Nos. 20-16759, 20-16766

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,
Plaintiffs-Appellees.
v.
KATIE HOBBS, *et al.*,
Defendants,
and
STATE OF ARIZONA, *et al.*,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01143

STATE OF ARIZONA'S OPENING BRIEF

MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn ("Beau") W. Roysden III
Solicitor General

Drew C. Ensign
Michael S. Catlett
Deputy Solicitors General
Jennifer J. Wright
Robert J. Makar
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5200
Drew.Ensign@azag.gov

Counsel for the State of Arizona

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INTRODUCTION

Arizona is a leader amongst states in making it easier to vote, and has systematically removed multiple barriers to voting that numerous other states continue to maintain. Arizona notably (1) permits online registration, (2) has eliminated any excuse requirement for voting by mail, (3) provides easy access to permanent mail-in balloting, (4) pre-pays postage, (5) continues to maintain in-person polling locations despite widespread vote-by-mail utilization, and (6) eschews any notarization or witness requirements for mail-in ballots. 2-ER-78-84. In doing so, the State has made voting considerably easier in ways that go far beyond what the U.S. Constitution requires.

But once again, "no good deed goes unpunished." *Winter v. NRDC*, 555 U.S. 7, 31 (2008). Arizona's extensive efforts to make voting less burdensome have been rewarded by yet another suit by Plaintiffs and aligned groups. Although the district court entered judgment and a permanent injunction for Plaintiffs, this Court granted a stay pending appeal, holding that "the State's probability of success on the merits [on appeal] is high." *Arizona Democratic Party v. Hobbs ("Hobbs I")*, 976 F.3d 1081, 1086 (9th Cir. 2020). This appeal now follows.

This case involves a late-filed challenge to Arizona's procedures regarding mail-in ballots, specifically those with unsigned ballot affidavits. Arizona is one of 31 states that use voters' signatures as the primary method of authenticating voters' identities for mail-in ballots, which serves as a primary and important method of protecting the integrity of their electoral systems using such ballots. 2-ER-97. Of those, 15 states—nearly *half*—do not provide voters *any* opportunity to cure a failure to sign the ballot affidavit whatsoever. 2-ER-97. Arizona is not among them. Instead, like Georgia, Massachusetts, and Michigan, it permits voters to cure their initial failure to sign a ballot as long as they do so by when polls close on Election Day ("Poll-Close Deadline"). 2-ER-83. Moreover, Arizona law affirmatively *requires* election officials to assist voters in curing non-signatures. 1-ER-15.

The lack of a post-election cure opportunity for non-signatures is hardly a recent development in Arizona law. In the 102 years that Arizona has permitted voting by mail, it has always required a signature and *never* permitted post-election curing of omissions. 2-ER-136. But after 101½ years—and less than two months before the 2020 primary elections and five months before the general election—

Plaintiffs filed the instant suit on June 10, 2020. 1-ER-5. Specifically, Plaintiffs challenged the relevant collection of statutes and regulations that do not permit post-election curing (collectively, the "Acts") as unconstitutional. Plaintiffs did not attempt to seek relief regarding the 2020 primary election—thereby inflicting on their own voters what they contended was unconstitutional disenfranchisement, purely through their own dilatory conduct.

Plaintiffs asserted two Fourteenth Amendment claims: (1) an *Anderson-Burdick* claim that the Acts imposed an unconstitutionally excessive burden, and (2) a procedural due process claim. 1-ER-5. The district court entered judgment for Plaintiffs on both claims and a permanent injunction on September 10. 1-ER-2-26.

The district court's merits analysis started off on the right foot, correctly holding that the burden imposed by the Acts is "minimal," and repeating that characterization a total of ten times. 1-ER-14-15, -17-20, -25. Indeed, as that court aptly observed, "there is nothing generally or inherently difficult about signing an envelope by Election Day." 1-ER-13. The district court further properly recognized that the Acts implicate several important state interests. 1-ER-14-19.

Unfortunately, its analysis then went off the rails. This Court's precedents are clear when the burdens are not "severe"—let alone forthrightly acknowledged to be "minimal"—that:

- "[T]here is no requirement that the rule is *the only or the best way* to further the proffered interests." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011) (emphasis added); and
- This Court's inquiry "is limited to whether the chosen method is *reasonably related* to [an] important regulatory interest," *Prete v. Bradbury*, 438 F.3d 949, 971 (9th Cir. 2006) (emphasis added).

Defying this Court's precedents, the district court effectively held there was but a single way that Arizona could comply with the Constitution: providing the five-business-day post-election cure period sought by Plaintiffs. In its view, "the challenged deadline fails to withstand the most deferential level of scrutiny." 1-ER-20.

The district court's aggressive second-guessing of the State's interests and micro-management of its electoral processes rests on patent legal errors. Indeed, this Court has *already* substantially held as much. In particular, the *Hobbs I* panel held outright that:

- The Acts "impose[], at most, a '*minimal*' burden." 976 F.3d at 1085 (emphasis added).
- "All ballots must have *some* deadline, and *it is reasonable that Arizona has chosen to make that deadline Election Day itself* so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job." *Id.* (second emphasis added).
- "[T]here can be no doubt (and the record contains evidence to show) that allowing a five-day grace period … would indeed increase the administrative burdens on the State to some extent." *Id.*
- "[T]he State has offered a reasonable explanation for why it has granted a limited opportunity to correct such 'mismatched' signatures but not to supply completely missing signatures." *Id.* at 1086.
- Ultimately, "the State's probability of success on the merits is high." *Id.*

On the issues that the *Hobbs I* panel outright resolved in a published decision, its holdings are binding as laws of the circuit and

the case. Even absent that formal preclusive effect, the *Hobbs I* panel's determinations are also plainly correct. And together those holdings alone effectively mandate reversal here on Plaintiffs' *Anderson-Burdick* claim, as do other not-yet-reached errors—including that the district court granted relief on concededly facial claims without even attempting to apply the standard for facial relief.

The district court's analysis also should have ended with its application of the *Anderson-Burdick* standard. This Court has been clear that "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework—governs *all* constitutional challenges to electoral regulations. *Dudum*, 640 F.3d at 1106 n.15. All such constitutional claims are "folded into the *Anderson/Burdick* inquiry." *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018).

This Court has repeatedly applied this rule categorically. *See infra* Section III.A. But despite the categorical nature of this Court's rule, the district court refused to follow it because this Court had not yet applied it to a *procedural* due process claim specifically, rather than a *substantive* due process claim. Thus, in its view, this Court's decisions are "best understood as placing all *substantive* due process and equal

protection challenges to election regulations under the *Anderson/Burdick* framework." 1-ER-20-21.

This too was manifest error. A "*single* analytical framework" means just that. Engrafting a *second* framework in the form of procedural due process is simply—and quintessentially—incompatible with this Court's standard. And, in granting a stay, this Court cited *Dudum* and explained that "[t]he State is also likely to succeed" on this issue since the claim should have been "evaluated under the *Anderson/Burdick* framework instead." *Hobbs I*, 976 F.3d at 1086 n.1.

But even if Plaintiffs' second claim were not categorically barred under *Anderson-Burdick* doctrine, it suffers another dispositive deficiency: Their *procedural* due process claim is actually nothing of the sort, and instead is *substantive* in nature. Plaintiffs do not seek procedures such as hearings or additional error-correction mechanisms, but instead a new substantive right: to have votes counted despite their conceded violation of state law. And even if Plaintiffs' procedural due process claim could overcome these dispositive hurdles, Plaintiffs would only get to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976)—under which their claim fails.

Finally, the district court also abused its discretion in evaluating the remaining requirements for issuing injunctive relief, including by committing several errors of law. In particular the district court (1) erred by categorically rejecting application of *Purcell* doctrine simply because the State allows voters to cure non-signatures pre-election, (2) miscalculated when Plaintiffs' delay in filing suit began running due to errors of state law, (3) failed to account for the "minimal" nature of the burdens when balancing the harms, and (4) failed to apply this Court's heightened standard for mandatory injunctions.

This Court thankfully staved off the immediate harms of the injunction by granting a stay pending appeal, either outright holding for the State on issues or recognizing that the determinations below were likely erroneous. This Court should now make explicit what it all-but held outright in its *Hobbs I* decision: the judgment below rests on multiple errors and must be reversed.

STATEMENT OF JURISDICTION

The district court entered final judgment and an injunction on September 10, 2020. 1-ER-2-26. Intervenor-Defendant the State of Arizona filed a timely notice of appeal on the same day. 2-ER-44-45.

The district court had jurisdiction under 28 U.S.C. §1331. This Court has jurisdiction under 28 U.S.C. §1291 and §1292(a).

ISSUES PRESENTED FOR REVIEW

This appeal presents four overarching issues:

(1) Whether this Court's published *Hobbs I* decision is binding as law of the circuit and/or law of the case as to issues on which the motions panel announced a definitive holding.

(2) Whether the district court committed legal error by entering judgment for Plaintiffs' on their *Anderson-Burdick* claim where:

   a. The district court and this Court both correctly held that the burden on voting rights was "minimal";

   b. The challenged Acts serve a variety of compelling and important state interests;

   c. The State's election-day deadline is reasonably tailored to serve those interests;

   d. The district court granted relief on a facial claim without ever applying the standard for such claims.

(3) Whether the district court committed legal error by holding for Plaintiffs on their procedural due process claim where:

a. This Court's precedents categorically preclude freestanding due process claims outside of the *Anderson-Burdick* framework;

b. Plaintiffs' procedural due process claim was actually substantive in nature; and

c. Plaintiffs' claim fails under the *Mathews* balancing test even if Plaintiffs could overcome the preceding dispositive deficiencies.

(4) Whether the district court committed legal error and/or abused its discretion in evaluating the requirements for injunctive relief, where:

a. It rejected outright the applicability of *Purcell* doctrine;

b. The district wrongly discounted Plaintiffs' long delay in bringing suit based on errors in construing Arizona law;

c. It failed to account for the "minimal" burden on Plaintiffs—which it had itself found—in balancing the harms/equities;

d. The district court failed to apply this Court's heightened standard for mandatory injunctive relief.

STATEMENT OF THE CASE

Factual and Legal Background

Registration and Balloting In Arizona Generally. Arizona provides a number of options for voters to cast ballots, and has taken multiple steps to make voting less burdensome. Arizona, for example:

- Allows voters to register online. 2-ER-78.
- Provides no-excuse access to mail-in balloting. 2-ER-78.
- Allows voters to elect inclusion on the permanent mail-in balloting list, under which they "automatically receive a ballot by mail for every election in which they are eligible to vote." 2-ER-78-79.
- Pre-pays postage for mail-in ballots. 2-ER-80.
- Requires nothing more than a signature to authenticate ballots, rather than requiring witnesses, notarization, and/or photocopying of identification. 2-ER-96-97.

Because of its ease, the option of voting by mail is exceptionally popular: 79% of Arizona voters cast mail-in ballots in 2018. 2-ER-109-

10.[1] Despite this popularity, Arizona continues to maintain in-person polling stations as additional voting options. 2-ER-81-82.

Mail-In Balloting and Signature Requirement.[2] Arizona has permitted absentee balloting since 1918, beginning with World War I soldiers. 2-ER-152-157. It is undisputed that from 1918-2020, Arizona has always required a signature to cast a vote by mail/absentee and has never permitted "curing" of non-signatures after election day.

