No. 20-2309

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAN WHITFIELD,
Plaintiff-Appellant,

and GARY FULTS,
Plaintiff,

v.

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

On Appeal from the United States District Court for the
Eastern District of Arkansas
No. 4:20-CV-00466-KGB (Hon. Kristine G. Baker)

Appellee's Opposition to Motion for Expedited Appeal and For Order Granting Injunction

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Table of Exhibits v
Introduction 1
Background 2
A. Arkansas's Ballot-Access Regime 2
B. Factual and Procedural Background 3
C. The District Court's Judgment 5
D. Post-Judgment Proceedings 9
Argument 10
I. Whitfield is not entitled to an injunction pending appeal. 10
A. Whitfield cannot prevail on his appeal. 11
1. Whitfield lacks standing. 11
2. The district court's decision will be affirmed. 13
B. The remaining factors weigh against an injunction. 20
II. Expedition is not warranted. 21
Conclusion 24
Certificate of Compliance 25
Certificate of Service 26

TABLE OF AUTHORITIES

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 20

Am. Party of Tex. v. White,
415 U.S. 767 (1974) 16

Anderson v. Bessemer City,
470 U.S. 564 (1985) 18

Anderson v. Celebrezze,
460 U.S. 780 (1983) 6, 19

Brakebill v. Jaeger,
905 F.3d 553 (8th Cir. 2018) 21

Burdick v. Takushi,
504 U.S. 428 (1992) 6, 14

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 11

Cox v. Mortg. Elec. Registration Sys., Inc.,
685 F.3d 663 (8th Cir. 2012) 11

Eu v. S.F. Cty. Democratic Cent. Comm.,
489 U.S. 214 (1989) 20

Green Party of Ark. v. Martin,
649 F.3d 675 (8th Cir. 2011) 9, 14, 15

Jenness v. Fortson,
403 U.S. 431 (1971) 16

Libertarian Party of N.D. v. Jaeger,
659 F.3d 687 (8th Cir. 2011) 15, 16, 19

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 13

McGehee v. Hutchinson,
854 F.3d 488 (8th Cir. 2017) (en banc) 22

McLain v. Meier,
851 F.2d 1045 (8th Cir. 1988) 18

Appellate Case: 20-2309 Page: 3 Date Filed: 07/20/2020 Entry ID: 4935302

Moore v. Martin,
No. 4:14-CV-00065-JM, 2018 WL 10320761 (E.D. Ark. Jan. 31, 2018)...........3

Moore v. Thurston,
928 F.3d 753 (8th Cir. 2019) 3

Munro v. Socialist Workers Party,
479 U.S. 189 (1986)...20

Nken v. Holder,
556 U.S. 418 (2009)...21

Norman v. Reed,
502 U.S. 279 (1992)...16

Planned Parenthood Ark. & E. Okla. v. Jegley,
864 F.3d 953 (8th Cir. 2017) 10

Planned Parenthood Minn., N.D., S.D. v. Rounds,
530 F.3d 724 (8th Cir. 2008) (en banc) 10

Populist Party v. Herschler,
746 F.2d 656 (10th Cir. 1984) 16

Purcell v. Gonzalez,
549 U.S. 1 (2006) (per curiam)...10, 20, 21

Republican Nat'l Comm. v. Democratic Nat'l Comm.,
140 S. Ct. 1205 (2020)...21

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998)...11

Storer v. Brown,
415 U.S. 724 (1974)..14, 17

Swanson v. Worley,
490 F.3d 894 (11th Cir. 2007) 16

Summers v. Earth Island Inst.,
555 U.S. 488 (2009)..12, 13

Thompson v. DeWine,
959 F.3d 804 (6th Cir. 2020) ....passim

Tripp v. Scholz,
872 F.3d 857 (7th Cir. 2017) 17

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008)...18

Statutes

2019 Ark. Laws Act 68, Sec. 2 3

Ark. Code Ann. 7-5-203(a)..3, 22

Ark. Code Ann. 7-7-103
(a)(1) 2
(b)(1) 2, 3
(b)(2) 2

52 U.S.C. 20302(a)(8)(A) 22

TABLE OF EXHIBITS

Exhibit A Excerpted portions of transcript of May 27, 2020 proceedings.

