No. 20-2095

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

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

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:20-cv-05070-PKH

AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF APPELLANT'S MOTION TO STAY

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INTEREST OF AMICUS CURIAE*

The Honest Elections Project is an independent, nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that States put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. As part of its mission in these challenging times, the Project seeks to ensure that elections are carried out both safely and lawfully. Lawsuits that challenge duly enacted election rules during the COVID-19 pandemic drain precious resources, distract state officials, create voter confusion, and undermine the integrity of elections. The Project thus has a significant interest in this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs claim that COVID-19 is license for courts to suspend laws that protect the integrity of the electoral process. The district court partially accepted Plaintiffs' invitation, enjoining Arkansas's requirements that signatures on initiative petitions be made in the presence of the canvasser and that the canvasser confirm their validity with a notarized affidavit. This Court will likely reverse that ruling for at least two reasons.

* No party's counsel authored this brief in whole or in part, and no one other than amicus and its counsel contributed money to fund the brief's preparation or submission.

First, COVID-19 cannot make an otherwise constitutional law unconstitutional. A global virus is not state action. Even if it were, the State's interest in maintaining the integrity of elections does not go away during a pandemic. If anything, that interest is *heightened* and outweighs any burdens associated with the virus (which affect both individuals and States alike).

Second, even if it were possible to challenge these laws "as applied" to COVID-19, the laws challenged here pass constitutional scrutiny. The State has an interest in deterring fraud and abuse in the initiative process. That interest is real, legitimate, and outweighs the small burdens on canvassers. Plaintiffs have submitted no evidence that individuals can go to work or the grocery store, but cannot obtain signatures or notarization, while honoring principles of social distancing. There is none.

For all these reasons and more, Plaintiffs are unlikely to succeed on appeal. Even if the merits were close, the equities aren't. *See* Stay Mot. 23-24. This Court should stay the district court's injunction.

ARGUMENT

The district court held that the challenged laws violate Plaintiffs' constitutional right to vote. Doc. 41 at 14-18. It invoked the balancing test from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The *Anderson-Burdick* test is an awkward fit here. *See* Stay Mot. 11-13. But even assuming it provides the right framework, the district court misapplied it.

Under *Anderson-Burdick*, States can conduct "substantial regulation of elections." *Burdick*, 504 U.S. at 432. The *Anderson-Burdick* test is a "flexible standard" that "reject[s] the contention that any law imposing a burden" on constitutional rights "is subject to strict scrutiny." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009); *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1241 (Nev. 2006). *Every* election law "is going to exclude, either de jure or de facto, some people" from exercising their rights; "the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

Anderson-Burdick requires Plaintiffs to satisfy a two-step inquiry, bearing a heavy burden at both steps. First, Plaintiffs must prove that the challenged laws impose a cognizable burden on their rights and then quantify the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Common Cause/Ga.*, 554 F.3d at 1354. Second, Plaintiffs must show that the burdens outweigh the State's interests. *Timmons*, 520 U.S. at 358. Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny and assess whether the law "'is narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Mine-run election laws that "impose[] only 'reasonable, nondiscriminatory restrictions'" are "'generally'" justified by "'the State's important regulatory interests.'" *Burdick*, 504 U.S. at 433.

The challenged laws here satisfy *Anderson-Burdick*. If they were constitutional before COVID-19 (as Plaintiffs concede), then they are constitutional now. COVID-19 is not state action that could change the *Anderson-Burdick* balance. Even if it could, that balance continues to favor the State.

I. COVID-19 cannot make the challenged laws unconstitutional.

The question in this case is whether COVID-19 *made* the challenged laws unconstitutional. No one thinks that collecting signatures and obtaining notarizations are severe burdens in normal times; these requirements are quintessential examples of "'reasonable, nondiscriminatory restrictions'" that do not warrant strict scrutiny. *Burdick*, 504 U.S. at 433. Instead, Plaintiffs contend that these laws are unconstitutional only "as applied during the COVID-19 pandemic." Doc. 7 at 11. And the district court's analysis turned on the "need for social distancing during this pandemic." Doc. 41 at 14.

This reasoning is flawed. Arkansas "has a strong interest in the continued adherence" to election laws "even during challenging times." *Arizonans for Fair Elections v. Hobbs*, 2020 WL 1905747, at *16 (D. Ariz. Apr. 17, 2020). Our nation's struggle with COVID-19, as unprecedented as it is, does not change the constitutional analysis, for two main reasons.

First, an otherwise constitutional law cannot become unconstitutional due to non-state action like a virus, which Arkansas neither created nor caused. While COVID-19 has dramatically changed Arkansans' everyday lives, "these circumstances are not impediments created *by the State*." *Bethea v. Deal*, 2016 WL 6123241, at *2 (S.D. Ga. Oct.

