United States Court of Appeals
For the Eighth Circuit

No. 20-2095

Bonnie Heather Miller; Robert William Allen; Adella Dozier Gray; Arkansas Voters First

Plaintiffs - Appellees

v.

John Thurston, in his official capacity as Secretary of State of Arkansas

Defendant - Appellant

Honest Elections Project; State of Ohio; State of Alabama; State of Alaska; State of Arizona; State of Indiana; State of Kentucky; State of Nebraska; State of North Dakota; State of Texas; State of Oklahoma; State of South Dakota; Arkansas State Chamber of Commerce

Amici on Behalf of Appellant

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: July 8, 2020
Filed: July 23, 2020

Before GRUENDER, WOLLMAN, and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

The plaintiffs sued to enjoin the Arkansas Secretary of State from enforcing Arkansas's initiative petition rules requiring in-person contact between petition circulators, petition signers, and notaries. As applied to them, the plaintiffs claimed, these requirements violate their First Amendment rights. The district court granted a permanent injunction, and Arkansas appealed. After Arkansas moved to stay the district court's judgment pending appeal, we consolidated the motion with our consideration of the merits and ordered expedited briefing and oral argument. With both now ripe for decision, we reverse the district court's judgment and deny the motion to stay as moot.

I. Background

The Arkansas Constitution allows "legal voters" to "propose a constitutional amendment by initiative petition." Ark. Const. art. 5, § 1. Arkansas Voters First ("AVF"), a registered Arkansas ballot question committee, is sponsoring a ballot initiative to amend the Arkansas Constitution's redistricting provisions. With the goal of having this initiative placed on the upcoming general election ballot, AVF launched its campaign and began circulating a petition in March 2020, during the COVID–19 pandemic. Now, in light of the pandemic, AVF and the other plaintiffs claim they cannot comply with Arkansas's in-person petition circulation and notarization rules.

Both the Arkansas Constitution and the Arkansas Code require petition circulators or "canvassers" to attach to the petition an affidavit affirming compliance with various procedural rules, including that all the petition signatures were made in the presence of the canvasser. Ark. Const. art. 5, § 1; Ark. Code Ann. § 7-9-108. This affidavit, the Arkansas Supreme Court has clarified, must also be notarized in person. *See Roberts v. Priest*, 975 S.W.2d 850, 855 (Ark. 1998). Plaintiffs claim they cannot comply with these two in-person requirements during the COVID–19 pandemic.

Robert Allen is a registered voter in Arkansas undergoing chemotherapy to treat his stage IV bladder cancer. With the exception of medical appointments, Allen's doctors advised him to stay home and limit in-person contact to his wife and healthcare workers. Adella Gray is a registered voter living in an Arkansas retirement community with over 400 other residents, all of whom, including Gray, are particularly vulnerable to COVID–19 because of their age. Both Allen and Gray want to sign AVF's initiative petition but claim they cannot comply with Arkansas's in-person signature requirement without putting their health and the health of others at serious risk. This, they claim, prevents an AVF canvasser, like Bonnie Miller, from safely soliciting their signatures. And while Miller is not particularly vulnerable to the virus like Allen and Gray, she also claims she cannot comply with Arkansas's in-person notarization requirement without risking both her health and the health of the notary. So AVF, Miller, Allen, and Gray sued to enjoin Arkansas's Secretary of State from enforcing the in-person signature requirement and the in-person notarization requirement. They claimed enforcement of these requirements during the COVID–19 pandemic would impermissibly burden their First Amendment rights to express their position on a political matter.