INTRODUCTION

This Court should deny Plaintiff-Appellant Dan Whitfield's motion. *First*, this Court should deny his motion for an injunction ordering his inclusion on the Arkansas ballot as an independent candidate for the United States Senate. Whitfield does not offer any argument in support of that request, and he cannot possibly show that the district court clearly erred when it found that Arkansas's ballot-access regime was not severely burdensome. Indeed, courts have consistently upheld significantly more demanding requirements than Arkansas's requirement that independent statewide candidates collect signatures from just 10,000 registered voters (or 0.58% of those eligible to sign) within 90 days to qualify for the ballot.

Nor, as the district court concluded, did Whitfield offer any evidence that COVID-19 rendered those requirements severely burdensome. To the contrary, other Arkansas candidates—one of whom testified below—ran successful signature drives despite the pandemic.

Second, this Court should deny expedition because Whitfield waited *two weeks* to make that request, and that delay demonstrates this matter is not so pressing that it ought to take precedence over others. Moreover, even if this Court granted Whitfield's request, his dilatory tactics have made it all but impossible to resolve this case before Arkansas's August 20, 2020 deadline for certifying candidates. And moving that *unchallenged* deadline would sow chaos. Instead, because

Appellate Case: 20-2309 Page: 7 Date Filed: 07/20/2020 Entry ID: 4935302

Whitfield purports to challenge Arkansas's ballot-access laws for this and future elections, this Court should resolve this case in ordinary course.

BACKGROUND

A. Arkansas's Ballot-Access Regime

To qualify for the ballot as an independent statewide candidate, Whitfield needed to satisfy two requirements. First, during the party filing period, he had to file a few simple "one page" forms listing "only basic information." Dist. Ct. Op. ("Op.") at 26; *see also id.* at 4; Ark. Code Ann. 7-7-103(a)(1). That period ran from November 4, 2019, through November 12, 2019. Op. 15. Second, by May 1, 2020, Whitfield needed to submit a petition signed by just 10,000 registered Arkansas voters. Ark. Code Ann. 7-7-103(b)(1) (number of signatures required pegged to office but capped at 10,000).

Whitfield had 90 days (beginning on February 1) to collect those signatures, and he could have collected them from any of Arkansas's 1,732,161 registered voters. *See* Ark. Code Ann. 7-7-103(b)(1); Op. 5. Indeed, unlike other States that limit who can sign petitions, any registered voter—regardless of partisan affiliation, primary participation, or having signed another petition—could sign Whitfield's petition. Ark. Code An. 7-7-103(b)(2); Op. 5. Thus, to qualify, Whitfield needed to collect signatures from just 0.58% of registered voters. Op. 5.

Appellate Case: 20-2309 Page: 8 Date Filed: 07/20/2020 Entry ID: 4935302

Those requirements were adopted in response to a 2018 court order declaring Arkansas's previous independent-candidate ballot-access requirements unconstitutional. *See Moore v. Martin* (*Moore I*), No. 4:14-CV-00065-JM, 2018 WL 10320761, at *3 (E.D. Ark. Jan. 31, 2018), *appeal dismissed as moot sub nom. Moore v. Thurston* (*Moore II*), 928 F.3d 753, 759 (8th Cir. 2019). Indeed, they mirror the relief ordered by the district court in that case. *See* 2019 Ark. Laws Act 68, sec. 2 (amending Ark. Code Ann. 7-7-103(b)(1)(A)). And as this Court noted last year, those changes "addresse[d] the [then] current—and soon obsolete—statute's infirmity" by "granting the relief [the plaintiff] sought." *Moore II*, 928 F.3d at 757; *see also* Op. 19-22 (reviewing statutory history).

Also relevant here, Arkansas law requires that 75 days before the general election—August 20 this year—"the Secretary of State shall certify to all county boards of election commissioners full lists of all candidates." Ark. Code Ann. 7-5-203(a). Immediately thereafter, county officials begin the process of printing paper ballots and programming voting machines for election day.

