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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FAIR MAPS NEVADA, a Nevada political action committee, SONDRA COSGROVE, DOUGLAS GOODMAND, and ROBERT MCDONALD

Plaintiffs,

vs.

BARBARA CEGAVSKE, in her official capacity as Nevada Secretary of State, JOSEPH P. GLORIA, in his official capacity as Clark County Registrar of Voters, DEANNE SPIKULA, in her official capacity as Washoe County Registrar of Voters, KRISTINA JAKEMAN, in her official capacity as Elko County Clerk, SADIE SULLIVAN, in her official capacity as Lander County Clerk, LACEY DONALDSON, in her official capacity as Pershing County Clerk-Treasurer, VANESSA STEVENS, in her official capacity as Storey County Clerk-Treasurer, NICHOLE BALDWIN, in her official capacity as White Pine County Clerk, SANDRA MERLINO, in her official capacity as Nye County Clerk, TAMMI RAE SPERO, in her official capacity as Humboldt County Clerk, KATHY LEWIS, in her official capacity as Douglas County Clerk-Treasurer, LINDA ROTHERY, in her official capacity as Churchill County Clerk-Treasurer, LACINDA ELGAN, in her official capacity as Esmeralda County Clerk-Treasurer,

Case Number:
3:20-cv-00271-MMD-WGC

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 2)

LISA C. LLOYD, in her official capacity as Lincoln County Clerk, LISA HOEHNE, in her official capacity as Eureka County Clerk, CHRISTOPHER NEPPER, in his official capacity as Mineral County Clerk-Treasurer, NIKKI BRYAN, in her official capacity as Lyon County Clerk-Treasurer, and AUBREY ROWLATT, in her official capacity as Carson City Clerk-Recorder,

Defendants.

Defendants Kristina Jakeman, Sadie Sullivan, Lacey Donaldson, Vanessa Stevens, Nichole Baldwin, Sandra Merlino, Tammi Rae Spero, Kathy Lewis, Linda Rothery, Lacinda Elgan, Lisa C. Lloyd, Lisa Hoehne, Christopher Nepper, and Nikki Bryan (collectively the "Rural County Defendants"), by and through the law firm of Marquis Aurbach Coffing, hereby submit their Opposition to Plaintiffs' Motion for Preliminary Injunction (ECF 2). This Opposition is made and based upon the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and any oral argument allowed at the time of hearing:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Whether seeking signatures for a constitutional initiative or seeking to recall the governor,[1] groups such as the Plaintiff are coming out of the woodwork to attempt to bypass the constitutionally mandated signature requirements and statutory time periods by citing to COVID-19 and the related restrictions implemented by the State of Nevada to assure the safety of its residents. Simply put, the constitutionally mandated signature requirements and statutory time periods required by the State of Nevada are reasonable and the mere prospect

[1] *See Fight for Nevada v. Cegavske*, United States District Court, District of Nevada Case No: 2:20-cv-00837-RFB-EJY.

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that the Plaintiffs or any other aggrieved party may fall short of this requirement does not relieve them of their obligations.[2]

II. STATEMENT OF THE CASE

In recent months, the United States has faced an unprecedented public health crisis, with a highly infectious virus spreading throughout the country. President Trump declared a national emergency on March 13, 2020 and much of the American population has been subject to "stay at home" orders issued by their local governments in a concerted effort to slow the spread of the virus. Nevadans became subject to these same restrictions when the Governor ordered all Nevadans to stay home and all non-essential business to close for a period of time. However, that time is now beginning to end. Nevadans are gradually and safely getting back to work and moving forward.

Certain groups and organizations have sought to capitalize on the effects of the virus. One such organization is Plaintiff - Fair Maps Nevada. Plaintiff readily acknowledges that, pursuant to the Nevada State Constitution, in order to qualify for inclusion on the November 2020 ballot, their initiative petition must be signed "by a number of registered voters equal to 10 percent or more of the number of voters who voted at the last preceding general election in not less than 75 percent of the counties in the State, but the total number of registered voters signing the initiative petition shall be equal to 10 percent or more of the voters who voted in the entire State at the last preceding general election."[3] Nev. Const. art. 19, § 2(2).

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[2] *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 204 (2008) (explaining that the signature requirement "requires persons to demonstrate a significant modicum of support before allowing them access to the general-election ballot, lest [the process] become unmanageable."); *see also Jenness v. Fortson*, 403 U.S. 431 (1971); *Norman v. Reed*, 502 U.S. 279, 295 (1992) (approving requirement of approximately two percent of the electorate); *American Party of Tex. v. White*, 415 U.S. 767, 783 (approving requirement of one percent of the vote cast for Governor in the preceding general election).