This Court has described Arizona's law regarding signatures as "straightforward," and explained: "First, Arizona requires early voters to return their ballots along with a signed ballot affidavit in order to guard against voter fraud—a requirement the plaintiffs do not challenge. These early ballots must be received by polling officials by 7:00 PM on Election Day so that they can be counted." *Hobbs I*, 976 F.3d at 1085 (citing A.R.S. §16-548(A)).

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[1] This includes ballots sent to voters by mail that are dropped off at polling places on election day.

[2] "Mail-in ballot" and "absentee ballot" are used interchangeably herein. For ease of discussion, this brief refers to voters signing their ballot, although they technically sign the ballot affidavit on the outside of the ballot envelope, rather than the ballot itself (which is a secret ballot).

"[T]o enforce these requirements, any ballot with an insufficient affidavit (including one that is missing a signature) will be disallowed by polling officials. If an early voter returns a ballot with an unsigned affidavit, Arizona has afforded him or her an opportunity to cure the problem, but only until the general Election Day deadline." *Id.* (citations omitted). Affected voters alternatively may cast a ballot in-person, which then supersedes (and voids) their unsigned mail-in ballot. 2-ER-134-35.

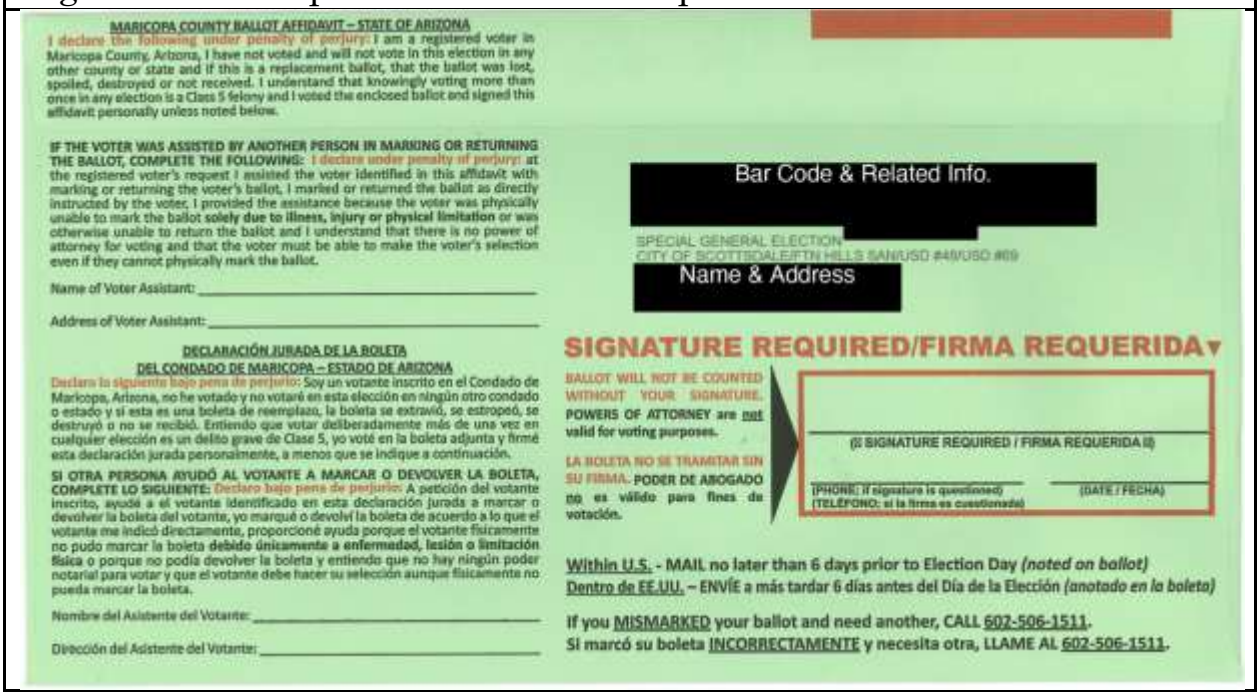
Arizona's Election Procedures Manual, which has the force of law, affirmatively mandates that officials take efforts to facilitate such curing. 2-ER-89. Specifically, it provides: "The County Recorder shall [] make a reasonable and meaningful attempt to contact the voter via mail, phone, text message, and/or email, to notify the voter the affidavit was not signed and explain to the voter how they may cure the missing signature or cast a replacement ballot before 7:00pm on Election Day." 2-ER-89. County officials expend considerable efforts to assist voters in curing non-signatures in time. 2-ER-85-90, -133-36, -199, -205-07.

Notice and Instructions. Arizona voters are provided with multiple notices of the signature requirement. 2-ER-92-93, -132. For

example, for voters in Maricopa County (home to roughly 3/5 of Arizona's population), the requirement of signing is provided on the front and back of the envelope, as well in the provided instructions, and is alternatively in bold, all caps, underline, or red-color text. 2-ER-92-95.

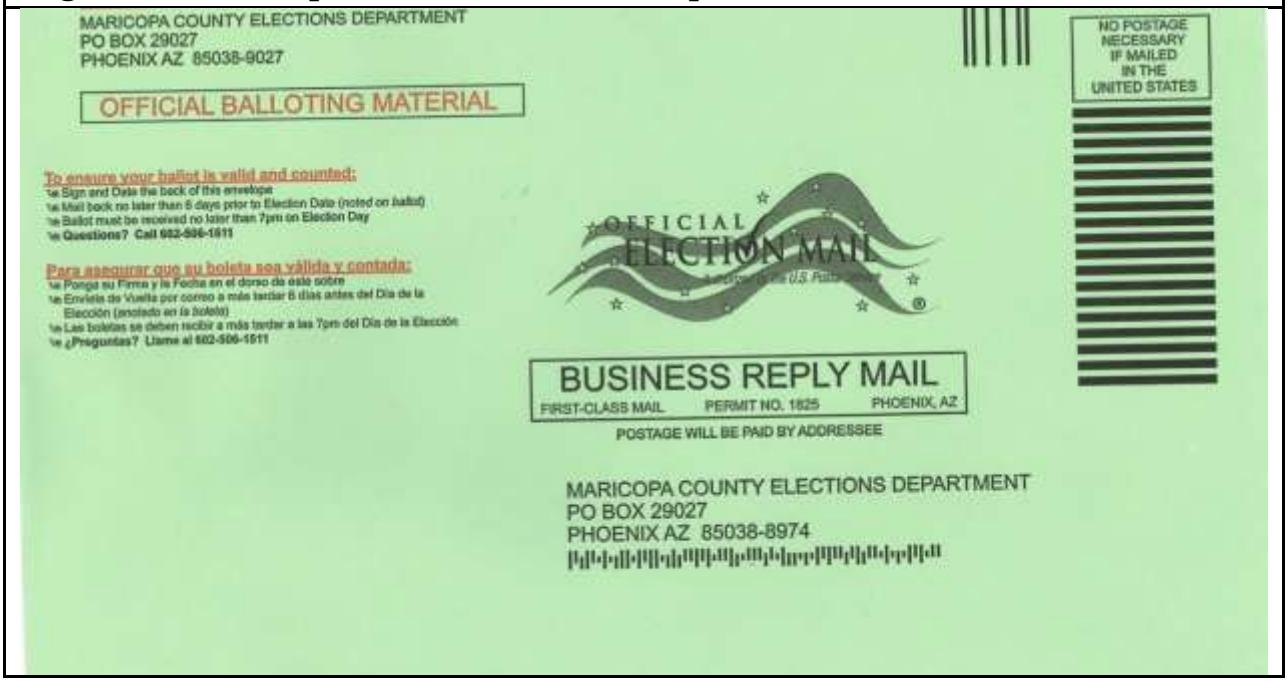
The back of the vote-by-mail envelope, which is also the ballot affidavit, appears as follows:

Figure 1: Maricopa VBM Back Envelope



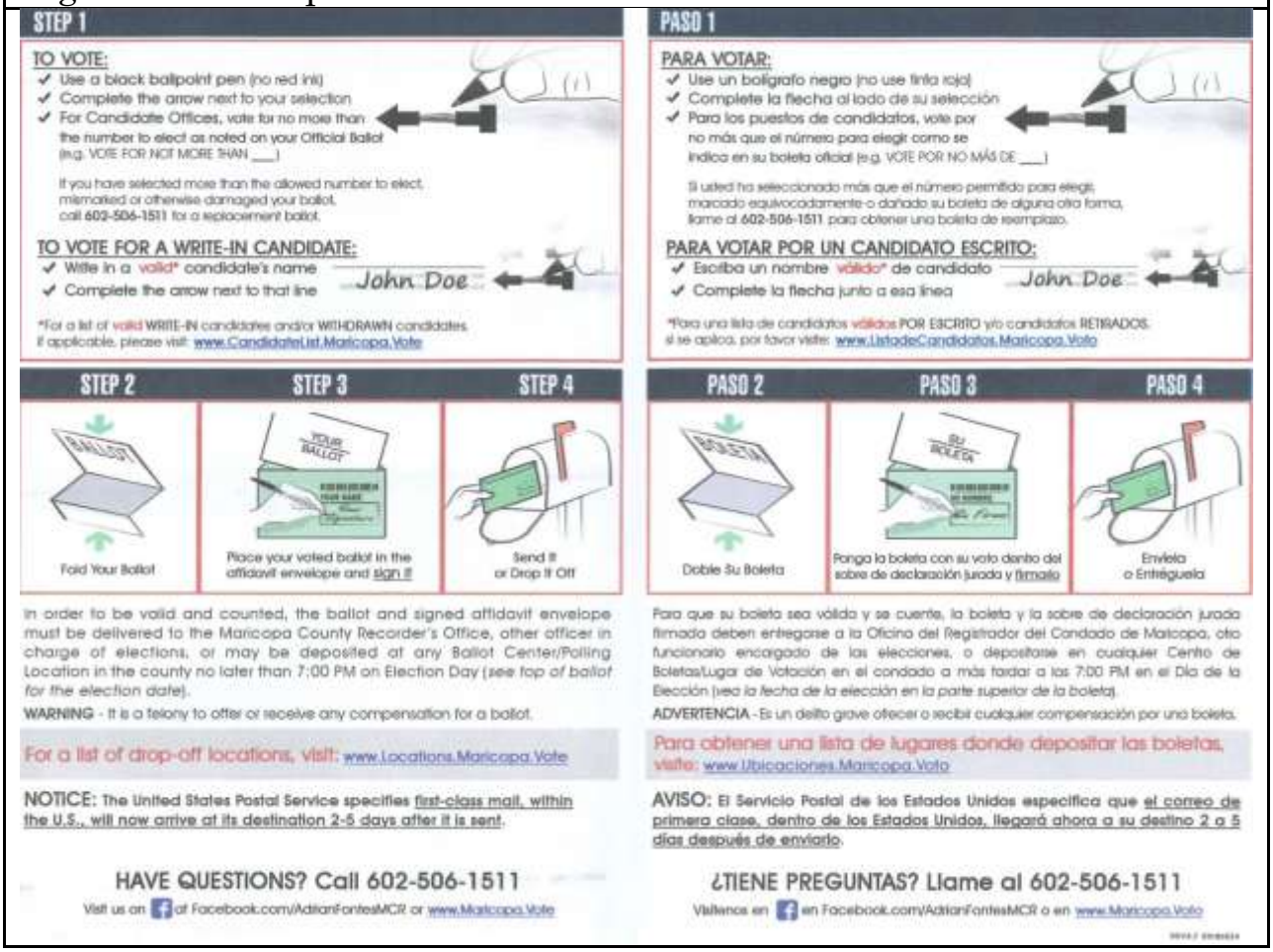
The front of the envelope similarly discusses the signature requirement in English and Spanish as one of three requirements:

Figure 2: Maricopa VBM Front Envelope



The included instructions provide signing as step three of four:

Figure 3: Maricopa VBM Instructions

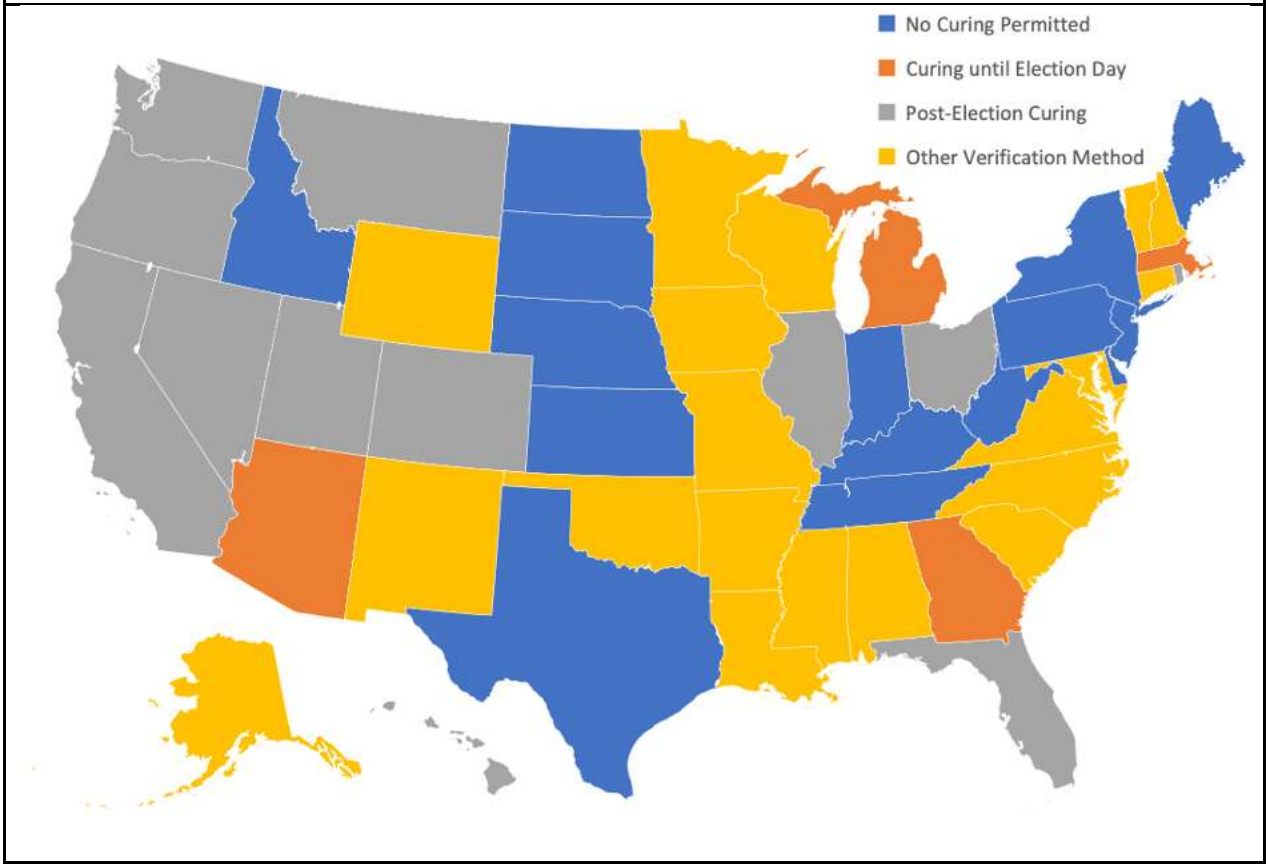


Signature Mismatches. Arizona law permits a verification process for signatures that do not appear to match the voter's signature on file (*i.e.*, mismatches). In 2019, the Arizona Legislature enacted a bill permitting "curing" (*i.e.*, verifying with the voter) apparent signature mismatches up to five business days after the relevant election. 2-ER-84-85. The statute does not provide a cure period for non-signatures. "County Recorders historically viewed these two types

of ballot problems differently[,]" and have long had different procedures for them. 2-ER-85-90.

Laws of Other States. The states are varied as to how they approach curing of non-signatures. Of the 31 states that use signatures as the primary method authentication, 15 do not permit curing at all. 2-ER-97. Four: Arizona, Georgia, Massachusetts, and Michigan permit curing up through election day. 2-ER-83, -97. Another twelve states permit post-election curing, with deadlines ranging from one day after the election (Montana) to two days before final certification (California). 2-ER-83-84, -97-98. Detailed tables are provided in the Appendix and at 2-ER-83-84, and are shown in Figure 4 next:

Figure 4: Non-Signature Curing By State



Ballot Disqualifications. Most Arizona voters, over 99%, encounter no issue with the signature requirement, either with non-signatures or mismatches. A small number of voters do, however, and fail to cure such issues prior to poll-close time. In 2016, 0.12% of ballots (3,079) were rejected for uncured non-signatures, and 0.10% of ballots (2,657) were disqualified for uncured mismatches. 2-ER-100. For 2018, those numbers declined to 0.10% (2,435) and 0.06% (1,516) for non-signature and mismatches, respectively. *Id.* Among states in which

voters principally or entirely cast ballots by mail, Arizona's disqualifications rates are modestly lower than average, even though many of those other states permit post-election curing. 2-ER-98-101.

Proceedings Below

Although Arizona law has never permitted curing of non-signatures ballots since absentee voting was introduced in 1918, Plaintiffs did not initiate suit until June 10, 2020. 1-ER-5. Plaintiffs did not seek any relief vis-à-vis the then-upcoming August 2020 primary, and instead sought a preliminary injunction for the 2020 general election.

The Secretary announced that she would take a nominal position in the litigation, and at oral argument took positions supporting Plaintiffs on the merits. 2-ER-57-61.

The district court granted the State of Arizona intervention to defend its laws. 1-ER-5. A group of Republican intervenors was also granted permissive intervention. *Id.*

The district court consolidated the motion for a preliminary injunction with trial on the merits under Rule 65(a)(2), although no

trial was held. 1-ER-5. Oral argument was conducted on August 18, 2020. 2-ER-47.

The district court issued its opinion and judgment on September 10, 2020. 1-ER-2-26. The district court began its analysis by resolving evidentiary matters not at issue in this appeal. 1-ER-6-8. It further held that Plaintiffs had established organizational standing. 1-ER-9-11.[3] It then turned to the burden on voting imposed by the Acts, which it concluded was "minimal" (repeating that characterization multiple times). 1-ER-12-14. It further recognized that the State had multiple important interests at stake, including: "(1) fraud prevention; (2) reducing administrative burdens on poll workers; [and] (3) orderly administration of elections[.]" 1-ER-14-20. Despite these interests, the district court concluded that "the challenged deadline fails to withstand the most deferential level of scrutiny." 1-ER-19-20.

The district court also held for Plaintiffs on their procedural due process claim. Although it acknowledged this Court's general rule that

[3] The State challenged Plaintiffs' Article III standing below. The district court made a factual finding that Plaintiffs had proved organizational standing. 1-ER-10-11. The State does not argue on appeal that this finding was clearly erroneous.

Anderson-Burdick governs all election constitutional challenges, observing that "the Ninth Circuit has noted that First Amendment, equal protection, and due process claims are each 'folded into the Anderson/Burdick inquiry.'" 1-ER-20 (quoting *Soltysik*, 910 F.3d at 449 n.7). But it noted that these "cases …. did not involve procedural due process claims[,]" and reasoned that an exception should apply to those claims (without offering an explanation why that should be the case). 1-ER-20-21. The district court further concluded the Due Process Clause required a post-election cure period under the *Mathews* balancing test. 1-ER-22-23.

The district court also concluded that the other requirements for injunctive relief were satisfied. It rejected outright application of *Purcell* doctrine, reasoning it was inapplicable because the State permitted pre-election curing and the injunction would extend that just "for a little longer." 1-ER-24-25. It further discounted Plaintiffs' delay in bringing suit, reasoning that it did not begin until "near the end of 2019" and that "[t]hough Plaintiffs could have brought this suit sooner than they did, the Court does not find their delay so substantial as to undermine the harms alleged." 1-ER-24. The court further concluded

that the balance of harms favored Plaintiffs. 1-ER-24.

Although the State specifically argued that (1) Plaintiffs' facial claims must be analyzed under the *Salerno*/no-set-of-circumstances standard and (2) Plaintiffs' request for mandatory injunctive relief must be analyzed under this Court's heightened standard for such relief, the district court did not analyze or even acknowledge either of these arguments.

The State quickly filed a notice of appeal. 2-ER-45.

Proceedings In This Court

The State and Republican Intervenors sought an emergency stay pending appeal, which this Court granted on October 6. *Hobbs I*, 976 F.3d at 1087. As explained below, the *Hobbs I* decision reached several conclusive determinations that are binding here.

SUMMARY OF THE ARGUMENT

This Court has already resolved the central issues in this case, directly holding that:

1) The Acts "impose[], at most, a '*minimal*' burden";
2) "*[I]t is reasonable that Arizona has chosen to make [the non-signature cure] deadline Election Day itself* so as to promote its

unquestioned interest in administering an orderly election and to facilitate its already burdensome job";

3) "[T]here can be no doubt … that allowing a five-day grace period … *would indeed increase the administrative burdens*"; and

4) "*[T]he State has offered a reasonable explanation* for why it has granted a limited opportunity to correct such 'mismatched' signatures but not to supply completely missing signatures."

Hobbs I, 976 F.3d at 1085-86 (all emphases added).

None of these determinations were equivocal, and instead were outright holdings expressed in a published opinion. As such, they are binding as both law of the circuit and law of the case. And together these holdings together effectively resolve Plaintiffs' *Anderson-Burdick* claim, leaving little (if anything) left to decide.

In any event, even if the Court was considering this case in the first instance, the district court's errors would remain patent. This Court in *Lemons v. Bradbury* held that the *complete absence* of any opportunity to cure a signature mismatch imposed only a "minimal" burden and that the state's "interest[] in detecting fraud" "justif[ied]

th[e] minimal burden on the right to vote." 538 F.3d 1098, 1102-05 (9th Cir. 2008). Under *Lemons*, reversal is required.

Even without the benefit of *Lemons*, this Court's "minimal" burden holding is clearly correct. The burden here is *substantially* lower than in either *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) and *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018), which concluded the applicable burdens were "not … substantial" and "extremely small." The minimal magnitude of the burden here is particularly true given (1) the extensive notice provided, (2) the overall ease of voting in Arizona, (3) the Acts' complete neutrality, applying to all voters equally, (4) Arizona's affirmative assistance obligation for pre-election curing, (5) the small number of voters affected, and (6) the relative generosity of Arizona law vis-à-vis other states.

The Acts are also sufficiently tailored to meet any applicable tailoring requirement, and reasonably serve the State's interests in securing its elections, reducing administrative burdens, and conducting orderly elections. In particular, the signature requirement is useless without a deadline attached to it, and this Court has already concluded that making the "deadline Election Day itself" was "reasonable," and

further that doing so "promote[d] [the State's] unquestioned interest in administering an orderly election and … facilitate[d] its already burdensome job." *Hobbs I*, 976 F.3d at 1085.