19, 2016) (emphasis added). Any additional burdens on electoral rights "are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic." *Mays v. Thurston*, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020). To date, most courts recognize that "COVID-19 … is not the result of any act or failure to act by the Government. And that fact is important" because "[a]ll of the election cases cited by Plaintiffs in which injunctive relief was granted involved a burden … that was created by the Government. Not so here." *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *3 n.2 (N.D. Ga. May 14, 2020); *accord Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 2020 WL 2982937, at *19 (5th Cir. June 4, 2020) (Ho, J., concurring).

Second, even if non-state action like COVID-19 factored into the *Anderson-Burdick* analysis, the outcome of that analysis would not change. COVID-19 affects *both* sides of the balance—the interests of the State and the burdens on the individual. True, COVID-19 has complicated many public activities, including signature gathering and notarizing. But "States" also have "important interests … in the wake of election emergencies": they must "focus their resources on recovering from the emergency, ensuring the accuracy of [electoral records] they have received, relocating polling places as needed, ensuring adequate staffing for the voting period, and otherwise minimizing the likelihood of errors or delays in voting." M.T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 593 (2018).

An "election emergency" should thus "seldom warrant" changes to election laws by judicial fiat. *Id.* Courts agree. *See, e.g.*, Doc. 12, *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020) (declining to intervene in Florida's primary election in the face of COVID-19); *Bethea*, 2016 WL 6123241 (declining to extend Georgia's voter-registration deadline in the wake of Hurricane Matthew); Doc. 58, *ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006) (denying request "to extend the deadline for counting absentee ballots received by mail" in New Orleans in the wake of Hurricane Katrina). While "Plaintiffs are correct that the COVID-19 pandemic constitutes an extraordinary circumstance that has resulted in profound dislocations, it is also a profound thing for a federal court to rewrite state election laws." *Arizonans for Fair Elections*, 2020 WL 1905747, at *3 (cleaned up). The district court should not have taken that profound step. "[T]he decision to drastically alter [the State's] election procedures must rest with … elected officials, not the courts." *Thompson*, 959 F.3d 804.

II. Even if COVID-19 changes the analysis, the challenged laws are constitutional.

This Court can grant a stay without resolving whether COVID-19 can be attributed to the State. That's because, even assuming it can be, the challenged laws still survive *Anderson-Burdick* review. The challenged laws remain reasonable, nondiscriminatory regulations that impose only normal burdens on individuals and, thus, are justified by the State's regulatory interests.

Burden on Individuals: On the individual side of the *Anderson-Burdick* balance, Plaintiffs must introduce "evidence" to "quantify the magnitude of the burden" from the challenged laws. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (op. of Stevens, J.). "[T]he extent of the burden … is a factual question on which the [plaintiff] bears the burden of proof," *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), and the plaintiff must "direct th[e] Court to … admissible and reliable evidence that quantifies the extent and scope of the burden." *Common Cause/Ga.*, 554 F.3d at 1354.

Plaintiffs did not do that. They did not prove that signatures and notarizations cannot be obtained in person without violating social-distancing norms. Nor could they. People can stand six feet away from each other, can wear masks, can use technology, and can use other safe and effective options. *See Thompson*, 959 F.3d 804. While these workarounds might be "harder" (as are many tasks during a pandemic), *id.*, inconveniences are not "severe" burdens that trigger strict scrutiny, *Crawford*, 553 U.S. at 198. Even if these workarounds are somehow unavailable for certain people, those idiosyncratic burdens are not relevant under *Anderson-Burdick*. *See id.* at 206 (Scalia, J., concurring in judgment). And Plaintiffs have made no attempt to quantify "the number" of people in this group or provide "concrete evidence" of "the magnitude" of the burden on them. *Id.* at 200-02 (op. of Stevens, J.).

Perhaps most importantly, *the State* has decided that the challenged laws should not be suspended during COVID-19 and, thus, petition gathering can still be done

safely. While a federal court might disagree, questions about how to "accommodate voters' interests while also striving to ensure their safety" are best left to election officials, who are "better positioned … to accommodate the many intersecting interests in play in the present circumstances." Doc. 30, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. 2020). Federal courts do "not have the authority 'to act as the state's chief health official' by making the decision" how best to protect "the health and safety of the community." *Taylor v. Milwaukee Election Comm'n*, 2020 WL 1695454, at *9 (E.D. Wis. Apr. 6, 2020). The district court lacked the competence—let alone the record evidence—to overturn Arkansas' judgment.

