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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PEOPLE NOT POLITICIANS OREGON, COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF OREGON, NAACP OF EUGENE/SPRINGFIELD, INDEPENDENT PARTY OF OREGON, and C. NORMAN TURRILL,

Plaintiffs,

v.

BEVERLY CLARNO, OREGON SECRETARY OF STATE,

Defendant.

Case No. 6:20-cv-01053-MC

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

## I. Introduction

Plaintiffs' claim—that the Secretary of State should have put initiative petition ("IP") 57 on the 2020 general election ballot—is moot and should be dismissed. It is Plaintiffs' burden to

prove that the controversy that arose before the November 2020 election is capable of repetition yet evades review. They have failed for two reasons. First, Plaintiffs have not demonstrated that there is a "reasonable expectation" or "demonstrated probability" that the same controversy will recur. *See Murphy v. Hunt,* 455 U.S. 478, 482 (1982). Plaintiffs' claim depends on the pandemic and public health orders, which have already changed significantly since spring and summer 2020 and are likely to continue to improve. Because Plaintiffs have not shown that materially similar circumstances will recur in future elections, they have not demonstrated that the pandemic and public health orders are likely to similarly affect their signature gathering efforts in future election cycles.

Second, this is not the kind of case that will always evade review. Plaintiffs could have secured approval to circulate an initiative petition for the November 2022 election in July 2020. Up to two years is plenty of time to litigate a claim. Plaintiffs' claim is not so inherently limited in duration that they would necessarily be unable to obtain judicial review.

Additionally, Plaintiffs' claim is not only moot, it is also barred by the Eleventh Amendment. Plaintiffs seek a declaration that their rights were violated during the November 2020 election, when a practically unprecedented pandemic gripped the world. Such a declaration would have no prospective effect, and federal courts are barred from entering retrospective relief against states. Therefore, Plaintiffs' claim is barred.

Because Plaintiffs have not met their burden to invoke this Court's jurisdiction, their Complaint should be dismissed.

## II. Argument

### A. The Secretary's evidence is properly before this Court.

#### 1. The submission of evidence is proper on a jurisdictional motion to dismiss.

Plaintiffs argue that the Court should apply the standards applicable to motions for summary judgment because the Secretary asks the Court to take judicial notice of certain public records. But courts routinely consider evidence outside the complaint to resolve motions to

dismiss for lack of jurisdiction. On a Rule 12(b)(1) motion to dismiss, the district court "is not confined by the facts contained in the four corners of the complaint—it may consider [other] facts." *Americopters, LLC v. Fed. Aviation Admin*, 441 F.3d 726, 732 n.4 (9th Cir. 2006). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High School, Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). "With a factual Rule 12(b)(1) attack…a court may look beyond the complaint to a matter of public record without having to convert the motion into one for summary judgment." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (internal citation omitted).

Plaintiffs appear to argue that the Secretary's evidence creates a factual dispute, but they do not actually contest any of the information contained therein. The Secretary asks this Court to take judicial notice of undisputed matters of public record reported by the Oregon Health Authority, such as the number of Oregonians who have been vaccinated and the number of COVID-19 cases. *See* Def. Mot. to Dismiss, ECF No. 44 at 11–12. "Government-agency websites, and the information contained therein, are matters of public record appropriate for judicial notice under Rule 201." *Century Indem. Co. v. Marine Group, LLC*, No. 3:08-CV-1375-AC, 2015 WL 5144330 at *2 (D. Or. Aug. 31, 2015); *see also Upchurch v. Multnomah Univ.*, No. 3:19-CV-00850-AC, 2020 WL 4006804, at *4 (D. Or. June 30, 2020) (taking judicial notice of university's admissions statistics which were "properly before the court because they are published on a government agency website and are matters of public record."). None of the facts in these public records are "subject to reasonable dispute." Fed. R. Evid. 201(b). What Plaintiffs dispute instead are arguments about those facts, namely that the increasing availability of vaccines, vaccination rates, lower COVID infection rates and deaths, and reduced COVID-related social restrictions create a significantly different environment than the one Plaintiffs

allege burdened their signature gathering efforts for IP 57. *See* Pls.' Opp. to Mot. to Dismiss ("Pls.' Opp."), ECF No. 50 at 11 (calling "whether pandemic-related social gathering restrictions unduly burden Plaintiffs' signature efforts" a "fact[] Defendant disputes"). The Governor's more recent executive orders, which loosen pandemic related restrictions, are a big part of the difference. *See* Def. Mot. to Dismiss, ECF No. 44 at 11–12. These orders are law, not facts. *See* ORS. 401.192(1) (stating that such orders "shall have the full force and effect of law").

