IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

DEBRA MAYS, JOHNNY SMITH, JR., and
THE CHRISTIAN MINISTERIAL ALLIANCE,

PLAINTIFFS,

v. **Case No. 4:20-cv-00341-JM**

JOHN THURSTON, in his official capacity as
Arkansas Secretary of State, and ASA HUTCHINSON,
in his official capacity as Arkansas Governor,

DEFENDANTS.

BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Like the entire world, Arkansas faces a public-health threat in COVID-19 unlike any in at least a century, with 449 cumulative cases and 6 deaths as of this filing.[1] But the sheer number of cases *understates* the threat. The disease has spread at pace that is difficult to comprehend. Take the U.S. numbers: On January 21, 2020—just 69 days ago, barely two months—there were zero reported cases. The first case was reported on January 22; the case number didn't even hit double digits until February 3. Yet last Wednesday, March 25, there were 68,440 U.S. cases, a number that jumped by *nearly 20,000 cases overnight*.[2]

"[S]tate and local executive officials are closest to the problems at hand and, as between different institutional actors, frequently possess the most flexibility in approach and political accountability to address them." *See* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 276 (2006). Given the fluidity of the COVID-19 crisis, state officials are best suited to calibrate a proper response that respects state law—particularly regarding politically sensitive issues

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[1] Ark. Dep't of Health, *Arkansas COVID-19 Update* (accessed Mar. 30, 2020, 11:29 a.m.), https://adem.maps.arcgis.com/apps/opsdashboard/index.html#/f533ac8a8b6040e5896b05b47b17a647.

[2] Ctrs. for Disease Control, *Cases in U.S.* (accessed Mar. 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

like election procedures. Indeed, because Plaintiffs' claims are premised on a misunderstanding of Arkansas law, they demonstrate the need to give state officials room to develop responses to rapidly changing crises. In recognition of that fact, the Northern District of Florida just two weeks ago refused to enter a temporary restraining order remarkably similar to the order requested in Plaintiffs' motion. *See Williams v. DeSantis*, No. 1:20-cv-00067 (N.D. Fla. Mar. 17-18, 2020) (Hinkle, J.), DE 12, DE 18.[3] This Court should follow that court's lead and refuse to fundamentally alter absentee voting in Arkansas less than a day before the polls open. It should deny Plaintiffs' motion.

BACKGROUND

When considering the receipt deadline for absentee ballots, this Court must take into account the myriad other deadlines laid out in Arkansas's electoral calendar. Illustrating the large number of deadlines—and the complex ways in which each deadline interacts with every other deadline—each election cycle, the Secretary publishes a calendar listing all the relevant electoral deadlines. The 2019–2020 calendar spans 49 dense pages and lists dozens, perhaps even hundreds, of interrelated deadlines. *See generally* Ark. Sec'y of State, *2020 Election Dates* (Jan. 2020), https://www.sos.arkansas.gov/uploads/2020_Election_Calendar_1-27-20_1.pdf. Plaintiffs' blithe assertions that Arkansas has no interest in a single deadline falling on a particular date ignores the interrelated nature of every deadline in the electoral calendar. (*See* Br. in Supp. of Mot. for TRO, DE 3 (TRO Br.) at 10.)

Changing even a single deadline by 10 days risks causing effects that ripple through an entire election cycle. Plaintiffs' requested relief poses just that risk, a point best illustrated by their mistaken understanding of the deadline to certify primary results.

[3] Copies of the Northern District of Florida's two orders are being simultaneously filed as attachments to this brief.