[3] *See* Plaintiffs' Motion at 4:4-12.

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Further, it is undisputed that NRS 295.056(3) establishes the date by which the proponent of an initiative petition must submit petition documents for verification to the county clerks. All parties also acknowledge that deadline is the fifteenth day after the primary election – June 24, 2020.[4] However, other than merely reciting the history of the COVID-19 virus, Plaintiffs provide very little in the form of substantive facts. While Plaintiffs affirm they filed their Initiative Petition (the "Petition") on November 4, 2019,[5] they wholly fail to detail what efforts were undertaken from that date through the filing of their Motion to try and gather signatures. There is nothing identifying what efforts they undertook during the months prior to any COVID-19 restrictions. There is no mention of how may signatures they currently have or additional signatures they will need to meet the constitutional requirements. Rather, Plaintiffs bypass providing this Court with any facts and thrust themselves upon this Court claiming nothing more than conclusory statements.

The reality is the relief sought by the Plaintiffs will create a significant burden on the Defendants.[6] Under the current deadlines, there are approximately eight weeks from the deadline to submit signatures for a petition until the time the ballots need to be completed and sent to military personnel.[7] During this limited 8-week period, and in addition to performing all of the other functions associated the Rural County Defendants positions, signatures need to be verified to determine sufficiency, the State will need to form committees to draft arguments for and against the petition and arguments need to be written

[4] *Id.* at 4:14-20.

[5] *Id.* at 3:22-23.

[6] *See* Declaration of Kathy Lewis In Support Of Opposition To Motion For Preliminary Injunction ("Lewis Dec.").

[7] *Id.* at ¶¶ 5-6.

and vetted.[8] Simply put, shortening the established time frame is unreasonable and untenable.[9]

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 governs preliminary injunctions. "'An injunction is a matter of equitable discretion' and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 32 (2008)). This relief is "never awarded as of right." *Alliance for the Wild Rockies v. Cottrell*, 623 F.3d 1127, 1131 (9th Cir. 2011). To qualify for a preliminary injunction, a plaintiff must satisfy four requirements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public interest. *See Winter*, 555 U.S. at 20.

But this is not a normal case. Rather than merely requesting a preliminary injunction to "preserve the status quo," *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963) (stating "[i]t is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo."), Plaintiffs seek a mandatory injunction to *change* the status quo. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (stating "a mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored.") (*internal citations omitted*). Here, Plaintiffs want to alter Nevada law and compel Defendants to take burdensome, affirmative actions that cannot be undone.

Mandatory injunctions are "particularly disfavored" and, thus, "trigger a higher standard." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); 42 *Am. Jur. 2d Injunctions* §6. Courts should deny a request for a mandatory injunction "unless the facts

[8] *Id.* at ¶¶ 6-13.

[9] *Id.*

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and law clearly favor the moving party." *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). A mere "prima facie showing" will not do. 42 *Am. Jur. 2d Injunctions* §6 (citing *Garcia*, 786 F.3d 733). Because they are a "stern remedy," courts "should exercise restraint and caution in providing this type of equitable relief," *Leonard v. Stoebling*, 728 P.2d 1358, 1363 (Nev. 1986), and require plaintiffs to show that, absent the mandatory injunction, "extreme or very serious damage will result," 42 *Am. Jur. 2d Injunctions* §6.

Plaintiffs cannot satisfy this heightened standard—or even the normal standard for a preliminary injunction. They are not likely to succeed on the merits of any claim. And, the equities tilt decisively in Defendants' favor. Accordingly, this Court should deny Plaintiffs' Motion.

IV. ARGUMENT[10]

A. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

As this Court very recently noted, "the states' police powers over matters of public health and safety and to act over the general welfare of their inhabitants is entrenched in the rights reserved to the state under the Tenth Amendment to the United States Constitution." *Paher v. Cegavske*, 2020 WL 2089813, at *7 (D. Nev. Apr. 30, 2020) (citing *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)). The Supreme Court has made it clear that "while the Equal Protection Clause provides a check on such state authority, our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional

[10] Aside from inclusion in the caption and being identified as parties to the Action, there are no specific allegations plead against the Rural County Defendants. Rather, a simple reading of the claims in Plaintiffs' Complaint evidence a dispute between the Plaintiffs and the Secretary - not the Rural County Defendants. Given that Plaintiffs' claims fail to state a claim for relief against the Rural County Defendants, they should be summarily dismissed from the action. Moreover, Plaintiffs' failure to a claim for relief is fatal to is motion for preliminary injunction. *See Villagrana v. Recontrust Co., N.A.*, No. 3:11-cv-00652-ECR-WGC, 2012 WL 1890236, at *7 (D. Nev. May 22, 2012) (holding that a "preliminary injunction will not issue" where claims must be dismissed). Quite simply, this Court may deny preliminary injunctive relief given that the Rural County Defendants are likely to succeed on the merits of their defense. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006)).