Plaintiffs bear the burden of proving they have properly invoked this Court's jurisdiction and, to carry that burden, they had the opportunity of responding to the Secretary's Motion with their own evidence. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (stating that when subject matter jurisdiction is challenged under Rule 12(b)(1), plaintiff bears the burden of persuasion). Because the Secretary's Motion to Dismiss is a factual motion that properly cited evidence in support, the Court should reject Plaintiffs' request that it apply the standard applicable to a motion for summary judgment.

**2. Mootness is unrelated to the merits.**

Plaintiffs next contend that this Court should apply summary judgment standards here because the jurisdictional issue of mootness raised in the Motion to Dismiss is intertwined with the substantive issues of this case. *See* Pls.' Opp., ECF No. 50 at 11. But that doctrine does not apply here. "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief'." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (quoting *Sun Valley Gasoline, Inc. v. Ernst Enter., Inc*. 711 F.2d 138, 139)) (both cited in Pls.' Opp., ECF No. 50 at 11).

In the authorities Plaintiffs cite, the courts' jurisdiction hinged on whether the plaintiffs had stated a particular federal cause of action. *See, e.g.*, *Meyer*, 373 F.3d at 1039 ("[J]urisdictional dismissals in cases *premised on federal-question jurisdiction* are exceptional….") (emphasis added). In *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, the

plaintiff invoked the court's jurisdiction under the Jones Act, wherein "the district court would have had subject matter jurisdiction…only if the defendants had been [plaintiff's] employers within the meaning of that Act." 813 F.2d 1553, 1558 (9th Cir. 1987). That disputed question was relevant to both jurisdiction as well as the underlying merits of the claims. *Id.* Similarly, the plaintiff's claim in *Sun Valley Gasoline*, which invoked federal jurisdiction under the Petroleum Marketing Practices Act, turned on whether plaintiff was in a "franchise relationship" with the defendant within the meaning of the Act. 711 F.2d at 139. And, in *Meyer*, the plaintiffs invoked the court's jurisdiction under the federal Resource Conservation and Recovery Act, which regulates the disposal of "solid or hazardous waste," the definition of which was both the basis of the plaintiffs' claim and determinative of jurisdiction. 373 F.3d at 1040.

Here, the issue is not whether this Court ever had jurisdiction, but whether mootness has erased this Court's jurisdiction going forward. Plaintiffs invoked the Court's federal question jurisdiction, pursuant to 28 U.S.C. § 1331, to address alleged violations of the First and Fourteenth Amendments. *See* Compl., ECF No. 1, ¶ 53. The Secretary's Motion does not argue that the First and Fourteenth Amendments do not apply to the regulation of Plaintiffs' activities. Rather, the Secretary contends that, even if Plaintiffs stated a valid federal cause of action before November 2020, that cause of action is now moot because the November 2020 election is complete. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) (distinguishing between Rule 12(b)(1) dismissals for actions not arising under the Constitution, laws, or treaties of the United States and for those failing to state a case or controversy within the meaning of the Constitution.). Mootness as a "[jurisdictional] defect is separate and apart from the merits of [Plaintiffs'] claims." *See Orff v. U.S.*, 358 F.3d 1137, 1150 (9th Cir. 2004) (finding the government's sovereign immunity defense unrelated to the merits of plaintiffs' underlying challenges concerning water rights, trust issues, and breach of contract).

