IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DCCC, *et al.*,

Plaintiffs,

v.

PAUL ZIRIAX, *in his official capacity as* SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD, *et al.*,

Defendants.

Case No: 20-CV-211-JED-JFJ

DEFENDANTS' BRIEF ON INJUNCTIVE RELIEF

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State election officials are engaging in herculean efforts to conduct an election during a global pandemic in a manner that balances ensuring that voters can safely and easily vote with preserving the integrity of and public confidence in the election. In the midst of this election cycle, Plaintiffs seek to overturn Oklahoma election laws and the efforts of these election officials, and instead have the Court craft brand new rules for absentee voting. Although Plaintiffs brought suit on May 18, 2020, and with only a few weeks from when absentee ballots must start getting mailed, Plaintiffs have yet to move for any preliminary injunction. Instead, this Court ordered the parties to file simultaneous briefs concerning an injunction for which Plaintiffs haven't yet moved. Doc. 34. Defendants object to any injunction issued under Rule 65, but nonetheless file this brief in compliance with the Court's order.

I. Background

Casting a ballot in past elections in Oklahoma has been easy, and it has only been made easier during the COVID-19 pandemic. In fact, the State has already conducted its June primary that demonstrated its safe and secure election procedures. The onset of a global pandemic caused by a novel coronavirus that leads to the disease known as COVID-19 has created fears related to voting, but Oklahoma officials have proactively addressed COVID-19 in a variety of ways.

COVID-19 can be contracted through droplets expelled by an infected person, such as when they cough or sneeze. Ex. 1, Barie Decl., ¶5. Though rare, COVID-19 can also be contracted through touching a contaminated surface and then touching the eyes, nose, or mouth; there is no evidence it can be contracted merely through the skin. *Id.* at ¶6. Nor is there substantial evidence that in-person voting creates a significant risk for COVID-19 transmission to voters. *Id.* at ¶¶11-19. In Oklahoma, the number of confirmed active cases at any given time in Oklahoma is low: only 0.19% of the population, so the chances of someone encountering a person spreading the virus is small. *Id.* at ¶10. And several studies have shown that in-person elections in the United States during the pandemic, such as those in Wisconsin, were not associated with significant spikes in COVID-19 rates. *Id.* at ¶¶15-18.

Nonetheless, Oklahoma is facilitating safe in-person voting during the pandemic, which voters can do early or on election day. Ex. 2, Ziriax Decl., ¶¶6-9. State election officials coordinated with the OU Health Sciences Center to develop protocols that would keep voters safe on election day. *Id.* at ¶7 & Att. 1. These procedures include markers and signage for social distancing, alcohol wipes for machines and common surfaces, personal protective equipment for poll workers, and masking recommendations for voters. *Id.* The Legislature also recently enacted a law, S.B. 1779, authorizing expenditures to implement these measures for safe in-person voting, expand the pool of potential poll workers, and authorize the use of public facilities as polling places during the pandemic. *Id.* at ¶18 & Att. 2.

In addition to in-person voting and early voting, Oklahoma has eased access to absentee voting during the pandemic as compared to the processes from previous years. Already in Oklahoma, any voter can request an absentee ballot without providing a reason or excuse, and can do so in-person, by mail, by fax, or online, without the need for signature matching, notarization, or to show ID. *Id.* at ¶¶10-11. Voters who timely request an absentee ballot can have over a month to return it either by mail or in-person, can request a second ballot if lost or stolen, and retain their right to vote in-person. *Id.* at ¶¶12-16. S.B. 1799 further facilitates absentee voting by authorizing funds for projected increase in absentee voting, allowing more assistance to those in nursing homes, and making clear that it is not illegal to gift a voter a stamp or envelope to assist in mailing an absentee ballot. *Id.* at ¶18 & Att. 2.

The State has also made it easier to verify ballots during the pandemic. S.B. 1779 loosened some of the restrictions on notaries that notarize ballots. *Id.* Moreover, thanks to the efforts of Oklahoma officials, scores of institutions across the state are offering free notarization services, including drive-through services, which voters can find out about online. *Id.* at ¶19. Newly-enacted S.B. 210 also expands the definition of "physically incapacitated" to include many who are impacted by or at high risk for COVID-19, such that they can obtain the signature of two witnesses instead of notarization to verify their absentee ballot. *Id.* at ¶17 & Att. 3. S.B. 210 also creates new procedures for those in nursing homes

if election officials cannot enter the facility due to COVID-19. *Id.* Finally, the Legislature created a new option for absentee voters never before used in past Oklahoma elections to further expand the opportunity cast an absentee ballot: during the emergency pandemic in 2020, a voter can include a photo copy of their federal, state, or tribal ID—the same ID that would be used in in-person voting—in lieu of the above two verification options. *Id.* Like with notarization, hundreds of institutions across the state are offering free photo-ID copying services to voters, including drive-through services. *Id.* at ¶19.

II. Argument

A party seeking an injunction bears the burden of proof on each of the well-known four factors for obtaining that extraordinary relief. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003). But where a movant seeks injunctive relief (1) "that alter[s] the status quo," (2) that includes a "mandatory preliminary injunction[]," or (3) "that afford[s] the movant all the relief that it could recover at the conclusion of a full trial on the merits," it seeks a disfavored injunction and must satisfy a heightened standard. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012)). Under this heightened standard, the movant must make a strong showing of both the likelihood of success on the merits and the balance of equities. *See id.* Because Plaintiffs seek all three types of disfavored injunctions, any injunction here must be held to the heightened standard.[1]

A. Plaintiffs are unlikely to succeed on the merits.

1. Plaintiffs lack standing to challenge the verification laws.

No individual voter brings any claim in this case asserting any burdens on their right to vote. Instead, the only Plaintiffs in this case are two organizations. To claim standing based on their members, these organizations must at the threshold show that their "members would otherwise have standing to

[1] At the outset, Defendants renew their objection that the parties and venue are proper in this case, *see* Docs. 24, 32, as further bolstered by the attached evidence, *see* Ex. 2, Ziriax Decl., ¶¶2-4; Ex. 3, Buchanan Decl. Defendants acknowledge this court's ruling, Doc. 33, but raise these issues again to preserve them.

sue in their own right." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiff DCCC has only one apparent member in Oklahoma—Congresswoman Kendra Horn—and it has offered no pleadings or evidence that the challenged laws injure her voting rights. Plaintiff Oklahoma Democratic Party ("ODP") pleads that its members are injured, but it is unable to identify any particular members that are unable to vote because of the challenged laws. Ex. 4, Andrews Depo. at 21, 33, 68-72.