Under Arkansas law, county boards of election commissioners must "canvass the returns and examine the ballots" after a primary election. Ark. Code Ann. 7-7-309. They must then "certify the result" no sooner than 48 hours after the primary "and not later than ten (10) days after the primary." *Id.* Plaintiffs incorrectly claim that "state law gives election officials between 15 and 19 days after Election Day to certify the election results." (Compl., DE 1 ¶ 54 (citing Ark. Code Ann. 7-5-701(a)(4), (c)(1)); *see* TRO Br. 10 (making same claim, and citing same provision).) The provision they cite applies to general elections held in November, not to preferential primaries nor general primaries held in the spring.[4] *See* Ark. Sec'y of State, *2020 Election Dates* 41 (Jan. 2020), https://www.sos.arkansas.gov/uploads/2020_Election_Calendar_1-27-20_1.pdf. Indeed, it appears in Chapter 5 of Arkansas's election code, which relates to election procedure generally, not Chapter 7, which related to primary procedures in particular. *See generally* Ark. Code Ann. 7-7-101 through -402.

If this Court were to grant the order that Plaintiffs request and require that mailed-in ballots be counted if received on the tenth day after the primary, then county boards of election would be unable to comply with their statutory deadline for certifying primary results. By suspending only the deadline to request an absentee ballot, the Governor's March 20 executive order, EO 20-08, balances the needs of Arkansas voters in light of COVID-19 with the statutory requirements on the Secretary and other election officials throughout the State. (*See* EO 20-08, DE 3-2.)

[4] Tomorrow's primary, although often thought of as a runoff, is referred to in Arkansas's election statutes as the "general primary election." *See, e.g.*, Ark. Code Ann. 7-7-202(b). The primary that occurred on Super Tuesday this year was the "preferential primary election." *See* Ark. Code Ann. 7-7-202(a).

ARGUMENT

In the middle of an unprecedented, global public-health crisis, Plaintiffs ask this Court, on the day before a primary, to fundamentally alter the procedures for conducting that primary. Such relief that is not in the public interest. In this case, that factor so favors denial of Plaintiffs' motion for a temporary restraining order that this Court need not move on to the merits—which is not to say Plaintiffs are likely to succeed on the merits. They aren't. First off, they have no standing to bring these claims because whatever injuries they have alleged, none were caused by Defendants. Second, and similarly, Plaintiffs allege no action by Defendants that they purport has burdened their right to vote. And even if they had, Defendants have compelling interests to justify their actions. Third, Plaintiffs cite no support for their claim under the Due Process Clause. They apparently ask this Court to break entirely new constitutional ground—on a scant TRO record, the day before an election, in the middle of a pandemic.[5] Reinforcing all these reasons for denying Plaintiffs' motion, the balance of the harms in this case favors Defendants. This Court should not grant Plaintiffs' requested relief and restructure Arkansas's March 31 primary less than a day before the polls open.

I. Restructuring Arkansas's primary at the last minute would not serve the public interest, so the Court should deny the motion without reaching the merits.

Plaintiffs ask this Court to issue a temporary restraining order on the day before a primary that alters the deadline for voting in that primary and dramatically restructures state absentee-voting law. Plaintiffs claim that such a radical, last-minute change would serve the public interest but make no mention of the damage it would do to Arkansans' "[c]onfidence in the integrity of [the] electoral process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). (*See*

[5] Plaintiffs seek a temporary restraining order only on their right-to-vote and due-process claims. They expressly do not seek a temporary restraining order on their Voting Rights Act claim. (TRO Br. 9.)

TRO Br. 15 (failing even to acknowledge that Arkansans have an interest in orderly elections).) "Given the imminence of the election and the inadequate time to resolve the factual disputes" that will certainly arise—not to mention a global pandemic—this Court should refuse to enter the requested order and instead should "allow the election to proceed." *Purcell*, 549 U.S. at 5-6; *see Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at *3 (S.D. Ga. Oct. 19, 2016) (recognizing public's "general interest in having citizens participate in the electoral process," but counterbalancing that with the public's "interest in preserving the integrity of that process" in the face of a hurricane that interfered with election).