Plaintiffs' claims further fail because they were facial in nature—which Plaintiffs conceded. But the district court failed *completely* to apply the standard for facial claims—or indeed acknowledge the facial/as-applied distinction whatsoever. That error is patent.

The district court also erred by issuing judgment for Plaintiffs on their procedural due process claim. As an initial matter, that claim was barred outright since this Court has held that "a single analytic framework," *i.e.*, *Anderson-Burdick*, governs *all* constitutional challenges to electoral regulations. *Dudum*, 640 F.3d at 1106 n.15. This Court has applied this categorical rule again and again to all constitutional claims, without exception. *Infra* Section III.A. But the district court thought it had discovered a never-before-recognized exemption, reasoning that those cases "did not involve procedural due process claims"—while offering no actual explanation as to why procedural due process claims should be treated differently. This unreasoned hairsplitting cannot withstand scrutiny.

Plaintiffs' *procedural* due process claim further fails because it is actually *substantive* in nature. Rather than seeking any new procedure, such as a hearing, Plaintiffs instead seek a new *substantive* federal right to have ballots counted notwithstanding their violation of state *substantive* law.

Even if Plaintiffs' procedural due process claim could overcome these dispositive hurdles, Plaintiffs would only get to the balancing standard of *Mathews v. Eldridge*, 424 U.S. 319 (1976)—under which their claim fails. The specific private interest here—the "right" to violate an exceedingly easy-to-comply-with requirement and cure it not merely pre-election, but also post-election—is weak at best. The risk of error is also exceptionally low, given the straightforward nature of the "is this signed or not?" inquiry. Nor, given the low risk of error and lack of evidence that a post-election cure period would actually be used, is there much apparent value to be had for additional proceedings. Put simply, procedural due process does not protect against the "risk" that the State will *correctly* apply its substantive law. And the governmental interests at issue are strong. All of the *Mathews* factors thus support the State here.

The district court also committed several errors of law and abused its discretion in evaluating the non-merits requirements for injunctive relief. In particular, it erred by concluding that *Purcell* doctrine was categorically inapplicable because the State permits pre-election curing, which this Court has already recognized. It further erred in discounting Plaintiffs' enormous and never-explained delay in bringing this suit, which it gave little weight based upon (1) errors of Arizona law and (2) its apparent belief that the Constitution demands identical treatment of signature mismatches and non-signatures—which this Court has already rejected. And the district court's balancing of the harms abused the court's discretion by failing to consider the repeatedly-recognized "minimal" magnitude of the harm.

Finally, the district court plainly erred in failing to applying this Court's heightened standard for mandatory injunctions—which the relief sought and granted plainly was. Much like the facial/as-applied distinction, however, the district court simply ignored the issue entirely—even though it was squarely raised by the State.

STANDARDS OF REVIEW

"A district court's decision to grant a permanent injunction involves factual, legal, and discretionary components. Therefore, [this Court] evaluate[s] a decision to grant such relief under several different standards of review." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). This Court "review[s] the district court's legal conclusions de novo." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). "Any factual findings supporting the decision to grant the injunction [are] reviewed for clear error." *Id.*

A court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

ARGUMENT

I. THIS COURT'S PRIOR RESOLUTION OF MANY ISSUES IS BINDING HERE

This Court's *Hobbs I* decision already resolved several critical issues conclusively, rather than merely expressing a prediction as to which parties were likely to prevail on them on appeal. As to these issues, the *Hobbs I* court's resolution in a published opinion is binding as both law of the circuit generally and law of the case specifically.

A. This Court's Published *Hobbs I* Opinion Is Law Of The Circuit

As a published opinion, the *Hobbs I* decision is binding circuit authority with respect to issues that it resolved outright, and could only be overturned by an en banc decision of this Court.

Notably, "[d]esignating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed." *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). "A published decision is 'final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.'" *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (citation omitted).

Under this Court's "'law of the circuit doctrine,' a published decision of this court constitutes binding authority 'which must be followed unless and until overruled by a body competent to do so.'" *Id.* (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (cleaned up)).

This Court has repeatedly made clear in en banc decisions that *all* germane determinations in published decisions are binding holdings that cannot be dismissed merely as dicta: A panel's "articulation of [an issue] bec[comes] law of the circuit, regardless of whether it was in

some technical sense 'necessary' to [the panel's] disposition of the case." *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc); *accord United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (collecting cases).

The binding effect of published decisions does not depend on whether it was issued by a motions or merits panel: "[A] motions panel's published opinion binds future panels the same as does a merits panel's published opinion." *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015). This result naturally follows as this Court (1) has "held that motions panels can issue published decisions," *id.* (citing *Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010); *Pearson v. Muntz*, 606 F.3d 606, 608 n.2 (9th Cir. 2010); General Order 6.3(g)(3)(ii); and Circuit Rule 36-1), and (2) subsequent panels "are bound by a prior three-judge panel's published opinions," *id.* (citing *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc)).[4]

[4] A subsequent panel of this Court purported to reject this holding of *Lair* as "dicta." *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1262 (9th Cir. 2020). That opinion reasoned that this holding in *Lair* holding was "dicta and not binding on subsequent cases" because it "was not necessary to its holding and it was not reached after 'reasoned consideration.'" *Id.* (citations omitted). But *Barapind* and its progeny

B. *Hobbs I* Is Also Binding As Law Of The Case

The holdings of the *Hobbs I* panel are also binding as law of the case. "Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez*, 677 F.3d at 389 n.4 (en banc) (citing *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc)). This Court has "recognized exceptions to the law of the case doctrine," which apply only "where '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'" *Id.* (quoting *Jeffries*, 114 F.3d at 1489).

None of those exceptions applies here. As explained below, the relevant *Hobbs I* holdings are legally *correct*, and certainly not "clearly erroneous" (and further do not occasion any "manifest injustice"). Nor

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make clear that subsequent panels may not evade prior holdings by the expedient of denigrating them as "dicta." *Supra* at 29-30.

Moreover, the issue of whether decisions of prior panels are binding on subsequent ones was plainly "germane" in *Lair*. 798 F.3d at 745-46. And *Lair*'s extensive analysis—which cites both opinions and rules of this Court—belies the "unreasoned" characterization. *Id.* at 747.

has there been intervening controlling authority. And there is no "different evidence" at issue since the record on appeal remains exactly the same as in *Hobbs I*.

The *Hobbs I* holdings are thus binding here as law of the case as well as law of the circuit.

C. The *Hobbs I* Opinion Is Only Persuasive Authority On Other Issues

As to other issues on which the *Hobbs I* panel offered only predictions, no formal binding effect attaches. But as the considered and unanimous judgment of three judges of this Court, this reasoning certainly carries persuasive force even if it lacks preclusive effect.

II. PLAINTIFFS' *ANDERSON-BURDICK* CLAIM FAILS

A. The *Anderson-Burdick* Framework Governs Plaintiffs' Burden Claim

As discussed in greater detail below (*infra* Section III.A), all challenges to electoral statutes and regulations are governed by the *Anderson-Burdick* framework. That framework recognizes that "'States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" *Prete*, 438 F.3d at 961 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Under the *Anderson-Burdick* framework, "an election regulation that imposes a severe burden is subject to strict scrutiny." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008). In contrast, "*Lesser burdens* trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012) (quoting *Prete*, 438 F.3d at 961) (cleaned up). For non-severe burdens, this Court applies "a sliding-scale balancing analysis, rather than pre-set tiers of scrutiny." *Dudum*, 640 F.3d at 1114 n.27.

Notably, "voting regulations are rarely subjected to strict scrutiny." *Dudum*, 640 F.3d at 1106. Moreover, "Elaborate, empirical verification of weightiness is not required." *Timmons*, 520 U.S. at 352. Instead, "Legislatures … should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

B. The Burden On Plaintiffs' Voting Rights Is Minimal

Because the burden imposed determines the applicable level of scrutiny, it is useful to begin there. The district court correctly held that the burden imposed is "minimal." 1-ER-12-14. This Court definitively agreed in its published *Hobbs I* decision granting a stay. That decision is binding here. In any event, that determination is compelled by the *Lemons* and *Rosario* decisions, as well as the record and context here.

1. This Court's Prior Holding That The Acts Impose "At Most" A "Minimal" Burden Is Binding

A panel of this Court has already definitively resolved the magnitude of the burden imposed by the Acts, expressly holding that "Arizona's Election Day signature deadline imposes, at most, a 'minimal' burden on those who seek to exercise their right to vote." *Hobbs I*, 976 F.3d at 1085. In doing so, it expressly agreed with the district court, which had reached the same legal conclusion. *Id.*

The panel's resolution was not in any way equivocal. Instead, the panel, like the district court, conclusively held that the burden was minimal. That definitive resolution is binding on this Court under the law of the circuit and case doctrines. *See supra* Section I.

2. A Minimal-Burden Determination Is Also Required Under *Lemons* and *Rosario*

This Court's decision in *Lemons* and the Supreme Court's decision in *Rosario* also all but compel a conclusion that the applicable burden is minimal. Importantly, *Lemons* specifically considered an *Anderson-Burdick* challenge to election laws governing signature mismatches, 538 F.3d at 1100-01. Notably, there was *no* opportunity for a voter to cure a signature mismatch *at all*—unlike here where there is merely an election-day deadline for curing. *Id.* at 1104. And signatures mismatches, as explained below (*infra* Section II.D), implicate substantially greater constitutional concerns than non-signatures. Thus, to the extent that *Lemons* is distinguishable at all, the State's arguments should fare *even better* here.

This Court's assessment of the applicable burden in *Lemons* under *Anderson-Burdick* was resounding: it was manifestly "minimal." Indeed, lest there be any doubt, this Court repeated its "minimal" burden holding a total of *five times*. *Id.* at 1102, 1104.

Lemons thus explains that "the absence of notice and an opportunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights" and further holds that "the state's

important interests justify the minimal burden on plaintiffs' rights." *Id.* at 1102, 1104. And it further held that "[t]he value of additional procedural safeguards"—*i.e.*, any opportunity to cure *at all*—"[wa]s *negligible* and the burden on plaintiffs' interests from the state's failure to adopt their proposed [cure] procedures [wa]s *slight at most*." *Id.* at 1105 (emphasis added). And because the claims for non-signatures are even weaker, *Lemons* is dispositive of the applicable burden here.[5]

The Supreme Court's decision in *Rosario v. Rockefeller*, 410 U.S. 752 (1973) is similarly controlling here. *Rosario* held that there is no constitutional violation where a party simply fails to act "prior to the cutoff date," (there registering as a member of a party). *Id.* at 758. In those circumstances, "if [plaintiffs'] plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps." *Id.*

The same result should obtain here: any rejection of ballots will result from the voter's "failure to take timely steps"—*i.e.*, following instructions as to when to return ballots or deadlines to cure signatures.

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[5] Although *Lemons* involved qualifying referenda for the ballot, this Court made clear that it (as here) "implicate[d] the fundamental right to vote." 538 F.3d at 1102.

3. In Any Event, The Burden Imposed Is Minimal

Even if the burden issue arose on a clean slate, this Court's prior minimal-burden holding is plainly correct for seven reasons.

First, the actual burden imposed by the State is truly minimal: a voter need only sign once, where prominently indicated, sometime within roughly a month. This contrasts with the burden in *Crawford*—*i.e.*, "inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph"—which the Supreme Court explained "*surely does not qualify as a substantial burden* on the right to vote." *Crawford*, 553 U.S. at 198 (emphasis added) (plurality opinion); *accord id.* at 204 (Scalia, J., concurring joined by Thomas and Alito, JJ.) ("[T]he burden at issue is minimal and justified"). The burden is even smaller here.