Plaintiffs' "argument that mootness is intertwined with the merits of this action is not correct." *See Lycurgan v. Jones*, 688 Fed. Appx. 442, 443 (9th Cir. 2017). The Court should therefore refuse their request to apply the standard for a motion for summary judgment.

**3. The Court should deny Plaintiffs' request for discovery.**

Plaintiffs also request the Court allow discovery before ruling on Defendant's Motion, but discovery is not necessary. A district court has broad discretion to grant discovery to determine whether it has jurisdiction. *Data Disc, Inc. v. Sys. Tech. Assoc., Inc*. 557 F.2d 1280, 1285 (9th Cir. 1977). However, "when it is clear that…discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction," a court need not grant a discovery request before ruling on a Rule 12(b)(1) motion. *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (quoting *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 431 n.24 (9th Cir. 1977)) (both cited in Pls.' Opp., ECF No. 50 at 12). "Discovery is necessary … only if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity." *St. Clair,* 880 F.2d at 201 (internal citation omitted).

Plaintiffs appear to argue that the Court, as a matter of fairness, should allow them discovery, presumably in response to the Secretary's request that the Court take judicial notice of public records. It should not, for several reasons. First, as noted above, the evidence the Secretary cited is appropriate under both Fed. R. Civ. P. 12(b)(1) and Fed. R. Evid 201(b)(2), and Plaintiffs had every right to submit their own evidence in response. Second, Plaintiffs fail to identify any jurisdictional fact they might be able to uncover in discovery. *Cf. Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (permitting plaintiff's discovery request to obtain "detailed accounting of all transactions undertaken by the [d]efendants" because the court's jurisdiction was tied to the defendants' contested involvement in the challenged transactions). The only example Plaintiffs provide of an issue in dispute—"whether pandemic-related social-gathering restrictions unduly burden Plaintiffs' signature efforts"—relates entirely to their activities. *See* Pls.' Opp., ECF No. 50 at 11. Information about impacts on Plaintiffs is

in Plaintiffs' control, and they could have presented evidence about it. Third, Plaintiffs filed a motion for summary judgment in this case (which is now stayed) in which they contend that "there is no genuine dispute as to any material fact" under Rule 56(a). *See* Pls.' Mot. for Summ. J., ECF No. 41 at 27. They have neither withdrawn that motion nor explained what has changed. Plaintiffs have made no showing that they need discovery to respond to the Motion to Dismiss, so discovery should be denied.

### B. The controversy underlying Plaintiffs' claim is not capable of repetition, yet evading review.

#### 1. Plaintiffs' speculation about future events is insufficient to show that this controversy is likely to recur.

To demonstrate that this controversy is capable of repetition, yet evading review, Plaintiffs must show a "reasonable expectation" or "demonstrated probability" that the same controversy will recur. *See Murphy v. Hunt,* 455 U.S. 478, 482 (1982). The "theoretical possibility" that Plaintiffs have presented here that their First Amendment rights will be unconstitutionally burdened leading up to the November 2022 election is not "sufficient to satisfy" this requirement. *Id*.

Every case cited by both parties concerns a statutory or policy provision that remained unchanged. *See id.*, 455 U.S. at 480 (challenge to state's limitation on pretrial bail); *FEC v. Wis. Right to Life, Inc*., 551 U.S. 449 (2007) ("*WRTL*") (challenge to FEC's statute where plaintiffs' alleged they would run ads banned by the statute in the future); *Am. Civil Liberties Union of Nev. v. Lomax*, 471 F.3d 1010, 1012 (9th Cir. 2006) (challenge of Secretary of State's enforcement of rule that required initiative proponents to obtain signatures from at least 10% of eligible voters in at least 13 of 17 Nevada counties.); *Padilla v. Lever*, 463 F.3d 1046, 1048 (9th Cir. 2006) (challenge to County Elections Department's practice of not requiring translated copies of recall petitions initiative by private proponents of recall). In each case, only two key facts determined whether it was reasonable to believe the controversy would recur: (1) the plaintiffs' credibly

alleged intention to engage in similar activities in the future and (2) the strong likelihood that the defendant would continue to enforce the challenged laws.

