Nos. 20-16759, 20-16766

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,
Plaintiffs-Appellees,

v.

KATIE HOBBS, *et al.*,
Defendants,

STATE OF ARIZONA, *et al.*,
Intervenor-Defendants-Appellants,

and

REPUBLICAN NATIONAL COMMITTEE and ARIZONA REPUBLICAN PARTY,
Intervenor-Defendants-Appellants.

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

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DISCLOSURE STATEMENT

No Plaintiff-Appellee entity has a parent corporation or a corporation that owns 10% or more of its stock.

Date: February 19, 2021

/s/William B. Stafford

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INTRODUCTION

This case is about Arizona's constitutionally unjustifiable failure to give voters a fair opportunity to cure and save from rejection mail ballots that are omitted from the vote count based on a technical and eminently curable error that has nothing to do with the voter's eligibility to vote: a voter's failure to sign the ballot envelope. Although Arizona law provides a five-day post-election cure period for voters whose ballots are flagged for rejection based on a perceived *inconsistent* signature, it is silent on the treatment of ballots identified for rejection based on a *missing* signature. The state's Chief Election Officer, Defendant Secretary of State (the "Secretary") sought to apply the same five-day post-election cure period to ballots submitted by lawful voters with missing signatures, but the Attorney General blocked those efforts. The resulting Inadequate Cure Period for missing signature ballots leads to the rejection of thousands of otherwise eligible ballots each election cycle, unjustifiably disenfranchising lawful Arizona voters.

Appellees sought an order from the district court requiring Arizona to provide a uniform post-election cure period for mail voters whose ballots are flagged for rejection due to signature deficiencies—whether

because a signature is flagged as "inconsistent" or missing entirely. They initially named as Defendants the Secretary and the recorders for each of Arizona's fifteen counties, who administer Arizona's elections. The State of Arizona (the "State") and the Republican National Committee and Arizona Republican Party (collectively, the "RNC") were granted leave to intervene.[1]

This is the rare case where a plaintiff sued and many of the defendants *agreed* that the claim was meritorious: The Secretary and several county recorders supported Appellees' request for relief. Pursuant to Federal Rule of Civil Procedure 65(a)(2), the district court consolidated a hearing on Appellees' preliminary injunction motion with a trial on the merits. After the trial, and based on a full record, the district court found in Appellees' favor and permanently enjoined the Inadequate Cure Period, in large part because it agreed with Appellees that "[a] system in which a voter who makes even the most minimal of marks receives the benefit of a post-election cure period while a voter who makes no mark does not is unreasonable." 1-ER-18. In doing so, the district court

[1] The RNC intervenors originally included Donald J. Trump for President, Inc. That entity has now withdrawn from this case.

properly held that the Inadequate Cure Period unconstitutionally burdens the right to vote and denies voters procedural due process.

Though none of the original defendants appealed, both sets of intervenors did. The State and the RNC now incorrectly assert that the Inadequate Cure Period is constitutional and that the district court made several legal errors in granting Appellees' requested relief. For the reasons that follow, the district court's judgment should be affirmed.

ISSUES PRESENTED

1. Does the motions panel's decision to grant a stay pending appeal in *Arizona Democratic Party v. Hobbs (Hobbs I)*, 976 F.3d 1081 (9th Cir. 2020), which was made on limited briefing under an expedited timeline and without oral argument, constitute a binding opinion on the merits such that this merits panel has no power to consider the merits itself?
2. Under the *Anderson-Burdick* framework, does the Inadequate Cure Period unduly burden the right to vote under the First and Fourteenth Amendments?

3. Does the Inadequate Cure Period violate the right to procedural due process?

4. Did the district court abuse its discretion in evaluating the requirements for injunctive relief?

STATEMENT OF THE CASE

Factual and Legal Background

For the past thirty years, Arizona has allowed any qualified voter to participate in the state's elections by voting an early mail ballot. 1-ER-3 (citing A.R.S. § 16-541, -542(C)). Since 2007, it has maintained what is known as the Permanent Early Voting List ("PEVL"); voters who sign up for the PEVL automatically receive a mail ballot for every election without having to make a new request each time. 2-ER-78. As a result, Arizona's voters have come to rely overwhelmingly on mail voting, with nearly 80% of the state's voters participating in elections by mail, even before the pandemic. 2-ER-107–08.

Mail voters must return their ballots in specially provided envelopes that include an affidavit requiring the voter's signature. 1-ER-3 (citing A.R.S. §§ 16-547, -548). Election officials compare the signature on the ballot envelope with the signature on file for the voter casting the

ballot. 1-ER-3 (citing A.R.S. § 16-550). If election officials deem the affidavit on the ballot envelope "insufficient, the vote shall not be allowed." A.R.S. § 16-552(B). Among the most common ways in which an affidavit on a ballot envelope is deemed insufficient are (1) if the voter mistakenly fails to sign where indicated on the envelope, and (2) if election officials determine that the signature provided is "inconsistent" with the one for the voter on file. 1-ER-3; SER-68–9.

The State recognizes that this process results in the initial rejection of ballots cast by lawful voters. Thus, on August 27, 2019, the Arizona Legislature amended state law to provide a post-election cure period for ballots with signatures flagged as "inconsistent" with the corresponding voter's registration record. 1-ER-3–4. The law requires that those voters must have until "the fifth business day after" an election "that includes a federal office" to cure their signatures. A.R.S. § 16-550(A). This conformed the basic process for verifying mail voters' identities with the preexisting process used to verify in-person voters' identities where necessary: The same five-day cure period is available for voters who arrive at the polls without proper identification and cast provisional ballots in person. 1-ER-4.

State law, however, does not expressly provide that a voter can correct a *missing* signature within the same period that is available to other voters whose ballots are flagged for identity verification. 1-ER-4. It is silent on cure periods for "missing signature" ballots. 1-ER-4. Therefore, the Secretary sought to impose a uniform cure period. 1-ER-4. As Arizona's Chief Election Officer, she is "required by law to prescribe in the Election Procedures Manual ('EPM') 'rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting.'" 1-ER-4 (quoting A.R.S. §§ 41-121, 16-452(A)).

The Secretary's draft EPM in October 2019 "instructed election officials to permit voters to cure a missing signature within the same post-election time frame applicable to perceived mismatched signatures." 1-ER-4. But "[t]he Attorney General," who must approve the EPM, *see* A.R.S. § 16-452(B), "objected to the Secretary's draft because, in his view, Arizona law implicitly prohibits a post-election cure period for missing signatures." 1-ER-4.[2] The Secretary disagreed but "acquiesced to

[2] The State and the RNC, joined by amici curiae—the attorneys general of a collection of other states (the "Other States") and two Arizona State

removing the language in the interest of timely issuing an updated version of the EPM." 1-ER-4. The final EPM thus does not authorize any post-election cure period for mail ballots with missing signatures. It provides only that voters may cure these ballots until 7:00 p.m. on election day.