Indeed, just two weeks ago, a district court in Florida denied a request with striking similarities to Plaintiffs' request—without reaching the merits of the plaintiffs' claims in that case, instead analyzing only the public interest. *See Williams v. DeSantis*, No. 1:20-cv-00067 (N.D. Fla. Mar. 17-18, 2020) (Hinkle, J.), DE 12, DE 18. Among other things, the *Williams* plaintiffs asked that court to order the Florida Governor, Secretary of State, and other election officials to count all mailed-in ballots received up to 10 days after the Florida primary. *See Williams*, Mot. for TRO (N.D. Fla. Mar. 16, 2020), DE 4 at 2-4. The *Williams* court correctly described this as asking a federal court to make "a fundamental alteration in the manner in which further voting will be conducted." *Williams*, Order Denying Mot. for TRO (N.D. Fla. Mar. 17, 2020), DE 12 at 1. That court focused primarily on the chaos that an election-eve order by a federal court would cause. *See id.* at 3 ("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."). It denied the *Williams* plaintiffs' request to extend the absentee-ballot deadline by 10 days.

That same day—the day of the Florida election and the district court's first order—the *Williams* plaintiffs filed a renewed motion, in which they again asked that court to force Florida election officials to accept ballots mailed in after the election. *See Williams*, Renewed Mot. for TRO (N.D. Fla. Mar. 17, 2020), DE 16 at 1-4. Acting the next day, after the end of Florida's primary, the court correctly rejected those arguments. As it said, "it would be adverse to the public interest to enter a temporary restraining order or preliminary injunction blocking the Secretary of State and Supervisors of Elections from processing the results of the March 17 presidential primary in accordance with the governing Florida statutes." *Williams*, Order Denying Renewed Mot. for TRO (N.D. Fla. Mar. 18, 2020), DE 18 at 1-2.

Supreme Court precedent supports the *Williams* court's decision. The Court has made clear that the public interest is not served by court orders altering election procedures shortly before elections. *See Purcell*, 549 U.S. at 4-6. When a federal court is asked to enter an order like the one that Plaintiffs request in this case, the court must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, *considerations specific to election cases*." *Id.* at 4 (emphasis added). Those election-case considerations include the danger that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. In *Purcell*, the Supreme Court considered whether the court of appeals had correctly granted "an application to enjoin operation of voter identification procedures just weeks before an election." *Id.* at 4. Weeks before was too close to the election in that case, so the Supreme Court vacated the injunction and allowed the election to proceed according to state law. *Id.* at 5-6.

If weeks before the election was too late for an injunction in *Purcell*, then the day before Arkansas's March 31 primary is certainly too late for a temporary restraining order here. "As an

election draws closer, that risk [of voter confusion and lowered turnout] will increase." *Id.* at 5. Granting Plaintiffs' requested order risks creating voter confusion, lowering turnout, and, as a result, reducing confidence in the outcome of tomorrow's primary. As a result, issuing a temporary restraining order would not serve the public interest; it would severely harm it.

The sheer temporal proximity in this instance—less than a day before voting begins—creates a severe risk of voter confusion. Other aspects of Plaintiffs' requested relief exacerbate that risk. For one thing, Plaintiffs would have this Court order that ballots must be counted as long as they "arrive at a polling place or the county clerk's office within, at a minimum, of ten days after Election Day." (Proposed Order, DE 2-1.) But each county board of election commissioners must "certify the result" of tomorrow's primary "not later than ten (10) days after the primary." Ark. Code Ann. 7-7-309. If county boards of election commissioners must continue accepting mailed-in ballots through the tenth day after the primary, complying with their statutory certification deadline will prove difficult, to say the least.

If that weren't bad enough, Plaintiffs' requested order would, as a practical matter, do away with all deadlines for receiving absentee ballots. They ask that "[t]he Court order[] that Defendants and their agents must *presume that ballots without a postmark* or other marking from the United States Postal Service *were mailed on or before Election Day*." (DE 2-1 (emphasis added).) Ordering Arkansas election officials to count ballots with no postmark would diminish their ability to distinguish between validly and invalidly submitted absentee ballots. Such a state of affairs would undermine voters' "[c]onfidence in the integrity of our electoral process," and that confidence "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

Because of the dangers it poses to the Arkansas electoral process, Plaintiffs' requested relief is decidedly not in the public interest. This Court is empowered to—and *should*—deny the motion for a temporary restraining order on this basis before even reaching the merits of Plaintiffs' claims.