At most, Plaintiff suggests that unidentified members could be "confused" by these laws and *might* be unable to vote in-person or absentee, despite the fact that almost 100,000 have recently done so in the June primary. *E.g.*, Am. Compl. ¶ 25. But for standing purposes, an "injury in fact" must be "concrete and particularized," and "actual or imminent," not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiff must prove identified members' inability to vote is "certainly impending." *Id.* at 564 n.2. Plaintiffs' "[a]llegations of *possible* future injury" are not enough. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Plaintiffs under the standards cited must show that the laws with certainty will prevent their members from voting. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 403 (5th Cir. 2020) (quoting *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807-08 & n.7 (1969)). Because Plaintiffs cannot show that any particular member with certainty will be unable to vote due to any of the challenged laws, Plaintiffs lack standing to sue on behalf of their members. *See Clark v. Edwards*, CV 20-283-SDD-RLB, 2020 WL 3415376, *6-11 (M.D. La. June 22, 2020).

Finally, Plaintiffs also lack direct standing for the allegations. Their claimed injury is a diversion of resources to educate voters on the challenged laws. Am. Compl. ¶¶ 16-18, 22-23.[2] But Plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). If Plaintiffs' members lack injury to their voting

[2] Indeed, Plaintiffs allege that if they obtain their requested relief, they would spend *more* resources to engage in ballot harvesting. Am. Compl. ¶ 24. Hardly a true diversion if the funds at issue would be spent on a currently illegal practice rather than some other aspect of their mission.

rights, Plaintiffs' cannot spend their way to standing by budgeting to address hypothetical voting right harms. *See id.* As other courts have held, if a Plaintiffs already spends their funds on voter outreach, changing what the Plaintiffs say to voters is not a diversion because it would have spent the funds on voter outreach either way.[3] And any new processes fashioned by the Court—processes never before used in Oklahoma and different from the ones used in the recent primary—would require even *more* expenditures by Plaintiffs in voter education efforts. Accordingly, Plaintiffs lack standing.

2. *Anderson-Burdick* does not create a right to vote absentee.

Assuming Plaintiffs have standing, their challenges to the state's absentee voting laws in Count I are unlikely to succeed, in part because in-person voting remains open to all voters. The Constitution empowers states to prescribe "the Times, Places and Manner of holding Elections," U.S. CONST. art. I, section 4, so states have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013). States thus "significant flexibility in implementing their own voting systems." *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010). And they can engage in "substantial regulation of elections." *Burdick*, 504 U.S. at 432.

In Count I, Plaintiffs allege all of the challenged laws are void under *Anderson-Burdick*:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Fish v. Schwab, 957 F.3d 1105, 1122 (10th Cir. 2020); *see also Anderson v. Celebrezze*, 420 U.S. 780 (1983). The severity of the burden on the right to vote determines the level of scrutiny of the state's interests.[4]

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[3] *See Clark*, 2020 WL 3415376, *11-15; *see also Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *ACORN v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 1:20CV457, 2020 WL 4484063, at *12-18 (M.D.N.C. Aug. 4, 2020).

[4] *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality op. of Stevens, J.); *Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008).

After all, every election law "is going to exclude, either de jure or de facto, some people from voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). But "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*, 504 U.S. at 434; *see also Crawford*, 553 U.S. at 190. A regulation is reasonable if it does not impose a substantial burden beyond "the usual burdens of voting." *Crawford*, 553 U.S. at 198.[5]

Under this balancing test, the character and magnitude of the injury to the Plaintiffs must be assessed in light of "the state's election code *as a whole*." *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). The court must "consider[] all voting opportunities that the Plaintiffs *could have* taken advantage of." *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020); *see also Burdick*, 504 U.S. at 438-39 (burden of regulation small in light of alternative options to access electoral rights); *Crawford*, 553 U.S. at 197-99 (same).

As explained, Oklahoma's election laws as a whole provide numerous easy routes for a voter to cast a ballot, so even if one form of voting is unavailable a voter has many other options. *See supra* 2-3; Ex. 2, Ziriax Decl., ¶¶5-19. Plaintiffs challenge only laws relating to absentee voting, but even if those challenges had merit, they cannot show a violation of the right to vote because in-person voting remains an option. Ultimately, "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020).[6] Because the right to vote is not at issue, all of Plaintiffs' challenges in Count I are subject to rational basis review and cannot succeed in showing a burden on the right to vote.

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[5] It is clear that the challenged laws are nondiscriminatory. Every voter must verify their ballot, every voter must follow the deadline, every voter must figure out how to send their absentee ballot, and every voter is free from ballot harvesting by political entities. *Crawford*, 553 U.S. at 203 (referring to a voter ID law as "neutral, nondiscriminatory"); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 452 (2008) (referring to nondiscriminatory laws as "politically neutral regulations").

[6] *See also McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (the "claimed right to receive absentee ballots" is not "the right to vote"); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment) ("[T]he casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative."); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 403-04 (5th Cir. 2020) (in challenge to

3. Plaintiffs are unlikely to succeed in their challenge to Oklahoma's absentee ballot verification laws.

Plaintiffs ask the Court to substitute Oklahoma's absentee ballot verification options—notarization *or* two-witness signature *or* photo ID copy—with one newly crafted by the Court that amounts to no verification at all: a signature that is not matched with any pre-existing voter signature database. OKLA. STAT. tit. 26, §§ 14-108, 14-113.2; Ex. 2, Att. 3, § 3 ("Ballot Verification Laws"). Even putting aside that voters do not have the right to vote absentee, the many options afforded under the Ballot Verification Laws do not unconstitutionally burden the right to vote.

a. The Ballot Verification Laws pose a minimal burden on voting.

Each of the options for absentee voters to verify their ballots alone, even if it was the only option, would not constitute a significant burden; considering voters can choose among them, any burden becomes vanishingly small. *See Crawford*, 553 U.S. at 197-99.

