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-Defendants-Appellants

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

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF THE STATE OF ARIZONA

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Karen Fann, President of the Arizona State Senate

Russell Bowers, the Speaker of the Arizona House of Representatives, and Karen Fann, the President of the Arizona State Senate, respectfully move for leave to file the attached brief of amici curiae in support of the State of Arizona.

IDENTITY AND INTEREST OF AMICI CURIAE

Speaker Bowers and President Fann are the presiding officers of their respective houses, which together constitute the Arizona Legislature. The Arizona Constitution vests in the Legislature "the legislative authority of the state." Ariz. Const. art. IV, pt. 1, § 1(1). Speaker Bowers and President Fann wish to participate as amici as representatives of the Legislature and defenders of its constitutional authority, which it exercised in enacting Arizona's election laws.

THE MOTION SHOULD BE GRANTED

Federal courts have found it "preferable to err on the side of granting leave" to file amicus briefs. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.); *accord Duronslet v. County of Los Angeles*, No. 16-cv-8933, 2017 WL 5643144, at *1 (C.D. Cal. Jan. 23, 2017) (same). And "[a]n amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of the Env't v. DeRuyter Bros. Diary*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

As the Legislature's presiding officers, Speaker Bowers and President Fann

have a unique perspective on the election regulations at issue, which fall squarely within the Legislature's purview.

All parties were notified of Speaker Bowers and President Fann's intent to file a brief as amici curiae. None has objected.

No party's counsel authored the proposed amici brief in whole or in part; and no person or entity, other than the amici or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Respectfully submitted this 27th day of January, 2021, by:

/s/ Andrew G. Pappas
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Andrew G. Pappas

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BRIEF OF AMICI CURIAE RUSSELL BOWERS, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, AND KAREN FANN, PRESIDENT OF THE ARIZONA STATE SENATE, IN SUPPORT OF THE STATE OF ARIZONA

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IDENTITY AND INTEREST OF AMICI CURIAE

Russell Bowers, the Speaker of the Arizona House of Representatives, and Karen Fann, the President of the Arizona State Senate, are the presiding officers of their respective houses, which together constitute the Arizona Legislature. The Arizona Constitution vests in the Legislature "the legislative authority of the state." Ariz. Const. art. IV, pt. 1, § 1(1). Speaker Bowers and President Fann are representatives of the Legislature and defenders of its constitutional authority, which it exercised in enacting Arizona's election laws.

All parties were notified of Speaker Bowers and President Fann's intent to file a brief as amici curiae. None has objected.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court decided that the federal Constitution requires that Arizona voters have up to five days after Election Day to sign their early ballots. The State of Arizona has explained in detail why the resulting injunction should be vacated and the judgment below reversed. Dkt. 32. Speaker Bowers and President Fann submit this short brief to emphasize the federalism and separation-of-powers problems the district court's decision creates.

ARGUMENT

1. Under the Elections Clause, state Legislatures prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. Thus "our democratic federalism 'permits states to serve "as laboratories for experimentation to devise various solutions where the best solution is far from clear."'" *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (quoting *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1028 (9th Cir. 2016) (en banc) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015))).

The product of Arizona's ongoing experimentation in early voting is a flexible system that "allows no-excuse [voting-by-mail] during the twenty-seven days before an election." 1-ER-3 (citing Ariz. Rev. Stat. §§ 16-541, -542(C)).[1] Voters who return their ballots by mail must do so "in specially provided, postage-paid envelopes and sign an affidavit printed on those envelopes." *Id.* (citing Ariz. Rev. Stat. §§ 16-547, -548). If a voter's signature on that envelope does not match the signature on her registration card, then Arizona law allows the voter "to cure [the] perceived mismatch[] . . . up to five business days after an election." 1-ER-4 (citing Ariz. Rev. Stat. § 16-550(A)). But if a voter fails to sign his ballot before the polls close on Election Day, then Arizona law provides no such "cure" period. So, the district court created one, deciding that the United States Constitution requires it. It does not.

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[1] The amici cite the State's Excerpts of Record, Dkt. 35-1.

2. Under the applicable framework, election laws that impose "severe" burdens on voters are subject to strict scrutiny, while those that impose only minimal burdens are generally justified by the State's "important regulatory interests." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (citations omitted). This "'flexible standard'" is rooted in the courts' recognition that "States . . . [need] 'to assure that elections are operated equitably and efficiently,'" and reflects the courts' "respect for governmental choices in running elections." *Id.* at 1106, 1114 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992)).

Here, the district court correctly found that "the challenged deadline imposes only minimal burdens," because "there is nothing generally or inherently difficult about signing an envelope by Election Day"—a requirement that "over 99% of voters timely comply" with. 1-ER-13–14. The court also found that the interests the State asserted are "important." 1-ER-14, -15, -17, -19. Yet the court concluded that none of those interests could "justify the minimal burdens imposed." 1-ER-14, -15, -17, -19. This conclusion is legally wrong and improperly invades the Legislature's prerogative to regulate Arizona elections.