It is undisputed that the data from recent election cycles show that thousands of Arizona voters have been disenfranchised due to lack of opportunity to cure missing signatures on their ballots. "For example, in 2016, Arizona rejected 3,079 ballots in unsigned envelopes. In 2018, that number was 2,435." 1-ER-15; *see also* State's Br. 18–19 (same). Maricopa County alone rejected 2,209 ballots for having a missing signature in the 2016 general election. SER-44. The same pattern holds for other elections and counties as well. *See e.g.,* SER-44 ("2014 General Election: 3,749; 2012 General Election: 4,610; 2010 General Election: 3,352; 2008 General Election: 2,644"); SER-83. This can happen for a variety of reasons. For example, cure is sometimes conducted by mail. *See, e.g.*, SER-30, 35, 64.

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legislators (the "Legislators")—go even further in their briefing, asserting that "Arizona statutory law actually and affirmatively precludes counting mail-in ballots not signed by poll-close time, thereby barring a post-election cure period." State's Br. 60–62; *see also* RNC's Br. 11–12; Other States' Br. 7–8; Legislators' Br. 5.

But ballots with missing signatures inevitably arrive on or close to election day. *See, e.g.*, SER-73. Given the lag time of physical mail, these voters are thus afforded no opportunity to cure. *See, e.g.*, SER 39–40.

It is also undisputed that providing voters notice of a missing signature and an opportunity to cure enfranchises lawful voters. The available data on cure rates shows that at least some voters who receive adequate pre-election notice of a missing signature correct the problem. 1-ER-23; *see also* SER-40, 73, 87.

This Lawsuit

The Arizona Democratic Party ("ADP"), Democratic National Committee ("DNC"), and DSCC sued the Secretary and all county recorders on June 10, 2020. They challenged the Inadequate Cure Period as (1) unjustifiably burdening the right to vote and (2) violating procedural due process. SER-90–92. Appellees moved to enjoin defendants to "allow voters to cure missing signatures in the same post-election period applicable to perceived mismatched signatures." 1-ER-5. The district court consolidated the injunction hearing with a merits trial. 1-ER-5. It also permitted the State and the RNC to intervene. 1-ER-5.

The Secretary did not oppose Appellees' requested injunction. SER-27. Moreover, the Secretary candidly admitted, in response to Appellees' discovery requests, that the regime of providing voters whose identity is in question with inconsistent cure periods is illogical and that Arizona would incur no meaningful additional burden by providing "missing signature" voters the same cure period as all other voters. SER-49–51.

Additionally, three defendant county recorders also supported Appellees' request for relief; the others did not take a position. SER-24. The Coconino County Recorder, for example, agreed with Appellees that a five-day post-election cure period for ballots with missing signatures would impose no administrative burden and, indeed, would promote the orderly administration of elections. SER-21.

On August 18, following the parties' briefing, the district court held a merits hearing, during which it admitted evidence and heard argument. 1-ER-5. On September 10, it permanently enjoined the Inadequate Cure Period. 1-ER-25. The State, joined by the other intervenors, moved the district court to stay the permanent injunction. *See* 3-ER-342. None of the named defendants joined in the request. The district court rejected the State's request for a stay. 1-ER-27–29.

The State and the RNC then sought an emergency stay pending appeal, arguing, among other things, that the district court's order would introduce confusion into the November general election, which at that point was less than two months away. *See* State of Arizona's Emergency Mot. for Stay Pending Appeal, *Arizona Democratic Party v. Hobbs*, No. 20-16759 (9th Cir. Sept. 18, 2020), ECF No. 4 at 18–19 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)); Intervenor-Appellants' Emergency Mot. for Stay Pending Appeal, *Arizona Democratic Party v. Hobbs*, No. 20-16766 (9th Cir. Sept. 21, 2020), ECF No. 2 at 10–12 (same). A motions panel of this Court granted that emergency stay on October 6, 2020. *Hobbs I*, 976 F.3d at 1087. The motions panel issued the stay on an expedited timeline with limited briefing, and without oral argument.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order granting a permanent injunction.

I. Although a motions panel of this Court granted Appellants' requested stay pending this appeal in *Hobbs I*, that decision does not bind this panel as to the merits of Appellants' appeal. This Court made that undeniably clear in its recent opinion in *East Bay Sanctuary Covenant v.*

Trump, 950 F.3d 1242 (9th Cir. 2020), which explains that merits panels need not treat motions panel decisions as binding precedent. *Id.* at 1262–63. Indeed, *East Bay Sanctuary Covenant* holds that the language in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015), upon which the State rests its argument to the contrary, is dicta. *E. Bay Sanctuary Covenant*, 950 F.3d at 1262.

As *East Bay Sanctuary Covenant* explains, there are a number of "good policy and practical reasons" that panels must be free to evaluate the merits of a case independent of an earlier motions panel's judgment. These include (1) the probabilistic nature of the inquiry that motions panels undertake when considering whether to grant a stay, (2) the fact that motions panels often make their decisions on expedited timelines with limited briefing and without oral argument, and (3) the lack of options for reconsideration of an unfavorable motions panel decision. *Id.* at 1262–64. All of these factors provide strong reason why in this case this panel should not be constrained by *Hobbs I* in its own merits analysis.

II. Turning to the merits, the district court correctly concluded that the Inadequate Cure Period unconstitutionally burdens the

fundamental right to vote in violation of the First and Fourteenth Amendments. In doing so, it applied the relevant "flexible" *Anderson-Burdick* standard that the Supreme Court has directed federal courts to apply to such claims. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The first step of the *Anderson-Burdick* inquiry requires a court to determine whether and to what extent a challenged law burdens the right to vote. *See Anderson*, 460 U.S. at 789; *see also Obama for Am. v. Husted* (*Husted II*), 697 F.3d 423, 428–29 (6th Cir. 2012). The second step requires consideration of the "precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434. A challenged regulation that imposes a "severe" burden is subject to strict scrutiny. *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) (citation omitted). But even when the burden is less than severe, the challenged law must be justified by state "interest[s] sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288–89 (1992).

The district court properly concluded, at the second step of the *Anderson-Burdick* inquiry, that the State's defense of the Inadequate Cure Period fails, regardless of the level of burden imposed on the right

to vote. Based on a full evidentiary record, the district court found that none of the State's purported interests—(1) fraud prevention; (2) reducing administrative burdens on poll workers; or (3) the orderly administration of elections—justify even a minimal burden. 1-ER-14. And though the State, the RNC, and Amici attempt to challenge the district court's conclusions, they offer no evidence or argument that justifies overturning the district court's findings.