B. Factual and Procedural Background

Whitfield and Gary Fults (who sought to run as an independent for the Arkansas House of Representatives) filed this suit claiming Arkansas's independent-candidate requirements violate the First and Fourteenth Amendments. Those claims generally fell into three categories.

First, Whitfield claimed that Arkansas's candidate filing period is unconstitutionally early. But he "had no difficulty" completing and turning in the required candidate forms and does not claim that requirement harmed him. Op. 26; Tr. 25. Nor for that matter did any of the other candidates who testified below have any difficulty meeting that requirement. Op. 26.

Second, Whitfield claimed that Arkansas's 10,000-signature threshold and 90-day collection are unconstitutional. Whitfield fell well short of that threshold, Op. 6, and he blames that on COVID-19 and Arkansas's pandemic response. Yet he has never pointed to any action by the Secretary—or any other Arkansas official—that impaired signature collection. Nor could he: Unlike other States, Arkansas never issued a stay-at-home order or otherwise restricted petitioning. Indeed, although Arkansas Governor Asa Hutchinson on March 11, 2020, declared a state of emergency and on March 26 limited gatherings in "confined" spaces "outside a single household or living unit" to ten or fewer people, neither of those orders imposed the more restrictive measures that became commonplace across the country. Op. 12, 44.

Instead, Whitfield insisted that COVID-19 automatically invalidated Arkansas's laws. At most, he argued that the pandemic simply rendered in-person collection unfeasible after March 12, and he cited his unilateral decision to stop in-person signature collection as evidence. *See* Tr. 41 (Whitfield's testimony that he

Appellate Case: 20-2309 Page: 10 Date Filed: 07/20/2020 Entry ID: 4935302

asked "volunteers . . . to stop collecting signatures in public if they did not feel like they could do so safely")[1]; Op. 41 (noting that Whitfield "did not attend in-person any large events after" March 11). Indeed, after March 12, Whitfield did little more than rely on people to visit his website, download his petition, and mail it back to him to collect signatures. Tr. 75-76.

But nothing required Whitfield to suspend petitioning. To the contrary, other candidates continued collecting signatures. Critically, for instance, Roderick Talley, an independent candidate for the Arkansas House of Representatives, testified that he went door-to-door in late April collecting signatures and that as a result he qualified for the ballot. Op. 8, Tr. 164. And despite the pandemic, other candidates successfully collected signatures and qualified for the ballot. *See* Op. 8.

Third, Whitfield claimed that Arkansas's regime violated the Equal Protection Clause.

C. The District Court's Judgment

Whitfield initially requested a preliminary injunction, but the parties agreed to consolidate that motion with a bench trial on the merits. Following that full-day

[1] Whitfield claimed to have "at least 600 private volunteers," Op. 40, but he considered anyone who "asked for signature sheets for their friends and family to sign" to be a volunteer. Tr. 40. Thus, as he explained, a volunteer could mean someone who collected "two signatures." *Id.*

Appellate Case: 20-2309 Page: 11 Date Filed: 07/20/2020 Entry ID: 4935302

trial, the district court held that Arkansas was entitled to judgment on all aspects of Whitfield's claims.

The district court began by rejecting Arkansas's argument that Whitfield lacked standing, Op. 10-13, and that the *Anderson/Burdick* framework did not apply. *See* Op. 13-18 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). Instead, applying *Anderson/Burdick*, the district court concluded that Whitfield's claims failed because the challenged provisions were not severely burdensome and were justified by important regulatory interests. Op. 18-19. Indeed, as the district court recognized, this case is ultimately about whether "'a reasonably diligent independent candidate could be expected to satisfy the signature requirements,'" Op. 18 (quoting *Storer v. Brown*, 415 U.S. 724, 742 (1974) (brackets omitted)). It found that—even in the context of COVID-19—the record demonstrated that a reasonably diligent candidate could have complied with Arkansas law. Op. 45 (discussing measures a reasonably diligent candidate would have taken).