The district court preliminarily enjoined Arkansas's Secretary of State from enforcing the in-person signature and notarization requirements. Applying strict scrutiny, the district court concluded enforcement of these two requirements during the pandemic would likely violate the plaintiffs' First Amendment rights to free expression. Even though the plaintiffs asserted only an as-applied challenge, the district court clarified that the injunction applied to not just the plaintiffs in this case or AVF's initiative petition specifically, but to *any* initiative petition filed with the Arkansas Secretary of State. The district court then prescribed the use of modified

Arkansas statutory form documents which, in the district court's view, solved the alleged First Amendment problem.[1]

Following the preliminary-injunction ruling, both parties informed the district court that no additional evidence would be presented in the case. So the district court converted the preliminary injunction into a permanent injunction and entered judgment. Arkansas appealed and quickly moved for a temporary administrative stay, a stay of the judgment pending appeal, and expedited review of the merits. We granted the motion for a temporary administrative stay, consolidated the motion for a stay pending appeal with the merits of the case, and ordered expedited briefing.

The pending motion and appeal are now ripe for review, and we have jurisdiction under 28 U.S.C. § 1291.

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[1]While we do not need to rule on Arkansas's challenge to the scope of the injunctive relief granted by the district court, we note it appears the district court may have taken a step too far in fashioning the injunctive relief. District courts have discretion to fashion injunctive relief, but "that discretion is not unlimited." *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 790 (8th Cir. 2004). Here, we believe it was improper for the district court to take the additional step of prescribing modified statutory forms which, in its view, solved Arkansas's First Amendment problem. *See Republican Party of Ark. v. Faulkner Cty.*, 49 F.3d 1289, 1301 (8th Cir. 1995) ("Cognizant of our role as a federal court, we do not purport to advise Arkansas on the best means of rendering constitutional its election code: that decision rests with the sound judgment of the Arkansas legislature.").

II. Analysis

A. Standing

Before considering whether a stay is warranted or whether a permanent injunction was appropriate, we must conclude this case presents a live[2] Article III case or controversy. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Arkansas argues it does not because the plaintiffs lack standing. *See id.* We review whether standing exists de novo. *Dalton v. NPC Int'l, Inc.*, 932 F.3d 693, 695 (8th Cir. 2019).

Each plaintiff must establish standing for each form of relief sought. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The plaintiffs here seek injunctive relief.

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat

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[2]Since the filing of this appeal, AVF has submitted its initiative petition to the Arkansas Secretary of State. To qualify for placement on the November 3, 2020, general election ballot, AVF's petition must include at least 89,151 signatures from eligible voters. And at oral argument, Arkansas informed us that the petition included 90,000 to 100,000 *unverified* signatures. But in a Rule 28(j) letter dated July 14, Arkansas informed us that its Secretary of State declared the petition "insufficient" because AVF failed to certify that each of its paid canvassers passed a criminal background check. *See* Ark. Code Ann. § 7-9-601(b)(3). Yet because any registered voter, including the individual plaintiffs, may challenge the Secretary's declaration in Arkansas state court and because the district court's injunction applies to all petitions — and not just AVF's petition — Arkansas maintains this case is not moot. Indeed, in their July 21 response to the Rule 28(j) letter, the plaintiffs informed us that they are challenging the Secretary's declaration in the Arkansas Supreme Court. Like Arkansas, they also believe this case is not moot. All things considered, we agree that the Secretary's insufficiency declaration does not moot this case. *See generally Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 795–96 (8th Cir. 2016).

> must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). The injury-in-fact component requires "a plaintiff [to] show that he or she suffered 'an invasion of a legally protected interest.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And "although federal standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits of the [claim].'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Rather, "we must 'assume that on the merits the plaintiffs would be successful in their claims.'" *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) (quoting *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008)).

Arkansas first argues a judgment in the plaintiffs' favor will not prevent or redress their injury "[b]ecause of how they pled this case." As explained above, the Arkansas Constitution requires petition signers to sign an initiative petition in the presence of the canvasser and that the canvasser attach a notarized affidavit to each part of the petition affirming compliance with petitioning rules. Ark. Const. art. 5, § 1; *Roberts*, 975 S.W.2d at 855. And section 7-9-108 of the Arkansas Code reiterates these rules. The plaintiffs' complaint, Arkansas says, challenged the statutory requirements but not the constitutional requirements. Thus, a favorable judgment cannot prevent or redress the plaintiffs' injury. This argument is misplaced.