Similarly, this Court has held that "[t]o the extent that having to register to receive a mailed ballot could be viewed as a burden, *it is an extremely small one*, and certainly not one that demands serious constitutional scrutiny." *Short*, 893 F.3d at 677 (emphasis added). But the burden of simply signing once on time is *even smaller* than the "extremely small" burden of filling out an absentee ballot request form.

Second, voters are given ample notice of both what is required of them *and* the consequences for non-compliance. *Supra* at 13-16. For example, the backs of the return envelopes voters in Maricopa County (home to roughly 60% of Arizona's population) provide in *large, red, bold, capital* letters on the back of the inner vote-by-mail envelope (*i.e.*, "**SIGNATURE REQUIRED**") along with the consequence (*i.e.*, "**BALLOT WILL NOT BE COUNTED WITHOUT YOUR SIGNATURE**"). *Supra* at 14-15. In addition, instructions to "Sign and Date" is one of three simple requirements explicated on the other side under "**To ensure your ballot is valid and counted.**" *Id.* And "sign it" is one of four simple steps in the instructions. *Supra* at 16.

Voters thus need simply read and heed this ample notice to ensure their vote is not disqualified. That is not a significant burden.

Third, the relevant burden must be evaluated in context and "considering all available opportunities to vote." *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020). As explained above, Arizona is a clear leader in *removing* burdens to voting. *Supra* at 11-12. The minimal nature of the burden thus becomes even more apparent when viewed in that context.

Fourth, the Acts are completely neutral in character. This Court has "repeatedly upheld as 'not severe' restrictions that are generally applicable, even-handed, [and] politically neutral." *Dudum*, 640 F.3d at 1106 (cleaned up). The Acts are just that: they apply to *all* voters equally, regardless of race, sex, age, or party. To the extent that they favor anyone, it simply is those that follow applicable rules/clear instructions—*i.e.*, "favoritism" that no legal system can function without.

Fifth, county recorders affirmatively try to assist voters in curing deficiencies by election day and provide opportunities for them to do so. *Supra* at 12-13. These opportunities would only typically be insufficient if the voter either ignores them pre-election or fails to follow instructions as to when to mail the ballot (thus cutting short the time available to cure). *Supra* at 13-16.

Sixth, the number of voters affected is very small—only about 0.1%. *Supra* at 18-19. And, of those, in the vast majority of cases the disqualification will be (1) a correct application of state law and (2) resulting from voters' failure to follow clear instructions.

Seventh, a comparison with other states shows that Arizona is hardly unduly or uniquely restrictive in its election-day cutoff for curing non-signatures. Of the 31 states that rely upon signatures to validate absentee ballots, nearly half—15 states—do not provide voters with *any* opportunity to cure, *ever*. 2-ER-83-84, -97. And three (Georgia, Massachusetts, and Michigan) limit the non-signature curing period to pre-poll close, just like Arizona. 2-ER-83, -97. Thus, under Plaintiffs' theories a whopping 19/31 of relevant states—*more than three-fifths*—are imposing unconstitutionally severe burdens on their voters. But such a holding would be unprecedented.

* * *

All of these reasons confirm the intuitively obvious conclusion that this Court has already reached: a requirement of signing (1) once, (2) where prominently indicated, (3) sometime in about a month—either by following simple directions in the first instance or curing such failure by Election Day—is a burden that is indeed "at most … 'minimal.'" *Hobbs I*, 976 F.3d at 1085.

4. Plaintiffs Wrongly Conflate The Burden Of Compliance With The Remedy For Non-Compliance

Plaintiffs' burden argument below was premised almost entirely on the remedy for failing to sign ballot affidavits, thus contending the burden was "severe" because under the Acts "a significant number of voters will be disenfranchised[.]" 2-ER-315. They further contended that "a severe burden [can exist] even where relatively small numbers of votes were not counted." 2-ER-315.

Plaintiffs' arguments wrongly conflate the *burden* of the actual requirement itself with the *remedy* for non-compliance. Accepting that conflation notably would render vast swaths of election law unconstitutional. For example, if a voter shows up to the polls one day late, his/her vote will not count. But that "disenfranchisement" (in Plaintiffs' parlance) does not mean that the requirement of voting by election day is severe.

The district court properly rejected Plaintiffs' premise, holding that "Plaintiffs' argument misguidedly conflates the burdens imposed by a challenged law with the consequences of noncompliance." 1-ER-12. In doing so, the district court cited to *Crawford*, which it rightly found

"illustrative." 1-ER-13. As it observed, the *Crawford* "Court described these burdens as 'the inconvenience of making a trip to the [Indiana Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph,' to obtain the required identification[,]" and the "Court did not characterize the burdens as disenfranchisement, even though failure to obtain the required identification or execute the appropriate affidavit would preclude the voter from casting a ballot that would be counted." 1-ER-13 (quoting *Crawford*, 553 U.S. at 198).

C. The Acts Are Constitutional Under The *Anderson-Burdick* Standard

Because the Acts impose only a minimal burden on voters, the level of scrutiny under the *Anderson-Burdick* framework is substantially relaxed. This Court used to apply only rational basis review when the burden was minimal, but has since overruled that standard. *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (en banc).

Nonetheless, *Anderson-Burdick* remains a "balancing and means-ends fit" standard, *id.*, and "sliding scale" framework, where the level of scrutiny is driven by the burden, *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019), *cert. denied* 141 S. Ct. 111 (2020).

Accord Dudum, 640 F.3d at 1114 n.27 ("[A] sliding-scale balancing analysis, rather than pre-set tiers of scrutiny, apply to challenges to voting regulations.").

Because the burden is not "severe," strict scrutiny does not apply. *Dudum*, 640 F.3d at 1114. Instead, only "less exacting" scrutiny applies. *Prete*, 438 F.3d at 961. Under that standard, the Acts are constitutional if they are "reasonably related to [an] important regulatory interest." *Id.* at 971. And, applying the inherently sliding-scale framework where the burden is "at most … minimal," the *Anderson-Burdick* standard is particularly undemanding here.

1. The Acts Serve Important State Interests

The Acts here serve multiple important state interests, any one of which is sufficient under less exacting scrutiny. Notably, the district court largely agreed that these interests existed, as did this Court in granting a stay. Three interests are dispositive here.

First, "'A State indisputably has a compelling interest in preserving the integrity of its election process.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The State's signature requirement serves this goal by validating the identity of voters casting mail-in ballots, as the

district court recognized. 1-ER-14. ("This interest is served by Arizona's signature requirement[.]").

Second, the State has an interest in reducing the administrative burden on poll workers at a time when they are otherwise busy tabulating ballots. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (recognizing that "easing administrative burdens … undoubtedly [furthers] 'important regulatory interests'") (quoting *Crawford*, 553 U.S. at 194-96)); *Lemons*, 538 F.3d at 1104-05 (reducing "administrative burden" is an important interest).

The district court recognized as much, holding that "[t]he State's interest in reducing administrative burdens on poll workers is important." 1-ER-15. Similarly, this Court held outright that making the cure "deadline Election Day … facilitate[s] [the State's] already burdensome job." *Hobbs I*, 976 F.3d at 1085.

Third, the State has an interest in "orderly administration" of elections, *Crawford*, 553 U.S. at 196, which is "weighty and undeniable," *Lemons*, 538 F.3d at 1104. This Court has already recognized the State's "unquestioned interest in administering an orderly election." *Hobbs I*, 976 F.3d at 1085. So too has the district

court: "[t]he State has an important interest in the orderly administration of elections[.]" 1-ER-17.

2. The Acts Satisfy Any Applicable Tailoring Requirement

Because the State possesses relevant compelling and important interests, the only remaining potential question is whether the Acts are sufficiently tailored to serve at least one of those interests.

As an initial matter, it not clear that any tailoring requirement applies at all where—as here—the applicable burden is minimal. In this Court's en banc *Tucson* decision, this Court concluded the relevant burden was "at best very minimal." 836 F.3d at 1027. And this Court further held that the challenge failed because Tucson "ha[d] advanced a valid, sufficiently important interest to justify its choice of electoral system," and effectively ended its analysis there. *Id.* at 1028. At most, this Court required that the challenged requirement "promote[d]" Tucson's interests without requiring any specific tailoring.

Here, this Court has already concluded that Acts imposed "at most, a 'minimal' burden," which is scarcely different from the "at best very minimal" burden of *Tucson*. *Tucson* suggests either that no tailoring requirement applies or that, if one exists, it requires only that

the challenged law "promote" the State's interests in some fashion. As discussed below, the Acts easily satisfy that standard. This Court need not reach whether a lesser tailoring standard applies where the burden is "minimal," however, because the Acts readily survive the less exacting review standard for non-minimal, but non-severe burdens.

Where the burden is "not severe, the State need not narrowly tailor the means it chooses to promote ballot integrity." *Timmons*, 520 U.S. at 365. Instead, this Court's inquiry "is limited to whether the chosen method is *reasonably related* to [an] important regulatory interest," *Prete*, 438 F.3d at 971 (emphasis added). Moreover, "there is no requirement that the rule is *the only or the best way* to further the proffered interests." *Dudum*, 640 F.3d at 1114 (emphasis added).

Under this standard, all three of the State's interests are sufficient to sustain the Acts here.

a. Securing Electoral System

It is undisputed that the signature requirement itself serves the State's "indisputably … compelling interest in preserving the integrity of its election process.'" *Purcell*, 549 U.S. at 4. Recent fraud in North Carolina, New Jersey, and California also underscores the importance

of the State's signature requirement in preventing voter fraud. 2-ER-105-06, -213-312.

But a signature requirement is ineffectual—indeed virtually useless—without a deadline attached to it. This Court has recognized as much already, explaining that "All ballots must have *some* deadline." *Hobbs I*, 976 F.3d at 1085.

Because the State's signature requirement cannot function without a deadline, the operative question is merely whether the State's Poll-Close Deadline is a reasonable one—*i.e.*, whether the signature requirement, when evaluated *together* with its deadline, "is reasonably related to [an] important regulatory interest." *Prete*, 438 F.3d at 971.

The answer to that question is plainly "yes." As this Court has already held, "it is reasonable that Arizona has chosen to make that deadline Election Day." *Hobbs I*, 976 F.3d at 1085. That notably is also the deadline to cast a ballot, which no court has found unconstitutional. Moreover, three other states use the same election-day deadline, and fifteen others provide no cure period at all. *Supra* at 17-18. There is no reason to believe that all of these states are acting beyond the bounds of constitutional reason.

This result is also all-but compelled by this Court's decision in *Lemons*. There, this Court held that the complete absence of any cure opportunity was sufficiently tailored in service of "Oregon's interest[] in detecting fraud," and thus "justif[ied] th[e] minimal burden on the right to vote." *Lemons*, 538 F.3d at 1102-04.

It defies logic that Oregon's failure to provide any cure opportunity whatsoever is constitutionally tailored, but the State's provision of a cure opportunity until poll-close time—combined with an affirmative obligation for poll workers to assist voters in curing—fails the *very same* constitutional tailoring requirement.

The district court erred by fixating on whether the Poll-Close Deadline *itself* deterred fraud: "there is no evidence that the challenged deadline reasonably prevents fraud[.]" 1-ER-14. But that reasoning fails even under its own logic: a five-business-day-post-election deadline does not prevent fraud any better than an election-day deadline, and the remedy it imposed below would thus simply substitute one unconstitutional deadline for another if its reasoning were correct.