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prerogatives." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (internal citations omitted). Further, "when a state chooses to give its citizens the right to enact laws by initiative, it subjects itself to the requirements of the Equal Protection Clause." *Angle v. Miller*, 673 F.3d 1122, 1127–28 (9th Cir. 2012).

The right to amend the Nevada Constitution squarely exists under the Nevada Constitution - ***not the U.S. Constitution***. Similarly, the procedures governing any such amendment to the Nevada Constitution are administered under the Nevada Revised Statutes – not those of the federal government. While "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote," *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969), it is undisputed that Nevada's statutory deadlines pass such muster as they are neither discriminatory or an abridgment of the right to vote.

In this context, given the absence any discriminatory burdens upon rights existing under the First and Fourteenth Amendments, Plaintiffs' request for injunctive relief amounts to nothing more than a demand that the Secretary take affirmative action to facilitate the exercise of a right granted under the Nevada Constitution. Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' claims. Whether the Nevada Constitution requires that state officials take affirmative steps to accommodate an initiative to amend the Nevada Constitution is a question for Nevada's state district courts.[11]

[11] Further, the people's sovereign right to incorporate themselves into a state's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is a nonjusticiable political matter. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, ___ U.S. ___, 135 S. Ct. 2652, 2673 (2015) (citing. *Ashcroft*, 501 U.S. 460(stating "[t]hrough the structure of its government … a State defines itself as a sovereign. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority.") "When a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *see also Arizona Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016).

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B. PLAINTIFFS DO NOT ENJOY A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs appear to argue that they have made enough claims (13 of them) such that at least one of them should be successful.[12] This spaghetti approach to pleading (throw it against the wall and see what sticks)[13] is ineffective in overcoming their burden. In sum, Plaintiffs assert six claims questioning the the constitutionality of the Secretary following the Nevada Statutes and refusing to extend the statutory deadline for submitting the Petition for verification no later than June 24, 2020 and seven claims relating to the use of electronic means to circulate and sign the Petition.[14]

Plaintiffs strategically characterize their claims as follows:

> Plaintiffs' constitutional claims allege that the Secretary's actions violate their right to engage in political speech by preventing them from circulating and qualifying the Initiative for the November ballot 2020 and further prevents them from voting on the Initiative in the November election. Plaintiffs claim that these actions violate the First and Fourteenth Amendments to the U.S. Constitution and various provisions of the Nevada Constitution, including Article 9, Section 1 (right to speech), Article 19, Section 2(1) (right to circulate an initiative petition), and Article 2, Section 1 (right to vote).[15]

However, the Secretary has done nothing but adhere to the relevant Nevada Revised Statutes. Plaintiffs' own Motion readily acknowledges that:

> NRS 295.056(3) establishes the date by which the proponent of an initiative petition must submit petition documents for verification to the county clerks. NRS 205.056(3). Where, as here, the initiative petition proposes an amendment to the Nevada State Constitution, the deadline is the fifteenth day after the primary election. Id. This year, that date falls on June 24, 2020 as Nevada's primary is scheduled to be held on June 9. See id. Included with each document of the Initiative must be a circulator's affidavit. NRS 295.0575. Pursuant to NRS 295.0575, the affidavit must, among other thing,

[12] *See* Plaintiffs Motion at 12:24-25.

[13] *See Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (stating that "[p]rolixity is a bane of the legal profession…").

[14] *See* Compl. ¶¶ 76-168.

[15] *See* Plaintiffs' Motion at 13:3-9.

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> affirm that the circulator "personally circulated the document," and "the signatures were affixed in the circulator's presence." NRS 295.0575(1), (5).[16]

Thus, any arguments that the Secretary's ***actions*** violate any constitutional right is really an argument that the application of the plain language of the statute violates their constitutional rights. However, "[t]here is no First Amendment right to place an initiative on the ballot." *Angle*, 673 F.3d at 1133 (9th Cir. 2012) citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (recognizing that "the power of the initiative is a state-created right"). The initiative process, is a product of state law, not federal law. The question presented in *Angle* was whether a statutory restriction on signature gathering may, consistent with the First Amendment, disproportionately burden certain categories of speech or specific groups of speakers. *See id.* While acknowledging that the Equal Protection Clause applies to the initiative process, the Court declined to hold that the federal judiciary has the power to order modifications to state initiative laws that are facially neutral and nondiscriminatory. In fact, the Court upheld the Nevada ballot initiative process precisely because it is facially neutral and nondiscriminatory. As the Court noted "it singles out no discrete or insular minority for special treatment [and] also applies to all initiatives regardless of subject matter, not solely to initiatives thought to be favored by a targeted segment of the population." *Angle*, 673 F.3d at 1132 (citing *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (internal quotations omitted). Here, the challenged statutory provisions are issue are facially neutral and nondiscriminatory.