In several paragraphs in their complaint, the plaintiffs challenge the in-person petitioning rules provided in Arkansas's Constitution. *Compl. ¶¶ 2, 3, 5, 71, 88, 91* (claiming "the requirements of Ark. Const. Art. 5, § 1" are unconstitutional under the First and Fourteenth Amendments). Regardless, Article III standing is not a technical code pleading requirement. *See Spokeo*, 136 S. Ct. at 1547. At the pleading stage,

plaintiffs must "'allege *facts* demonstrating' each element" of standing. *Id*. (emphasis added) (quoting *Warth*, 422 U.S. at 518); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013) (stating "at the pleading stage a petitioner can move forward with general factual allegations of injury") (internal quotation marks omitted). At later stages, plaintiffs' burden is to show standing by a preponderance of the evidence. *Iowa League of Cities*, 711 F.3d at 870.

Arkansas cites a district court case from the Ninth Circuit to support its argument. *See Arizonans for Fair Elections v. Hobbs*, No. CV-20 00658-PHX-DWL, __ F. Supp. 3d __, 2020 WL 1905747, at *4 (D. Ariz. Apr. 17, 2020). Unlike the plaintiffs in this case, the plaintiffs in *Hobbs* conceded they were challenging certain Arizona statutory requirements but were not challenging the same requirements in Arizona's Constitution. *Id*. They argued that once they successfully challenged the statutory requirements in federal court, Arizona state courts would not strictly enforce the same constitutional requirements. *Id*. The District of Arizona found this position speculative and, on redressability grounds, dismissed the case for lack of standing. *Id.* at *4–5; *see Lujan*, 504 U.S. at 561 (explaining it must be more than speculative that a favorable judgment will redress the injury). Because the plaintiffs in this case do challenge Arkansas's statutory and constitutional in-person petitioning rules, *Hobbs* lends no support.

Next, Arkansas contends the plaintiffs' injuries "are not traceable to any state action." To be clear, Arkansas does not argue any plaintiff lacks an injury in fact, only that no plaintiff has proved their injury is traceable to Arkansas's actions. As Arkansas sees it, the COVID–19 pandemic and AVF's own dilatory action — waiting until March to start its campaign — caused the plaintiffs' injuries. We disagree. "Traceability requires proof of causation," a showing that "the injury resulted from the actions of the defendant 'and not . . . [from] the *independent* action of some third party not before the court.'" *Oti Kaga, Inc. v. S.D. Housing Dev. Auth.*, 342 F.3d 871, 878 (8th Cir. 2003) (alterations in original) (emphasis added) (quoting *Lujan*, 504 U.S. at

560). Absent enforcement of the challenged in-person petitioning rules, the plaintiffs' asserted injuries disappear. The plaintiffs' asserted injuries are not the result of their own or some third party's *independent* action. Nor are they caused solely by the COVID-19 pandemic. Rather, the plaintiffs have adequately shown their asserted injuries are fairly traceable to Arkansas's action, i.e., enforcement of its initiative petition rules requiring in-person signatures and in-person notarization.

Neither of Arkansas's arguments demonstrate any plaintiff lacks Article III standing. And, assuming the plaintiffs will succeed on the merits, we are otherwise satisfied they have standing. *See Am. Farm Bureau Fed'n*, 836 F.3d at 968.

B. Permanent Injunction

We review the grant of a permanent injunction for abuse of discretion. *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). A district court abuses its discretion by resting its decision on clearly erroneous factual findings or an erroneous legal conclusion.[3] *Id.*

"A permanent injunction requires the moving party to show actual success on the merits." *Id.* If actual success is found, courts must then consider three factors to determine whether a permanent injunction is warranted: "(1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest." *Id.*

Here, the district court's merits determination rests on the erroneous legal conclusion that the in-person signature and notarization requirements are subject to strict scrutiny. Analyzed under the appropriate standards, we conclude neither

[3]Arkansas does not argue the district court made any clearly erroneous factual findings, likely because the parties submitted this case largely on undisputed facts.

requirement violates the First Amendment. And because actual success on the merits is essential to the plaintiffs' permanent injunctive relief, our analysis goes no further than the merits. *See id.* at 233.[4]

The plaintiffs challenge the enforcement of two Arkansas initiative petition rules, as applied to them. The first requires individuals who wish to sign an initiative petition to sign in the presence of a canvasser. Ark. Const. art. 5, § 1; Ark. Code Ann. § 7-9-108. The second requires the canvasser who collected the signatures to attach to each part of the petition a notarized affidavit affirming compliance with Arkansas's petition rules. Ark. Const. art. 5, § 1; Ark. Code Ann. § 7-9-108. The canvasser must be present before the notary. *Roberts*, 975 S.W.2d at 855. In light of the COVID–19 pandemic, the plaintiffs argue, enforcing the in-person aspect of these initiative petition rules impermissibly burdens their First Amendment rights to express their views on a political matter — Arkansas's constitutional redistricting provisions.

To analyze this claim, the district court applied what is known as the *Anderson/Burdick* framework. Under this framework, courts first "weigh the 'character and magnitude' of the burden the State's rule imposes on [First Amendment] rights against the interests the State contends justify that burden, and

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[4]Our analysis of whether a stay is warranted overlaps almost completely with our analysis of whether a permanent injunction was merited. *Compare Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (delineating the "four factors" we consider "in determining whether to issue a stay"), *with Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) (delineating the four factors we consider when reviewing the district court's issuance of a permanent injunction). Most importantly, both require an assessment of the merits, albeit under slightly different legal and evidentiary standards. *Compare Brady*, 640 F.3d at 789 (requiring the court to *consider* whether the stay movant has shown a strong likelihood of success on the merits), *with Lowry*, 540 F.3d at 762 (requiring the permanent-injunction movant to *prove actual* success on the merits). And since the permanent-injunction standard is more demanding, our stay analysis is subsumed by our permanent-injunction analysis.

consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). If the rule imposes "severe burdens on the plaintiffs' rights," it must be "narrowly tailored and advance a compelling state interest." *Id.* "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434).

Arkansas argues the district court committed legal error by applying the *Anderson/Burdick* framework. In Arkansas's view, the two challenged initiative petition requirements do not even implicate the First Amendment. If this were true, the plaintiffs' claims would fail as a matter of law. *See Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). In the alternative, Arkansas argues that if the challenged initiative petition requirements *are* subject to First Amendment scrutiny, the district court erred by concluding they impose a severe burden on the plaintiffs' First Amendment rights, triggering strict scrutiny. We take these arguments in order.

1. Implication of the First Amendment

"[T]he right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *Id.* And states have "considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). Still, certain rules and requirements related to the process may nevertheless implicate the Federal Constitution, including the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 428 (1988) (finding Colorado's statutory ban on paid petition circulators unconstitutional under the First Amendment); *see also Buckley*, 525 U.S. at 192–97 (finding Colorado's requirement that initiative petition circulators be registered voters unconstitutional); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (recognizing states' "considerable leeway" to ensure integrity and reliability in

the initiative process is limited by the First Amendment, which "requires vigilance 'to guard against undue hinderances to political conversations and the exchange of ideas'") (quoting *Buckley*, 525 U.S. at 191–92).

In *Dobrovolny*, we distinguished between initiative petition laws that only make the process "difficult" and those that affect "the communication of ideas associated with the circulation of petitions." 126 F.3d at 1113. The latter implicate the First Amendment. *See id.* Supreme Court precedent, as well as our own, illustrates this distinction. In *Meyer*, Colorado's statutory ban on paid petition circulators implicated the First Amendment because it limited "the number of voices who will convey appellees' message," "the hours they can speak," and "the size of the audience they can reach." 486 U.S. at 422–23. Similarly, in *Buckley*, the Court subjected Colorado's requirement that petition circulators be registered voters to First Amendment scrutiny because it "drastically reduce[d] the number of persons, both volunteer and paid, available to circulate petitions." 525 U.S. at 193. In *Jaeger*, we applied First Amendment scrutiny to North Dakota's requirement that petition circulators be state residents and its ban on per-signature commission payments to petition circulators. 241 F.3d at 616–18.

The law at issue in *Dobrovolny*, however, was different. As interpreted by the Nebraska Supreme Court, Article III, § 2 of the Nebraska Constitution set the number of petition signatures needed to get an initiative on the ballot equal to 10% of registered voters in Nebraska, measured on the date initiative petitions must be submitted to the Secretary of State. *Dobrovolny*, 126 F.3d at 1112. This was problematic for the petition organizers because they had no advance notice of the number of signatures needed to qualify an initiative for the ballot. *Id.* Distinguishing Nebraska's initiative petition law from the unconstitutional Colorado law at issue in *Meyer*, we recognized that the Nebraska law, though burdensome, "in no way restricted [the] ability to circulate petitions or otherwise engage in political speech." *Id.* True, we said, the Nebraska law "may have made it difficult for appellants to plan their initiative

campaign and efficiently allocate their resources," but "the difficulty of the process alone is insufficient to implicate the First Amendment." *Id.* at 1113. There must be some affect on "the communication of ideas associated with the circulation of petitions." *Id*. Nebraska's law had no such effect. *Id.*; *see also Hoyle v. Priest*, 265 F.3d 699, 703–04 (8th Cir. 2001) (finding an Arkansas law which required counting only registered-voter petition signatures did not implicate the First Amendment); *Wellwood v. Johnson*, 172 F.3d 1007, 1008 (8th Cir. 1999) (concluding Arkansas laws increasing the number of signatures needed for initiatives "to decide whether to change a county from 'wet' to 'dry,' or vice versa" did not implicate the First Amendment).

Turning to the two challenged initiative petition laws in this case, neither poses a First Amendment problem on its face. As applied, however, the in-person signature requirement affects the communication of ideas associated with the circulation of AVF's petition. Specifically, it burdens Allen's and Gray's ability to express their position on a political matter by signing AVF's initiative petition. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 195–96 (2010) (explaining "[a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure" and that "the expression of a political view implicates a First Amendment right"); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (explaining the Court in *Reed* "held . . . that a citizen's signing of a petition" is "core political speech") (internal quotation marks omitted). It also affects the number of people a canvasser like Miller can solicit. *See Meyer*, 486 U.S. at 422–23 (finding First Amendment implicated where the challenged law limited "the size of the audience [canvassers] [could] reach"); *see also Buckley*, 525 U.S. at 186 (reiterating that "[p]etition circulation . . . is core political speech") (internal quotation marks omitted). Thus, we find no error in subjecting Arkansas's in-person signature requirement to First Amendment scrutiny. As applied to the plaintiffs, that requirement burdens their ability to engage in core political speech.

As it did in its standing arguments, Arkansas reiterates that the plaintiffs' ability to sign and circulate the initiative petition is burdened by the COVID–19 pandemic, not by any state action. This is not accurate. Enforcement of the in-person signature requirement is necessary to cause the plaintiffs' First Amendment injury. And by blaming the pandemic, Arkansas has not changed the fact that enforcing its in-person signature requirement under current circumstances burdens the plaintiffs' ability to engage in core political speech. *Calzone v. Summers*, 942 F.3d 415, 420 (8th Cir. 2019) (en banc) (explaining an as-applied challenge requires the court to "examine the constitutionality of the law in light of 'the particular facts of [the plaintiff's] case'") (quoting *Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017)).

As to the in-person notarization requirement, however, we fail to see how its enforcement affects the communication of ideas associated with the circulation of AVF's petition. During the notarization process, neither the canvasser nor the notary are engaged in any exchange or communication of ideas. Or at least the plaintiffs have not shown they are. Although the requirement may make it more difficult to verify the signatures on the petition during a pandemic, this is not enough to implicate the First Amendment. *See Dobrovolny*, 126 F.3d at 1113. There must be some effect on the communication of ideas associated with petition circulation, and the plaintiffs have not shown the in-person notarization requirement has that effect. It is therefore not subject to First Amendment scrutiny, even as applied or enforced here. The district court erred in concluding otherwise.

2. Applicable Level of Scrutiny

Having determined the in-person signature requirement implicates the First Amendment, we now address the level of scrutiny to which it should be subjected. "Generally, laws that burden political speech are subject to strict scrutiny." *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944, 949 (8th Cir. 2018) (cleaned up). But we have not always applied strict scrutiny to initiative petition laws

that implicate the First Amendment. In *Jaeger*, for example, without referencing the *Anderson/Burdick* framework by name, we applied its "sliding standard of review" to two North Dakota initiative petition laws. 241 F.3d at 616 ("Severe burdens on speech trigger an exacting standard in which regulations must be narrowly tailored to serve a compelling state interest, whereas lesser burdens receive a lower level of review."). In keeping with this precedent, we will apply the same sliding standard here. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.") (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002)).

To determine the appropriate level of scrutiny, we "weigh the 'character and magnitude' of the burden the State's rule imposes on [First Amendment] rights against the interest the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). If Arkansas's in-person signature requirement severely burdens the plaintiffs' ability to engage in political speech, strict scrutiny applies. *See id.*; *see also Jaeger*, 241 F.3d at 616. Otherwise, lesser scrutiny applies. *Jaeger*, 241 F.3d at 616. To be severe, the burden must "go beyond the merely inconvenient." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment) (citing *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)).

The district court erred when it concluded Arkansas's in-person signature requirement imposed a severe burden. The plaintiffs argue enforcement of this requirement bars them from signing or circulating AVF's initiative petition. But this is not necessarily true. In fact, the Arkansas Code provides accommodations specifically for individuals who require assistance signing an initiative petition. Ark. Code Ann. § 7-9-103(a)(1)(B). "If a person signing a petition requires assistance due to a disability, another person may print the petitioner's name, address, birth date, and the date of signing on the petition. The assisting individual must then sign and print his or her name in the margin of the petition." *McDaniel v. Spencer*, 457 S.W.3d 641,

650–51 (Ark. 2015) (cleaned up) (citing Ark. Code Ann. § 7-9-103(a)(1)(B)(i), (ii)). And a "disability" for purposes of § 7-9-103(a)(1)(B) "is *any condition* that would not allow a petitioner to write the required information on the petition without assistance." *Id.* at 651 (emphasis added). Neither party accounts for this accommodation. Yet, it appears such an accommodation assuages the burden on the plaintiffs' ability to engage in core political speech by signing or circulating AVF's initiative petition. Allen and Gray could communicate with an AVF canvasser, like Miller, using a phone or computer, and section 7-9-103(a)(1)(B) would, in theory, permit another person to sign the petition for them while they observe, in person, through a window from the safety of their homes.

Even absent section 7-9-103(a)(1)(B), however, one can imagine relatively simple ways for individuals like Allen and Gray to safely comply with the in-person signature requirement during the COVID–19 pandemic. As Arkansas illustrates in its brief, for example, AVF can advertise its petition using traditional and social media and bring the sterilized petition to Allen's and Gray's homes where it can be safely transferred with little to no contact. No doubt, the in-person signature requirement imposes real burdens. We are just not persuaded it imposes severe burdens. Strict scrutiny is therefore not applicable.