That is not the proper inquiry, however. Instead, the relevant question is whether the State's signature requirement, including with

its election-day cure deadline, is "*reasonably related* to [an] important regulatory interest." *Prete*, 438 F.3d at 971. It plainly is. And by insisting that *only* a five-business-day-post-election cure period could satisfy the Constitution, the district court violated this Court's recognition that "there is no requirement that the rule is *the only or the best way* to further the proffered interests." *Dudum*, 640 F.3d at 1114 (emphasis added).

More generally, Plaintiffs' arguments and the district court's reasoning fly in the face of the concept of deadlines. "'[D]eadlines are inherently arbitrary,' while fixed dates 'are often essential to accomplish necessary results.'" *United States v. Locke*, 471 U.S. 84, 94 (1985) (citation omitted). In rejecting a shortly-after-the-deadline-should-be-good-enough argument much like Plaintiffs', the Supreme Court emphatically explained that "[t]he notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle." *Id.* at 100-01. Indeed, "If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule....; yet regardless of where the

cutoff line is set, some individuals will always fall just on the other side of it." *Id.* at 101.

Plaintiffs' argument that the Constitution demands a five-business-day mulligan period should meet the same fate as in *Locke*.

A comparison to federal appellate practice is also instructive. Ultimately, the Acts' deadlines are at least as tailored as the typical 30-day notice-of-appeal deadline. Both require parties to take very simple actions in about a month of time to preserve their rights (including, often, voting rights). And unlike a notice of appeal, the Acts require neither a filing fee nor substantive content of any sort. But the concept that denying a post-deadline "cure period" for late notices of appeal violates the Constitution is absurd.

b. Reducing Administrative Burdens

The Acts also reasonably serve the State's important interest in reducing administrative burdens. *Lemons*, 538 F.3d at 1104-05. Because of the prevalent use of voting by mail, Arizona election results already take significant time and effort to calculate. 2-ER-107-09. But if poll workers and resources are diverted post-election to effectuate Plaintiffs' proposed remedy, election results will necessarily take *even*

longer to process. *See* 2-ER-137.

Notably, the Office of the Pima County Recorder submitted a declaration explaining that the existing burdens of tabulating votes in primary elections already take *all ten* of the ten days available to the office. 2-ER-137. There simply is no slack with which to accommodate additional burdens. But by limiting no-signature cure efforts to election day and the weeks before it, the State prevents post-election resource diversion away from tabulation.

This Court already recognized that "there can be no doubt (and the record contains evidence to show) that allowing a five-day grace period beyond Election Day to supply missing signatures would indeed increase the administrative burdens on the State to some extent," and that the State's Poll-Close Deadline "facilitate[s] [the State's] already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Hobbs I*, 976 F.3d at 1085. This holding, based on an identical record, is both binding and dispositive here.

c. Conducting Orderly Elections.

The State's Poll-Close Deadline also facilitates its important interest in "orderly administration" of elections. *Crawford*, 553 U.S. at

196. In particular, the State has a single cut-off for (a) signing ballot affidavits (along with any necessary curing of non-signatures), (b) getting absentee ballots delivered, and (c) voting in-person. This single deadline (1) reduces voter confusion by lessening the number of relevant dates to know, (2) provides desirable finality and certainty, and (3) provides clear delineations for poll workers (*i.e.*, pre-election day and election day: focus on getting ballots in and validated/cured, and post-election day: focus on getting ballots counted).

This Court has already recognized as much, holding that making the "deadline Election Day itself … promote[s] [the State's] unquestioned interest in administering an orderly election." *Hobbs I*, 976 F.3d at 1085. That too is controlling here.

The district court reached a contrary conclusion based largely on deferring to the position of Arizona's Secretary of State. 1-ER-17. That court noted "[i]n the Secretary's judgment, there is no meaningful difference between an unsigned ballot envelope and one with a perceived mismatched signature," and gave "great weight to the Secretary's judgment[.]" 1-ER-17.

This was error for three reasons. *First*, the Arizona Constitution entrusts this decision to Arizona's *Legislature*, not its Secretary of State. The U.S. Constitution provides no license for the district court to violate state separation of powers to permit the Secretary to usurp the powers of the Legislature. The Legislature's judgment—not the Secretary's—is to whom the district court properly owed deference. But none was given.

Second, the Secretary's judgment rested on the premise that Arizona law did not expressly preclude post-election curing of non-signatures. 2-ER-184-85. That is incorrect. *See infra* Section II.G.

Third, the Secretary's shifting positions undermine the district court's extensive reliance on her judgment as an unbiased source of expertise. 1-ER-16-17. While the Secretary told this Court that she "will continue to take a nominal position relating to Appellants' merits arguments[,]" Dkt.16 at 1, she actually affirmatively supported Plaintiffs merits arguments below, contended that: (1) "the Secretary believes that the current procedure is likely unconstitutional," (2) she "believe[s] the language in the manual is likely unconstitutional," and (3) she "also agrees with plaintiffs' *Anderson/Burdick* claim with

respect to the burden." 2-ER-57-60. But despite her clearly expressed views on the ultimate merits issues, the district court made no effort to consider whether they may have biased her proffered opinions to which the district court uncritically deferred.

In addition, the district court appeared to reason that the Acts were not constitutionally tailored because the State permits post-election curing of signature mismatches. But mismatches raise substantially different (and greater) concerns, and the State reasonably treats them differently. *See infra* Section II.D. Indeed, this Court has already held as much.

The district court's reasoning also runs afoul of this Court's decision in *Short v. Brown*, which recognized a "specific [state] interest in incremental election-system experimentation [that can] adequately justify" laws imposing minimal burdens. 893 F.3d at 679. Arizona only enacted a law providing for post-election curing of signature mismatches in 2019. *Supra* at 16-17. At a minimum, *Short* permits the State some time for experimentation before deciding whether to extend

that cure period to non-signatures. The district court erred by short-circuiting that process and imposing equivalency immediately.[6]

D. The District Court's Extensive Reliance On An Analogy To Signature Mismatches Was Error

Both Plaintiffs' arguments and the district court's reasoning rest heavily on an extended analogy to cases involving signature *mismatches*, rather than absent signatures. That foundational premise is unsound for two reasons.

First, given the inherent subjectivity in analyzing signatures and a variety of factors that may cause both signatures and matching determinations to vary, courts have found the risk of error in signature matching to be material—thus creating value for additional procedural protections. But the risk of error in ascertaining that a ballot affidavit lacks a signature entirely is miniscule. Neither Plaintiffs nor the district court contended otherwise.

Second, when votes are disqualified for signature *mismatches*, the voter is often entirely blameless. But for completely absent signatures,

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[6] For all of these reasons, the Acts would survive strict scrutiny as well. The State prevailed on the issue as to whether such scrutiny applied below, however.

the disqualification will nearly always be the *exclusive fault* of the affected voters—particularly given the clarity of the notice. *Supra* at 13-16.

This Court has already recognized these key differences, explaining that "whereas the failure to sign one's ballot is entirely within the voter's control, voters are not readily able to protect themselves against the prospect that a polling official might subjectively find a ballot signature not to match a registration signature." *Hobbs I*, 976 F.3d at 1086. As a result, "the State has offered a reasonable explanation for why it has granted a limited opportunity to correct such 'mismatched' signatures but not to supply completely missing signatures." *Id.*

Moreover, even Plaintiffs' *own cases* cited below, 2-ER-66-71, -315-19, explain these distinctions quite well. For example, *Democratic Exec. Comm. of Fla. v. Lee*, expressly contrasts mismatches/no-signatures by explaining that "[i]t is one thing to fault a voter if she fails to follow instructions about how to execute an affidavit to make her vote count." 915 F.3d 1312, 1324-25 (11th Cir. 2019). But this case actually *is* that

"one thing." In contrast, a "signature-match scheme can result in the rejection … *through no fault of the voter*." *Id.* at 1316 (emphasis added).

Similarly, *Saucedo* explains that "handwriting analysis … is fraught with error" and that "Plaintiffs seek no more than to … [allow] evidence from the best source–the voter." *Saucedo v. Gardner*, 335 F.Supp.3d 202, 219 (D.N.H. 2018). But determining whether a ballot is signed at all is *not* similarly "fraught with error" and Plaintiffs do not merely seek consideration of new evidence here, but rather to supersede the undisputed evidence of non-signature.

Northeastern Ohio Coalition for Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012) is even worse for Plaintiffs. It notably *reversed*, as an *abuse of discretion*, an injunction regarding a "deficient-affirmation remedy," such as "missing or misplaced … voter signature[s]"—*i.e.*, a strikingly similar claim to what is presented here. *Id.* at 584, 587 (citation omitted). The Sixth Circuit there contrasted "right-place/wrong-precinct ballots" which mostly "result … from poll-worker error," *id.* at 595 (cleaned up) with "voters' failure to follow the form's rather simple instructions" to sign. *Id.* at 598-99. Just as in *Husted*, the injunction issued here on the latter basis was an abuse of discretion.

E. Plaintiffs' Facial-Only Claims Fail The *Salerno* Standard For Facial Relief

Plaintiffs' challenge is *necessarily* facial in nature, since they did not challenge any particular application of the Acts—or indeed join any voters at all. Plaintiffs have admitted as much: "Plaintiffs' claims are facial in nature, as the State correctly observes[.]" 2-ER-65.

But facial challenges "are disfavored for several reasons," including that they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008). For that reason, facial challenges fail unless "no set of circumstances exists under which the [Acts] would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987).

Here there are obvious circumstances where Plaintiffs' theories fail even under their own terms. For example, if a voter receives notice of an absent signature three weeks before the election and opportunity to cure until election day, there is no reason to believe the absence of a further five-business-day-post-election cure period imposes an unconstitutional burden. Indeed, even Plaintiffs recognize that *some*

duration of cure period is constitutionally sufficient. And should those days occur pre-election, that provides constitutional applications of the Acts even if Plaintiffs' constitutional arguments otherwise had merit.

Although the State raised this precise argument below, both in briefing and in oral argument, 2-ER-62-63, -73, and Plaintiffs conceded the facial nature of their claim, the district court remarkably did not expend a single word analyzing Plaintiffs' facial claims under the *Salerno* standard. 1-ER-2-25. Indeed, the words "face," "facial," and "set of circumstances" are simply nowhere to be found, even though the court asked a pre-announced question at oral argument that is squarely relevant to the issue. 1-ER-33, 2-ER-62-63.

The district court's injunction thus rests on a patent error requiring reversal: it granted facial relief without even acknowledging the standard for facial claims.

F. The District Court's Reasoning Would Invalidate The Laws Of At Least 15 Other States

The district court also erred by failing (1) to put Arizona's law in context of other states (which it simply ignored) and (2) address that its holding would inevitably doom laws of at least 15 other states. In opposing a stay, Plaintiffs disputed the latter point, contending that

"[i]ndividual assessment of each state's laws and the burdens they impose" would be required, under which those other states' laws might survive. Dkt. 19-1 at 20.

That is specious. The district court did not dispute the existence of the State's important interests, only its tailoring to the circumstances at hand. And there simply is no tenable legal reasoning under which Arizona law—which *does provide* an opportunity for curing up to poll-close time—could ever be found *less tailored* than the 15 states that *deny entirely any* opportunity to cure. No "individual assessment" could evade the critical fact that Arizona's law is more generous and, as a matter of law, *necessarily* more tailored than those 15 states—whose laws would necessarily be unconstitutional if the district court's reasoning s were correct. And the equivalent laws of Georgia, Massachusetts, and Michigan, which similarly permit pre-poll-close curing, would also be imperiled.