II. Plaintiffs are not likely to succeed on the merits of their attempt to restructure Arkansas's absentee-ballot procedures.

A. Plaintiffs do not have standing to bring any claims related to absentee voting.

Plaintiffs have suffered no injury at the hands of the Governor, the Secretary, or any other Arkansas official. Instead, by failing to exercise their state-law right to request an absentee ballot, Plaintiffs have inflicted injury to themselves. Article III does not grant them standing to sue based on self-inflicted injury.

To establish their standing, Plaintiffs must show not just a concrete injury that this Court can redress, but also that their alleged injury 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 Environment*, 523 U.S. 83, 103 (1998). Here that means Plaintiffs must show that their alleged inability to vote by absentee ballot was "*caused by* private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (emphasis added). And they cannot make that showing if they caused their own alleged injuries. "[S]elf-inflicted injuries are not fairly traceable to the Government's purported activities." *Clapper*, 568 U.S. at 418.

To the extent Plaintiffs are injured—that is, are allegedly unable to comply with Arkansas's receipt deadline for absentee ballots—no action by either Defendant caused that injury. If anything, Defendants' actions related to tomorrow's primary partially remediated any injury to

Plaintiffs. The Governor's March 20 executive order suspended the normal prerequisites for requesting an absentee ballot (*e.g.*, by showing a "physical disability," Ark. Code Ann. 7-5-402(2)) so that all Arkansans, including Plaintiffs, could elect to vote by absentee ballot in tomorrow's primary. (*See* EO 20-08, DE 3-2 at 1 (suspending section 402 to allow "all eligible qualified electors currently entitled to vote in the March 31, 2020 election [to] request the appropriate absentee ballots").) Therefore, as of March 20, Ms. Mays, Rev. Smith, and all members of the Christian Ministerial Alliance were eligible to request an absentee ballot.

Nevertheless, the complaint does not allege that any Plaintiff had requested an absentee ballot. In fact, it affirmatively alleges the opposite. As of the complaint's March 26 filing—*six days after the Governor's executive order*—both Ms. Mays and Rev. Smith "ha[d] not yet requested an absentee ballot." (Compl. ¶¶ 18-19.) And the Christian Ministerial Alliance simply makes no allegations whatsoever about whether any of its members had requested absentee ballots. (*See* Compl. ¶¶ 21-23.) Nearly a week after the Governor had taken emergency action to expand the availability of absentee voting to benefit Arkansans in the same position as Plaintiffs, and just five days before tomorrow's primary, none of them had acted.

The Governor has exercised his emergency state-law powers to reduce the effect that the COVID-19 pandemic will have on voters like Plaintiffs. But Plaintiffs have failed to take advantage of the resulting accommodations. Article III does not grant Plaintiffs standing to sit idly by and then sue to restructure tomorrow's primary. *See Clapper*, 568 U.S. at 418. This Court should deny the motion for a temporary restraining order because Plaintiffs lack standing.

B. The burdens imposed by a global pandemic do not invalidate Arkansas's otherwise-constitutional absentee-voting deadlines.

Plaintiffs do not allege that either Defendant has done anything to burden their right to vote. Instead, they allege that the COVID-19 pandemic has made voting more difficult for them,

and that, although Defendants have acted to help voters like Plaintiffs (*see* EO 20-08, DE 3-2), the Constitution requires Defendants to do more. Plaintiffs are not likely to succeed on this right-to-vote claim, giving this Court still another reason to deny the motion for a temporary restraining order.

