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

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

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

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

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY PENDING APPEAL

In the midst of a pandemic just months before an election, this Court has re-written the manner in which Arkansas administers its state-created petition process. On May 29, 2020, this Court permanently enjoined the State's statutory "in-person signature and sworn affidavit requirements," finding that these requirements "impose severe burdens on Plaintiffs' core political speech, especially in light of the State-recognized need for social distancing during this pandemic." Doc. 41, p. 14 of 25. This injunction "usurped 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) (issuing writ of mandamus to vacate temporary restraining order). So it comes as no surprise that the Sixth Circuit just last week stayed a similar injunction by an Ohio district court pending that State's appeal. *See Thompson v. Dewine*, — F.3d —, 2020 WL 2702483, at *6 (6th Cir. May 26, 2020). As a result, Defendant is likely to succeed on the merits of his just filed appeal of the Court's final order, and this Court should stay its enforcement pending

that appeal. *See* Fed. R. App. P. 8(a) (providing that parties "must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal").

ARGUMENT

Federal courts consider four factors in deciding whether to grant a stay of an injunction pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). A stay is granted when the appeal presents "serious" legal issues and the balance of equities favors the stay applicant. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982). Defendant easily meets this threshold.

A. Defendant is likely to succeed on the merits of his appeal.

a. No First Amendment Rights are Implicated Here

First, the Plaintiffs' claims do not implicate the First Amendment. This Court's preliminary injunction acknowledged Defendant's argument that heightened First Amendment scrutiny—whether under *Anderson/Burdick* or otherwise—does not apply to Plaintiffs' claims here. Doc. 41, p. 11 of 25. But this Court did not analyze Defendant's argument on this point. *See* Doc. 41, p. 6 of 25 (applying *Anderson/Burdick* without justification). This lack of analysis led the Court to apply

the incorrect legal standard. Therefore, Defendant is likely to succeed on the merits of his appeal.

The First Amendment confers no "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan,* 564 U.S. 117, 127 (2011). The right to place an initiative on the ballot is a state-created right and is not a right guaranteed by the United States Constitution. *See, e.g., Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc). In other words, although "the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). "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." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). Thus, any right to place a specific issue on the ballot is limited to what is granted in the Arkansas Constitution or statutes.

The Arkansas Constitution and related Arkansas statutes conditions ballot access on strict compliance with numerous requirements. In relevant part, Ark. Code Ann. § 7-9-108 requires that a petitioner sign an initiative petition in the presence of a canvasser and that the canvasser sign and swear in the presence of a notary to his or her affidavit attesting to the genuine and compliant nature of the signatures on his or her initiative petition. These laws govern the *mechanics* by which initiatives are placed on the ballot; they do not impact *speech* related to the initiative process.

See Hoyle v. Priest, 59 F. Supp. 2d 827, 830 (W.D. Ark. 1999); *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 675 (8th Cir. 2012); *Bernbeck v. Gale*, 58 F. Supp. 3d 949, 954–56 (D. Neb. 2014) *vacated and remanded on other grounds*, *Bernbeck*, 829 F.3d 643. Accordingly, because no First Amendment issues are implicated by the in-person witnessing and notarization requirements, the Court erroneously applied the *Anderson/Burdick* test to Plaintiffs' challenge and subjected these laws to strict scrutiny. Had the Court properly determined that the challenged laws are not subject to the First Amendment scrutiny, then Plaintiffs' First Amendment claims necessarily fail.

b. Even if First Amendment scrutiny applies, the State has taken no action imposing a severe burden on Plaintiffs

Even if First Amendment scrutiny applied to the challenged statutes, these laws withstand such scrutiny and are constitutional. Here, the Court determined that *Anderson/Burdick* applies, yet failed to analyze in any meaningful way "the character and magnitude" of the alleged burden the laws imposed on Plaintiffs' First Amendment rights. Instead, the Court summarily determined that "these 'in-person' requirements and the notarization requirement impose severe burdens on Plaintiffs' core political speech, especially in light of the State-recognized need for social distancing during this pandemic." Doc. 41, p. 14 of 25. That is incorrect, as the Sixth Circuit explained in a recent order staying an injunction similar to this Court's injunction. *See Thompson*, 2020 WL 2702483, at *3-5 (concluding that Ohio's response to COVID-19 did not make its initiative-petitioning regulations severely burdensome).

The Court erred in concluding that witnessing and notarization requirements constitute a severe burden for *Anderson/Burdick* purposes. Though there is no bright line test in determining what is "severe," the only ballot initiative case from the Eighth Circuit to apply heightened scrutiny is *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001). But *Jaeger* is materially different from this case. In *Jaeger*, North Dakota law required that canvassers be North Dakota residents and further prohibited payment to petition circulators. The Eighth Circuit applied heightened scrutiny to those two laws because the Supreme Court had already applied heightened scrutiny to two similar laws. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 US 182, 192-93 (1999) (reviewing requirement that petition circulators be registered voters in State); *Meyer v. Grant*, 486 U.S. 414, 416 (1988) (same, ban on use of paid petition circulators). Heightened scrutiny applied in *Meyer*, *Buckley*, and *Jaeger* only because the laws in those cases "significantly inhibit[ed] communication with voters about proposed political change." *Buckley*, 525 U.S. at 192; *see Meyer*, 486 U.S. at 422 (noting that "[t]he refusal to permit appellees to pay petition circulators retrict[ed] political expression"). By contrast, Arkansas's in-person witnessing and notarization requirements simply "protect the integrity and reliability of the initiative process" by regulating the mechanics of the process, rather than who may participate in the process or how participants are compensated. *Jaeger*, 241 F.3d at 616 (quoting *Buckley*, 525 U.S. at 191). The record does not support and the Court has failed to articulate how in-person witnessing and notarization—as opposed to challenges brought on by COVID-19—

impede the dissemination of views, curtails discussion of issues, or shrinks the size of the audience reached.