First, the court determined that the State's interest in "fraud prevention does not justify the minimal burdens imposed," "[b]ecause there is no evidence that the challenged deadline reasonably prevents fraud." 1-ER-14. That conclusion contravenes the Supreme Court's decision in *Crawford*, which upheld an Indiana law

seeking to prevent "in-person voter impersonation at polling places" even though there was "no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195 (2008) (Stevens, J., op.). And far from requiring evidence that Indiana's law "reasonably prevent[ed] fraud," 1-ER-14, the Supreme Court observed that "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196.

The district court also concluded that "the Election-Day deadline for curing missing signatures is not necessary to advance the State's fraud prevention interest." 1-ER-14–15. But this Court rejected such a necessity requirement in *Dudum*, explaining that where (as here) "a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests." 640 F.3d at 1114. And an Election-Day deadline for completing a ballot is of course reasonable, as the Court already concluded. *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020).

Next, the district court concluded that "the State's interest in alleviating administrative burdens does not justify the minimal burdens imposed by the challenged deadline," because "a post-election cure period would not impose meaningful administrative burdens on election officials." 1-ER-16–17. Again, because the burdens on voters are minimal, the State "is *not* required to show that its [requirement]

is narrowly tailored—that is, is the one best tailored to achieve its purposes." *Dudum*, 640 F.3d at 1114; *accord Ariz. Green Party v. Reagan*, 838 F.3d 983, 992 (9th Cir. 2016) (rejecting the argument that the State must "adopt . . . the most efficient possible" voting-deadline system given the "de minimis burden" imposed by the existing deadlines). And for good reason. As the Supreme Court explained in *Burdick*, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." 504 U.S. at 433.

As for the administrative burdens on elections officials that a post-election cure period would create, it was for the Legislature—not the district court—to decide whether those burdens were "meaningful." 1-ER-17. The court "assign[ed] great weight" to the Arizona Secretary of State's "judgment [that] Arizona could implement a post-election cure period without imposing significant administrative burdens on election officials," yet discounted the contrary view of one such official, Pima County's Deputy Recorder and Registrar of Voters. 1-ER-16. It was the Legislature's role to weigh those divergent views and choose the best policy, because "[t]his cost-benefit analysis is the kind of judgment that the Legislature was entitled to make." *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 733 (9th Cir. 2015).

The same goes for the State's important interest in the orderly administration of elections. Here too the district court gave "great weight" to the Secretary of

State's judgment that "there is no meaningful difference between an unsigned ballot envelope and one with a perceived mismatched signature," and ultimately decided that treating them differently "undermines, rather than serves, the State's interest in the orderly administration of elections." 1-ER-17–19. But again, that policy judgment was the Legislature's to make, *Ariz. Libertarian Party*, 798 F.3d at 733—not the court's (and not the Secretary's). And the Legislature made that judgment, deciding that unsigned affidavits are different from those with perceived signature mismatches, and reasonably choosing to provide a cure period for one but not the other. *See Hobbs*, 976 F.3d at 1086 (concluding that "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").

3. Still another interest readily justifies this policy: the State's "interest in incremental election-system experimentation." *Short*, 893 F.3d at 679. As the Supreme Court observed five decades ago, "a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) (quotation omitted). The Arizona Legislature did exactly this, enacting cure periods for some defects but not others.

Our federal system not only permits but encourages this sort of experimentation. The district court's injunction stifles it, transforming a step-by-step experiment

into a sweeping constitutional mandate. Again and again, the district court cited cure periods that Arizona law already provides in order to impose a new one. *See, e.g.*, 1-ER-14, -16, -18. And so the disincentive to innovate is clear. If Arizona had not provided any cure periods at all (and some States do not, 1-ER-18), the challenged deadline likely would have withstood the district court's scrutiny. *Cf. McDonald*, 394 U.S. at 810–11 ("Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges . . . that has provided appellants with a basis" for their constitutional challenge).

CONCLUSION

"Election laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. And if even minimal burdens trigger the sort of judicial scrutiny that the district court engaged in here, then the federal courts will quickly displace the States' policymaking role in elections. They should not. As this Court observed, "[w]hile . . . federal courts have a duty to ensure that national, state and local elections conform to constitutional standards, [they] undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182–83 (9th Cir. 1988). Or, as the Sixth Circuit recently put it, the federal courts should not "become entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Democratic Party v. Husted*,

834 F.3d 620, 622 (6th Cir. 2016); *see also Stevo v. Keith*, 546 F.3d 405, 409 (7th Cir. 2008) ("warn[ing] . . . against federal judicial micromanagement of state regulation of elections").

The district court improperly substituted its policy judgment for the Arizona Legislature's, fashioned a new election rule, and committed a spate of legal errors in the process. This Court should reverse the district court's judgment.

Respectfully submitted this 27th day of January, 2021, by:

/s/ Andrew G. Pappas
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UNITED STATES COURT OF APPEALS
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