1. Heightened scrutiny does not apply, so Plaintiffs' claim fails.

As an initial matter, there is no binding precedent applying any form of heightened scrutiny to a claim like Plaintiffs' claim here, which amounts to "only a general objection . . . to the details of the emergency regime." Diane P. Wood, *The Bedrock of Individual Rights in Times of Natural Disaster*, 51 Howard L.J. 747, 756 (2008). Plaintiffs style this as an *Anderson/Burdick* claim, referring to two seminal Supreme Court cases, *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). (*See* TRO Br. 6.) But the *Anderson/Burdick* analysis was not designed for reviewing state executives' emergency actions *to reduce burdens on voters* caused by an emergency. Much of the Eighth Circuit's *Anderson/Burdick* precedent relates to whether the structure of a State's electoral calendar severely burdens parties' and candidates' attempts to appear on the ballot. *See, e.g.*, *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 691 (8th Cir. 2011) (applying *Anderson/Burdick* and upholding requirements for appearing on ballot); *Green Party of Ark. v. Martin*, 649 F.3d 675, 677 (8th Cir. 2011) (same, upholding Arkansas's petition-signature requirement for new political parties).

None of the cases that Plaintiffs cite require this Court to apply any form of heightened scrutiny. The most factually analogous case they cite, *In re Holmes*, 788 A.2d 291 (N.J. App. 2002), related to vote counting during the 2001 anthrax attacks, does not even cite *Anderson* or *Burdick*. (*See* TRO Br. 8-9.) In that case, the New Jersey state intermediate appellate court held—strictly as a matter of New Jersey state law—that state election officials should have

counted absentee ballots that arrived one day past the deadline "due to anthrax contamination" at a U.S. Postal Service facility. 788 A.2d at 294. *Holmes* did not analyze the First Amendment.

If heightened scrutiny does not apply, Plaintiffs' claims must fail. When reviewing state executives' exercise of their emergency powers under state law, federal courts should tread lightly. Otherwise, "consideration of the assertion of emergency powers invites the judiciary into a thicket of highly volatile and frequently politicized issues." Rossi, *supra*, 56 Duke L.J. at 252. Given the dearth of federal litigation in this area, the precise standard is not well defined. But federal courts should generally defer to state executives' management of emergencies. *See id.* at 266 (suggesting that "where federal law is ambiguous, federal courts would defer to state executive actors during times of crisis"). Recognizing that COVID-19 would affect tomorrow's primary, the Governor acted on March 20 to allow all Arkansans to vote by absentee ballot. That action is a reasonable response to the current public-health crisis and deserves deference. This Court should decline Plaintiffs' invitation to second-guess it.

2. If this Court applies heightened scrutiny as a matter of first impression, Plaintiffs' claim still fails.

Setting aside the fact that no binding precedent requires this Court to apply the *Anderson/Burdick* inquiry to this claim, Plaintiffs' right-to-vote claim fails even under that inquiry. The Supreme Court has for decades left no doubt about the States' freedom to regulate the electoral process: "The States possess a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (some quotation marks omitted). As a result, strict scrutiny does not apply to all election regulations. *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").

Instead, the Supreme Court and the Eighth Circuit apply a sliding-scale analysis. To "discern the level of scrutiny required" under this analysis—and thus the nature of the interest a State needs in order to justify an election regulation—courts must "analyze the burdens imposed" by that regulation. *Green Party of Ark. v. Martin*, 649 F.3d 675, 681 (8th Cir. 2011). Where a State's election regime "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 governmental interest and narrow tailoring—applies to *severely* burdensome regulations. *See Martin*, 649 F.3d at 680. Thus, Defendants "need not assert a compelling interest" unless Plaintiffs first establish that *some action of Defendants*—rather than an unprecedented global, public-health crisis—imposes a severe burden on Plaintiffs' rights. *Wash. State Grange*, 552 U.S. at 458. Wherever this case lands on *Anderson/Burdick*'s sliding-scale, Plaintiffs' claim fails.

i. Plaintiffs do not allege any severe burden on their right to vote caused by Defendants.

To the extent Plaintiffs allege any burden on their right to vote—and as already discussed, they actually have alleged no actionable burdened because they failed to request absentee ballots, *see supra* Part II.A—COVID-19 created that burden rather than any action by the Governor or the Secretary of State. Plaintiffs point to the Governor's March 20 executive order, but that order made it easier for them to vote. They never explain how an executive order providing them *more opportunities to vote* creates a severe burden on their rights. They simply claim that the Governor should have made it still easier to vote by absentee ballot in tomorrow's election.