Relying on precedent from the United States Supreme Court, other circuits have recognized that the hallmark of a severe burden is exclusion or virtual exclusion from the ballot. *Compare Lubin v. Panish*, 415 U.S. 709, 719 (1974) (striking $701.60 filing fee for ballot-access petition because it excluded indigent candidates from running for office with no reasonable alternative means of access), *and Williams v. Rhodes*, 393 U.S. 23, 24, 35 (1968) (striking "series of election laws," including requirement that minor political parties file a petition signed by the number of voters equal to fifteen percent of the votes cast in the preceding gubernatorial election, because it "made it virtually impossible" for any party other than the Republican Party and Democratic Party to gain ballot access), *with Jenness v. Fortson*, 403 U.S. 431, 438 (1970) (upholding a requirement that five percent of all registered Georgia voters sign candidate's petition for ballot access and noting that even serious restrictions on third parties' ballot access are generally upheld unless they truly operate to "freeze the political status quo").

This standard recently was recognized by the United States Court of Appeals for the Sixth Circuit in *Thompson*. *See* 2020 WL 2702483, at *3 ("a severe burden excludes or virtually excludes electros or initiatives from the ballot"). In *Thompson*, the Sixth Circuit granted a stay of the district court's preliminary injunction which enjoined enforcement of, among other statutes, Ohio's in-person witnessing requirement. There, the court observed:

> 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. Or 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.

Id. at *4.

The same holds true here. Though the State has recognized the need for social distancing, nothing prevents Plaintiffs from witnessing signatures from a safe distance.

In upholding the number of signatures requirement, this Court stated:

> To be clear, the COVID-19 pandemic and the social distancing measures the State has deployed in response have unquestionably limited Plaintiffs' ability to discuss, sign, or submit initiative petitions in sufficient number to obtain placement on the ballot. But although a provision makes it difficult "to plan [an] initiative campaign and efficiently allocate . . . resources, the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected."

Doc. 41, p. 7 of 25. The Court seems to have ignored this finding in relation to the in-person witnessing and notarization requirements. Though the pandemic and social-distancing guidelines may have made it more difficult to comply with these requirements, the *requirements* themselves do not severely burden Plaintiffs' First Amendment rights. *See Thompson*, 2020 WL 2702483, at *4 (acknowledging that "procuring signatures is now harder (largely because of a disease beyond the control of the State)" but finding no "state action" amounting to a "severe burden" under the First Amendment). The Court's finding that a severe burden exists was in error.

The Court's reasoning for enjoining the in-person witnessing and notarization requirements turned on its application of strict scrutiny and the determination that the State's methods for preventing fraud in signature gathering were not narrowly tailored. Under any lesser scrutiny level, the State's legitimate and compelling interest in preventing fraud survives scrutiny and would be found constitutional. Doc. 41, p. 14-16 of 25.

B. Defendant will be irreparably harmed absent a stay

Defendant will be irreparably harmed absent a stay of the permanent injunction. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct.1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (bracket omitted). Thus, an injunction "seriously and irreparably harms" a State any time it wrongly "bar[s] the State from conducting . . . elections pursuant to a statute enacted by the Legislature." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see id.* 2324 n.17 (making clear that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

Beyond the serious questions surrounding the constitutionality of ordering the State to undertake "open-ended and potentially burdensome obligations," *see*

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

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

As explained above, the ballot initiative procedures that Plaintiffs challenged are safeguards against voter fraud and overly crowded ballots. These protections not only serve the State's interest, but also the voting public's interest.

C. The remaining factors weigh in favor of a stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "These factors merge when the Government is the opposing party." *Id.* A court is not required to "delay enforcement of a state law that the court has determined is likely to withstand constitutional challenge solely

because the law might injure third parties." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 106, 134 S. Ct. 506, 507(2013) (Scalia, J., concurring in denial of application to vacate stay).

D. The Court exceeded its power to grant injunctive relief

Regardless of Defendant's likelihood of success on appeal on the merits, this Court has exceeded its power to grant relief by ordering that the "Secretary of State must also accept as compliant with Arkansas law any petitioner signatures and signature pages in support of an initiative petition that were not circulated and signed in the presence of a canvasser and any canvasser affidavits that, if unsworn, are declarations made under penalty of perjury." Doc. 41, p. 23 of 25.

Federal courts can enter positive injunctions that require parties to comply with existing law. But they cannot "usurp[] a State's legislative authority by re-writing its statutes" to create new law. *See, e.g.*, *Esshaki v. Whitmer*, — F. App'x — 2020 WL 2185553, at *2 (6th Cir. May 5, 2020). Here, the Court has mandated new requirements upon the Secretary of State, and in doing so, has usurped the State's authority to modify its election procedures in light of the COVID-19 pandemic. Outside the election context, the Eighth Circuit has made clear that a district court abuses its discretion when it second-guesses a State's response to the pandemic. *See In re Rutledge*, 956 F.3d at 1029 (issuing writ of mandamus to vacate district court's order that "encroach[ed] upon the State's policy determination in how best to combat COVID-19").

The Sixth Circuit's order in *Thompson v. Dewine* is instructive:

> The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts. A stay of this Court's injunction is therefore necessary to avoid such a result.
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> There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.

Id. at *11.

CONCLUSION

For these reasons, Defendant respectfully requests that this Court stay enforcement of its Order dated May 29, 2020, pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Bird, hereby certify that on June 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the NexGen system which shall send notice to all counsel of record.

William C. Bird