First, during the COVID-19 emergency, absentee voters have the option of attaching a copy of their ID to verify their absentee ballot. *See* Ex. 2, Att. 3, § 3. This ID could be their free voter card provided by the state, or another federal, state, or tribal ID. *See id.*; OKLA. STAT. tit. 26, § 7-114. Many institutions across the state are offering free photo-ID copying services to voters, including drive-through services. Ex. 2, Ziriax Decl. ¶19. Voters can also take a photo or scan and print at home, use commercial or non-profit copy services, or use any one of numerous low-cost apps, like with CVS or FedEx, to take a picture of their ID on their phone and have a photocopy sent to them via the mail. And voters will have many months to obtain a photocopy—roughly any time between May and November. The Supreme Court has already held that in-person Voter ID "imposes only a limited burden on voters' rights," *Crawford*, 553 U.S. at 202-03; absentee ID poses no much greater burden.

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absentee voting laws, "the right to vote is not 'at stake'"); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting "a blanket right of registered voters to vote by absentee ballot").

Second, voters can have their ballot notarized by a notary public, who by law cannot charge a fee for the service. 26 O.S. § 14-108(A).[7] As Plaintiffs admit, there are tens of thousands of notaries across the State, Am. Compl. ¶ 50. Like with the ID photocopy, scores of institutions across the state are offering free notarization services, including drive-through services. Ex. 2, Ziriax Decl. ¶19.

Third, voters who qualify as "physically incapacitated" have the additional option of having their ballot signed by two witnesses. 26 O.S. § 14-113.2. The Legislature expanded the definition of "incapacitated" to include many who are impacted by or at high risk for COVID-19. Ex. 2, Att. 3, § 3(C). This witnessing can be done by members of a voter's household. As other courts have noted in upholding witnessing requirements during the pandemic, it can also be done by a friend, neighbor, postal worker, package or food delivery person, and can be done outdoors, wearing masks, and well-more than six feet apart.[8] Indeed, this is how Plaintiff is currently conducting voter registration efforts. Ex. 4, Andrews Depo at 14-17. Voters who truly want to remain shut-in can have the witness observe through video chat or through a window, and then sign the ballot when it is passed underneath the front door or left outside in the mailbox. *See supra* n.8 Voters in nursing homes can also request assistance in filling out and witnessing their ballots by bipartisan absentee voter boards, with no further requirements for verification. 26 O.S. § 14-115. And the Legislature also created new alternate procedures for those in nursing homes if those boards cannot enter the facility due to COVID-19. Ex. 2, Att. 3, § 3(B).

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[7] In May, the Oklahoma Supreme Court interpreted an existing provision in the State's Civil Procedure Code (Title 12) to allow voters to sign an affidavit under penalty of perjury in lieu of the notarization required by the Election Code (Title 26). *League of Women Voters of Oklahoma v. Ziriax*, 463 P.3d 524 (Okla. 2020). However, no election prior to this decision had ever been conducted in Oklahoma using this process for ballot verification, nor any since. Three days after the decision, the Legislature enacted S.B. 210, abrogating this decision by clarifying the law to require notarization for regular absentee ballots, but providing the ID photocopy alternative described herein. Ex. 2, Att. 3, §§ 1-2.

[8] *See Thompson*, 959 F.3d at 810 (endorsing "witnessing the signatures from a safe distance"); *Democracy N. Carolina*, 2020 WL 4484063 at *27, *33 (witnessing ballots with such precautions not "a serious risk to voters"); *Clark*, 2020 WL 3415376, *6-7; *Democratic Nat'l Cmte v. Bostelmann*, Nos. 20-1538 *et al.*, 2020 WL 3619499, at *2.

While voters do need to take some steps to comply with these laws, the "[b]urdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about [] constitutionality" and they "surely do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 197-98. They are, for example, no greater than the burdens during in-person voting in other years where voters have the time and expense of transporting themselves to their polling place in a timely manner, potentially waiting in line, and showing ID to cast a ballot. And they are even lighter given the many options for verifying an absentee ballot *and* the option to cast a ballot in-person or early which, as described above, remains a safe way to vote in Oklahoma. *See supra* pp.1-3; *see also Democracy N. Carolina*, 2020 WL 4484063 at *34.

Unable to show that the many in-person, early, and absentee options for voting are inherently burdensome, Plaintiffs point to the COVID-19 pandemic as the source of their burdens. But as other courts have held, that is a burden imposed externally by a world-wide pandemic, *not* by the State or the Ballot Verification laws, and thus not subject to invalidation under *Anderson-Burdick*.[9] A voter caught in a storm on the way to the polling place would have a more difficult time voting, but that is not injury caused by the state, and does not render otherwise-valid laws unconstitutional. This is true no matter the prevalence of severe thunderstorms in Oklahoma and no matter how the state's weather warning systems could have eased the burden. Put another way, given the ubiquity of the virus, COVID-19 is now part of the "usual burden on voting" that arises "arising out of life's vagaries"—and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98.

[9] *See Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020) ("First Amendment violations require state action … [s]o we cannot hold private citizens' decisions to stay home for their own safety against the State."); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020) (burdens caused "because of circumstances beyond the state's control, such as the presence of the Virus"); *id.* at 415-16 (Ho, J., concurring); *Mays v. Thurston*, 4:20-CV-341 JM, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020); *Coalition for Good Governance v. Raffensperger*, 1:20-CV-1677-TCB, 2020 WL 2509092, at *3 n.2. (N.D. Ga. May 14, 2020); *Clark*, 2020 WL 3415376, *10-11.

In any event, the State has taken numerous measures to ease and make safer voting during the pandemic. *See supra* 2-3. Plaintiffs' fears about in-person voting cannot overcome the evidence that in-person remains low risk during COVID-19. Ex. 1, Barie Decl., ¶¶10-19; *see also Clark*, 2020 WL 3415376, *10-11. Oklahoma only adds to its already-constitutional in-person option through its many absentee options which, as discussed, can be verified without getting into close contact with any other human, such as drive-through notaries or ID photocopying and socially-distant witnessing,. *See supra* 7-8.

Indeed, there is no evidence that, in practice, COVID-19 has led to significant voter burdens on Oklahoma as a whole; to the contrary, voter participation has gone up. Ex. 2, Ziriax Decl., ¶¶34-36. In the recent June primary, only 0.14% of all votes were rejected because of the Ballot Verification Laws, and the percentage of those who requested an absentee ballot that were able to successfully cast a ballot has increased. *Id.* Plaintiffs bear the responsibility to quantify the magnitude of the burden with reliable evidence, and they cannot do so here. *Crawford*, 553 U.S. at 200; *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009).