(*See, e.g.*, Compl. ¶ 39 ("By failing to suspend the Election Receipt Deadline, state officials have rendered the extension of the March 24 deadline meaningless for many voters who will not be able to request, receive, and submit their absentee ballots by mail in order for them to be counted."). This is not a claim that the Governor or anyone else has "disenfranchise[d]" Plaintiffs. (TRO Br. 6.) Defendants have acted to ensure that the pandemic causes as little disruption as possible in tomorrow's primary. Their actions do not severely burden Plaintiffs' voting rights.

None of the "disenfranchisement" cases they cite are at all comparable. (*See id.*) Most glaringly, the Fourth Circuit did not even purport to apply the *Anderson/Burdick* inquiry in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). In that Voting Rights Act case, the court simply made the true statement that "even one disenfranchised voter—let alone several thousand—is too many." *Id.* at 244. It nowhere suggested that a case like this one amounts to disenfranchisement of any voters. Nor do the other two cases Plaintiffs' cite, both of which reviewed state-law procedures for invalidating timely ballots. *See Democratic Executive Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 583 (6th Cir. 2012). These cases do not support the proposition that Arkansas's absentee-ballot deadline, which Plaintiffs do not claim would be severely burdensome under normal circumstances, is made severely burdensome because of COVID-19.

Because Plaintiffs cannot show a severe burden, Arkansas's "important regulatory interests" in managing "election procedures" justify the absentee-ballot deadline. *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Defendants "need not assert a compelling interest." *Green Party of Ark.*, 649 F.3d at 685 (quoting *Wash. State Grange*, 552 U.S. at 458).

Instead, "something like rational basis review" applies in a case like this. Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 330 (2007).

The absentee-ballot deadline easily survives that standard. That deadline, together with the ten-day deadline to certify primary results, serves Arkansas's important interest in "ensur[ing] elections are fair, honest, and orderly." *Libertarian Party of N.D.*, 659 F.3d at 693. The COVID-19 crisis does not weaken that interest but heightens it. Given how unsettled all of American society is at this moment, Defendants and other Arkansas election officials must work even harder to ensure that voters are confident in the results of tomorrow's primary. *Cf. Marston v. Lewis*, 410 U.S. 679, 680 (1973) ("States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds."). To protect Arkansas's interest in orderly elections, this Court should deny the motion for a temporary restraining order.

ii. Arkansas's compelling interests in maintaining confidence in the integrity of its elections while at the same time responding to a global, public-health crisis justify its election regulations.

Plaintiffs have offered no support for the proposition that Defendants' actions severely burden their right to vote. If they had, their claim would still fail because Arkansas's "compelling interest in preserving the integrity of its election process" justifies maintaining as much of the normal electoral calendar as possible in the face of COVID-19. *Eu*, 489 U.S. at 231. Last-minute tinkering with election procedures—particularly procedures as fundamental as the deadline for casting a ballot, whether it be in-person or absentee—risks undermining voters' "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4. Motivated by a compelling interest in maintaining that confidence, the Governor's March 20 executive order balanced the need to help voters affected by COVID-19 with the need to ensure orderly elections.

Because that compelling interest justifies the actions that Plaintiffs' challenge, their claim is not likely to succeed.

Plaintiffs' misunderstand the nature of that compelling interest when they fault Defendants for lacking a "precise interest" in the absentee-ballot deadline. (TRO Br. 10.) In their view, Defendants must justify picking that deadline as opposed to picking a deadline hours or days later, which they claim would be less burdensome. But "the mere identification of a less burdensome alternative is not dispositive in election cases" because a challenger could always identify another threshold that might accomplish similar goals. *Libertarian Party of N.D.*, 659 F.3d at 698. As the Eighth Circuit has said, any "precise date" on the electoral calendar "is to some extent 'necessarily arbitrary.'" *McLain v. Meier*, 851 F.2d 1045, 1050 (8th Cir. 1988) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974)). "A litigant could always point to a day slightly later that would not significantly alter a state's interests until the point at which" the State could set no deadlines at all. *Id.* Plaintiffs cannot succeed simply by pointing to a date later than the current absentee-ballot deadline and arguing that it would be less burdensome.