G. Arizona Law Affirmatively Precludes Post-Election Curing Of Non-Signatures

The Secretary's judgment—to which the district court wrongly accorded "great weight" 1-ER-16—was premised on her view that Arizona statutory law was "silent on the cure period for ballots with

missing signatures," and she therefore "sought to fill this gap in the Elections Procedures Manual"—a view that she repeated in this Court. Dkt. 16 at 1-2. But that legal premise is wrong. Arizona statutory law actually and affirmatively precludes counting mail-in ballots not signed by poll-close time, thereby barring a post-election cure period.

This result flows from the interaction of two statutes. First, A.R.S. §16-548(A) requires that a ballot affidavit "must be received … [by] 7:00 p.m. on election day." Second, A.R.S. §16-552(B) provides that "[i]f the affidavit is insufficient, the vote shall not be allowed."

The combination of these two provisions means that ballots must have arrived with their respective ballot affidavits by poll-close time, and that if they are not then sufficient *then*, the vote accordingly "shall not be allowed." A.R.S. §16-552(B).

This conclusion is further underscored by the canon of *expressio unius*. When the Arizona Legislature expressly provided a post-election cure period for signature mismatches in 2019, but not non-signatures, that omission is presumptively intentional and should be given effect. *See*, *e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) ("When a statute limits a thing to be done in a particular mode, it includes a

negative of any other mode." (cleaned up)); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc).[7]

III. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM FAILS

A. Plaintiffs Cannot Bring A Freestanding Due Process Claim Outside Of The *Anderson-Burdick* Framework

As an initial matter, Plaintiffs' procedural due process claim fails because *all* constitutional challenges to electoral regulations are governed by the *Anderson-Burdick* standard. The district court thus erred by permitting Plaintiffs to bring a freestanding procedural due process challenge and evaluating it instead under the *Mathews v. Eldridge* standard.

As this Court has explained, "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework—applies to *all* constitutional challenges to election regulations. *Dudum*, 640 F.3d at 1106 n.15. In *Dudum*, for example, this Court applied *Anderson-Burdick* to Dudum's "First Amendment, Due Process, [and] Equal Protection claims." *Id.* This Court concluded that this approach was required under the

[7] The motions panel appeared to accept this view of Arizona law, which it found "straightforward." *Hobbs I*, 976 F.3d at 1085. But if this Court believes the issue to be a close one, it should certify this important question of Arizona law to the Arizona Supreme Court.

Supreme Court's *Anderson* decision, and noted further that the D.C. Circuit agreed. *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7 (1983) and *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)).

This Court similarly refused to apply "traditional First Amendment jurisprudence to [the plaintiff's] viewpoint-discrimination and compelled-speech claims" challenging an election provision, because "each is folded into the *Anderson/Burdick* inquiry" instead. *Soltysik*, 910 F.3d at 449 n.7. And it further applied *Anderson-Burdick* to all constitutional claims in *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 729 n.7 (9th Cir. 2015) and *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085,1090 (9th Cir. 2019). Other circuits are in accord. *See Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (*Anderson-Burdick* "applies to *all* First and Fourteenth Amendment challenges to state election laws."); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (*Anderson-Burdick* is the "single standard for evaluating challenges to voting restrictions"); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *LaRouche*, 152 F.3d at 987-88.

Moreover, this Court held in *Hobbs I* that the State was "likely to succeed in showing that the district court 'erred in accepting the plaintiffs' novel procedural due process argument,' because laws that burden voting rights are to be evaluated under the *Anderson/Burdick* framework instead." 976 F.3d at 1086 n.1 (citation omitted). This Court further favorably cited the Eleventh Circuit, which has adopted the same standard. *Id.* (citing *Raffensperger*, 976 F.3d at 1282).

The district court thus erred in indulging Plaintiffs' freestanding procedural due process claim, rather than considering it solely under the *Anderson-Burdick* framework.

B. Plaintiffs' Procedural Due Process Claim Is Actually Substantive In Character

Plaintiffs' due process claim is fundamentally miscast: while styled as a procedural due process claim, it actually seeks a new right that is *substantive* in nature. Specifically, Plaintiffs do not seek any new *procedures*, such as an administrative or judicial hearing as to whether no-signature determinations were actually correct. Instead, Plaintiffs seek a new federal substantive right to have votes counted

notwithstanding their violations of state substantive law (here signing by the election deadline).[8]

Plaintiffs' Count Two readily fails under the substantive due process standard, which requires the asserted right to be "'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (cleaned up) (citations omitted). But it is well-established that "there is no constitutional right to an absentee ballot" at all, *Mays*, 951 F.3d at 792, and Plaintiffs' theory runs contrary to 102 years of Arizona history.

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[8] Notably, the right recognized in Plaintiffs' case law regarding signature mismatches is the right to present extrinsic evidence to challenge the initial mismatch determination—not an independent right to (1) violate the law pre-election and then (2) belatedly comply post-election. For example, in *Saucedo*, plaintiffs sought only "[a]dditional procedures would simply allow for more probative extrinsic evidence to be considered." 335 F.Supp.3d at 220. They did not seek the right to flout the signature requirement by, say, signing ballots "Mickey Mouse" and "cure" it by signing their real names later (and after knowing whether their protest vote is likely to affect the outcome). Similarly, if Plaintiffs were claiming a right to vote notwithstanding failing to register by the deadline—*e.g.*, through a new post-registration-deadline "cure" period—Plaintiffs would plainly be seeking a *substantive* right, not a procedural one. So too here.

C. Plaintiffs' Claim Fails Under *Mathews* Balancing

Even if Plaintiffs could overcome each of the proceeding dispositive hurdles, they would only get to balancing under the *Mathews* standard—under which their claim fails. Under *Mathews*, a court considers:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"

Brittain v. Hansen, 451 F.3d 982, 1000 (9th Cir. 2006) (quoting *Mathews*, 424 U.S. at 334-35). Under the *Mathews* standard, the State is not obligated to provide a post-election cure period for non-signatures.

1. Private Interest

Here the affected private interest is weak. True, at the highest level of generality—*i.e.*, the right of a citizen to vote—the private interest is obviously strong. But due process claims are analyzed with particularity. Thus, in *Mathews* the relevant private interest was not in the disability benefits generally, but "the uninterrupted receipt of this

source of income pending final administrative decision" *specifically*. 424 U.S. at 340.

Here there is no right to cast an absentee ballot *at all*, let alone one that flouts applicable legal requirements. The private interest in having a *noncompliant* vote count is, at best, weak. And that is particularly true as the State will permit voters to cure an absent signature pre-election.

The private interest here is thus the "right" to have a vote count despite (1) contravening an exceedingly easy-to-comply requirement, and (2) doing so with insufficient time to permit a pre-election cure. If that interests exists at all, its weight is extraordinarily faint.

This weakness in stands in notable contrast to signature-mismatch cases. Citizens' interest in not having their votes disqualified through circumstances typically *not their fault at all* is undoubtedly stronger than here. The same is not true where votes not counting will typically be the *exclusive fault of the voters* in failing to meet simple requirements for which there is ample notice and time to comply.[9]

[9] Indeed, Plaintiffs own case law only provides that "the State must … ensure that voters' ballots are fairly considered and, *if eligible*,

Moreover, even where private interests are strong, due process does not permit flouting of applicable deadlines. Suits in federal court, for example, often seek to vindicate constitutional rights of enormous importance. But if a litigant files a notice of appeal just one day late in such a suit, procedural due process provides no escape hatch from the lack of appellate jurisdiction—even if that means complete extinguishment of the right at issue.

2. Risk Of Error/Value Of Additional Procedural Safeguards

a. Risk of Error

The risk of error here is exceedingly low. Notably, only 0.10% of total ballots were disqualified for lacking signatures in the 2018 election. 2-ER-99-100. Even assuming *all* of those no-signature determinations were incorrect (which is exceedingly doubtful), that shows a maximum 0.1% total error rate of wrongly disqualifying

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counted." *Saucedo*, 355 F.Supp.3d at 217 (emphasis added). But Plaintiffs do not contest that poll workers "fairly consider" whether ballots are actually signed or not. And, under Arizona law, an unsigned is not "eligible" for counting.

ballots.[10] This Court has found a risk of potential error *40 times as high* to be "low." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1035-36 (9th Cir. 2012) (agreeing that "the risk of error was low" where "only 4% of veterans who file benefits claims are affected").

But given the exceptional simplicity of "is it signed or not?" determinations, the true error rate is likely far lower than 0.1%. 2-ER-90, -102. Indeed, Plaintiffs do not even attempt to quantify the rate, and instead bizarrely contended that "[t]he 'error rate' of 'non-signature determinations' … has minimal, if any, probative worth[,]" 2-ER-162, -169, -176,—despite that being the second *Mathews* factor. Plaintiffs' true disagreement is thus with the Supreme Court's standard.

Notably, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). Plaintiffs do not offer any argument (let alone evidence) that the risk of wrongful no-signature determinations is material in the "generality of cases." *See also Los*

[10] Because 79% of voters cast their ballots by mail, the maximum possible error rate for non-signature determinations for mail-in ballots specifically is about 0.127% (0.1%/.79).

Angeles v. David, 538 U.S. 715, 718 (2003) (per curiam) (second *Mathews* factor did not favor additional proceedings given "the straightforward nature of the issue").

Instead, Plaintiffs focus almost exclusively on the "risk" that Arizona poll workers will *correctly* follow Arizona law and disqualify unsigned ballots. Plaintiffs, for example, contend below (2-ER-317) that "[i]t is virtually certain that some Democratic voters … will inadvertently fail to sign their mail ballots," and thus have their vote "rejected." But those speculated disqualifications are not "erroneous deprivation[s]," *Mathews*, 424 U.S. at 335—they are *correct* disqualifications under Arizona's signature requirement. Procedural due process does not protect against the "risk" that a state will *correctly* apply its own law to the facts at hand (which further underscores the *substantive* nature of the asserted right).

b. Value Of Additional Proceedings

For similar reasons, the value of additional procedures is vanishingly small. In particular, where the correct determination is straightforward, the "value of additional procedures and the risk of erroneous deprivation are *quite minimal*." *Brittain*, 451 F.3d at 1001

(emphasis added). Plaintiffs' claim, however, is predicated on the "value" of reducing *accurate* disqualifications. But "a primary function of legal process is to minimize the risk of *erroneous decisions*"—not *correct* ones. *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (emphasis added).

At its base, Plaintiffs' argument appears to be that if a voter *intended* to sign a ballot affidavit but failed to do so, then it would be an "erroneous deprivation" not to count their vote. Plaintiffs thus argued below (2-ER-318) that a post-election cure period could "add significant probative value[,]" presumably as to the voter's intent. But Arizona law turns on whether the ballot is *actually* signed, not whether the voter intended to do so. A.R.S. §16-552(B). And the risk of error must be considered in light of the underlying law. *Kaley v. United States*, 571 U.S. 320, 334 (2014).

The value of additional proceedings is further significantly attenuated by three other factors. *First*, Arizona voters receive *ample* notice of the signature requirement. *Supra* at 13-16. This notice also diminishes the value of any additional procedures: Plaintiffs never explain how a voter that overlooks the three pre-election notices will

nonetheless respond to a *fourth* notice that a signature is deficient. Some undoubtedly may, but for many others the notice of signature deficiency would go exactly as heeded as the multiple pre-election notices: *i.e.*, completely disregarded.