Even if Plaintiffs could suggest additional measures to facilitate voting during the pandemic, this Court should defer to the state's judgments on how best to handle voting during the pandemic rather than upset the balance Oklahoma has struck. As Chief Justice Roberts explains in another First Amendment context, a State's decision on how to address the coronavirus is a "dynamic and fact-intensive matter subject to reasonable disagreement," so when state "officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad,'" and "they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay United Pentecostal Church v. Newsom*, No. 19A1044 at 2 (May 29, 2020) (Roberts, C.J., concurring) (citing *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905)).

Thus, the COVID-19 pandemic requires that courts give *more* weight, not less, to state judgments about how best to preserve the right to vote and election integrity.[10]

That is why the Supreme Court has repeatedly refused to upset the judgment of state officials on how best to address COVID-19. For example, the Supreme Court recently stayed a district court preliminary injunction that, *inter alia*, halted Alabama's absentee ballot verification laws—which are even more strict than Oklahoma's because they require voters to *both* include a photocopy of their ID *and* have it notarized or witnessed. *Merrill v. People First of Alabama*, No. 19A1063 (July 2, 2020). An order from this Court upending Oklahoma's election-related decisions during the pandemic risks the same swift halt by appellate courts that has occurred in case after case this year in challenges to the decisions of election officials during the pandemic. [11]

b. The State's interests in the Ballot Verification Laws outweigh any burdens.

Under the *Anderson-Burdick* framework, the State's interests in the Ballot Verification Laws outweigh any burdens particular voters may experience, in normal times or during the pandemic. *First*, the Ballot Verification Laws help prevent voter fraud, and "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196 (plurality op.). The "propriety" of "preventing election fraud" is "perfectly clear." *Id.* Oklahoma's

[10] *See, e.g.*, *Democratic Nat'l Cmte v. Bostelmann*, Nos. 20-1538 *et al.*, 2020 WL 3619499, at *2; *Williams v. DeSantis*, No. 1:20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020); *Sinner v. Jaeger*, 3:20-CV-00076, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020); *Bethea v. Deal*, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016); *ACORN v. Blanco*, 2006 WL 1034962 (E.D. La. Mar. 27, 2006).

[11] *See Republican Nat'l Comm. v. Common Cause RI*, No. 20A28 (Aug. 13, 2020); *Little v. Reclaim Idaho*, No. 20A18 (July 30, 2020); *Texas Democratic Party v. Abbot*, No. 19A1055 (June 26, 2020); *Republican Nat'l Committee v. Democratic Nat'l Committee*, No. 19A1016 (April 6, 2020) (per curiam); *see also Barnes v. Ahlman*, No. 20A19 (Aug. 5, 2020) (jails); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (July 24, 2020) (religious services); *Peterson v. Barr*, No, 20A6 (July 14, 2020) (execution); *Dep't of Homeland Sec. v. New York*, No. 19A785 (April 24, 2020) (immigration).

Ballot Verification Laws help deter and prevent fraud because obtaining someone else's ID or finding a notary or multiple witnesses willing to participate in forgery are far more difficult than faking a signature.

Second, the state has an interest beyond preventing fraud in actually *detecting* fraud. Reducing the requirement for ballot verification to a mere signature requirement "gives no effect to the state's substantial interest in combatting voter fraud." *Democratic Nat'l Cmte v. Bostelmann*, Nos. 20-1538 *et al.*, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) (staying district court order that "categorically eliminates the witness requirement applicable to absentee ballots"); *see also Democracy N. Carolina*, 2020 WL 4484063 at *35-36. The Ballot Verification Laws aid in fraud detection because the notary or witness can be questioned, and finding a notary's or witness's name on one false affidavit can help in detecting other fraudulent ballots by finding other places that notary or witness acted. *See* Ex. 5, Strach Decl. ¶ 28.

Third, the state has an interest in safeguarding voter confidence. "[P]ublic confidence in the integrity of the electoral process. . . encourages citizen participation in the democratic process. *Crawford*, 553 U.S. at 197 (plurality op.). This is an independent interest from detecting and deterring voter fraud. *See id.* If there was no effective measure to detect or prevent fraud—Plaintiffs' proposal of an unmatched signature is about as ineffective as it gets—decreased confidence in the accuracy of the election results is a possibility. Public confidence is promoted if the State takes proactive measures to prevent fraud.

These interests are a "legislative fact" that the state need not prove with evidence and that the state can advance prophylactically without showing any current ongoing fraud. *See Frank v. Walker*, 768 F.3d 744, 750-51 (7th Cir. 2014); *Crawford*, 553 U.S. at 194-195.[12] But to the extent that evidence of the

[12] *See also Utah Republican Party v. Cox*, 892 F.3d 1066, 1113 (10th Cir. 2018) (Tymkovich, J. concurring in part and dissenting in part); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008); *Democracy N. Carolina*, 2020 WL 4484063 at *36.

existence of absentee voter fraud is necessary,[13] it is not hard to show. Indeed, the Supreme Court in *Crawford* upheld an in-person voter ID law based on the well-evidenced history of absentee voter fraud. 553 U.S. at 194-96. If in-person voter ID is valid because of the history of absentee fraud, surely absentee voter ID is valid based on that same history, especially with two more options in to verify a ballot.

As the Commission on Federal Election explained: "Absentee ballots remain the largest source of potential voter fraud."[14] The Supreme Court and many other courts have long agreed that absentee voting is particularly vulnerable to, and has a long history of, fraud.[15] And Defendants have documented over a hundred cases of absentee fraud throughout the nation, including Oklahoma. *See* Ex. 6, Cleveland Decl. Exs. 1-124; Ex. 5, Strach Decl. ¶¶ 8-30; Ex. 2, Ziriax Decl., ¶¶ 21-23. This covers only cases of *discovered* fraud, not the fraud that goes undetected, especially in states without as robust measures as Oklahoma's. And this fraud is also not inconsequential: it sometimes leads to the results of the election being overturned. *See* Ex. 6, Cleveland Decl. Exs. 112-124; Ex. 5, Strach Decl. ¶¶ 18, 27.