On the burdens side of the analysis, the district court correctly recognized that Arkansas's requirements and the pandemic imposed some burden. It identified "the onset of an unprecedented global pandemic; wide-scale cancellation of public events, closure of business, restaurants, and other gathering places; guidance for people to stay home and avoid social contact; and the combined impact of these

related occurrences," as things that could hamper efforts "to collect the required signatures." Op. 44. But "based on all the record evidence before it," it "decline[d] to characterize this burden as substantial." *Id.* Rather, it explained both that other candidates—facing the same circumstances—had successfully collected signatures and that other courts had rejected similar claims. Op. 45.

For instance, it cited the Sixth Circuit's rejection of a similar claim that COVID-19 rendered Ohio's ballot-access laws severely burdensome. *Id.* (citing *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020)). Echoing that court's analysis, it explained that there was "'no reason that Plaintiffs'" could not have "'advertise[d] their candidacies within the bounds of our current situation'" through "social or traditional media inviting interested electors to contact them and bring the petitions to the electors' homes to sign." *Id.* (quoting *Thompson*, 959 F.3d at 810 (brackets omitted)); *cf.* Tr. 108 (Fults testifying that he was "willing to go out and collect signatures in person, following social distancing rules, in order to collect signatures"). Or—again echoing the Sixth Circuit—the district court explained that Whitfield and Fults could have brought their "petitions to the public by speaking with electors" from a safe distance "and sterilizing writing instruments between signatures." Op. 45.

Moreover, underscoring the point, the district court explained that the "record evidence presented" here "regarding other candidates" established that a reasonably diligent candidate could have mounted an effective signature campaign. Op. 45. Other candidates had done exactly that, including conducting in-person collection after March 12. *See* Tr. 144 (Furrer testifying that she collected signatures after the emergency declaration by "put[ting] a petition on the clipboard on their front porch, knock[ing] on the door, step[ping] back and talk[ing]" to voters); Tr. 164 (Talley testifying that he obtained all of the required signatures in fourteen days by going door-to-door). It also noted that despite restrictions on gatherings of more than ten people in confined spaces, Whitfield "acknowledges that he met virtually with the Garland County Democrats after the declaration of a state of emergency and received signatures from that virtual meeting in the mail." Op. 46. Thus, as the district court explained, "[t]he signature collection process was able to continue, albeit in a different manner." *Id.* Consequently, even considering the pandemic, the district court concluded that while "not trivial," the burdens here "cannot be characterized as severe." *Id.*

The district court next turned to Arkansas's interest. Echoing precedent, it recognized Arkansas's "significant regulatory interests" in "prevent[ing] frivolous candidacies by ensuring candidates enjoy a modicum of support, reduc[ing] voter confusion, and ensur[ing] elections are fair, honest, and orderly." Op. 46 (citing

Green Party of Ark. v. Martin, 649 F.3d 675, 686 (8th Cir. 2011)). And it held Arkansas's interests "sufficient to justify [] non-severe burden[s]." *Id.* It therefore found for Arkansas on this claim.

Finally, the district court rejected Whitfield's equal-protection claims on the grounds that neither independent and partisan candidates nor presidential and state candidates are similarly situated. Op. 50. And in any case, as the district court found, Whitfield is not severely burdened by any such distinctions. *Id.*

D. Post-Judgment Proceedings

Whitfield filed a notice of appeal two days after the district court's decision. Dist. Ct. Doc. 30. He then waited *twelve more days* to ask for expedited review, and as of the filing of this response, *nearly a month* after judgment, he has not filed an opening brief. That inexplicable delay has—as his motion all but concedes—made it virtually impossible for this Court to resolve this case before Arkansas's August 20 certification deadline. Yet Whitfield's motion argues that is not a problem because this Court can simply reward his lack of diligence and grant him an injunction requiring his inclusion on the ballot. But despite the nature of that request, Whitfield's motion fails to even address the requirements for extraordinary relief—let alone a request that this Court rewrite Arkansas's election laws on the eve of an election.