Interests of State: The district court invalidated the challenged laws under strict scrutiny, reasoning that the laws were not "narrowly tailored" in light of "less burdensome alternatives." Doc. 41 at 14-18. But strict scrutiny does not apply here because, as just explained, the challenged laws do not impose severe burdens on individuals. The district court's "narrow tailoring" analysis is, thus, wholly misplaced. Even if Arkansas can use other laws to punish fraud and abuse after it occurs, the State has the right to impose prophylactic "'safeguards … to deter or detect fraud and to confirm the identity of [signees].'" *Crawford*, 553 U.S. at 194-97. Arkansas's "compelling" interests—ensuring that people who sign petitions are real, are eligible to sign, and truly support the cause—are more than sufficient to uphold the challenged laws. *Thompson*, 959 F.3d 804.

It is no answer to say that fraud in the petition process is rare or unproven. Unlike Plaintiffs (who must quantify their burdens with concrete evidence), *Anderson-Burdick* treats the sufficiency of the State's justification as a "legislative fact" that is accepted as true so long as it's reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). States need not present "any record evidence in support of [their] stated interests." *Common Cause/Ga.*, 554 F.3d at 1353; *accord ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (city need not "present evidence of past instances of voting fraud"). In fact, when responding to an *Anderson-Burdick* challenge, States can rely on "post hoc rationalizations," can "come up with its justifications at any time," and have no "limit[s]" on the type of "record [they] can build in order to justify a burden placed on the right to vote." *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). States can rely on examples from other jurisdictions, court decisions, general history, or sheer logic. *Common Cause/Ga.*, 554 F.3d at 1353; *Frank*, 768 F.3d at 750. In *Crawford*, for example, the Supreme Court found Indiana's interest in preventing in-person voter fraud compelling even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194.

But fraud in the petition process is a serious concern. Examples are not hard to find:

- In 2016, a California "woman pleaded guilty to filing false or fraudulent signatures with the Monterey County Election Department while gathering signatures for a recall petition of a school district trustee." *Salinas Woman Guilty of Election Fraud*, The Californian (Sept. 22, 2016), bit.ly/2XN9WC5.

- In 2017, a Colorado man pleaded guilty to two felonies: registering a fictitious voter and to falsifying initiative petitions. *Secretary of State Bruce McPherson Announces Conviction in Alameda County Voter Fraud Case*, Cal. Sec'y of State (June 14, 2006), bit.ly/2fdgCSl.
- In 2017, a Denver man pleaded guilty to felony forgery for collecting fraudulent signatures for a minimum-wage-increase ballot initiative. *Campaign Worker Pleads Guilty to Felony Forgery on Minimum-Wage Petition*, Col. Politics (Jan. 20, 2017), bit.ly/2AT2f4v.
- In 2017, a Colorado woman pleaded guilty to forging signatures on petitions in several Colorado counties. *Woman Who Forged Signatures on Keyser Petitions Is Sentenced*, The Gazette (Jan. 20, 2017), bit.ly/37hQ79a.
- In 2013, "[t]wo campaign workers for [Indiana] state Sen. Terry Link were indicted … on forgery and perjury charges of placing phony signatures on the senator's nominating petitions for his current re-election campaign." *2 Link Campaign Workers Indicted*, Chic. Trib. (Aug. 14, 2008), bit.ly/2AmVgAO.
- In 2013, four individuals forged over 200 signatures on a petition to enter Barack Obama and Hillary Clinton into the 2012 Indiana Democratic Primary. *Indiana Dem Official Sentenced to Prison for '08 Ballot Fraud in Obama–Clinton Primary*, Fox News (June 17, 2013), fxn.ws/2BM9xHs.

As the Seventh Circuit recently explained, States maintain their "substantial interest in combatting voter fraud" during a pandemic. Doc. 30, *Bostelmann*, No. 20-1538. The Seventh Circuit thus stayed an injunction that suspended Wisconsin's witness-signature requirement in light of COVID-19. The Fifth and Sixth Circuit recently issued similar stays. *See Tex. Democratic Party*, No. 2020 WL 2982937; *Thompson*, 959 F.3d 804. As the Fifth Circuit put it, the coronavirus simply has "not given unelected federal judges a roving commission to rewrite state elections codes." *Tex. Dem. Party*, 2020 WL 2982937 at *1 (cleaned up). So too here.

CONCLUSION

This Court should stay the district court's injunction.

Dated: June 10, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with any length requirements because it contains 2,573 words, which is less than half of the 5,200 words that Rule 27 gives the parties for motions. *Cf.* Fed. R. App. P. 29(a)(5) (allowing amicus briefs to be "one-half the maximum length authorized by these rules for a party[]"). This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: June 10, 2020

/s/ Patrick Strawbridge
Counsel for Honest Elections Project

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will electronically notify all counsel of record.

Dated: June 10, 2020

/s/ Patrick Strawbridge
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