This Court may also affirm the district court's decision on a different ground: Because there is "concrete record evidence of the disenfranchisement" of thousands of "would-be voters" as a result of the Inadequate Cure Period, the burden on the right to vote is significant—making the Inadequate Cure Period even less justifiable. *See Fish v. Schwab*, 957 F.3d 1105, 1131 (10th Cir. 2020), *cert. denied*, No. 20-109, 2020 WL 7327906 (U.S. Dec. 14, 2020).

III. The district court likewise correctly determined that the Inadequate Cure Period violates procedural due process. As a threshold matter, the three-part test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), is the proper frame of analysis for the procedural due process claim, not *Anderson-Burdick*. The cases that the State cites in support of

the opposite conclusion do not involve procedural due process claims and are "best understood as placing all *substantive* due process and equal protection challenges to election regulations under" *Anderson-Burdick*. 1-ER-20–21. In any event, as explained above, Appellees prevail under the latter standard as well. 1-ER-21.

The district court, applying *Mathews*, accurately concluded that the lack of a post-election cure period for unsigned mail ballots is constitutionally inadequate. After a trial on the merits, the district court found that "[a] post-election cure period would increase the likelihood" that voters can fix unsigned mail ballots and that the "State's interests in maintaining its Election-Day deadline for curing unsigned [ballots] are weak," among other factual findings. 1-ER-23. The State does not, and cannot, explain why these factual findings are clearly erroneous. Neither the State nor the RNC explain why, or how, the district court's rigorous procedural due process analysis is legally flawed or incomplete.

IV. Finally, the district court did not err in evaluating the requirements for injunctive relief. First, although the State takes issue with the district court's alleged rejection of the doctrine set forth in *Purcell*, whether the district court properly weighed *Purcell* in

considering the public interest is now irrelevant: The injunction was stayed before the 2020 general election, and the next election in which the injunction will take effect is almost two years away. In any event, the district court correctly considered *Purcell*, which, though cautioning against last-minute changes that are likely to sow voter confusion, does not per se preclude election-year injunctions of voting laws. This is especially so here, where the district court entered judgment almost two months before election day and where there was no evidence that the requested relief would confuse voters, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *See Purcell*, 549 U.S. at 5-6.

Nor did the district court abuse its discretion in balancing the equities. Despite the State's contention that the district court failed to account for Appellees' supposed delay in bringing the lawsuit, Appellees brought suit only a few months after it became clear that the requested cure period would not be in the EPM. Regardless, courts have not applied laches in voting rights cases, like this one, where plaintiffs seek only prospective relief. *Garza v. Cnty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990). And the district court's weighing of the injuries was appropriate;

indeed, as noted above, there is no competing state interest that can justify imposing a burden on voting rights in this case at all.

Lastly, the district court did not err in failing to apply what the State describes as a "heightened mandatory-injunction standard." The injunction that the district court entered is in fact a "classic form of prohibitory injunction," *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017); and even if it were mandatory in nature, Appellees met the higher standard.

STANDARD OF REVIEW

"Because '[a] district court's decision to grant a permanent injunction involves factual, legal, and discretionary components,' [this Court] evaluate[s] such a decision under three different standards of review." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). The district court's legal conclusions are reviewed de novo; its factual findings will be set aside only if clearly erroneous; and the scope of the injunction is reviewed for abuse of discretion. *Id.*

ARGUMENT

I. The motions panel's decision in *Hobbs I* is not binding on this merits panel.

As this Court recently explained in *East Bay Sanctuary Covenant*, a decision by a motions panel does not bind a merits panel in the same case. 950 F.3d at 1262–63. The State's argument to the contrary cannot be sustained. Indeed, the State can only make it by baldly (and improperly) dismissing *East Bay Sanctuary Covenant* as incorrect and relying instead on language from an earlier decision that this Court has previously recognized is non-precedential "dicta." State's Br. 30 & n.4 (citing *Lair*, 798 F.3d at 747); *see also E. Bay Sanctuary Covenant*, 950 F.3d at 1262 (holding that *Lair*'s "law-of-the-case discussion is dicta and not binding on subsequent cases").

This Court especially emphasized the resonance of its *East Bay Sanctuary Covenant* guidance where an earlier motions panel was deciding whether to grant a stay, which, "much like the decision whether to grant a preliminary injunction[,] is a 'probabilistic' endeavor." *E. Bay Sanctuary Covenant*, 950 F.3d at 1264. A motions panel "discuss[es] the merits of a stay request in 'likelihood terms,' and exercise[s] a 'restrained approach to assessing the merits.'" *Id.* Notably, "[s]uch a predictive

analysis should not, and does not, forever bind the merits of the parties' claims. This sort of 'pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to "act responsibly," rather than doling out "justice on the fly."'" *Id.* (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011)).

Likewise, "[t]here are good policy and practical reasons" that "later panels may review the merits of a case 'uninhibited' by a motions panel's earlier decision in the same case." *Id.* at 1262–63. *First*, "[m]otions panels' orders are generally issued without oral argument, on limited timelines, and in reliance on limited briefing." *Id.* at 1263. Indeed, as illustrated in the series of rules that the *East Bay Sanctuary Covenant* opinion cited, this is by design, and reflects the fundamentally different nature and purpose of motions, as compared to merits briefs. *See id.* (citing Fed. R. App. P. 27(e) (motions are decided without oral argument unless court orders otherwise); Fed. R. App. P. 27(a)(3)-(4) (responses and replies must be filed within ten days of service of motion); Fed. R. App. P. 27(d)(2) (motions or responses are limited to 5,200 words; replies are limited to 2,600 words); Ninth Circuit Rule 3-3(b) (in preliminary injunction appeal, opening brief must be filed within 28 days of notice of appeal; response

must be filed 28 days thereafter; reply may be filed 21 days thereafter); Ninth Circuit Rule 32-1(a) (opening and response briefs limited to 14,000 words)).

Second, "[r]econsideration of a motions panel's decision by a merits panel . . . 'differs in a significant way' from reconsideration of a merits panel's decision." *E. Bay Sanctuary Covenant*, 950 F.3d at 1263 (quoting *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986)). Notably, an unfavorable merits panel decision can be reviewed by "a petition for panel rehearing, rehearing en banc, or petition for certiorari," whereas "[m]otions for reconsideration or modification of a motions panel's order are 'discouraged,' 'disfavored by the court[,] and rarely granted.'" *Id.* (citing Ninth Circuit Rule 27-1 advisory committee note). Thus, "motions panel decisions are 'rarely subjected' to a thorough reconsideration process; '[f]ull review of a motions panel decision will more likely occur only after the merits panel has acted.'" *Id.* (quoting *Houser*, 804 F.2d at 568).