To argue otherwise, they point only to cases that required States to extend voter-registration deadlines in the face of hurricanes that required state offices to close. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 & n.2 (N.D. Fla. 2016); *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1344-45 (S.D. Ga. 2016). But extending voter-registration deadlines does not pose the same acute threat of voter confusion that Plaintiffs' requested relief poses. In fact, in another recent COVID-19 election case, the district court denied a request to "extend the deadline for receipt of absentee ballots from the current deadline of 8:00

p.m. on election day" despite granting request to extend voter-registration deadlines. *Democratic Nat'l Committee v. Bostelmann*, No. 20-cv-249, 2020 WL 1320819, at *7 (W.D. Wis. Mar. 20, 2020).

Arkansas has a compelling interest in maintaining voter confidence in election results during this global public-health crisis. And that compelling interest justifies making only limited changes to the procedures for tomorrow's election. Because of that compelling interest, the Constitution did not require Defendants to take further action at all, and certainly not the actions requested by Plaintiffs. Therefore, Plaintiffs' right-to-vote claim not only is unlikely to succeed, it will in fact fail. This Court should deny the motion for a temporary restraining order.

C. Plaintiffs cite no case even remotely similar to this one where a court found a violation of the Due Process Clause.

As an alternative to their failed right-to-vote claim, Plaintiffs seek a temporary restraining order based on their novel procedural-due-process claim. The theory of this claim is that the Due Process Clause requires state executive officials to modify otherwise-valid state statutes in times of emergency. (*See* TRO Br. 11-12.) Plaintiffs cite no support for this new type of claim. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (considering statute that "vest[ed] moderators with sole, unreviewable discretion to reject" absentee ballots); *Raetzel v. Parks/Bellemont Absentee Elec. Bd.*, 762 F. Supp. 1354, 1355 (D. Ariz. 1990) (considering statute that gave voters no notice or hearing if they were determined to be not qualified voters). An emergency proceeding on Plaintiffs' motion for a temporary restraining order is not appropriate for creating an entirely new claim under the Due Process Clause.

III. The harm that Plaintiffs' relief would cause to Defendants' ability to manage a fluid public-health crisis outweighs Plaintiffs' self-inflicted injuries.

Plaintiffs' self-inflicted injuries are outweighed by the harm that a temporary restraining order would cause to Defendants and the people of Arkansas. Although Plaintiffs generically recite case law on irreparable harm, they do not discuss the self-inflicted nature of their alleged inability to comply with the absentee-ballot deadline. (*See* TRO Br. 13-14.) As already discussed, despite the Governor's March 20 executive order making clear that any Arkansan could request an absentee ballot for tomorrow's primary, Plaintiffs chose not to apply for an absentee ballot. *See supra* Part II.A. Their injuries, therefore, are "self-inflicted wounds," and such wounds are "not irreparable injury." *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995).

Contrast that with the harm a temporary restraining order would impose on Defendants and the State they represent. The Supreme Court has consistently warned that "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); *see Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (explaining that State "would be harmed if it could not apply its own laws . . . now, even if it might later be able to" apply altered version of law). And the election-law context of this case heightens rather than lessens that harm. Voter confusion, once caused, will not be easily remedied. In fact, a temporary restraining order followed by a later court order contradicting it would exacerbate that confusion. *See Purcell*, 549 U.S. at 4 (noting the particular dangers of "conflicting court orders").

The harm to Arkansas, and by extension, Arkansans, is further heightened by the public-health crisis that surrounds this litigation. State executive officials need flexibility to respond to

developing crises. *See* Rossi, *supra*, 56 Duke L.J. at 276 ("[S]tate and local executive officials are closest to the problems at hand and, as between different institutional actors, frequently possess the most flexibility in approach and political accountability to address them."). But litigation challenging decisions they make in an emergency situation hinders that flexibility. *Cf. Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (discussing the importance of "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably," which motivates qualified-immunity doctrine). Plaintiffs' requested temporary restraining order would harm all Arkansans by restricting Defendants' ability to respond to this rapidly developing crisis.