ARGUMENT

I. Whitfield is not entitled to an injunction pending appeal.

Whitfield's motion for an injunction should be denied because (1) he cannot show that he is likely to prevail on the merits; (2) an injunction would inflict irreparable harm on Arkansas and its citizens; (3) an injunction would be contrary to the public interest; and (4) the balance of the equities weighs against an injunction. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc) (discussing injunction factors). Whitfield, moreover, faces a particularly difficult burden here since election-law injunctions present a unique risk of sowing chaos and voter confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). And that is why the Supreme Court has repeatedly warned lower courts not "to change state election rules as elections approach." *Thompson*, 959 F.3d at 813.

Whitfield has not met that standard. Far from making a rigorous showing that he is likely to succeed on the merits, Whitfield utterly fails to even explain why he thinks he *might* prevail. *See Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (where state statute is involved, "more rigorou*s* showing" than usual "that [he is] likely to prevail on the merits" is required (internal quotation marks omitted)). Indeed, this Court should deem any

Appellate Case: 20-2309 Page: 16 Date Filed: 07/20/2020 Entry ID: 4935302

merits argument that he might attempt to make on reply waived and deny the requested injunction on that basis alone. *See Cox v. Mortg. Elec. Registration Sys., Inc.*, 685 F.3d 663, 674 (8th Cir. 2012) (stating that the appellants "waived [an] issue by failing to provide a meaningful explanation of the argument and citation to relevant authority in their opening brief").

Nevertheless, for the sake of completeness, Arkansas briefly addresses the reasons why Whitfield's First Amendment claims—which are the only claims on which he sought a preliminary injunction below—fail.

A. Whitfield cannot prevail on his appeal.

Whitfield cannot succeed on the merits of his appeal because he lacks standing, and in any event, the district court correctly concluded that—even considering COVID-19—he could have complied with Arkansas law.

1. Whitfield lacks standing.

This Court need not reach the merits of Whitfield's claims because he lacks standing. To establish standing, a plaintiff must show not just a concrete injury, but also that it is "fairly traceable to the challenged action." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). In other words, "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Here, that requires Whitfield to show that the alleged burdens on his

First Amendment rights were "*caused by* private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (emphasis added). He has not made—and cannot make—that showing.

For starters, Whitfield caused his own alleged injury. His testimony establishes that he told however many volunteers he had to "stop collecting signatures in public" on March 12, Tr. 41, believing that "people's health and safety . . . is more important than signing a petition." Tr. 63; *see also id.* ("I can't be asking people to sacrifice the health and safety of their loved ones."). He also personally stopped collecting signatures in person after that date and instead resorted to simply relying on people to see and visit his website, download his petition, sign it, and mail it back to him. Tr. 75-76. Yet as the district court explained, that suspension was unnecessary since Whitfield and others could have continued safely collecting signatures consistent with social distancing guidelines. Op. 45. That Whitfield chose not to do so, thereby causing his petition efforts to fail, cannot be attributed to Arkansas. To the contrary, such "self-inflicted injuries are not fairly traceable to the Government's purported activities" and are not a basis for judicial relief. *Clapper*, 568 U.S. at 418.

Moreover, even accepting Whitfield's allegations at face value, to the extent he has been injured, COVID-19 caused his injuries—not Arkansas. Indeed, while he suggested below that the pandemic made it more difficult to collect signatures

because of the fear of transmission, Arkansas did not cause that situation and Whitfield cannot "hold private citizens' decisions to stay home" or decline to sign a petition "for their own safety against the State." *Thompson*, 959 F.3d at 810; *cf. id.* ("First Amendment violations require state action."). Thus, at best, Whitfield's claim "depends on the unfettered choices made by independent actors not before the courts" and that means he has failed to demonstrate an "essential element[] of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted); *accord Summers*, 555 U.S. at 492. Nor for that matter does Whitfield have standing to challenge the party filing period since he does not claim to have been injured by it. To the contrary, he "had no difficulty" completing and turning in the required candidate forms and he does not allege that requirement injured him. Op. 26; Tr. 25. He therefore cannot prevail on the merits, and his motion should be denied.