In contrast, this case requires the assessment of additional factors. Plaintiffs here have not alleged that the Secretary's application of the constitutional initiative requirements violates their First Amendment rights in and of itself. Instead, they allege that the Secretary violated their rights by applying those requirements *during the shut-down caused by the COVID-19 pandemic and the Governor's orders*. *See, e.g.*, Pls.' Opp., ECF No. 50 at 19 ("the pandemic and ensuing public health orders disrupted Plaintiffs' in-person signature gathering"). Even if Plaintiffs take all the necessary steps to attempt to qualify another initiative petition for the November 2022 ballot, and the Secretary enforces the constitutional requirements as she did in November 2020 (and always does), those facts alone do not demonstrate that the Secretary's enforcement will violate Plaintiffs' rights.

Plaintiffs are correct that, in this as-applied context, they need not show that "every legally relevant characteristic" of this controversy will repeat. *See WRTL*, 551 U.S. at 463 (internal quotation marks omitted). In *WRTL*, the Supreme Court rejected the FEC's argument that WRTL should have to prove that "every legally relevant characteristic" of a future controversy would be identical, instead holding that the plaintiff's intention to run "'materially similar'" ads in future election cycles that would violate the statutory blackout period was sufficient to show the controversy was "capable of repetition." *See id.* at 463. But, unlike in *WRTL,* the facts in the 2022 initiative cycle are not likely to be "materially similar" to those that existed in the 2020 cycle. *Id.* The pandemic and the Governor's orders, both of which have already changed significantly, are central to Plaintiffs' claim. *See e.g.,* Compl., ECF No. 1 ¶¶ 24-51 (section entitled "The Pandemic"); Pls.' Mot. for TRO, ECF No. 2 at 11–13 (section entitled "The state's Pandemic-related restrictions on signature-gathering"). In *WRTL*, the statute at issue remained the same and the facts that changed—the content of the ads—were not at the center of the controversy. This case is not analogous.

The parties agree the pandemic is unpredictable, but as the party seeking to invoke this Court's jurisdiction, Plaintiffs bear the burden of demonstrating the likelihood that "the same controversy will recur involving the same litigants." *See Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) (citing *Murphy*, 455 U.S. at 482). That likelihood is undermined where, as here, it is subject to "contingencies, none of which are within Plaintiffs' control." *See Koller v. Harris*, 312 F. Supp. 3d 814, 824 (N.D. Cal. April 20, 2018); *see also Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014) ("where…challenged conduct requires the confluence of a series of complicated political and fiscal contingencies, the probability of its recurrence…decreases."). Plaintiffs' contentions that "this pandemic or other related-yet-unforeseeable events…could restrict the ability to conduct in-person signature gathering" or that "[i]t is entirely reasonable…that circumstances 'materially similar' to those that occurred last year could recur and impact Plaintiffs' ability to conduct in-person signature gathering" are speculative and heavily dependent on external developments. *See* Pls.' Opp., ECF No. 50 at 12, 20, respectively. The scenarios Plaintiffs hypothesize could equally or more likely *not* occur or could have minimal or no effect on their signature gathering efforts. *See People Not Politicians Or. v. Clarno*, 826 Fed. Appx. 581, 589 (9th Cir. 2020) (Nelson, J., dissenting) (noting that not even a "colorable [possibility]" satisfies Plaintiffs' burden of demonstrating that this same controversy will occur again). Because Plaintiffs have offered nothing more than a "chance of repetition [that is] remote and speculative" the Court should dismiss their Complaint for lack of jurisdiction. *See Williams v. Alioto*, 549 F.2d 136, 142 (9th Cir. 1977).

**2. Plaintiffs' claim could be litigated before the upcoming election.**

That Plaintiffs' individual circumstances might afford them less than the full two years to collect signatures does not mean that their claim is one of inherently limited duration that would evade review. To show an issue would "evade review," for the capable of repetition, yet evading review exception, Plaintiffs must show "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration…." *WRLT*, 551 U.S. at 462. The "exception is

concerned not with particular lawsuits, but with classes of cases that, absent an exception, would *always* evade judicial review." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) (internal citation omitted) (emphasis in original). While election cases are often held to be of inherently limited duration, many of those cases presented significantly shorter windows of time than what is available here. In *WRLT*, the Supreme Court held that because the challenged law affected political advertisements broadcast between 30-60 days before an election and "groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period," there was not enough time for plaintiffs to litigate their case when it arose immediately before an election. 551 U.S. at 462; *see also Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (where the controversy would be live only around eight months before the election); *Padilla*, 463 F.3d at 1049 (where the controversy would have been live approximately four and a half months before the election).

Plaintiffs here could have secured a ballot title and approval to circulate a petition for the November 2022 election as early as July 6, 2020. *See* Declaration of Summer Davis, ECF No. 16, ¶5. That Plaintiffs have not yet taken the first steps to qualify for the November 2022 election and will therefore have less than the maximum available time is irrelevant: What matters is the two-year period to file an initiative petition and litigate any constitutional challenges. *See Protectmarriage.com*, 752 F.3d at 837 ("[t]he exception was designed to apply to situations where the type of injury involved inherently precludes judicial review, not to situations where [the type of injury is precluded as a] practical matter.") (internal quotation marks and citation omitted) (bracketed text in original). The type of claim Plaintiffs bring therefore is not so inherently limited in duration that they could not obtain judicial review. They therefore cannot meet the "evading review" prong of the mootness exception.

### 3. The declaratory judgment Plaintiffs seek will have no effect on the rights of the parties in the future.

A declaratory judgment issued in this case would be advisory because it would not have an impact on future applications of Oregon's constitutional provisions pertaining to initiative petitions. As applied to claims to declaratory relief, the test for mootness "is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Bayer v. Neiman Marcus Group, Inc.,* 861 F.3d 853, 867 (9th Cir. 2017) (citing *MedImmune, Inc. v Genetech, Inc*., 549 U.S. 118, 127 (2007)) (internal citation omitted). "[A] case or controversy exists justifying declaratory relief only when the challenged government activity is not contingent, has not evaporated or disappeared, and by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Headwaters, Inc. v. Bureau of Land Mgmt*., 893 F.2d 1012, 1015 (9th Cir. 1990) (internal quotation and alteration omitted). "The adverse effect…must not be so remote and speculative that there is no tangible prejudice to the *existing interests* of the parties." *Id*. (emphasis in original, internal quotation marks omitted.)

As the Secretary anticipated in her motion, Plaintiffs have incorrectly attempted to compare their request for declaratory judgment to cases where such relief would have a future effect on the rights of parties. *See e.g., Meyer v. Grant*, 486 U.S. 414, 417 n.2 (declaratory judgment would cease enforcement of the state constitutional provision prohibiting the use of paid circulators for initiative petition campaigns against plaintiffs' planned future campaigns); *WRLT*, 551 U.S. at 463-64 (declaratory judgment would prevent enforcement of ban of advertisements run shortly before an election on plaintiffs' planned future advertisements) (both discussed and distinguished from Plaintiffs' present case in Def.'s Mot. to Dismiss, ECF No. 44 at 14); *see also Padilla*, 463 F.3d at 1050 (declaratory judgment would determine whether or not plaintiffs would receive recall petitions printed only in English in the future) (cited in Pls.' Opp., ECF No. 50 at 22).

Plaintiffs insist that a declaratory judgment "is necessary *should* their ability to access the ballot be once again burdened by the pandemic or other related events… ." Pls.' Opp., ECF No. 50 at 22 (emphasis added). But that assertion rests on contingent future events, namely, that the effects of the pandemic and related public health orders will remain as they were when Plaintiffs attempted to qualify IP 57 for the November 2020 ballot. *See id*. at 16 ("[N]o one can predict when the ongoing pandemic or other intervening event will severely undermine Plaintiffs' in-person signature gathering campaign."). But the federal courts have authority to issue declaratory judgments to vindicate the rights in an actual dispute, not to issue "guidance" as to hypothetical future events. *See* Pls.' Opp., ECF No. 50 at 22; *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 785 (9th Cir. 1979) ("In essence, what Stewart sought was an advisory opinion for possible use in the future when…and if he retires for a second time.").