Ultimately, Oklahoma's Ballot Verification Laws do not pose a barrier to the right to vote, they promote it: "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Plaintiffs' request to ease the ability of persons to commit absentee voter fraud—and to get away with it—risks undermining the suffrage

[13] Although *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), *cert pet. filed* No. 20-109 (U.S.), may be interpreted as requiring such evidence, Defendants assert that such requirements are inconsistent with *Crawford* and the Tenth Circuit's earlier decision in *Santillanes*.

[14] https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf

[15] *Crawford*, 553 U.S. at 195-96; *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004); *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc); *Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982); *Tex. Democratic Party*, 961 F.3d at 413 (Ho, J., concurring). Even judges who doubt that fraud is an issue with in-person voting have recognized that "absentee-ballot fraud . . . is a documented problem." *Crawford*, 553 U.S. at 225 (Souter, J., dissenting).

rights of all Oklahomans. *Anderson*, 417 U.S. at 227 (voters have a right to vote "without its being distorted by fraudulently cast votes"). For these reasons, they are unlikely to succeed.

4. Plaintiffs' challenge to the Ballot Harvesting Laws will not succeed.

For similar reasons, Plaintiffs cannot succeed in their challenge to Oklahoma laws prohibiting and punishing Plaintiffs from requesting, collecting, and submitting the absentee votes of other unrelated people. OKLA. STAT. tit. 26, §§ 14-101.1, 16-104.1, 16-126 ("Ballot Harvesting Laws"). Ballot harvesting breaks the chain of custody between voters and government officials with the possibility that votes will be unduly influenced, tampered with, or destroyed. Recent experiences show how such efforts can fraudulently alter the results of an election. The State is under no constitutional duty to take such risks.

a. The Ballot Harvesting Laws are constitutional under *Anderson-Burdick*.

The Ballot Harvesting Laws imposes only a minimal, if any, burden on the right to vote. It doesn't actually require anything of any voter to cast a vote; it merely prohibits outside groups from harvesting their ballot. Thus, voters can still vote as they normally do, even if without "assistance" from political operatives, going through the "usual burden on voting." *Crawford*, 553 U.S. at 197-98.

In any event, Oklahoma does not completely ban voter assistance; it allows family and even roommates to offer assistance. *See* OKLA. STAT. tit. 26, § 14-101.1. Moreover, those confined to nursing homes can get assistance absentee voting boards to obtain, verify, and submit their ballot. *Id.* at § 14-115. And if a nursing home is closed to outside visitors during the pandemic, new state law specially authorizes designated officials within the nursing homes to assist with absentee ballots. Ex. 2, Att. 3, § 3(B). Plaintiffs fail to show that lack of ballot harvesting imposes a severe burden on voting.

Moreover, Plaintiffs' complaints are self-contradictory: for other claims, they decry the risk to voters from personal contact from outsiders during the pandemic (especially the elderly) when voting in-person or complying with the Ballot Verification Laws, but then ask for the Court to allow Plaintiffs

to go around *en masse* potentially exposing the most vulnerable populations to the virus through their ballot harvesting activities. By Plaintiffs' own standards, the Ballot Harvesting Laws protect voters from COVID-19 because it prevents groups going door-to-door by the thousands attempting to "assist" with people's absentee ballots and thereby risking their health. Ex. 4, Andrews Depo. 55-58 (describing ideas for "vote from home parties" and visits to churches and retirement homes to collect ballots).

Indeed, it is precisely these voters who are *most* vulnerable to undue influence, intimidation, or coercion by Plaintiffs and other groups—showing the State's interests in the Ballot Harvesting Laws. *See Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1187-88, 1190-91, 1206 (Ill. App. 2004); *see also* Strach Decl. ¶¶ 48-55. So while political entities like Plaintiffs may suffer injury because they cannot pressure voters into casting votes for their party's candidates, that injury is not an injury to the voter or the voter's rights. *See Crawford*, 553 U.S. at 195-96 & n.13 (plurality op.); *Qualkinbush*, 826 N.E.2d at 1190-91 (describing how "easily someone of influence could manipulate the[] votes" when assisting with absentee ballots).[16] The problem of coercion is inherent in mail-in voting, but it's only made worse by ballot harvesting schemes. *Qualkinbush*, 826 N.E.2d at 1197; Carter-Baker, *supra* n.14 at 47 ("Absentee balloting is vulnerable to abuse in several ways," including that "[c]itizens who vote at home, at nursing homes, as the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.").

Oklahoma has a legitimate interest in preventing and detecting voter fraud that is facilitated by ballot harvesting, promoting confidence in the election, and ensuring an orderly electoral process. Much like protecting evidence in an investigation, the Ballot Harvesting Laws protect the chain of custody between the voter and election officials in order to reduce opportunities for fraud. *Cf. Qualkinbush*, 826 N.E. 2d at 1204; *see* Strach Decl. ¶¶ 40-42. Indeed, combined with eliminating the Ballot Verification

[16] The Ninth Circuit has disregarded *Crawford*, as Plaintiffs note, in a Voting Rights Act case—not one brought under the Constitution like Plaintiffs do here—but it has also stayed its own judgment pending Supreme Court review. *Compare* Am. Compl. ¶ 132 (citing case), *with* Stay Order, *DNC v. Hobbs*, No. 18-15845 (9th Cir. Feb. 11, 2020).

Laws that Plaintiffs attack, ballot harvesting can result in fraudulent ballots on a mass scale. That is why the Carter-Baker Commission and others have recommend that in general states should prohibit third parties "from handling absentee ballots," particularly recommending that "[t]he practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." Carter-Baker , n. 14 at 47.

Again, this interest is not theoretical, as many courts have recognized the problems caused by fraud vai ballot harvesting.[17] Defendants document yet more cases, *see* Ex. 6, Cleveland Decl. Exs. 81-111, including the ballot harvesting incident that undid a Congressional race in North Carolina two years ago, *see* Strach Decl ¶¶ 14-27. *See also* Ex. 2, Ziriax Decl., ¶¶23-31.