These "policy and practical reasons" are "heightened" here precisely because *Hobbs I* decided a motion to stay, *id.* at 1264, and they establish that this panel can and must perform its own independent analysis of the

merits of this case. *Hobbs I* was issued on an extremely expedited timeline with limited briefing and no oral argument. The State filed its Motion for Stay on September 18, 2020. Appellees filed their Response a week later on September 25. The State and the RNC filed Replies on September 28 and 29, respectively. And each of these filings was subject to the lower word count limits for motions, *see, e.g.*, Ninth Circuit Rule 27(d)(2).

The case was stayed, without oral argument, on October 6. That stay order, moreover, emphasized the pendency of the November election, and the *Purcell* line of cases, pursuant to which "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 (quoting *Republican Nat'l Committee v. Democratic Nat'l Committee*, 140 S. Ct. 1205, 1207 (2020)). Appellees could not feasibly seek review of that decision in time to have any impact for the November election. Additionally, the *Hobbs I* court made clear throughout its opinion that it was evaluating the State's "*probability* of success on the merits," not more. *Hobbs I*, 976 F.3d at 1086 (emphasis added); *see also*

id. at 1085 ("[T]he State has shown that it is *likely* to succeed on the merits.") (emphasis added).

Ultimately, the question confronting the motions panel was different than that confronting this panel now, and *Hobbs I* does not bind this Court. *See E. Bay Sanctuary Covenant*, 950 F.3d at 1264–65 (explaining the questions presented to the motions and merits panels are different and that it will thus "treat the motions panel's decision as persuasive, but not binding").

II. The Inadequate Cure Period unduly burdens the right to vote in violation of the First and Fourteenth Amendments.[3]

The district court correctly concluded that the Inadequate Cure Period unconstitutionally burdens the fundamental right to vote. 1-ER-

[3] The State observes, correctly, that Appellees' claims were facial in nature and then erroneously argues that they fail the *Salerno* standard for facial relief. State's Br. 58–59. As an initial matter, the *Salerno* "no set of circumstances" standard is but one standard that the Supreme Court has articulated for facial challenges. *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 24 (1st Cir. 2016) (citation omitted); *see id.* (explaining the Supreme Court's lower, "plainly legitimate sweep" standard could also apply) (citation omitted). In any event, even if the *Salerno* standard applies, Appellees' claims satisfy it. Given the mechanical application of cure period deadlines to any affected Arizona voter, the "components of the burden" that the Inadequate Cure Period "imposes are defined by its facial terms, not by any anticipated exercise of discretion in its application." *Id.* at 24–25. A court need not "speculate

19–20. In doing so, it properly applied the flexible *Anderson-Burdick* standard. *See supra* at 12–13. As Appellants acknowledge, under *Anderson-Burdick*'s "means-end fit framework," a challenged election regulation imposing "severe" restrictions, at one end of the scale, is subject to strict scrutiny. *Soltysik*, 910 F.3d at 444 (citation omitted). But even if the burden is less than severe, the challenged law must be justified by state "interest[s] sufficiently weighty to justify the limitation." *Norman*, 502 U.S. at 288–89.

At the first step, a court considers whether and to what extent a challenged law burdens the right to vote. *See Anderson*, 460 U.S. at 789; *see also Husted II*, 697 F.3d at 428–29 ("The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights." (alterations in original) (quoting *Biener*, 361 F.3d at 214)). At the second step, a court examines "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which

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about 'hypothetical' or 'imaginary' cases," and "can readily ascertain" from state law "as written" that the Inadequate Cure Period is unconstitutional. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1337 (N.D. Ga. 2018) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)).

those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Although the district court found the burden at step one to be "minimal," it found that the Inadequate Cure Period violates the First and Fourteenth Amendments because it found (at step two) that the asserted state interests do not justify even the minimal burden imposed. 1-ER-19–20. This Court should affirm. Just as the district court found, the State's interests cannot justify the Inadequate Cure Period, even if it is only minimally burdensome. In addition, this Court may affirm because, at step one, the Inadequate Cure Period in fact severely burdens the right to vote. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (explaining this Court may affirm the district court's judgment on any ground supported by the record).

A. The State's interests cannot justify the burden, even if minimal, that the Inadequate Cure Period imposes on the right to vote.

None of the three interests that the State puts forward are "sufficiently weighty to justify the limitation" of the Inadequate Cure Period. *Burdick*, 504 U.S. at 434; State's Br. 43–45. As the district court

properly found, this is true even if the Inadequate Cure Period imposes only a minimal burden on the right to vote. 1-ER-20.

To reach its conclusion, the district court examined each of the "precise interests put forward by the State"—(1) fraud prevention; (2) reducing administrative burdens on poll workers; and (3) the orderly administration of elections.[4] It considered whether the Inadequate Cure Period reasonably furthered these interests and found that it did not. This was not because the district court applied a heightened standard or impermissibly "second-guessed" every rationale, as the RNC and Other States imply (notably without citation to the record). RNC's Br. 5–7;

[4] The State put forward a fourth interest at the district court, "promoting voter participation and turnout," 1-ER-14, which it has abandoned on appeal. *See* Fed. R. App. P. 28(a)(9)(A) (requiring that argument in appellant's brief contain the "appellant's contentions and the reasons for them"); *United States v. Williamson*, 439 F.3d 1125, 1138 (9th Cir. 2006) (explaining that claim is waived without argument). The State has also never put forward an "interest in incremental election-system experimentation" as a justification for the Inadequate Cure Period, as the amici Legislators suggest. Legislators' Br. 6. Although the State mentions this interest in passing, arguing that the "district court's reasoning also runs afoul of this Court's decision in *Short v. Brown*, [893 F.3d 671 (9th Cir. 2018)], which recognized a 'specific [state] interest in incremental election-system experimentation,'" State's Br. 54 (quoting *Short*, 893 F.3d at 679), the fact that this Court recognized that interest in another case does not mean that it should consider such an interest here, where the State has not affirmatively raised it. *See* State's Br. 43 (expressly stating that only "[t]hree interests are dispositive here").

Other States' Br. 7. Rather, the State's lack of record evidence for its made-for-litigation arguments compelled the district court's holding.[5]

i. The Inadequate Cure Period does not serve a state interest in preventing voter fraud.