Second, Arizona law affirmatively requires election officials to facilitate curing pre-election. *Supra* at 12-13. And county officials have expended considerable efforts in doing so. 2-ER-85-90, -133-36, -199, -205-07.

Third, the recent experience in California's 2020 primary underscores the lack of marginal value for Plaintiffs' proposed remedy. Even though California permits non-signatures to be cured up to two days before results are certified, it still disqualified nearly 13,000 votes for lacking signatures—roughly 0.18%—and at a rate at least 50% *greater* than Arizona's 0.1-0.12% rate. 2-ER-213-20. It also disqualified over 70,000 ballots as late even though California merely requires ballots to be post-marked, rather than received, by election day. *Id.*

This data underscores that no matter how lenient the rules and cure opportunities are, many voters will still fail to take advantage.

And Plaintiffs offered no evidence that many voters would actually use their post-election cure opportunity.

3. Governmental Interests

As set forth above, the governmental interests here are strong. *Supra* at 43-55. And subjecting every aspect of electoral administration to judicial second-guessing even where the burdens are minimal—which is the necessary predicate of the judgment below—will greatly impair the State's ability to conduct elections.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN EVALUATING THE REQUIREMENTS FOR INJUNCTIVE RELIEF

In addition to its merits-based errors, the district court also erred/abused its discretion in evaluating the other equitable requirements for injunctive relief.

A. The District Court's Categorical Rejection Of *Purcell* Doctrine Was Legal Error

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. Under what has become known as *Purcell* doctrine, "the Supreme Court 'has repeatedly emphasized that

lower federal courts should ordinarily not alter the election rules on the eve of an election.'" *Hobbs I*, 976 F.3d at 1086-87 (quoting *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (per curiam)) (collecting cases).

Notably, the district court's *Purcell* analysis failed entirely to address the critical consideration of *Purcell* doctrine: *i.e.*, the proximity of the upcoming election. 1-ER-24-25. Instead, its *Purcell* analysis ignored that the election was less than two months away. That alone is reversible error.

The district court appeared to hold that *Purcell* doctrine was categorically inapplicable because Plaintiffs sought to have election officials "continue applying the same procedures they have in place now, but for a little longer." 1-ER-24-25. But alteration of the status quo by injunction close to an election is the essence of *Purcell* doctrine. 549 U.S. at 4-5. For example, prior to the district court's injunction, county recorders would have told voters non-signatures needed to be cured by election day. Then, post-injunction, they presumably told voters they had five business days post-election to do so. And, following this Court's stay, they could again tell voters of the Poll-Close Deadline. Such contradictory, ping-ponging instructions are precisely the sort of

"conflicting orders [that] can themselves result in voter confusion," which *Purcell* seeks to avoid. *Id.* And it was entirely avoidable if Plaintiffs had brought suit earlier.

This Court has already recognized the applicability of *Purcell* in granting a stay, when it string cited four *Purcell* cases (including *Purcell*) and explained that "as we rapidly approach the election, the public interest is well served by preserving Arizona's existing election laws." *Hobbs I*, 976 F.3d at 1086. Furthermore, a mere seven days later, this Court again rejected another merely-continues-an-existing-process-just-a-little-bit-longer attempt to evade *Purcell*, where this Court rejected an attempt to extend the existing deadline to register to vote for the general election. *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020).

The district court thus erred in rejecting application of *Purcell* doctrine.

B. The District Court Abused Its Discretion In Balancing The Harms

1. The District Court's Discounting Of Plaintiffs' Delay Rests On Legal Error

This Court has long recognized delay in bringing suit properly "implies a lack of urgency and irreparable harm." *Oakland Tribune,*

Inc. v. Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985). Plaintiffs' delay here is monumental: for 102 years Arizona has required absentee ballots to be signed without giving an opportunity for post-election cure, *supra* at 12—without challenge by Plaintiffs for that entire time until June 2020. This Court recently faulted plaintiffs for delay between "the enactment of the [challenged Arizona law] in 2014 to filing suit in July 2019." *Miracle v. Hobbs*, 808 F. App'x 470, 473 (9th Cir. 2020). There is no reason why Plaintiffs' twenty-times-over delay should fare any better here.

The district court reasoned that Plaintiffs' delay actually began 101 years later in late 2019: "it was not until the [Election Procedures Manual] was finalized near the end of 2019 that the State's unjustified differential treatment of unsigned ballot envelopes became apparent." 1-ER-24. This reasoning is wrong for five reasons.

First, Plaintiffs' alleged injury arises from the lack of a post-election cure period for non-signatures, not "differential treatment." This has been an unbroken feature of Arizona law for 102 years, however.

Second, this Court has already held that the State reasonably distinguishes between mismatches and non-signatures, *supra* Section II.D—thereby rejecting the district court's "unjustified differential treatment" premise.

Third, the differential treatment actually arose from a *statute* enacted by the Legislature and signed into law on April 1, 2019—not the Elections Procedure Manual. *Supra* at 16. The district court appeared to believe that the Election Procedures Manual could have created a post-election cure process, but Arizona law affirmatively forbids that possibility. *Supra* Section II.G.

Fourth, Plaintiffs have *never* provided any explanation for their delay in filing the instant suit, even assuming such delay began in late 2019—not in briefing below or in this Court opposing a stay. By accepting the complete absence of explanation as sufficient here, the district court abused its discretion.

Fifth, Plaintiffs' delay here is particularly illustrative. Although Plaintiffs alleged that the Acts impose severe, unconstitutional burdens, they did not file suit in time to seek relief for the 2020 primary election. Thus, while Plaintiffs allege the Acts unconstitutionally disenfranchise

voters, they were apparently perfectly comfortable inflicting those very disenfranchisement harms on *their own voters* so long as candidates of other parties did not benefit in the process.

Plaintiffs' delay thus belies the marginal magnitude of their harms even in their own estimation. And Plaintiffs' delay would have forced the State to conduct the primary and general elections under different procedures absent the stay from this Court—an obvious invitation to chaos and confusion, which was entirely avoidable had Plaintiffs acting more diligently. But the district court's order simply ignores all of these considerations.

2. The District Failed To Account For The Minimal Burden Presented

The district court also erred by failing to account for the "minimal" burdens imposed by the Act—a characterization it repeated *ten times*—when balancing the harms/equities. 1-ER-14-25. Any genuine *balancing* would necessarily have to consider this minimal weight. But, as if completely untethered from the rest of its opinion, the district court did not consider the minimal magnitude of the burden at all when balancing the harms. 1-ER-24-25.

Instead, the district court focused exclusively on "the weightiness of the rights at stake[.]" 1-ER-24. But absent some significant burden on those rights, the actual harms to be balanced are, as the district court acknowledged elsewhere, "minimal." The district court abused its discretion in failing to weigh them as such.

C. The District Court Erred By Failing To Apply The Heightened Mandatory-Injunction Standard

Finally, the district court erred by failing to apply this Court's standard for mandatory injunctions. Plaintiffs' requested injunction is necessarily "mandatory" in nature: seeking not just to prohibit ballot disqualification but the affirmative counting of non-compliant votes and creation of a new, post-election cure procedure for non-signatures. Plaintiffs' request relief thus "'goes well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored.'" *Stanley v. USC*, 13 F.3d 1313, 1320 (9th Cir. 1994) (cleaned up). Plaintiffs seeking mandatory injunctions thus must satisfy a heightened burden: district courts must "*deny such relief*, 'unless the facts and law *clearly favor* the moving party.'" *Id.* (emphasis added) (citation omitted)).

Although the State specifically raised this argument below, 2-ER-74, the district court's order is entirely silent as to this issue—thereby

completely failing to apply this Court's heightened standard. By applying only the more-relaxed standard for prohibitory injunctions, the district court manifestly erred. And, for all the same reasons that Plaintiffs' arguments lack merit as explained above, the "facts and law" do not favor Plaintiffs at all, let alone "clearly" so.

CONCLUSION

The district court's judgment should be reversed and this Court should direct entry for the State on both of Plaintiffs' claims.

Respectfully submitted,

MARK BRNOVICH
ATTORNEY GENERAL

s/ Drew C. Ensign
Drew C. Ensign
Michael S. Catlett
Deputy Solicitors General
Jennifer J. Wright
Robert J. Makar
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5200
Drew.Ensign@azag.gov

Joseph A. Kanefield
Chief Deputy & Chief of Staff

Brunn ("Beau") W. Roysden III
Solicitor General

APPENDIX

Table 1. 50 State Absentee Vote-By-Mail Policies

State	Drop Off at any Early Voting Location	Drop off at any Election Day Voting Location	Ballot Drop-boxes	On-line System to Track VBM ballots	Pays for Post-age	Election Day or Before VBM Receipt Deadline	Signature Matching Problem Cure Period (# of days)	No Signature Cure Period (# of days)
Alabama						✓	NA	NA
Alaska	✓	✓		✓			NA	NA
Arizona	✓	✓	✓	✓	✓	✓	5	ED
Arkansas						✓	NA	NA
California	✓	✓	✓	*	✓		2 days prior to certification	2 days prior to certification
Colorado	✓	✓	✓	✓		✓	8	8
Connecticut						✓	NA	NA
Delaware				✓	✓	✓	0	0
Florida				✓		✓	2	2
Georgia						✓	ED	ED
Hawaii	✓	✓			✓	✓	5	5
Idaho				✓	✓	✓	0	0
Illinois							14	14
Indiana					✓	✓	0	0
Iowa				✓	✓		NA	NA
Kansas	✓	✓	✓		✓		0	0
Kentucky						✓	0	0
Louisiana						✓	NA	NA
Maine						✓	0	0
Maryland				✓			NA	NA
Massachusetts				✓		✓	ED	ED
Michigan						✓	ED	ED
Minnesota				✓	✓	✓	NA	NA
Mississippi						✓	NA	NA
Missouri					✓	✓	NA	NA
Montana	✓	✓	✓	✓		✓	1	1
Nebraska			✓	✓		✓	0	0
Nevada					✓		7	7
New Hampshire						✓	NA	NA
New Jersey							0	0
New Mexico	✓	✓	✓		✓	✓	NA	NA
New York							0	0
North Carolina	✓	✓					NA	NA
North Dakota				✓			0	0
Ohio				✓			7	7
Oklahoma						✓	NA	NA
Oregon	✓	✓	✓	✓	✓	✓	14	14

Pennsylvania						✓	0	0
Rhode Island					✓	✓	7	7
South Carolina				✓		✓	NA	NA
South Dakota						✓	0	0
Tennessee						✓	0	0
Texas							0	0
Utah	✓	✓	✓	✓	✓		7-14	7-14
Vermont						✓	NA	NA
Virginia						✓	NA	NA
Washington	✓	✓	✓	✓	✓		21	21
West Virginia				✓	✓		0	0
Wisconsin					✓	✓	NA	NA
Wyoming						✓	NA	NA
Total State	12	12	10	19	18	34	NA	NA

Note: ED stands for Election Day, NA stands for Not Applicable, these states do not rely on signature verification or signature verification alone to verify ballot eligibility.
* Some counties have ballot tracking.

Source: Atkeson Expert Report, 2-ER-75-130

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 20-16759, 20-16766

I am the attorney or self-represented party.

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[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Drew C. Ensign **Date: 1/20/21**.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign