No. 20-16759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, et al.,
Plaintiffs-Appellees,
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,
Defendants,
and
STATE OF ARIZONA, et al.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:20-cv-01143

BRIEF OF 18 STATES AS *AMICI CURIAE* IN SUPPORT OF ARIZONA

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are the States of Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. The Constitution empowers each State to set voter qualifications and determine "The Times, Places and Manner" for the elections the State conducts. U.S. Const. art. I, §§ 2, 4; *id.* amend. XVII. States have compelling interests in running orderly elections, promoting and safeguarding voter confidence, and deterring and detecting voter fraud. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008); *Storer v. Brown*, 415 U.S. 724, 729-30 (1974). Yet while all amici share these common goals, each State has the freedom—and the obligation—to tailor its voting laws to the unique needs of its populace.

The district court's erroneous ruling threatens these interests by holding that even the most minimal of burdens that advances numerous important State interests must be invalidated if the State could do a little more to make the burden a touch lighter. But the Framers did not give federal courts a mandate to micromanage State election laws. Amici States thus have an interest in this Court correcting the error below.

[1] This brief is filed under Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF THE ARGUMENT

The court below found—correctly—that the challenged provisions "impose[d] only minimal burdens" on voters. *Ariz. Democratic Party v. Hobbs*, -- F. Supp. 3d --, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *8 (D. Ariz. Sept. 10, 2020), *stayed pending appeal*, 976 F.3d 1081, 1087 (9th Cir. 2020). Yet it nevertheless concluded that Arizona could offer no rational reason for requiring voters to submit a completed, signed ballot affidavit by election day. *Id.* at *10. That was error. The Constitution imposes on States—not courts—the primary responsibility of setting the "times, places and manner" of holding elections. U.S. Const. art. I, § 4, cl. 1. That is one reason why election laws vary among the States. And the Supreme Court has repeatedly emphasized that a State's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983) (collecting cases). Arizona's interests in ensuring the orderly administration of elections, promoting voter participation, preventing voter fraud, and reducing administrative burdens—all reasons the State offered below—were more than enough to clear the low hurdle under *Anderson-Burdick* when the burden imposed is "minimal."

ARGUMENT

The Constitution is clear that the "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the

legislature thereof." U.S. Const. art. I, § 4, cl. 1. States fulfill this obligation in myriad lawful ways; the Constitution does not mandate a particular way of securing the franchise. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969).

For instance, even though "there is no constitutional right to an absentee ballot," *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020), every State offers voters some form of absentee voting or vote-by-mail. But they do not do this in the same way. Some States—Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, South Carolina, Tennessee, Texas, and West Virginia—generally restrict mail-in absentee voting to citizens who will be absent on election day or who will otherwise have difficulties voting in person. *See* Ala. Code § 17-11-3; Ark. Code Ann. § 7-5-402; Conn. Gen. Stat. § 9-135; 15 Del. Code Ann. § 5502; Ind. Code § 3-11-10-24; Ky. Rev. Stat. Ann. §§ 117.085(1)(a), 117.077; La. Stat. Ann. § 18:1303; Mass. Gen. Laws ch. 54, § 86; Miss. Code Ann. § 23-15-715; Mo. Rev. Stat. § 115.277; N.H. Rev. Stat. Ann. § 657:1; S.C. Code Ann. § 7-15-320; Tenn. Code Ann. § 2-6-201; Tex. Election Code Ann. § 82.001; W. Va. Code § 3-3-1(b). Other States—like Arizona—choose to allow any voter to vote by mail. Ariz. Rev. Stat. Ann. §§ 15-541, -542(C). The Constitution does not require States to adopt a one-size-fits-all approach.

States also differ in the deadlines they set regarding mail-in absentee voting. Rhode Island, for example, requires absentee voter applications to be received "not

later than four o'clock (4:00) p.m. on the twenty-first (21st) day before the day of" the election. 17 R.I. Gen. Laws § 17-20-2.1. By contrast, voters in Alabama have until five days before the election to apply for an absentee ballot. *See* Ala. Code § 17-11-3. In Arizona, it's eleven days before election day. *See* Ariz. Rev. Stat. Ann. § 16-542(E). Once they mark their absentee ballots, voters in most States (including Arizona) must return the ballot on or before election day for it to be counted, while voters in 18 States can have their ballots counted so long as the ballot was post-marked on or before election day and received by an election official within a certain period of time after election day. *See* Nat'l Conf. of State Legislatures, *Receipt and Postmark Deadlines for Absentee Ballots*, https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

Likewise, States diverge in how they verify the identity of an absentee voter. As Dr. Lonna Atkeson, Arizona's expert witness below, noted in her report, 19 States rely on methods other than signature matching to verify a voter's identification. 2-ER-97. Alabama, for instance, requires that voters submit a copy of their photo ID with their absentee ballot application and return their voted ballot with a signed affidavit that is either notarized or signed by two witnesses. *See* Ala. Code §§ 17-9-30(b), 17-11-10(b) & (c). As for the 31 States that rely on signature matching to verify voter identification, 16 States offer voters the chance to cure an

unqualified ballot, while 15 do not. 2-ER-97. And of the States that have cure provisions, the stated periods for a voter to remedy the irregularity range from two days postelection (Florida) to 21 days postelection (Washington). *Id.* Arizona, of course, allows ballot affidavits with mismatched signatures to be cured up to five days postelection, while requiring that a ballot affidavit with no signature at all be cured by the end of election day.

All these decisions are ones the Constitution leaves to each State to make. As the Supreme Court has recognized in a different context, "[d]eadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results." *United States v. Boyle*, 469 U.S. 241, 249 (1985). "It is, thus, an 'aimless journey' to 'decide whether some date other than the one set out in [a] statute' might better serve some goal, 'for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date [the legislature] has in fact set out in the statute.'" *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 956 (9th Cir. 2020) (Bybee, J., concurring in part and dissenting in part) (second alteration in original) (quoting *United States v. Locke*, 471 U.S. 84, 93 (1985)).

Accordingly, the court below erred by holding that the Constitution forbids Arizona from requiring voters to submit a completed, signed ballot affidavit by the time the polls close on election day. Oddly enough, in coming to this wrong conclusion, the district court got most of the law right. First, it correctly recognized that

Plaintiffs' challenge is reviewed under the *Anderson-Burdick* balancing test, in which the level of scrutiny depends on how severely the challenged regulation burdens the right to vote. *See Ariz. Democratic Party*, 2020 WL 5423898, at *6; *see also Anderson*, 460 U.S at 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Second, it correctly recognized that "there is nothing generally or inherently difficult about signing an envelope by Election Day" and that the burden imposed was therefore "minimal." *Ariz. Democratic Party*, 2020 WL 5423898, at *7. And third, it correctly recognized that Arizona has legitimate State interests in preventing fraud, reducing administrative burdens, ensuring orderly administration of elections, and promoting voter participation. *Id.* at *8-10.

Having gotten that much right, it is perplexing that the court went awry at the stage of the process that should have been the easiest: determining whether Arizona's election day deadline for curing ballot affidavits missing signatures passes the minimal level of review consonant with a "minimal" burden. *See id.*; *cf. Dudum v. Arntz*, 640 F.3d 1098, 1115 n.27 (9th Cir. 2011) (noting "that a sliding-scale balancing analysis, rather than pre-set tiers of scrutiny, apply to challenges to voting regulations"). As the Supreme Court has explained, "when a state election provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting

Anderson, 460 U.S. at 788). Under this standard, "[l]egislatures are presumed to have acted constitutionally … and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald*, 394 U.S. at 809.

Considering that the district court itself found that the State's offered reasons—preventing fraud, reducing administrative burdens, ensuring orderly administration of elections, and promoting voter participation—were "important," *Ariz. Democratic Party*, 2020 WL 5423898, at *8-10, the burden incumbent on Plaintiffs should have been far too heavy for them to bear. *See Ariz. Green Party v. Reagan*, 838 F.3d 983, 991-92 (9th Cir. 2016) (emphasizing that Arizona "is not required to adopt a system that is the most efficient possible" (quotation marks and citation omitted)). Instead, the district court second-guessed every rationale Arizona offered and found that the challenged provision could not be rationally related to any legitimate interest because Arizona had chosen to offer different "accommodations … for ballots in envelopes with perceived mismatched signatures." *Ariz. Democratic Party*, 2020 WL 5423898, at *10.

But it is not irrational for a State to "take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (quoting *McDonald*, 394 U.S. at 809 (internal quotation marks omitted)). So when the Arizona Legislature met in 2019 and enacted a five-day postelection cure period for ballot envelopes with

perceived mismatched signatures, it did not have to provide that remedy for every other ballot irregularity.

Nor is it irrational for Arizona to treat different situations differently. And there are important differences between unsigned ballot affidavits and those with mismatched signatures. For one, the former are incomplete ballots—a voter who submits one can still go vote in person—while the latter are complete but cannot be counted until the State confirms the voter's identity. For another, while it is entirely within a voter's control whether she signs her ballot affidavit, it is not within her control whether a polling official then sets the ballot aside due to a perceived signature mismatch. As the stay panel recognized, "[i]t is rational, then, that the State might voluntarily assume some additional administrative costs to guard against the risk of losing such votes at potentially no fault of the voters," but "the State may still reasonably decline to assume such burdens simply to give voters who completely failed to sign their ballots additional time after Election Day to come back and fix the problem." *Ariz. Democratic Party*, 976 F.3d at 1086.

Third, embracing only the most necessary post-election administrative costs—and eschewing the rest—is also rational when the State seeks to certify election results quickly and thereby promote confidence in the integrity of the election. *See New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (noting that "conducting an efficient election, maintaining order, quickly certifying election

results, and preventing voter fraud" were interests that justified Georgia's election-day absentee ballot deadline). Most States "want to be able to definitively announce the results of the election on election night, or as soon as possible thereafter," and "counting all the votes quickly can help the State promptly resolve any disputes, address any need for recounts, and begin the process of canvassing and certifying the election results in an expeditious manner." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

Finally, it is not irrational for a State—a separate sovereign in our federal system—to eschew the company of other States. The district court faulted Arizona for being "the only state that sets a different deadline for curing a missing signature than a perceived mismatched signature," *Ariz. Democratic Party*, 2020 WL 5423898, at *10, and concluded that "Arizona's outlier status … suggests that setting different deadlines for curing these two identification problems is not rational or orderly," *id.* But States are not bound by the district court's herd requirement. Nowhere does the Constitution say that once a certain number of States have decided something that all others must fall in line.[2] Instead, the Constitution gives to each State the responsibility of setting the "time" and "manner" of its elections. Perhaps the State will

[2] In any event, the court below was talking about the 15 other States that allow voters—in different ways and within different time periods—to cure mismatched signatures. That is hardly a consensus against Arizona's position.

choose wisely; perhaps not. But "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Unless a State chooses a "manner" of election that is not simply unwise but which unconstitutionally infringes on the right to vote, courts should yield to the policy choice of the State. And because Arizona's challenged law advances important State interests with only minimal burdens on Plaintiffs, there is no ground for replacing it with a judicially crafted alternative.

CONCLUSION

This Court should reverse the decision below.

Dated: January 22, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) and Circuit Rule 32-1-(a). This brief contains 2346 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, pursuant to Fed. R. App. P. 32(g)(1), this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: January 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System, which will serve an electronic copy on all registered counsel of record.

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