Plaintiffs also appear to attack the decisions of the Secretary in her official capacity. The Secretary is "the Chief Officer of Elections." NRS 293.124(1). She "is responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in this State." *Id.* The Secretary is also empowered to "adopt such regulations as are necessary to carry out" these duties and on "other matters [she] determine[s] necessary." NRS 293.123(2); NRS 293.247(j). And she

[16] *Id.* at 4:13-20.

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can "may provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State." NRS 293.247(4). The Secretary "is entitled to deference" on these questions and, because her decision is "supported by substantial evidence," courts "will not disturb them." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 310 P.3d 560, 564 (Nev. 2013). Given the foregoing, this Court should afford deference to the decisions of the Secretary in the performance of her elected duties.

Despite the foregoing, Plaintiffs argue this Court should invoke the balancing test from the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Anderson-Burdick*, States can conduct "*substantial* regulation of elections." *Burdick*, 504 U.S. at 432 (emphasis added; quoting *Storer v. Brown*, 415 U.S. 724 (1974)). It is a "flexible standard" that "reject[s] the contention that any law imposing a burden on the right to vote is subject to strict scrutiny." *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 903-04, 141 P.3d 1235, 1241 (2006). Contrary to Plaintiffs' claim that the Defendants' conduct will "prevent Plaintiffs and other Nevada voters from voting on the Initiative in the November election,"[17] an election law is not invalid because it prevents someone from voting or affects voting rights. Every election law "is going to exclude, either de jure or de facto, some people from voting; 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) (emphasis added).

Under *Anderson-Burdick*, Plaintiffs must satisfy a two-step inquiry, bearing a heavy burden at both steps. First, they must establish a cognizable burden on the right to vote arising from the challenged law and the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Second, they must show that the burden

[17] *See* Plaintiffs' Motion at 13:20-21.

outweighs the State's interest. *Id.* 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)). In contrast, election laws that "impose[] only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters" are "'generally'" justified by "'the State's important regulatory interests.'" *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788). After all, there is no constitutional right to be free from "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.).

So that courts can perform this balancing test, plaintiffs must introduce "evidence" to "quantify the magnitude of the burden" from the challenged laws. *Id.* at 200. "[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 imposed by the" challenged law. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). Courts generally treat the sufficiency of a State's justification, however, as a "legislative fact," that is accepted as true so long as it is reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (*Frank I*); *see also Crawford*, 553 U.S. at 194-97. 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).

When plaintiffs try to establish a law's burden on voting rights, "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Evidence that a law uniquely burdens one particular group does not justify enjoining the statute facially as to all voters. Rather, facial challenges like Plaintiffs' fail when the

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challenged law "has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202. A challenged law clears that low threshold when its "broad application to *all* [of a State's] voters ... imposes only a limited burden on voters' rights." *Id.* at 202-03, *see also id.* at 206 (Scalia, J., concurring in judgment) (when assessing a burden's severity, courts must look at the burden's impact "categorically" upon all voters, without "consider[ing] the peculiar circumstances of individual voters"). Given the States' "constitutional" power to "play an active role in structuring elections" and bring "order, rather than chaos," to "the democratic process," *Burdick*, 504 U.S. at 433, the "burden some voters face[]" from a challenged law cannot "prevent the state from applying the law generally," *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*). "[H]igh hurdles for some persons" should be vindicated by those voters in as-applied challenges that seek relief for "those particular persons." *Id.*

Our nation's struggle with COVID-19, as unprecedented as it is, should not meaningfully change how courts apply *Anderson-Burdick*. A virus cannot make an otherwise constitutional law unconstitutional. While COVID-19 has dramatically changed Nevadans' everyday lives, COVID-19 is "not [an] impediment created ***by the State***." *Bethea v. Deal*, 2016 WL 6123241, at *2 (S.D. Ga. Oct. 19, 2016) (emphasis added); *see id.* at *2-3 (stressing the dearth of "any precedent that would constitutionally or statutorily mandate that Defendants provide an extension in the absence of any actual government action that burdens an individual's right to vote"). States like Nevada have acted to protect the "right to vote during this global pandemic". *Mays v. Thurston*, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020). "Any injury caused by Plaintiffs' failing to take advantage of these available avenues to exercise their rights to vote are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic." *Id.*

Even if non-state action factored into the *Anderson-Burdick* analysis, the ultimate 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. But, states also have "important interests … in the wake

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of election emergencies": they must "focus their resources on recovering from the emergency, ensuring the accuracy of voter registrations 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." Michael 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.*; *see, e.g.*, *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020)[18] (declining to intervene in Florida's ongoing 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); *ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006)[19] (denying request "to extend the deadline for counting absentee ballots received by mail" in New Orleans in the wake of Hurricane Katrina). With these principles in mind, Plaintiffs are not likely to prevail.

As noted above, under *Anderson-Burdick*, Plaintiffs must satisfy a two-step inquiry. First, Plaintiffs must establish a cognizable burden on the right to vote arising from the challenged law and the severity of that burden. *Timmons*, 520 U.S. at 358. Second, Plaintiffs must show that the burden outweighs the State's interest. *Id.* 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*, 502 U.S. at 289). In contrast, election laws that "impose[] only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters" are "'generally'" justified by "'the State's

[18] *See Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020), attached hereto as **Exhibit A** for the convenience of the Court.

[19] *See ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006), attached hereto as **Exhibit B** for the convenience of the Court.

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important regulatory interests.'" *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788).

First, Plaintiffs are not challenging the law or the statutory requirements regarding obtaining signatures to earn a place on the ballot. Rather, Plaintiffs complaint is that the restrictions put into place to "flatten the curve" of the COVID-19 virus have created a situation where they will be unable to collect the necessary signatures to comply with the law. However, a virus cannot make an otherwise constitutional law unconstitutional. As such, the "law" they appear to be challenging is not the initiative process, but rather, the emergency restrictions and guidelines that were implemented to protect the health and safety of the public. Moreover, these restrictions and guidelines "impose[] only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights" and are reasonably justified by "'the State's important regulatory interests.'" *Burdick*, 504 U.S. at 433. Consequently, it appears Plaintiffs are merely upset that the circumstances they, and the rest of the nation, are facing have made meeting the otherwise reasonable requirements a little more difficult.

Additionally, Plaintiffs have not provided any evidence to "quantify [] the magnitude of the burden" placed on them. *Crawford*, 553 U.S. at 200. "[T]he extent of the burden … is a factual question on which the [plaintiff] bears the burden of proof," *Nago*, 833 F.3d at 1124, and the plaintiff must "direct th[e] Court to … admissible and reliable evidence that quantifies the extent and scope of the burden imposed." *Billups*, 554 F.3d at 1354. Here, there is no evidence suggesting the Plaintiff would have been able to meet the constitutional burden absent the restriction. Moreover, Plaintiffs have not shown what efforts they undertook, despite any social distancing restrictions, to exercise their political speech and circulate their Petition. Rather, based upon the lack of evidence provided, it appears the Plaintiffs merely waited until the last minute and then decided to cry "foul" in the hopes of judicially overcoming the constitutional requirement.

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Second, Plaintiffs must show that the burden outweighs the State's interest. Again, Plaintiffs are not challenging the statutory requirements regarding obtaining signatures to earn a place on the ballot. Rather, Plaintiffs complaint is that the burden of the health restrictions has made it difficult to collect signatures. However, any enhanced burden that stems from the health restrictions does not outweigh the State's interest in maintaining its statutory deadlines for submission of signatures under NRS 294.056(3) or the plain language requirement that all the signatures be, among other things, "affixed in the circulator's presence" under NRS 295.0575(5) to avoid fraud.[20]

C. THE EQUITIES WEIGH DECISIVELY AGAINST PLAINTIFFS.

Even if this Court concludes that one of Plaintiffs' claims has merit, it should deny preliminary relief at this time. A preliminary injunction "does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). It remains "an extraordinary remedy never awarded as of right," and this Court has the right to deny one "[a]s a matter of equitable discretion." *Id.* at 1943. Here, it must do so as Plaintiffs cannot show that they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.* at 1944. These equitable factors, as well as the "*Purcell* doctrine," all favor Defendants.

1. <u>Plaintiffs will suffer no unique irreparable harm.</u>

Plaintiffs assert the conclusion they will suffer irreparable harm because, without a preliminary injunction, the "[p]recluding the inclusion of the Initiative on the November ballot will unconstitutionally infringe Plaintiffs' right to engage in political speech by

[20] Assuming, *arguendo*, that electronic signatures could be safely and securely obtained. Plaintiffs have failed to proffer how such signatures would be gathered. Are they really proposing a mass email blast sent out where any recipient could e-sign their petition and merely click a box affirming they reside in Nevada, are 18 years of age and have the opportunity to read the full text of the Petition? Not only is such a proposition ripe for fraud, how could an individual reasonably affirm, under oath, that such signatures were signed in their presence? In fact, there is nothing prohibiting Plaintiffs from utilizing electronic means to motivate and/or organize voters to meet with circulators to physically sign the petition.

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circulating and, in the case of individual voters, voting on, an amendment to the Nevada Constitution."[21] This argument assumes that Plaintiffs have made a showing that the Petition was likely to gather a sufficient number of signatures, which they have not. *See State Farm Mut. Auto. Ins. Co. v. Jafbros Inc*., 860 P.2d 176, 178 (Nev. 1993) ("[T]he existence of a right violated is a prerequisite to the granting of an injunction."); *Democratic Nat'l Comm. v. Reagan*, 2018 WL 10455189, at *4 (D. Ariz. May 25, 2018) ("Because Plaintiffs are not likely to succeed on the merits of their appeal, they necessarily have not shown a likelihood of irreparable harm or a sharply favorable tip in the balance of hardships, especially considering their requested relief would upend rather than preserve the status quo."). Simply put, Plaintiffs are in the same position as every other individual or group attempting to collect signatures for their cause.

2. The balance of harms and public interest favor Defendants.

"When the government is a party," the balance of the equities and the public interest "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, the "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Adherence to the constitutionally and statutorily established plan is supported by weighty public interests that outweigh any burden on the Plaintiffs. *See Benisek*, 138 S. Ct. at 1944 (recognizing the public interest in "orderly elections"); *Bent Barrel, Inc. v. Sands*, 373 P.3d 895 (Nev. 2011)(recognizing the "significant governmental interest in the public health and safety of the people in this state").

The public interest is also disserved by courts imposing burdensome injunctions on state officials at this juncture, while they are trying to find the time, energy, and resources to address a public-health emergency.[22] As one court recently put it, with "public election

[21] *See* Plaintiffs' Motion at 11:3-5.

[22] *See* Lewis Dec.

offices and volunteers … stretched to the limit in this pandemic crisis," the equities do not lie with any plaintiff who "calls for quick implementation of a systemic remedy" to statewide election procedures. *Black Voters Matter Fund v. Raffensperger*, 2020 WL 2079240, at *4 (N.D. Ga. Apr. 30, 2020) "Although … 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 v. Hobbs*, 2020 WL 1905747, at *3 (D. Ariz. Apr. 17, 2020).

3. The *Purcell* principle prohibits Plaintiffs' eleventh-hour request.

When Plaintiffs ask federal courts to enjoin voting laws on an emergency basis they must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, ***considerations specific to elections cases***." *Purcell*, 549 U.S. at 5 (emphasis added). Nevada precedent incorporates federal precedents on injunctions, *see, e.g., Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 215 P.3d 27, 31 (Nev. 2009) (quoting *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)), so it's no surprise that Nevada courts too have long disfavored the "unwarranted interference by the judicial department with the electoral franchise of the people of this state" attendant to eve-of-election judicial decrees, *Beebe v. Koontz*, 72 Nev. 247, 253-54, 302 P.2d 486, 490 (1956). Like Nevada, other States have also followed this so-called "*Purcell* principle" and have rejected emergency judicial changes to election laws. *See, e.g., Liddy v. Lamone*, 919 A.2d 1276, 1288 (Md. 2007); *Dean v. Jepsen*, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 454 (Mich. 2007).

Based on the non-interference principle animating these decisions, the U.S. Supreme Court customarily stays lower-court orders thrusting last minute election changes upon States. In this way, the Court "allow[s] the election to proceed without an injunction suspending [election] rules." *Purcell*, 549 U.S. at 6. This practice is longstanding. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (denying relief because it would result in

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"serious disruption of [the] election process" and "confusion" for voters); *see also North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014); *Perry v. Perez*, 565 U.S. 1090 (2011).

The practice of granting stays to maintain the election-law status quo has constitutional overtones. It ensures that voters, candidates, and political parties know and adhere to the same neutral rules throughout the election process. As *Purcell* explained, this stability and predictability promotes "[c]onfidence in the integrity of our electoral process," which "is essential to the functioning of our participatory democracy." 549 U.S. at 4. In short, "[a]ny change in the election process at this time would negatively impact and disrupt the election process, which is already underway." *Id.* The *Purcell* principle guards against those very concerns and should by itself preclude the relief Plaintiffs seek.

V. CONCLUSION

Based upon the foregoing, the Rural County Defendants respectfully request this Court deny Plaintiff's Motion for Preliminary injunction.

Dated this 15th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 2)** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 15th day of May, 2020.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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EXHIBIT A

Williams v. DeSantis
No. 1:20-cv-67 (N.D. Fla Mar 17, 2020)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

ACACIA WILLIAMS, DREAM DEFENDERS, NEW FLORIDA MAJORITY, ORGANIZE FLORIDA, TERRIAYNA SPILLMAN, RAY WINTERS, KATHLEEN WINTERS, and BIANCA MARIA BAEZ

Plaintiffs,

v. CASE NO. 1:20cv67-RH-GRJ

RON DESANTIS, in his official capacity as Governor of the State of Florida, LAUREL M. LEE, in her official capacity as Florida Secretary of State, and FLORIDA ELECTIONS CANVASSING COMMISSION,

Defendants.

_____/

ORDER DENYING A TEMPORARY RESTRAINING ORDER

The Florida presidential primary has been in progress through voting by mail and early in-person voting and is concluding with in-person voting today, Tuesday, March 17, 2020. At 9:29 p.m. on Monday, March 16, the plaintiffs filed this lawsuit seeking a fundamental alteration in the manner in which further voting will be conducted. At 11:16 p.m., the plaintiffs moved for a temporary restraining order

or preliminary injunction. The defendants have entered appearances but, not surprisingly, have not yet responded to the complaint or motion.

The factual basis for the lawsuit and motion is substantial: the ongoing covid-19 national healthcare emergency. Going to the polls may risk infection of individual poll workers and voters and thus may advance the spread of the disease, increasing the already-substantial risk that the nation's healthcare capacity will eventually be overrun. Responsible supervisors of elections can take steps to reduce but not eliminate the risk.

Some voters are at greater risk than others. And the steps that responsible individuals have already taken to reduce the risk of spreading the virus—for example, by leaving college campuses—will make it difficult or impossible for some to vote.

As a prerequisite to a temporary restraining order or preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest. *See, e.g.*, *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

At this hour, with voting in progress, a temporary restraining order would be adverse to the public interest. At least until the polls close, and under all the circumstances, it will be in the public interest to allow the Governor, Secretary of State, and Supervisors of Elections to perform their respective roles. The national healthcare emergency is not a basis to cancel an election, and the plaintiffs do not assert it is.

This order makes no ruling on the merits. The order also makes no ruling on whether the plaintiffs' claims will become moot when the polls close or will instead either support a claim for relief affecting this primary or be capable of repetition yet evading review. A separate order will be entered setting procedures going forward.

IT IS ORDERED:

The motion for a temporary restraining order is denied. The motion for a preliminary injunction remains pending and will be addressed through further procedures after the polls close.

SO ORDERED on March 17, 2020.

s/Robert L. Hinkle
United States District Judge

EXHIBIT B

Acorn v. Blanco
No. 2:06-cv-611 (E.D. La Apr 21, 2006)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GERALD WALLACE, ET AL.	**CIVIL ACTION NO. 05-5519**
VERSUS	**SECTION B(2)**
KATHLEEN BLANCO, GOVERNOR, STATE OF LOUISIANA, ET AL.	

AND

MICHAEL TISSERAND, ET AL.	**CIVIL ACTION NO. 05-6487**
VERSUS	**SECTION B(1)**
KATHLEEN BLANCO, GOVERNOR, STATE OF LOUISIANA, ET AL.	

AND

ASSOCIATION OF COMMUNITIES FOR REFORM NOW, ET AL.	**CIVIL ACTION NO. 06-611 SECTION B(1)**
VERSUS	
KATHLEEN BLANCO, GOVERNOR, STATE OF LOUISIANA, ET AL.	

ORDER AND REASONS

Before the Court is *ACORN* Plaintiffs' (Plaintiffs) request[1] for this Court to extend the deadline for counting absentee

[1]Plaintiffs' request came to the Court via fax on April 18, 2006. Defendants responded via letter on April 19, 2006, to which Plaintiffs replied on April 20, 2006. All correspondence will be simultaneously filed into the record.

ballots received by mail to occur on or before April 26, 2006, as opposed to doing so under existing law's election day deadline of April 22, 2006. For the reasons that follow, and to allow expedited consideration and resolution per parties' request, **IT IS ORDERED** that Plaintiffs' proposed extension is **DENIED**.

DISCUSSION

Plaintiffs contend deficiencies in the absentee ballot process will likely disenfranchise large numbers of displaced Orleans Parish voters. They contend absentee voters' requests for ballots can take as long as five to six days to process. Plaintiffs base this on information available on the Louisiana Secretary of State's Web site and anecdotal evidence from community organizations. Their proffered evidence consists of rank speculation and unsupported, conclusory allegations, grounded in part upon information about displaced persons who are not registered as Orleans Parish voters; displaced persons who have cancelled or suspended registrations and are thus not qualified to vote; or displaced first-time voters who registered to vote by mail and whose registration did not fall within the window provided by state law allowing first-time voters to vote by mail. "[U]nsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient" to substantiate Plaintiffs' claims that harm will likely result and court intervention is necessary to address this

speculative harm. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985)(discussing the use of affidavits in the context of summary judgment); *Ramon v. Cont'l Airlines*, No. 04-20983, 2005 U.S. App. LEXIS 23533, at **3-4 (5th Cir. Oct. 31, 2005)(noting the district court was within its discretion in striking affidavits containing nothing but legal conclusions).

Further, the issues raised herein do not rise to the level of constitutional[2] or Voting Rights Act violations. Plaintiffs challenge deficiencies in the process, noting that the deadlines set by the State do not allow voters who request absentee ballots by April 18, 2006, or displaced voters who request absentee ballots by the extended deadline of April 21, 2006, sufficient time to obtain and return a ballot by the April 22, 2006, deadline, violating voters' rights protected under Section 2 of the Voting Rights Act. It is ironic that a step taken by the State, apparently to allow as many displaced voters as possible the ability to request and receive an absentee ballot, by post *or by fax*, is now being challenged as having the exact opposite effect.

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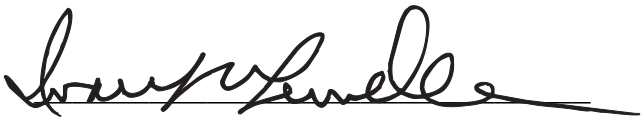
[2]The Court notes Plaintiffs would have to show discriminatory intent or purpose to show a constitutional violation of the Fourteenth or Fifteenth Amendment. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997). Plaintiffs fail to allege any facts that would allow such a conclusion. Accordingly, the Court addresses Plaintiffs' allegations only under the Voting Rights Act.

The 1982 amendments to the Voting Rights Act replaced the intent test with a results test. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-79 (1997)(discussing the 1982 amendments and noting the Section 2 results test). Under the new test, plaintiffs in a Section 2 case must show that based on the totality of circumstances, the electoral process is not equally open to participation by the members of a racial minority in that its members have less opportunity than other members of the electorate to participate in the political, electoral process. *Id.* at 479. Plaintiffs have simply failed to make that showing. Plaintiffs have shown at best that those voters, regardless of race, who waited until the last opportunity to request an absentee ballot may not be able to return that ballot on time, or may incur additional costs in order to do so. That is not enough for this Court to find a disparate impact, and thus a Voting Rights Act or constitutional violation.

Current statistics support this Court's conclusion that there is no disparate impact. Current statistics show more than 20,000 voters have voted by absentee ballot or by early voting at a parish registrar's office. Brian Thevenot, *Officials Go All-out to Safeguard Vote*, TIMES PICAYUNE, Apr. 21, 2006, at National p.1. "The racial breakdown of those voters -- 65 percent black, 32 percent white, and 3 percent other -- closely mirrors the breakdown of registered voters citywide." *Id.*

We should remember that our evacuation emanated from a natural disaster that ravaged our beloved City, casting thousands of our fellow citizens across the face of America. Hurricane Katrina (and Rita) crossed all divides, human-made and others. Due in large part to one of the three cases, state officials working with plaintiff-attorneys in that case made wide-reaching, beneficial changes in election laws to ameliorate the impact from these storms on displaced registered voters. To say their efforts will "disenfranchise" minority voters is disingenuous. For the first time in modern history, thousands of our registered voters were able to vote in a city election outside of the city limits. Despite argument that African-American voters would be less inclined to vote absentee than white voters, an overwhelming majority of absentee ballots were cast by African-American voters in this election. Moreover, the comparative percentages of early black-white ballots tracked voter registration rolls. These examples further evidence an extraordinary work in progress. Good causes are not promoted by degrading embellishments. Ideologies are not overcome by replacing them with other ideologies. Justice must be indivisible.

New Orleans, Louisiana, this 21st day of April, 2006.



UNITED STATES DISTRICT JUDGE