). From this date,
28 Defendants' efforts to verify initiative petitions begins. Specifically, county clerks have

1 four business days to transmit the total number of signatures to the Secretary of State,
2 nine additional business days to verify signatures, and twelve additional business days to
3 conduct a further count if the total number of signatures is between 90-100%. *Id.*; *see also*
4 NRS § 293.1276(1) (deadline for provision of count to Secretary); NRS § 293.1277(1)
5 (deadline for verification); NRS § 293.1279(3) (deadline for conducting further count
6 verification). Appeals of any decision by the Secretary must be made within five working
7 days. NRS § 293.12793(1)(a). This does not include any court challenges to decisions
8 made pertaining to ballot initiatives.

9 Exhibit 1 contains two schedules listing the critical deadlines that must be met in
10 order to hold the general election on November 3, 2020, as required by state and federal
11 law. The first schedule lists the usual deadlines, and the second schedules demonstrates
12 the impact of a 60-day extension. Mere review of the two disparate schedules highlights
13 the audacity of Fair Maps' request. There would be minimum opportunity for normal
14 verification to ensure that ballot initiatives changing Nevada's constitution would be
15 accurate and free from fraud, much less new procedures to verify "electronic signatures."
16 Likewise, there would be limited to insufficient time to prepare necessary ballot
17 materials. (ECF No. 20 at 3:3-8). Perhaps this is why the Legislature severely limited the
18 authority of the Secretary to extend the statutory submission deadline where access had
19 been denied to public buildings to five days total. *See* NRS 293.127565(3).⁴

20 Under such circumstances, there is no likelihood of success on the merits that
21 Nevada's Constitution or statutes require the Secretary to comply with Fair Maps'
22 demand for an extension. This further warrants denial of the motion.

23 ...

24 ...

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26
27
28 ⁴ To the extent it could resolve this dispute, the Secretary does not oppose a five
business day extension (until Wednesday, July 1, 2020) for the submission of initiative
signatures under this statutory authority.

1 D. Collectively, NRS §§ 295.056 and .0575, and NRS § 293.12758 Promote
2 Important State Interests that Outweigh any Alleged Burdens upon Voting
3 Rights or Free Speech

4 Despite having offered no evidence of progress made in gathering signatures prior
5 to March 24, 2020, Fair Maps seeks a minimum 60-day extension of the statutory June 24
6 deadline described at NRS § 295.056(3), and modifications to signature and witness
7 requirements as set forth at NRS § 295.0575 and NRS § 293.12758. As discussed above,
8 however, these provisions are neither discriminatory on their face nor discriminatory in
9 their current application. The statutory deadline and signature/witness requirements
10 impact all policy advocates in the same way, regardless of political affiliation, viewpoint,
11 race, ethnicity or gender. Fair Maps argues only that these provisions prevents its
12 members from gathering signatures during the COVID-19 pandemic, and attributes the
13 signature gathering impediments to gubernatorial directives mandating social distancing.

14 However, Fair Maps does not identify the source of its supporters' alleged right
15 under the U.S. Constitution to advance legislation by way of popular initiative. Although
16 they have a right under the First Amendment to engage in political advocacy, that right
17 will not be significantly impacted by the enforcement of NRS § 295.056(3). Fair Maps
18 and its supporters remain free to advocate for their legislative policy proposal by way of
19 traditional methods of political advocacy.

20 In summary, the challenged provisions serve a legitimate state interest in ensuring
21 that a recall proposal has adequate public support to qualify for the ballot, and that ballot
22 access is not fraudulently procured through an atypically lengthy signature gathering
23 period and relaxed standards governing the form of signatures and the presence of
24 witnesses. These provisions also serves the state's interest in making sure that signature
25 gathering is completed within a 90-day period of time, thus minimizing the risk that the
26 signature verification and appeals processes will disrupt preparations for the November 3
27 general election.

28 Moreover, the enforcement of these provisions places no impermissible burden
upon a right that is guaranteed by the First or the Fourteenth Amendment to the U.S.

1 Constitution. Although enforcement of the statutory deadline and signature/witness
2 requirements could theoretically impact Fair Maps' ability to advance its legislative policy
3 proposal through the electoral process, such enforcement will not impact its Fair Maps'
4 ability to advance its policy proposal through traditional political advocacy. Any burden
5 on the right to advance a policy proposal through Fair Maps' preferred method of a
6 popular initiative is heavily outweighed by the state's interest in adhering to the rule of
7 law and in maintaining uniformity in the application of Nevada's laws governing the
8 state's initiative, referendum and recall petition processes.