Because the burdens are less than severe, we review Arkansas's in-person signature requirement to ensure it is reasonable, nondiscriminatory, and furthers an important regulatory interest. *Timmons*, 520 U.S. at 358. Starting with the regulatory interest, Arkansas says the in-person signature requirement protects the integrity of its initiative petition process. The plaintiffs argue this interest is not so significant here because "the risk of fraud or corruption . . . is more remote at the petition stage than at the time of balloting." *Meyer*, 486 U.S. at 427. We disagree for two reasons. First, we have characterized a state's interest in protecting the integrity of its initiative processes as "paramount." *Hoyle*, 265 F.3d at 704. Second, like the State of Washington in *Reed*, Arkansas maintains its interest in integrity is not limited to just

fraud and corruption. *See Reed*, 561 U.S. at 198. Its interest includes preventing mistakes as well, like duplicate signatures and signatures from ineligible voters. *See id.* And Arkansas's initiative petition laws require in-person canvassers to protect against these concerns. *See* Ark. Const. art. 5, § 1; Ark. Code Ann. § 7-9-108. Thus, we cannot say Arkansas lacks an important interest here.

Still, the plaintiffs argue, Arkansas did not present enough evidence to *justify* its asserted regulatory interest. But states are not required to present "elaborate, empirical verification of the weightiness of [their] asserted justifications." *Timmons*, 520 U.S. at 364. They can "respond to potential deficiencies in the electoral process with foresight . . ., provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)); *see also Green Party of Ark. v. Martin*, 649 F.3d 675, 686 (8th Cir. 2011) ("Arkansas need not allow itself to be harmed by such ills before enacting appropriate measures to prevent harm."). Under this standard, Arkansas sufficiently demonstrated its in-person signature requirement advances an important interest — protecting the integrity of Arkansas's initiative process. And this is not to mention the fact that Arkansas has encountered fraud in the initiative process before, meaning its interest is legitimate as well as important. *See Hoyle*, 265 F.3d at 702 (recognizing an Arkansas special master's finding of fraudulent initiative petition signatures); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (explaining courts must "determine the legitimacy" of a state's interest).

To pass constitutional scrutiny, then, the in-person signature requirement must be reasonable and nondiscriminatory. As mentioned above, this requirement is designed to have in-person canvassers ferret out fraud and mistake by ensuring, at a minimum, only one signature per person and that signatures come from eligible voters. *See* Ark. Const. art. 5, § 1; Ark. Code Ann. § 7-9-108. So at least in this regard, it is reasonable and nondiscriminatory.

In fairness, the plaintiffs do not argue this requirement is discriminatory. Nor do they challenge the reasonableness of requiring in-person signatures to prevent fraud and mistake in normal circumstances. They do, however, argue it is unreasonable to enforce the in-person signature requirement against them during the COVID–19 pandemic. We are not convinced. Under Arkansas law, it appears Allen and Gray can still sign AVF's initiative petition in the presence of a canvasser from the safety of their own homes or other safe location. *See* Ark. Code Ann. § 7-9-103(a)(1)(B). With the assistance of another person, this can be done while Allen and Gray observe through a window or from a safe distance. This possibility, along with other possibilities irrespective of section 7-9-103(a)(1)(B), makes enforcement reasonable. *See Jaeger*, 241 F.3d at 617 (illustrating various ways in which non-resident canvassers could still participate in the petition circulation process).

III. Conclusion

The district court's decision to grant permanent injunctive relief rests on the conclusion that Arkansas's in-person signature and notarization requirements are subject to strict scrutiny. They are not. The in-person notarization requirement does not implicate the First Amendment. And the in-person signature requirement, while implicating the First Amendment, imposes less-than-severe burdens on the plaintiffs' rights and survives the applicable lesser scrutiny. As a result, the plaintiffs' First Amendment claims fail on the merits.

The district court's judgment and grant of permanent injunctive relief are therefore reversed. Arkansas's pending, consolidated motion for a stay of the district court's judgment pending appeal is denied as moot.