It is not enough that Plaintiffs claim they will only obtain and return "sealed and voted" ballots, and to do otherwise remains unlawful, Am. Compl. ¶¶ 171, 175, because again undoing the Ballot Harvesting Laws will hinder the State's ability to *prevent* and *detect* fraud. That is why courts across the country have recognized states' strong interest in such laws.[18] Once the door is opened for groups to legally roam around collecting ballots, it becomes harder to ensure Plaintiffs or any other harvesting group will not tamper with, destroy, or fail to return the ballots, intentionally or unintentionally. Nor can we guarantee that Plaintiffs or other groups won't attempt to influence a vote in exchange for their "assistance." Broad prohibitions on ballot harvesting, however, will mean that voters will know *never* to give their ballot to an outside group (preventing fraud from occurring to begin with) and will mean that

[17] *See Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (ordering a special election due to ballot harvesting fraud); *Qualkinbush*, 826 N.E.2d at 1195-96 (in addition to Illinois, pointing to cases in New Jersey and California); *Matter of Protest Election Returns & Absentee Ballots in November 4, 1997 Election for City of Miami, Fla.*, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (declaring new winner of election for Miami mayor after "massive fraud in absentee ballots," including the use of "so-called 'ballot brokers'").

[18] *Qualkinbush*, 826 N.E. 2d at 1193, 1199; *see also id.* at 1195-96 (citing other courts upholding harvesting bans for similar reasons).; *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004); *Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994) (describing massive fraudulent ballot harvesting in election where control of Pennsylvania Senate was at stake).

voters can inform about or the state can investigate any group that is engaging in such activities (allowing the detection of fraud). As one court put it when upholding similar laws to those challenged here:

> We find that the burden placed upon absentee voters by the restriction on who may mail an absentee ballot … is slight and is nondiscriminatory. This provision limits the number of third parties who come in contact with an absentee ballot and provides a safeguard that the ballot will be voted based on the intent of the voter, not someone else. Additionally, this provision limits the number of third parties who come in contact with the absentee ballot once it has been voted, thus limiting the number of individuals able to tamper with it, destroy it, or fail to mail it. … This is an important state interest. … [It] protects the integrity of the election process by depriving unauthorized persons of the opportunity to tamper with completed absentee ballots, thereby addressing such issues as coercion, fraud, and secrecy that potentially arise with absentee voting.

Qualkinbush, 826 N.E.2d at 1199 (citations omitted).

The same is true of harvesting absentee ballot applications: it prevents groups from turning in the application without the voters' knowledge, stealing the ballot from the unsuspecting voters' mailbox, and casting a fraudulent vote; or manipulating voters into requesting an absentee ballot and, once received, turning control over to the harvester, *Cf. Qualkinbush*, 826 N.E.2d at 1187-88, 1190-91; or simply taking possession of the application but (intentionally or unintentionally) never turning it in, leaving the voter waiting for an absentee ballot that never arrives. Oklahoma's limitations on who can return the ballot ensures that "order, rather than chaos," is the story of our election. *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

b. The Ballot Harvesting Laws do not violate the First Amendment.

Nor can Plaintiffs prevail in Count IV by recasting their claim as one involving political speech. *Anderson-Burdick* already takes into account any actual First Amendment concerns of voters; no separate analysis is necessary. *See Democracy N. Carolina*, 2020 WL 4484063 at *50-51. Plaintiffs claim that their act of collecting and returning others' ballots is somehow expressive, but then tacitly admit that ballot harvesting does not involve political speech or association because they are collecting "*sealed* and *voted*

ballots." Am. Compl. ¶ 175 (emphasis in original). If the political speech is finished, the ministerial acts to complete and submit the form containing the speech are not protected acts.

Put another way, Plaintiffs' proposed ballot harvesting is conduct, not speech. As the party invoking the First Amendment, they have the burden to prove it applies. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). To determine whether the conduct at issue is protected under the First Amendment, courts examine (1) whether the conduct shows an "intent to convey a particularized message," and (2) whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Here, Plaintiffs aren't trying to convey any message with discernable content—and certainly not one most would understand—by the act of collecting and returning other people's votes of unknown content.[19] Not all conduct is expressive and because not all conduct related to speech becomes expressive conduct. *See Clark*, 468 U.S. at 297-98; *Rumsfeld*, 547 U.S. at 66; *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The only way to inject political speech into ballot harvesting is if the parties involved are discussing a ballot that can still be voted, allowing the harvester to influence the vote. And if this were the case, then the Ballot Harvesting Laws actually promote the First Amendment because they "provide[] a safeguard that the ballot will be voted based on the intent of the voter, not someone else." *Qualckinbush*, 826 N.E.2d at 1199. Thus, unless Plaintiffs concede that they want to harvest ballots in order to influence how the person votes—in which case the State's interest in prohibiting such undue influence is even *stronger*—their Count IV fails to allege any First Amendment injury.

[19] *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (collecting absentee ballots is not speech); *Democracy N. Carolina*, 2020 WL 4484063 at *51-52 ("delivering absentee ballot requests is not expressive conduct"); *see also Miller v. Thurston*, No. 20-2095, --- F.3d ----, 2020 WL 4218245, at *6 (8th Cir. July 23, 2020) (notarizing and returning petition signatures is not speech); *Voting for America v. Steen*, 732 F.3d 382, 393 (5th Cir. 2013) (collecting voter registrations is not speech); *League of Women Voters v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (same).

5. Plaintiffs are unlikely to succeed in their challenge to the Ballot Receipt Deadline.

Plaintiffs also challenge Oklahoma's law requiring absentee ballots to be received by 7 P.M. on Election Day, 26 O.S. § 14-104 ("Ballot Receipt Deadline"), proposing instead a new deadline fashioned out of whole cloth. But Plaintiffs are unlikely to succeed in their request to write new election laws. *See Thompson*, 959 F.3d at 812 (federal courts can enjoin laws, but they cannot "usurp[ ] a State's legislative authority by re-writing its statutes' to create new law" (citation omitted)); *Democracy N. Carolina*, 2020 WL 4484063 at *45 (stating it is not the court's role to rewrite [the State's] election law.").

Oklahoma's Ballot Receipt Deadline imposes no different burden than any other deadline would impose. "[A] generally applicable deadline that applied to all would-be absentee voters would likely survive the *Anderson-Burdick* analysis, even if it resulted in disenfranchisement for certain. . . individuals." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). As the Tenth Circuit has observed, any deadline "will invariably burden some voters. . . for whom the earlier time is inconvenient." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018). These burdens are assessed in light of "a state's legitimate interest in providing order, stability, and legitimacy to the electoral process." *Id.*[20]

Plaintiffs' only real argument is that voters might not comply or that the postal service might be dysfunctional. *See, e.g.*, Am. Compl. ¶¶ 104-116. Defendants are not responsible for either of these. "[V]oters who fail to get their vote in early cannot blame [state] law for their inability to vote; they must blame 'their own failure to take timely steps.' " *Thomas v. Andino*, No. 3:20CV01552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) (quoting *Rosario v. Rockerfeller,* 410 U.S. 752, 758 (1973), 410 U.S. at 758). As the Supreme Court recently observed, voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a late-requesting voter, not a burden imposed

[20] Plaintiffs misrepresent a Supreme Court case to avoid this precedent, caliming that the Supreme Court affirmed revising deadlines. See Am. Compl. ¶ 118. A brief review of the cited case shows that the deadline issue was not raised on appeal—a far cry from being affirmed.

by state law. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). That is why multiple district courts have found this exact sort of deadline valid. *See Thomas*, 2020 WL 2617329, at *26; *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004). Here, Oklahoma begins sending out ballots a full 45 days before the Ballot Receipt Deadline, Ex. 2, Ziriax Decl., ¶ 12, so no amount of postal or other delay can possibly impose a burden to returning it timely. Also, the problems attributed to the Postal Service are not properly considered here, as Oklahoma does not manage the U.S. Postal Service. *Cf. Mays v. Thurston*, 4:20-CV-341, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020).

The Deadline is more than justified by the State's interest in orderly elections and promoting voter confidence in the election. Deadlines facilitate this order because states must have a point at which they stop receiving ballots and start counting them to determine the winner. *Cox*, 892 F.3d at 1077; *Friedman*, 345 F. Supp. at 1377. All states must set some deadline—and "[t]he most common state deadline for election officials to receive absentee/mailed ballots is on Election Day when the polls close."[21] The Deadline also "eliminates the problem of missing, unclear, or even altered postmarks, eliminates delay that can have adverse consequences, and eliminates the remote possibility that in an extremely close election … a person who did not vote on or before election day can fill out and submit a ballot later." *Nielsen v. DeSantis*, No. 4:20-cv-236, Doc. 332 at 3 (N.D. Fla. June 24, 2020). The deadline also secures voter confidence in the election: voters become less sure of the results if one candidate is a winner on election day, but as more ballots come in, the results are changed. This raises suspicions in states that don't have an election day receipt deadline. Ex. 2, Ziriax Decl., ¶37. Moreover, Plaintiffs' proposal may actually lead to *more* disenfranchisement because of its reliance on a postmark.[22]

[21] https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx

[22] *See* Jesse McKinley, *Why the Botched N.Y.C. Primary Has Become the November Nightmare*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/nyc-mail-ballots-voting.html (describing thousands of ballots rejected because of a lack of a postmark).

In Count III, Plaintiffs also raise a Fourteenth Amendment procedural due process claim to the Deadline, Am. Compl. ¶¶ 157-166, but *Anderson-Burdick* provides the relevant framework for both Counts I and III. All alleged burdens on First and Fourteenth Amendment rights are analyzed together under *Anderson-Burdick*. *See Burdick*, 504 U.S. at 434; *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019); *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). Thus, for the reasons stated above, Plaintiffs are unlikely to exceed on Count III as well. In any event, nothing is unfair about the procedure imposed by the Deadline. Voters can ensure their absentee ballot is counted by turning it in person—or by requesting and sending it in early enough rather than waiting to the very last minute.

6. Plaintiffs are unlikely to succeed in their demand that the State appropriate funds to pay for pre-paid postage.

Plaintiffs' final challenge does not challenge any law at all: rather, they argue that it is unconstitutional for the State not to appropriate dollars to pre-pay for postage for absentee ballots. Am. Comp. ¶¶ 153-156. Like with the Ballot Deadline, Plaintiffs ask the Court to impermissibly craft new state law out of whole cloth. *Supra* p. 19. But the Court should reject the invitation to forcibly appropriate money from the State treasury, violating both the separation of powers.

Even assuming this claims is cognizable under *Anderson-Burdick* as Count I alleges, Am. Comp. ¶ 148, lack of free postage is just the typical burden of voting, just like transporting oneself to the polls. *Crawford*, 553 U.S. at 198. The state is not inflicting the realities daily life and its transactional costs on Plaintiffs' members—life is—and declining to provide free stamps (or any other good or service that could facilitate voting) is not the inflicting of a harm. Several courts have concluded that, even assuming lack of prepaid postage is a restriction, it is a valid evenhanded one.[23] Plaintiffs admit there are many,

[23] *See League of Women Voters of Ohio v. Larose*, 2020 U.S. Dist. LEXIS 91631 (S.D. Ohio Apr. 3, 2020); *Bruce v. City of Colorado Springs*, 971 P.2d 679 (Colo. Ct. of Appeals 1998); *cf. Griffin,* 385 F.3d at 1130 (court could not require Internet voting, nor require state to "have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access").

low-cost ways to get postage: use stamps already possessed, visit the post office, print stamps at home, or order online. Am. Compl. ¶¶ 87-91. Finding reliable transportation is as much of a burden in getting to the polls as it is getting to the post office, but neither makes a state's election system unconstitutional. Indeed, mailing your vote is likely *easier* than the typical process of voting in person.

Meanwhile, the State has an inherent and fundamental interest as sovereign in protecting and managing the public fisc. "Protecting the public fisc ranks high among the aims of any legitimate government." *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1227 (6th Cir. 1997). This interest is heightened during a health emergency like COVID-19, when a state's limited resources for elections are further strapped by the need to respond to a crisis.

In Count II, plaintiffs recast the *absence* of a state law appropriating funds for pre-paid postage as a "poll tax" in violation of the Twenty-Fourth Amendment. But Oklahoma does not require voters to pay postage to vote: they also can vote in -person or turn in their absentee ballot in-person. OKLA. STAT. tit. 26, § 7-104; *id.* § 14-108. Even if voters choose to use the postal service, Oklahoma law does not require that they pay the postage themselves. *Id.* § 16-106 (anyone can gift an envelope or stamp to a voter).