Nothing this Court can do can remedy the harm alleged here: that the Secretary's application of the state constitutional signature threshold and deadline requirements to IP 57 leading up to the November 2020 election burdened Plaintiffs' First Amendment rights during the pandemic. A declaration adjudicating the Secretary's actions would not "affect the behavior of the [Secretary] towards [Plaintiffs]" in the future as they attempt to qualify an initiative for a future election. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

Because "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical set of facts[,]'" Plaintiffs' request for declaratory judgment on an otherwise moot claim should be rejected. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *N.C. v. Rice*, 404 U.S. 244, 246 (1971)).

### C. Without showing how a declaratory judgment would affect the future rights of either party, Plaintiffs' claim is barred by the Eleventh Amendment.

Plaintiffs explicitly "seek adjudication of Defendant's past constitutional violation…." *See* Pls.' Opp., ECF No. 50 at 22. Such a declaratory judgment without prospective effect is barred by the Eleventh Amendment. Whether requested relief is prospective or retrospective is

determined by "the substance rather than … the form of relief sought." *Papasan v. Allain,* 478 U.S. 265, 279 (1986). Thus, the *Ex Parte Young* exception to the Eleventh Amendment "does not permit judgments against state officers declaring that they violated federal law in the past …." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Plaintiffs rely on *Porter* and *Padilla* for the proposition that declaratory relief is available here, but both are distinguishable. In each of those cases, the court issued a declaratory judgment after it determined that the plaintiffs would in fact be subject to the challenged illegality in the future and that declaratory judgment could prevent future and ongoing illegality. *See Porter*, 319 F.3d at 490; *Padilla*, 463 F.3d at 1050; *see also, L.A. Cty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992) ("Declaratory … 'relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment.'") (quoting *Papasan*, 478 U.S. at 278). As discussed above, Plaintiffs here have made no showing of a present violation or that a future violation is likely. Plaintiffs do not allege, for example, that the Secretary's future application of the challenged constitutional provisions will in fact burden their First Amendment rights as they attempt to qualify another IP for the November 2022 election. Instead, they allege that an adjudication of their rights in the 2020 election would assist them in the future *if* the pandemic continues unabated and *if* related public health measures limit in-person gatherings to the degree they did in spring and summer 2020. *See* Pls.' Opp., ECF No. 50 at 22 ("Plaintiffs' request for declaratory relief…is necessary should their ability to access the ballot be once again burdened by the pandemic or other related events that limit in-person signature gathering.").

Plaintiffs also argue that *Green v. Mansour* is distinguishable because there, unlike here, an intervening change necessarily eliminated the prospects of a current and future controversy between the parties. 474 U.S. 64, 66 (1985) (cited in Pls.' Opp., ECF No. 50 at 23). But that argument ignores the importance of the pandemic on this litigation. Here, a similar "intervening action" affects the future likelihood of this controversy: the pandemic receding and the relaxing

of social distancing provisions in the Governor's executive orders. These are the very facts that Plaintiffs themselves highlight as central to their complaint. *See, e.g.*, Pls.' Opp. to Mot. to Dismiss, ECF No. 50 at 23 ("Defendant's unconstitutional conduct is likely to recur given the longevity of pandemic-related restrictions on social interaction.").

Essentially, what Plaintiffs are requesting is an advisory opinion from this Court. Their "deterrence interests ['hopes that a judicial declaration…may help efficiently avoid such rights violations in the future'] are insufficient to overcome the dictates of the Eleventh Amendment." *See Green*, 474 U.S. at 68 (bracketed text from Pls' Opp., ECF No. 50 at 22). Their request for declaratory relief should therefore be dismissed.

**III. Conclusion**

For the reasons discussed above and in the Motion to Dismiss, the Secretary of State respectfully requests this Court dismiss Plaintiffs' Complaint for lack of jurisdiction.

DATED April 12, 2021.

Respectfully submitted,

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