First, the State argues that the Inadequate Cure Period is justified by concerns about preventing fraud. But the State's only argument on this point is that the ballot *signature requirement* itself prevents fraud. State's Br. 43. It makes no argument, and presents no evidence, that the *lack of a post-election cure period* prevents election fraud. Nor could it. After all, Appellees object to the State's failure to adopt additional verification procedures that would allow voters, whose identity is in question due to lack of signature, an opportunity to *prove* they cast the ballot in question. *See Fla. Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) ("[L]etting mismatched-signature voters cure their vote by proving their identity *further* prevents voter fraud[.]").

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[5] As noted above, in rejecting the post-election cure period proffered by the Secretary in the EPM, the Attorney General did not object on the bases advanced in this litigation but, rather, on his expressed view that Arizona law implicitly did not authorize such a cure period. 1-ER-4.

The RNC, supported by the Legislators, challenges the district court's conclusion that the Inadequate Cure Period does not further the State's interest in voter fraud. RNC's Br. 5–7; Legislators' Br. 3–4. Again, though, the State lost on this point because of a fatal lack of evidence—not because the district court applied some implicitly incorrect standard or required that the Inadequate Cure Period be the best way to prevent fraud.[6] The State entirely failed to produce any admissible and probative evidence during trial that prohibiting a post-election cure period prevents fraud in any way. Put differently, even though the district court found that the State's interest in fraud prevention is, in the abstract, "important," 1-ER-14, the State did not put forward any evidence that the Inadequate Cure Period "is rationally related" to that interest. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 733 (9th Cir. 2015).

As the district court found, "[b]ecause there is *no* evidence that the challenged deadline reasonably prevents fraud . . . fraud prevention does not justify the minimal burdens imposed." 1-ER-14 (emphasis added). Indeed, the State outright admitted during the hearing before the district

[6] The State's reliance on *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), is misplaced, *see infra* at 43–45. *See* State's Br. 48.

court that fraud is generally not suspected as the reason that ballots are returned missing signatures, based on the number of ballots submitted without signatures. SER-13–15. As such, the State implicitly acknowledged that the lack of a post-election cure period serves only to ensure disenfranchisement of certain voters who made a simple omission in filling out their ballot envelope. And, indeed, it makes no sense that merely allowing voters this opportunity to cure their ballots by confirming that they did in fact submit the ballots in question would result in voter fraud. Certainly, the State cites no record evidence to undermine the district court's well-reasoned conclusion that the State's talismanic invocation of the specter of fraud does not automatically justify any challenged state election law.[7]

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[7] As the Legislators note, the district court observed that prohibiting a post-election cure was "not necessary to advance the State's fraud prevention interest." Legislators' Br. 3 (quoting 1-ER-14). True. But the district court also expressly stated that the State did *not* have to select the best method for preventing fraud: The problem was that the State did not present *any* evidence that the Inadequate Cure Period prevented fraud *at all*. 1-ER-15. That makes this case different from *Feldman*, in which the district court found that "Arizona 'need not show specific local evidence of fraud in order to justify preventative measures.'" *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1091 (D. Ariz. 2016), *aff.*, *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 390 (9th Cir. 2016). In arguing otherwise, the RNC obscures the fact that *Feldman*

ii. Concerns about administrative burdens on poll workers do not justify the Inadequate Cure Period.

Second, the State argues that the Inadequate Cure Period is justified by the State's "interest in reducing the administrative burden on poll workers." State's Br. 44. As a threshold matter, administrative burdens do not justify disenfranchisement. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) ("Although these reforms may result in some administrative expenses . . ., such expenses are likely to be minimal and are far outweighed by the fundamental right at issue.").

Even if they could, the district court found—again, on a complete trial record—that "a post-election cure period would not impose meaningful administrative burdens on election officials and, therefore, the State's interest in alleviating administrative burdens does not justify [even, in its view,] the minimal burdens imposed by the [Inadequate Cure Period]." 1-ER-16–17. Notably, this Court reviews the district court's factual finding—that there would be no "meaningful administrative

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involved a challenge to restrictions on third-party ballot collection, which could, at least theoretically, prevent fraud (if fraud exists), whereas the Inadequate Cure Period does not and cannot purport to prevent fraud at all. RNC's Br. 6–7.

burdens on election officials"—for clear error. Here, the district court considered the evidentiary record the State failed to build and found that an interest in reducing administrative burdens could not justify the Inadequate Cure Period. This is not engaging in a "cost-benefit analysis," as the RNC and Legislators suggest. RNC's Br. 7; Legislators' Br. 5. This is what *Anderson-Burdick* requires.[8]

And though the State—joined by the RNC—challenges the district court's factual findings on the administrative burden justification, the Appellants, and the Legislators, once again mischaracterize the record. *See* State's Br. 50–51; RNC's Br. 7; Legislators' Br. 4–5. The State failed to establish at the trial that there is any more than a slight burden on election officials.

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[8] The Legislators raise an argument, not directly raised by any party, that the district court's holding related to the State's interest in the orderly administration of elections is incorrect. Legislators' Br. 5–6. Amici cannot raise arguments. *United States v. City of L.A.*, 288 F.3d 391, 400 (9th Cir. 2002). Regardless, the district court correctly determined that the Inadequate Cure Period has no nexus to ensuring efficient election administration given the record evidence. 1-ER-19 ("On this record, treating unsigned envelopes worse than those with perceived mismatched signatures or in-person conditional provisional ballots undermines, rather than serves, the State's interest in the orderly administration of elections.").

In fact, as the district court found, the record amply established that remedying the Inadequate Cure Period would not create administrative burdens. 1-ER-16. In this regard, the district court credited the "Secretary's judgment," as the state's Chief Election Officer, that "Arizona could implement a post-election cure period without imposing significant administrative burdens." The Secretary reached that judgment for good reason. Specifically, "because the counties already were required to handle the 'cure' process for early ballots with mismatched signatures and conditional provisional ballots, . . . the Additional Cure Period would not cause any significant increase in costs or resources." SER-53. Indeed, "[t]he Secretary believed that county officials could feasibly implement the Additional Cure Period with existing resources." SER-55.

Apache County, Navajo County, and Coconino County officials all supported this conclusion. In fact, they affirmatively advocated for the additional cure period. SER-24. The Coconino County Recorder advised the district court that she did "not think that the requested post-election cure period for unsigned ballots would be a burden." SER-21. Indeed, the Recorder advised that Coconino County already has "staff on hand to call

voters and notify them of signature mismatch issues for five days after an election" and "Post-Election ID Verification Sites set up and staffed for five business days after an election," such that it "would not need to hire additional staff to administer" a post-election cure period for missing signature ballots (as it already does for inconsistent signatures and in-person voters who fail to bring acceptable identification when they appear to vote). SER-20. The missing signature cure period "could be administered in tandem with and would use the same processes as the five business day signature match and provisional conditional ballot processes." SER-20–21. Thus, the post-election cure period would have no significant impact on her office or impact the timing of certification of election results. SER-21.

The State's only admissible record evidence on administrative burden was that curing missing signatures would take more effort than curing inconsistencies. This evidence came in the form of one declaration from a county recorder who simply noted that more staff time would be required if relatively more voters sought to cure their ballots, without providing any information such as whether the county would incur more expense as a result (and, if so, how much). 1-ER-16.

The State also speculates that if the post-election cure period is implemented "election results will . . . take *even longer* to process" and could prevent ballots from being counted under the statutory deadlines. State's Br. 50–51. But it fails to explain, let alone support, why this would be. Counties *already must provide* a five-day post-election cure period and process for inconsistent signatures and conditional provisional ballots. A.R.S. §§ 16-550, 16-579; SER-101–04. The State does not even attempt to explain why curing missing signature ballots, but not the others, would delay final tabulation. And there is no record evidence that an additional cure period interferes with election certification in any way, as the State claims. *See* State's Br. 50–51. In fact, as noted above, the only evidence in the record on this point shows the opposite: As the Coconino County Clerk advised, she did not believe that providing missing signature voters with the same opportunity to cure as missing ID voters or inconsistent signature voters would in any way delay election results. SER-21.

Ultimately, there is no way to read the record to overturn the district court's factual finding with regard to administrative burden.

iii. The Inadequate Cure Period undermines, rather than advances, the State's interest in the orderly administration of elections.

Third, the State argues that the Inadequate Cure Period is justified by the State's interest in the "orderly administration" of elections. State's Br. 51–55. Specifically, the State argues that having the same deadline (election day) for curing non-signature ballots, voting in person, and returning mail ballots is desirable because it (1) reduces the number of dates to know; (2) provides finality; and (3) sets a clear deadline for poll workers. State's Br. 52.

But one of these things (curing non-signature ballots) is not like the others. What *would* be "orderly" and consistent is if the *cure date* for missing ballot signatures was set for five days after the election, *the same* as the *cure dates* for ballots with signature inconsistencies and conditional provisional (i.e., missing ID) ballots. In fact, the Secretary—the state official tasked with advancing the orderly administration of elections—wanted these three deadlines to be the same precisely "to ensure uniformity, efficiency, and impartiality" and "reduc[e] voter confusion and by ensuring that eligible voters are not excluded from the democratic process." SER-50. Likewise, the Coconino County Recorder

advised the district court that "the requested post-election period for unsigned ballots would promote the orderly administration of elections." SER-21. It strains credulity to believe that the deadline sought by the state's Chief Election Officer, and county recorders, would undermine election administration. Indeed, the only reason why those three deadlines are not the same is that the Attorney General objected. SER 59–60.[9]

In the end, the State and the RNC cannot establish fault with the district court's actual decision under *Anderson-Burdick*, so they resort to mischaracterizing it. The district court, for instance, did not conclude that officials cannot set reasonable deadlines for elections, including for curing ballots, as the State suggests. State's Br. 49. It also did not conclude, as the State claims, that a post-election cure period for inconsistent signatures must invariably be identical to missing

[9] The State cites *United States v. Locke*, 471 U.S. 84, 101 (1985) to argue all Appellees' arguments "fly in the face of the concept of deadlines." State's Br. 49–50. In *Locke*, the court refused to hold that a party substantially complied with a missed deadline. 471 U.S. at 101. In this case, though, Appellees are not asking this Court to excuse compliance with a deadline, but to address the irrational burden on the right to vote imposed by the *specific* deadline in question as it relates to other relevant deadlines.

signatures. State's Br. 49. Instead, the district court examined the claims presented in *this* case and engaged in the case-specific, factual analysis that is necessary to resolve claims under *Anderson-Burdick*. *See Soltysik*, 910 F.3d at 445. In doing so, the district court correctly found that under the facts of this case—and after a trial on the merits—relief is warranted.

iv. Other states' laws do not bear on the constitutionality of the Inadequate Cure Period.

The arguments by the State and the RNC that *other* states' ways of "address[ing] non-signatures" may be constitutional are beside the point. State's Br. 59–60; RNC's Br. 10–12. *Anderson-Burdick* requires an individualized assessment of the specific state's law in question and the burdens it imposes. *See, e.g.*, *Ohio State Conf. of N.A.A.C.P. v. Husted (Husted III)*, 768 F.3d 524, 547 n.7 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Anderson*, 460 U.S. at 789.

It is true, as the Other States point out, that states have substantial discretion in regulating their elections. Other States' Br. 2–4. But that, of course, does not mean all election deadlines pass constitutional muster. *See Anderson*, 460 U.S. at 806 (deadline for filing nomination petitions imposed unconstitutional burden); *Nader v. Brewer*, 531 F.3d

1028, 1039 (9th Cir. 2008) (deadline burdensome and unconstitutional). Consistent with the Supreme Court's directive that challenges "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions," *Anderson*, 460 U.S. at 789, courts recognize that states' election laws are not fungible. For example, state voter ID laws are not universally constitutional or unconstitutional—individual assessment of each state's law and the burdens it imposes is required. *See, e.g.*, *Husted III*, 768 F.3d at 547 n.7, ("[W]e do not find that other states' electoral laws and practices are relevant to our assessment of the constitutionality or legality" of Ohio law.).

All of that said, to the extent that what other states do matters, Arizona's extension of the cure period to some voters and not others makes it an "outlier." 1-ER-18. "Arizona currently is the *only* state that sets a different deadline for curing a missing signature than a perceived mismatched signature." 1-ER-18–19 (emphasis added). This only further supports the conclusion that no proper state interest is advanced by this disparate treatment.

The Inadequate Cure Period cannot survive any level of scrutiny under *Anderson-Burdick*. *See Detzner*, 2016 WL 6090943, at *7 (finding

it is "illogical, irrational and patently bizarre for the State . . . to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters").

B. The Inadequate Cure Period imposes a severe burden on the fundamental right to vote.

As the district court properly held, the State has not justified the burden on the right to vote, however small, imposed by the Inadequate Cure Period. That said, rejecting mail ballots for lack of signature without providing the five-day post-election cure period that the State provides for other ballots presents a severe, or at the very least, significant burden on Arizona voters, notwithstanding the district court's finding otherwise, 1-ER-14.[10] Thus, this Court may also affirm the district court's decision on the ground that the Inadequate Cure Period severely burdens the right to vote.

Federal courts have repeatedly held that disenfranchisement of a significant number of voters severely burdens the fundamental right to vote. *See Detzner*, 2016 WL 6090943, at *6 (considering law requiring

[10] As explained above, *supra* I, the motions panel's reliance on the district court's observation as to the degree of the burden is not binding on this panel.

election officials to verify voter identity through signature-matching process: "If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."); *Stewart v. Blackwell*, 444 F.3d 843, 871–72 (6th Cir. 2006) (finding "severe" burden where unreliable punch card ballots and optical scan systems resulted in thousands of votes not being counted).

Indeed, in the context of voting rights, "the basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318, 1321 (11th Cir. 2019) (same). And courts have found a severe burden even where relatively small numbers of votes were not counted. *See Ne. Ohio Coal. for Homeless v. Husted (Husted I)*, 696 F.3d 580, 593 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3% of total votes inflicted "substantial" burden on voters).[11]

[11] The State takes issue with Appellees' reliance on *Husted I*. There, the court considered multiple constitutional challenges to voting laws. In considering a law that resulted in disenfranchisement, or votes not being counted, the court plainly held that the burden was "substantial" (a fact the State ignores). 696 F.3d at 593. To be sure, in considering a ballot affirmation requirement, the court found the burden "minimal," and

i. The evidence supports a finding that the Inadequate Cure Period severely burdens the right to vote.

The district court and the State mischaracterize Appellees' argument as one that "conflates the burdens imposed by a challenged law with the consequences of noncompliance." 1-ER-12; State's Br. 41–42. But that reading misses the mark. Appellees do not challenge the signature requirement itself. Rather, they challenge the rule by which the State *does not* allow voters whose mail ballots lack a signature to prove their identity post-election—even though the State *does* allow voters whose identity it doubts for similar reasons (lack of ID or inconsistent signature) to do so. A.R.S. § 16-550.

It is undeniable that, as a result of the Inadequate Cure Period, thousands of ballots have been rejected for uncured non-signatures in recent elections. *See supra* at 7–8; 1-ER-15. Accordingly, the thousands of "would-be voters disenfranchised in this case provide a concrete evidentiary basis to find that a significant burden was imposed by the"

"unspecified." *Id.* at 600. But Appellees do not challenge the mere existence of the ballot signature requirement but, rather, the State's procedures (or lack thereof) allowing a voter to prove that the voter did, in fact, submit the mail ballot in question. Thus, *Husted I*'s discussion of the burden of ballot affirmation requirements is not relevant.

Inadequate Cure Period. *Fish*, 957 F.3d at 1130 (finding significant burden on the right to vote when record showed that thousands of voters had been disenfranchised by a requirement to show documentary proof of citizenship to register to vote). Indeed, courts have held in similar signature-related cases that evidence of voters being disenfranchised because of an insufficient signature cure period supports a finding of significant burden under *Anderson-Burdick*. *See Lee*, 915 F.3d at 1321 ("On these facts"—documentary evidence of disenfranchised voters—"we have no trouble finding that Florida's [signature mismatch rejection] scheme imposes at least a serious burden on the right to vote."); *Detzner*, 2016 WL 6090943, at *6 (finding "severe burden on the right to vote" because "thousands" of mail voters are disenfranchised without opportunity to cure their signature; noting numerical evidence from previous election cycle).

ii. The cases that the district court and the State cite to argue that the burden is only minimal are inapposite.

In support of its conclusion that the burden imposed by the Inadequate Cure Period is minimal, the district court relied primarily on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). But the

district court misapplied *Crawford*, which, when read properly, supports *Appellees* here (not Appellants).

Crawford concerned a challenge to an Indiana law requiring voters to show certain forms of identification before voting in person at the polls. It did not consider voters' ability to cure ballots flagged for rejection based on a missing or inconsistent signature. Notably, as explained above, cases considering similar signature-related laws have found they imposed significant burdens on the right to vote. *See Lee*, 915 F.3d at 1321; *Detzner*, 2016 WL 6090943, at *6.

Not only is *Crawford* not inconsistent with these decisions, but, when read as a whole, it *supports* them. The law that the plaintiffs in *Crawford* challenged *included* a post-election cure period not dissimilar from the one Appellees seek here, the existence of which the Court relied on in finding the challenged law constitutional. *Crawford*, 553 U.S. at 199 (explaining that "the severity of th[e] burden is . . . mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted" if they "execute the required affidavit" "within 10 days" after the election). Arizona provides a five-day post-election cure period for *in-person* voters who, like in

Crawford, fail to bring adequate identification on election day. 1-ER-4. The issue in this case is its failure to do the same for voters who fail to sign their mail ballots. Properly read, *Crawford* only underscores the burden imposed by the Inadequate Cure Period.

In addition, the district court made too much of the fact that *Crawford* "did not characterize the burdens [in that case] 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. That statement is itself accurate, but the district court ignores the fact that, unlike here, the plaintiffs in *Crawford* "had 'not introduced evidence of a single, individual Indiana resident who w[ould] be unable to vote'" as a result of the law. 553 U.S. at 187 (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)). Here, by contrast, thousands of voters are disenfranchised every election because of the Inadequate Cure Period. 1-ER-15. Moreover, the fact that the burdens in *Crawford* and this case (or *Crawford* and *Fish*, for that matter) can be analyzed differently despite the fact that the "consequence[s] of noncompliance" are the same underscores that Appellees do not suggest

a standard by which "every voting prerequisite would impose the same burden and therefore would be subject to the same degree of scrutiny." 1-ER-12. Appellees, consistent with *Crawford* and *Fish*, argue for a case-by-case evaluation of burden. Where, as here, there is "concrete record evidence of the disenfranchisement" of a large number of "would-be voters" as a result of a challenged rule, there is "reason to believe that the [challenged rule] does impose a significant burden on [the state's] voters, even if some of those voters could have [complied with the rule]." *Fish*, 957 F.3d at 1131.

The State's reliance on *Lemons*, is similarly misplaced. In *Lemons*, the court evaluated an inapposite issue—a challenge to the lack of opportunity to cure *referendum* signatures, which was afforded to signers of mail ballots. 538 F.3d at 1100. There are immediate and important differences between a voter signing a referendum petition—in which the voter is one of many who must sign in order to show that a measure has sufficient broad public support to warrant placing it on the ballot to be voted on by the full electorate—and a voter signing an absentee ballot envelope, which contains the ballot effectuating the voter's direct exercise of their right to vote. The law at issue here involves the latter, and its

consequence is *total disenfranchisement*. In contrast, invalidating a voter's signature on a referendum petition does not stop the voter from voting for that referendum if it qualifies for the ballot. In fact, *Lemons* itself explicitly recognized the unique nature of referendum petitions and how they differ fundamentally from the direct casting of a ballot, emphasizing these differences to find that fewer safeguards were justified in signature matching—including that it is comparatively more administratively burdensome to verify signatures on referendum petitions as compared to ballots. *Id*. at 1104.