As other courts have held, permitting the use of the mail to vote as one option among many but not paying for the postage does not qualify as a tax.[24] The distinction between incidental costs and a tax is whether the cost "is one deliberately imposed by the State." *Veasey v. Perry*, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting); *see Hill v. Kemp*, 478 F.3d 1236, 1245 (10th Cir. 2007) (citing *Black's Law Dictionary* 1496 (8th ed. 2004)). A tax must also "yield public revenue." *Hill*, 476 F.3d at 1245. Neither

[24] *See Black Voters Matter Fund v. Raffensperger*, 1:20-CV-01489-AT, 2020 WL 4597053, at *27 (N.D. Ga. Aug. 11, 2020) (dismissing postage-stamp poll tax argument); *Nielsen v. DeSantis*, No. 4:20-cv-236, Doc. 332 at 2 (N.D. Fla. June 24, 2020) ("Postage charged by the United States Postal Service—like the fee charged by any other courier or the bus fare for getting to the polls to vote in person—is not a tax prohibited by the Twenty-Fourth Amendment.").

element is met here. Oklahoma is not deliberately imposing any cost to vote, including the cost of stamps, and it does not receive any revenue from stamps purchased. It's not a tax.

Finally, to the extent that the absence of a law could somehow be conceived-of as a tax, federal law provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. As the Tenth Circuit has held, Oklahoma law provides for the state court remedy mentioned in the Tax Injunction Act. *Hill*, 478 F.3d at 1246 (citing OKLA. STAT. tit. 12, § 1397). Thus, assuming Plaintiffs are correct that lack of pre-paid postage is a poll tax, they must bring that challenge in state court in Oklahoma, and this court cannot enjoin any such tax.

7. At most, Plaintiffs could only succeed in an as-applied challenge with respect to particularly-identified individual voters, not a facial challenge.

As a final point, Plaintiffs are unlikely to succeed on their claims because they are seeking *facial* relief under the guise of *as-applied* arguments regarding particular voters. In *Crawford*, the plurality opinion stated that it saw no basis to "invalidate the entire statute" at issue "even assuming an unjustified burden on some voters." *Crawford*, 553 U.S. at 203. And the concurrence wholly rejected the idea that laws that "are especially burdensome for some voters" would justify any relief. *See id.* at 208 (Scalia, J., concurring in the judgment). The "burden some voters face[]" cannot "prevent the state from applying the law generally." *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). As a result, "[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). Instead, the proper course for people with particular burdens is to seek as-applied relief for themselves. *Frank*, 819 F.3d at 386.

Yet what Plaintiffs seek here is what *Crawford* firmly rejected. Plaintiffs advance multiple allegations about how the laws at issue are especially burdensome for some voters, *e.g.*, Am. Compl.

¶¶ 15, 18, 74, 92-93, 124, but seek complete invalidation of the laws for all voters on that basis. Because *Crawford* requires that this court reject that request, Plaintiffs are unlikely to succeed.

B. The remaining equitable factors favor denying an injunction.

The balance of the equities favors denying an injunction. Unless unconstitutional—and the above analysis shows otherwise—"barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature … would seriously and irreparably harm the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). That is why the Supreme Court has instructed all other courts that it must weigh "considerations specific to election cases," including that court orders close to an election "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5 (2006). The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (2020). This principle helps prevent "serious disruption of [the] political process" right before an election. *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968).

Under the *Purcell* principle, July is too close to a November election to strike down an entire suite of election laws. *See Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016); *see also Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying lower court injunction that changed election laws 61 days before election day). Here, because voters will have already participated in two elections by the time of the injunction hearing (the primary and the run-off) following the processes during the pandemic challenged in this suit, changing those processes for the upcoming general election will only lead to greater voter confusion. Stability and predictability of election rules are necessary for "[c]onfidence in the integrity of our elector process" *Purcell*, 549 U.S. at 4. In contrast, creating confusion encourages voters "to remain away from the polls." *Id.* at 5. This sort of "interference by the judicial department with the electoral franchise of the people of this state . . . might well amount to a substantial destruction of that most important civil right." *Beebe v. Koontz*, 302 P.2d 486, 490 (Nev. 1956). This Court should

reject Plaintiffs' invitation to "tamper with election regulations" and impose never-before-used "election procedures [that] threaten to take the state into uncharted waters." *Thompson*, 959 F.3d at 812. By forgoing the filing of a motion for preliminary injunction when they filed this case in May, Plaintiffs failed to even try seeking relief consistent with *Purcell*.

This is all the more relevant because this suit challenges *absentee* voting laws, which require preparation, have deadlines, and allow for voting far before election day.; *Thompson*, 959 F.3d at 813 ("the November election itself may be months away but important, interim deadlines that affect Plaintiffs … and the State are imminent"). Effectively, the general election starts in mid-September when absentee ballots can begin to be sent out and voted. As Secretary Ziriax explains, changing any of the challenged laws would require printing of new absentee ballot materials, assembly of absentee ballot packets, and more burdens on county election boards that could very well delay the sending of absentee ballots—giving voters *less* time to fill out and return them. Ex. 2, Ziriax Decl., ¶¶38-41 & Att. 5-12.

The *Purcell* principle commands district courts to deny a preliminary injunction regardless of whether Plaintiffs are likely to succeed on the merits of their claim. *See Purcell*, 549 U.S. at 5 (vacating an injunction based on timing while "express[ing] no opinion here on the correct disposition" of the merits); *Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014). Plaintiffs may argue that COVID-19 alters the *Purcell* principle, but the Supreme Court has already rejected that argument. *Compare* Resp'ts Br. 16, bit.ly/2AKc1Gt, *with RNC*, 140 S. Ct. at 1206-08.

In contrast to the state's harm, Plaintiffs suffer little but inconvenience from the denial of any injunction, as their asserted harms are speculative. Again, they cannot show any particular member cannot exercise one of the many opportunities to vote because of the challenged laws, individually or in combination. *See supra* p.4. Harm that is speculative or hypothetical will not suffice; the harm must be both certain and great, not merely serious and substantial. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System, which will transmit a Notice of Electronic Filing and a copy of the document to all counsel who have entered an appearance in this case.

s/ *Mithun Mansinghani*

MITHUN MANSINGHANI