2. The district court's decision will be affirmed.

The district court correctly concluded that even in the context of a pandemic, the challenged provisions do not impose severe burdens. And it correctly concluded that, under *Anderson/Burdick*, Arkansas's important interests in fair, honest, and orderly elections, among other things, justified the challenged requirements. This Court is likely to affirm that decision.

Appellate Case: 20-2309 Page: 19 Date Filed: 07/20/2020 Entry ID: 4935302

The Constitution vests States with a "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). And while voting is fundamental to our political system, "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (quotation marks omitted). To the contrary, elections are ultimately about picking winners and losers and "[a]ttributing to [them] a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* at 438; *see Storer v. Brown*, 415 U.S. 724, 735 (1974).

As a result, courts apply a sliding-scale analysis to determine the constitutionality of ballot-access requirements. *See Burdick*, 504 U.S. at 432 (criticizing "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"). To "discern the level of scrutiny required," courts "analyze the burdens imposed" by a regulation. *Martin*, 649 F.3d at 681. Where it "imposes only modest burdens, . . . the State's important regulatory interests" in managing "election procedures" suffice to justify it. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Alternatively, a more exacting standard—requiring a compelling interest and tailoring—applies to *severely* burdensome requirements. *See Martin*, 649 F.3d at 680. The district court correctly

applied the *Anderson/Burdick* framework, and Whitfield cannot prevail on the merits of his appeal.

a. Arkansas's ballot-access requirements impose only slight burdens—particularly on independent candidates who, like Whitfield, seek statewide office. Indeed, when properly viewed in terms of the pool of voters eligible to sign Whitfield's nominating petition, as precedent requires, Arkansas's independent candidate signature requirement falls "well below the upper threshold of reasonable under Supreme Court precedent." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 696 (8th Cir. 2011). As a result, the district court did not err in rejecting Whitfield's claim that Arkansas's requirements were severely burdensome and subject to strict scrutiny.

To assess the burden of Arkansas's 10,000-signature requirement, it must be expressed as a percentage of the pool of voters eligible to sign an access petition. *See id.* (explaining how to calculate percentage of eligible pool). Because Arkansas allows any registered Arkansas voter to sign an access petition, the 10,000-signature requirement requires statewide candidates, like Whitfield, to collect signatures from only about *half a percent* of the eligible pool of voters. *See* Op. 40. (pool of those eligible to sign represents 0.58% of registered Arkansas voters).

Appellate Case: 20-2309 Page: 21 Date Filed: 07/20/2020 Entry ID: 4935302

Courts have consistently upheld significantly more demanding signature thresholds. *See Green Party*, 649 at 686-87 (collecting citations to "far more burdensome ballot access schemes [that] have been approved by the Supreme Court" and other courts). As far back as 1971, for instance, the Supreme Court upheld a requirement that a candidate submit "a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question." *Jenness v. Fortson*, 403 U.S. 431, 432 (1971). And this Court has similarly called "5% of the number of votes cast in the previous gubernatorial election" the "upper threshold of reasonable" ballot-access requirements. *Jaeger*, 659 F.3d at 696; *see Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984) (reading *Jenness* similarly to the Eighth Circuit). Indeed, Arkansas's 0.58% requirement for candidates like Whitfield is *eight times easier* to comply with than the requirement upheld in *Jenness*.

It is thus an understatement to say that it falls "well below" the 5% threshold of reasonableness set by *Jenness*. *Jaeger*, 659 F.3d at 696; *see Norman v. Reed*, 502 U.S. 279, 295 (1992) (upholding a 2% signature requirement because it was "a considerably more lenient restriction than the one [the Court] upheld in *Jenness*"); *see also Swanson v. Worley*, 490 F.3d 894, 904 (11th Cir. 2007) ("Alabama's three-percent signature requirement is a reasonable, nondiscriminatory restriction

Appellate Case: 20-2309 Page: 22 Date Filed: 07/20/2020 Entry ID: 4935302

that imposes a minimal burden on plaintiffs' rights."). And collecting so few signatures within 90 days is not a severe burden. *See Am. Party of Tex. v. White*, 415 U.S. 767, 786 (1974) (upholding requirement of gathering approximately 400 signatures *per day* within 55-day period); *Tripp v. Scholz*, 872 F.3d 857, 861, 871-72 (7th Cir. 2017) (upholding 5% signature requirement and similar 90-day collection window).

Ultimately, the burdensomeness question turns on whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements." *Storer*, 415 U.S. at 742. There is no question that, absent a pandemic, a reasonably diligent candidate could be expected to obtain 10,000 signatures in the 90-day period leading up to May 1 before a general election and obtain ballot access. And Whitfield has barely ever disputed that.

The COVID-19 pandemic did not change that analysis. To the contrary, as the district court explained—after listening to a day of trial testimony from a number of witnesses—while the pandemic might have changed the mechanics of collection, there is no reason why Whitfield could not have safely continued collecting signatures and complied with Arkansas law. *See* Op. 45 (finding Whitfield could have collected signatures by advertising and then bringing petitions to people to sign or otherwise collecting signatures from a safe distance using sterilized pens). Indeed, other independent candidates in Arkansas, as the district court

noted, did exactly that and qualified for the ballot. Op. 8. Whitfield's decision not to do that—but instead to simply rely on people to go to his website, download a form, and mail it back to him (Tr. 75-76)—does not demonstrate that a "reasonably diligent candidate" could not "be expected to satisfy" Arkansas law. *McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988).

Thus, as the district court correctly found, the "signature collection process was able to continue, albeit in a different manner," and Whitfield failed to show that the pandemic rendered Arkansas's requirements severely burdensome. Op. 46. And Whitfield does not point to anything suggesting—as required to prevail on appeal—that finding was clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (applying the clearly-erroneous "standard to the findings of a district court sitting without a jury, [because] appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*" (internal quotations omitted)).

b. Arkansas's significant regulatory interests justify the challenged regulations. Arkansas did not need to "assert a compelling interest," in support of its ballot-access regime, *Wash. State Grange*, 552 U.S. at 458, because Whitfield failed to establish that Arkansas law imposed a severe burden. *See* Op. 44. Instead, Arkansas only needed to show that the challenged provisions further "important regulatory interests." *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted).

As the district court concluded, Arkansas easily made that showing because the challenged provisions further Arkansas's "significant regulatory interests" in "prevent[ing] frivolous candidacies by ensuring candidates enjoy a modicum of support, reduc[ing] voter confusion, and ensur[ing] elections are fair, honest, and orderly." Op. 47; *see also infra* pp. 19-20 (discussing at greater length Arkansas's compelling interest in preventing frivolous candidacies). Indeed, it cannot be gainsaid that a candidate that struggles to collect signatures from just *half a percent* of registered voters is not a viable candidate. This Court will ultimately affirm.

c. Even if Arkansas's requirements imposed a severe burden (and as the district court determined based on the facts before it, they do not), Whitfield still could not prevail on appeal because the challenged provisions are tailored to achieve a compelling interest.

First, Arkansas's signature threshold passes because it is tailored to achieve the State's compelling "interest in *eliminating frivolous candidates*." *Jaeger*, 659 F.3d at 697 (emphasis added). Courts have long recognized that the best way to achieve that interest is by "requir[ing] candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Anderson*, 460 U.S. at 788 n.9. And while Whitfield might quibble with the precise signature threshold that Arkansas chose here, the Supreme Court has never "required a State seeking to impose reasonable ballot access restrictions to make a particularized

showing that voter confusion in fact existed before those restrictions were imposed." *Munro v. Socialist Workers Party*, 479 U.S. 189, 204 (1986).

Second, Arkansas's 90-day signature-collection window is also tailored to serve compelling interests. That collection window keeps the petitioning process honest because without confining petitioning to a limited period, fraudulent activity would be much more difficult to police. And fraud prevention is undoubtedly a compelling interest. *See Purcell*, 549 U.S. at 4 (noting "the State's compelling interest in preventing voter fraud"); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (discussing the State's "compelling interest in preserving the integrity of its election process"). Thus, even applying strict scrutiny, Arkansas's laws are constitutional.