9 **Fair Maps Will Suffer No Irreparable Harm If Required to Follow**
10 **Nevada Law**

11 Fair Maps advances a legislative policy proposal by way of its initiative petition.
12 This policy proposal is just one of many competing policy proposals that will ultimately be
13 accepted or rejected in the give-and-take milieu of partisan politics. In the universe of
14 ideas, Fair Maps' policy proposal does not merit special attention or consideration simply
15 because it has been packaged as a popular initiative. If the organization's anti-
16 gerrymandering proposal does not appear on the ballot as a result of the COVID-19
17 pandemic, Fair Maps and its supporters remain free to advance the proposal through
18 their elected representatives by way of traditional political advocacy.

19 In short, there is no right under the First or Fourteenth Amendments to obtain a
20 desired policy outcome. In the legislative policy arena, the only rights guaranteed by the
21 First and the Fourteenth Amendment are the rights to advocate for a desired policy
22 outcome in a public forum that is free from discrimination. On their face, Article 19 of the
23 Nevada Constitution and NRS §§ 295.056, 295.0575 and 293.12758 do not even implicate
24 these federal rights. Insofar as the COVID-19 pandemic has made it difficult for Fair
25 Maps to satisfy certain conditions governing ballot qualification, the alleged "burden"
26 upon its supporters' right of free speech is simply an imposition upon their preferred
27 method of advancing a legislative proposal through the electoral process rather than
28

1 through traditional political channels. This imposition upon their preference for using
2 the initiative process does not amount to irreparable harm.

3 There are also unanswered questions in this case about causation. To date, Fair
4 Maps has not offered any evidence to suggest that signature gathering efforts undertaken
5 prior to the issuance of social distancing guidelines were progressing toward a successful
6 outcome. Fair Maps filed its initiative petition on November 4, 2019 (ECF No. 1 at 7:16-
7 19), and following litigation, Fair Maps filed an amended initiative petition on January 7,
8 2020. (ECF No. 1 at 7:20-24). Social distancing mandates were not implemented in
9 Nevada until March 24, 2020. (ECF No. 1 at 8:1-8).

10 Presumably Fair Maps made some effort between November 4, 2019, and March
11 24, 2020, to obtain signatures in support of its initiative petition. Assuming that Fair
12 Maps was unable to gather a significant number of signatures during this time frame, it
13 has an obligation to supply that information so that the Court may determine whether
14 the COVID-19 pandemic, and the resulting gubernatorial directives, were causally
15 related to Fair Map's alleged inability to gather the required number of signatures by
16 the June 24 deadline. In the absence of any evidence of causation, Fair Maps cannot
17 demonstrate that it will suffer irreparable harm resulting from the enforcement of
18 the statutory deadline and signature/ witness requirements.

19 **The Balance of Equities and the Public Interest Weigh Heavily in**
20 **Favor of the Secretary**

21 There is no genuine doubt that Nevada has the power to protect the health of
22 its citizens, particularly in an emergency such as the COVID-19 pandemic. Prior to
23 ratification of the Constitution, various colonies had quarantine laws, thereby
24 establishing the legal tradition of local and state jurisdiction over matters of public
25 health reflected in the Constitution's reservation of power to the states to regulate
26 public health, safety, and morals. *Gibbons v. Ogden*, 22 U.S. 1 (1824). It is in this
27 context that Fair Maps seeks to exploit the public health emergency for its benefit,
28 invoking the resulting health and safety directives as justification for extending the

1 statutory deadline for gathering signatures in support of its initiative petition.
2 Under these circumstances, it is in the public interest to uphold the rule of law, thus
3 ensuring consistency and uniformity in the application and enforcement of Nevada’s
4 unique laws governing popular initiative, referendum and recall.

5 **V. CONCLUSION**

6 The instant lawsuit against Secretary Cegavske presents a question of state
7 law, not federal law. That question is whether the state has an obligation to
8 facilitate the exercise of a right under the Nevada Constitution when a pandemic
9 makes it difficult to satisfy the lawful statutory conditions on the exercise of that
10 right. Fair Maps fails to identify a violation of federal law or the U.S. Constitution.
11 For this reason, and the other reasons discussed above, the Court should deny Fair
12 Maps’ motion for a preliminary injunction, and dismiss its claims pursuant to Fed.
13 Rule Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction.

14 DATED this 15th day of May 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 15th day of May, 2020, I filed and served with this Court's CM/ECF electronic filing system, **NEVADA SECRETARY OF STATE'S CONSOLIDATED MOTION TO DISMISS AND OPPOSITION TO MOTION FOR PRLIMINARY INJUNCTION**, service is by this Court's electronic notification system:



An employee of the Office
of the Attorney General

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EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Chart Summarizing the Statutory and Constitutional Deadlines for 2020 Initiative Petitions	1