Conclusion

For these reasons, the Court should deny Plaintiffs' motion for a temporary restraining order.

Dated: March 30, 2020

Respectfully submitted,

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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

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

ACACIA WILLIAMS et al.,

Plaintiffs,

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

RON DESANTIS et al.,

Defendants.

____/

ORDER DENYING THE RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER, DENYING IN PART THE MOTION FOR A PRELIMINARY INJUNCTION, AND SETTING A SCHEDULE

The plaintiffs moved for a temporary restraining order or preliminary injunction. The order of March 17 denied a temporary restraining order and left pending the motion for a preliminary injunction. The plaintiffs have filed a second motion for temporary restraining order.

As set out in the March 17 order, a temporary restraining order or preliminary injunction cannot be entered when it would be adverse to the public interest. On the specific facts of this case, it would be adverse to the public interest to enter a temporary restraining order or preliminary injunction blocking the

Secretary of State and Supervisors of Elections from processing the results of the March 17 presidential primary in accordance with the governing Florida statutes. This order denies the second motion for a temporary restraining order and denies the motion for a preliminary injunction except to the extent that it applies to future elections. The order sets the schedule for further proceedings.

IT IS ORDERED:

1. The second motion for a temporary restraining order, ECF No. 16, is denied.

2. The motion for a preliminary injunction, ECF No. 4, is denied with respect to the March 17 presidential primary and remains pending with respect to future elections.

3. The deadline for the Federal Rule of Civil Procedure 26(f) attorney conference is April 6, 2020. At the conference, the attorneys must address the schedule for the remaining part of the preliminary-injunction motion, whether a hearing on that motion should be consolidated with the trial on the merits under Rule 65(a)(2), and the matters set out in Rules 16(b)(3)(A), 16(b)(3)(B), 16(c)(2), 26(f)(2), and 26(f)(3). Discovery may begin after the attorney conference or, if both sides agree, earlier.

4. All conferences, proceedings, and discovery should be conducted electronically or remotely, when possible, to comply with best practices during the national healthcare emergency.

5. The deadline to file the Rule 26(f) report is April 13. The report must address the schedule for the remaining part of the preliminary-injunction motion, whether a hearing on the motion should be consolidated with the trial on the merits, and the matters set out in Rules 16(b)(3)(A), 26(f)(2), and 26(f)(3). The report may address any other scheduling or case-management issue.

6. Unless a change is agreed to by all parties and set out in the Rule 26(f) report, or a change is ordered by the court, these are the deadlines for Rule 26 disclosures:

(1) for 26(a)(1) disclosures, 14 days after the 26(f) attorney conference;

(2) for 26(a)(2) disclosures, the deadlines set out in Rule 26(a)(2)(D);

(3) for 26(a)(3) disclosures, the deadline set in an order for pretrial conference to be entered later or, if no such order is entered, the deadline set out in Rule 26(a)(3)(B).

7. The deadline for the defendants to respond to the remaining part of the preliminary-injunction motion, ECF No. 4, is extended to April 20, 2020.

8. Absent good cause set out in the 26(f) report, the discovery deadline will be June 5, 2020, and a consolidated hearing on the preliminary-injunction motion

will occur during the two-week period that begins on July 20, 2020. These dates will be moved *earlier* if all parties so request. The parties should not request a *delay* of these dates except for good cause. The national healthcare emergency is good cause only in the unlikely event that proceedings cannot be conducted in a manner consistent with best practices.

9. Based on the plaintiff Terriayna Spillman's notice of voluntary dismissal, ECF No. 17, the complaint is deemed amended to delete her claims. *See Perry v. Schumacher Grp. Of La.*, 891 F.3d 954 (11th Cir. 2018).

SO ORDERED on March 18, 2020.

s/Robert L. Hinkle
United States District Judge