*   *   *

Whitfield cannot prevail on the merits of his claims, and this Court should deny his requested injunction.

B. The remaining factors weigh against an injunction.

This Court should also deny Whitfield's extraordinary request that this Court simply order his inclusion on the ballot because such an injunction would cause Arkansas and its citizens irreparable harm. By definition, a State's "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); *see also Thompson*, 959 F.3d at 812.

Moreover, in election-related cases, last-minute injunctions, like the one Whitfield seeks here, "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5; *see Brakebill v. Jaeger*, 905 F.3d 553, 559-60 (8th Cir, 2018). Such injunctions are also contrary to the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

That is why the Supreme Court has repeatedly warned lower courts not "to change state election rules as elections approach." *Thompson*, 959 F.3d at 813. And that is true, even where, like here, "the November election itself may be months away," because "moving or changing a deadline or procedure now will have inevitable, other consequences." *Id.* Indeed, given the fact that the candidate certification deadline is now just a month away, any last-minute injunction would necessarily sow chaos and risk undermining faith in Arkansas's electoral process. Thus, this Court should decline Whitfield's request that it "alter [Arkansas's] election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

II. Expedition is not warranted.

This Court should also deny Whitfield's request for expedition. As noted above, he waited *two weeks* to seek expedition and still has not filed an opening brief. That delay undermines his claim that his appeal is so meritorious that it ought to take precedence over other matters. And granting expedition now (and

Appellate Case: 20-2309 Page: 27 Date Filed: 07/20/2020 Entry ID: 4935302

potentially shortening Arkansas's response) on the grounds that effective review for this election cycle might otherwise prove impossible would wrongly reward Whitfield for his delay and encourage others to do the same. Thus, Whitfield's dilatory tactics alone warrant denying his request. *See McGehee v. Hutchinson*, 854 F.3d 488, 491 (8th Cir. 2017) (en banc) (holding that in matters of equity, delay on the part of the moving party creates "a strong equitable presumption against the grant" of relief).

Moreover, this Court should also deny Whitfield's motion because his proposed timeline risks electoral chaos.[2] By law, the Secretary must "certify to all county boards of election commissioners full lists of all candidates" by August 20. *See* Ark. Code Ann. 7-5-203(a). County officials then use that information to immediately begin the process of preparing paper ballots and programming voting machines, and that process is necessary to meet other state and federal deadlines. *See, e.g.*, 52 U.S.C. 20302(a)(8)(A) (requiring absentee ballots to be mailed to qualifying voters under the Uniformed And Overseas Citizens Absentee Voting Act, "not later than 45 days before the election"). Yet even on Whitfield's pro-

---

[2] Whitfield asks that Arkansas be required to file a brief within 30 days of notice that his brief has been docketed. This Court's rules already require that, and given Whitfield's delay, it would be incongruous to shorten Arkansas's response time.

posed schedule, at best, this Court would hold expedited oral argument, issue a decision, and (in the unlikely event Whitfield prevailed) remand to the district court for an appropriate remedy after that deadline. It's unclear how election officials could possibly respond to that situation without potentially running afoul of other state and federal deadlines. And because all that could have been avoided had Whitfield *acted* expeditiously, his motion should be denied.

Finally, because Whitfield purports to challenge Arkansas's requirements not just for this election cycle—but generally and for future elections—denying expedition would not prejudice this Court's ability to resolve this case. Instead, denying expedition would merely leave Whitfield facing the immediate consequences of his own dilatory tactics.

CONCLUSION

For these reasons, the Court should deny the motion for an injunction pending appeal and expedition.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

Appellate Case: 20-2309 Page: 30 Date Filed: 07/20/2020 Entry ID: 4935302

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,045 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Nicholas J. Bronni
Nicholas J. Bronni

CERTIFICATE OF SERVICE

I certify that on July 20, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Nicholas J. Bronni
Nicholas J. Bronni