And even in the referendum signature-matching context, the *Lemons* court emphasized (and explicitly relied upon) the existence of important procedural safeguards that limited the risk of erroneous rejection of a signature, which "protect[ed] the rights of petition signers and treat[ed] voters in different counties equally." *Id.* at 1104.[12] As a result, "the verification process [was] weighted in favor of *accepting* questionable signatures," putting the thumb on the scale of the voter. In contrast, the Inadequate Cure Period flatly disenfranchises voters,

[12] For example, the signature-match review process was multi-tiered; "higher county elections authorities review[ed] all signatures that [we]re initially rejected." *Id*.; *see also id*. at 1105.

particularly those who are not notified that their ballot is missing a signature until election day. *Id.* at 1105 (emphasis added). Indeed, it is the very *lack of procedural safeguards* that gives rise to this claim; and the State here can point to *no* safeguards (unlike in *Lemons*) that mitigate the clear constitutional injury that follows as a result.

The State likewise misreads *Rosario v. Rockefeller*, 410 U.S. 752 (1973). There, plaintiffs failed to timely comply with a pre-election registration deadline. *Id.* at 757–58. The Court held that the deadline was constitutional because voters had ample opportunity to register and failed to do so. *Id.* at 758. That is not the case here. The Inadequate Cure Period results in ballots cast *before* election day going uncounted. The relevant comparison is to the State's varying cure periods for mail ballots with inconsistent signatures and conditional provisional ballots. Regardless, *Rosario* held only that the failure to register by the deadline was not a *severe* burden; not that *all* deadlines related to voting impose only a "minimal" burden on voting. Nor could it. Courts have often recognized that deadlines related to voting impose significant and impermissible burdens. *See Anderson*, 460 U.S. at 806 (deadline for filing nomination petitions imposed substantial and unconstitutional burden);

Nader, 531 F.3d at 1039 (deadline for filing nomination petitions imposed severe burden).

Finally, the State's citation to *Short* does little to advance its argument. As stated above, *supra* at 39, Appellees do not challenge the signature requirement itself, but rather the Inadequate Cure Period. Thus, the fact that this Court in *Short* held that "having to register to receive a mailed ballot" is, at most, an "extremely small" burden, is inapposite to the burden inquiry here. 893 F.3d at 677.

iii. The State's various other scattershot arguments are unavailing.

The State's remaining arguments are unsupported by authority, contrary to controlling law, or unpersuasive on their face. The State argues, for example, that the burden is minimal because the Inadequate Cure Period affects only a small number of voters. State's Br. 39–40. The Supreme Court, however, has emphasized that when assessing the severity of the burden, courts must consider the effects of the restriction on those voters who are *affected* by the law, not the burdens on *all* voters. *See, e.g.*, *Crawford*, 553 U.S. at 198, 201 (controlling op.) ("[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]," not all voters). That

some voters need not avail themselves of a cure period is therefore of no moment to the determination that this Court must make here—*i.e.*, what is the burden on the thousands of Arizona voters who *are* disenfranchised by the Inadequate Cure Period?[13]

Relatedly, the State argues that the burden here is minimal because "Arizona is a clear leader in removing burdens to voting." State's Br. 38 (emphasis omitted). Appellees dispute this characterization of Arizona's election laws as a whole. But regardless, the fact that *some* state voting laws are constitutional hardly means *all* are. And evaluation of the burden must be done from the perspective of the impacted voters, not the electorate as a whole, or through some sort of comparative assessment where the state with the most restrictive and retrogressive

[13] The State also argues that the burdens imposed by the Inadequate Cure Period are "minimal" because it is "generally applicable, even-handed, [and] politically neutral." State's Br. 38–39 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)). But *Dudum* simply noted that the Ninth Circuit has held, in other circumstances, that laws that meet that description do not impose "severe" burdens. It nowhere held, or suggested, that such laws *categorically* impose "minimal" burdens. They do not in this case, for the reasons discussed. Indeed, the State could even-handedly require that all voters, both Republican and Democrat alike, wade through a pool of venomous snakes to reach a polling place, and such a generally applicable law would plainly impose more than a minimal burden on the right to vote.

election laws sets the national baseline. *Crawford*, 553 U.S. at 198, 201; *see also O'Brien v. Skinner*, 414 U.S. 524, 29–30 (1974). Here, the affected voters are those Arizona voters who cannot cure their unsigned ballots due to the Inadequate Cure Period. Some of these voters have no other "available opportunities to vote," *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020), given the Inadequate Cure Period. These include voters who submit unsigned ballots on or close to election day. *See supra* at 8 (some unsigned ballots received by counties too close to election day to afford *any* cure opportunity).[14] Nevertheless, despite the fact that there is a fine line between signing and not signing a ballot under Arizona's guidance, this same burden does not extend to voters with inconsistent signatures—or to voters casting provisional ballots at the polls, for that matter—as the State allows those voters to cure their ballots after election day. A.R.S. § 16-550; 1-ER-4; 1-ER-18. As the district court aptly observed, "[a] system in which a voter who makes even the most minimal

[14] For similar reasons, that there is a pre-election day cure period for missing signature ballots does not mean that the Inadequate Cure Period is a "minimal" burden, as the State argues citing no authority. State's Br. 38–39. It is of no use to some affected voters.

of marks receives the benefit of a post-election cure period while a voter who makes no mark does not is unreasonable." 1-ER-18.

The State does not deny some voters will be disenfranchised by the Inadequate Cure Period. This disenfranchisement, even if it affects "only" thousands of lawful voters each cycle, is the definition of a "severe" (and certainly a significant) burden on those voters' right to vote. *See Lee*, 915 F.3d at 1321. As explained above, *see supra* II.A, the State's asserted interests cannot justify even a minimal burden, let alone a severe one.

III. The Inadequate Cure Period violates procedural due process.

The district court properly determined that the Inadequate Cure Period is unconstitutional because it violates procedural due process. The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A procedural due process claim under the Due Process Clause requires a showing of "(1) a deprivation of a constitutionally protected liberty . . . interest, and (2) a denial of adequate procedural protections." *Franceschi v. Yee*, 887 F.3d 927, 935 (9th Cir. 2018). The district court's conclusion that the Inadequate Cure Period violates due process should be affirmed.

A. *Mathews*—not *Anderson-Burdick*—governs this claim.

As a threshold matter, the district court correctly analyzed Appellees' procedural due process claim under the three-part *Mathews v. Eldridge* test, which requires balancing of:

> first, 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 349).

The State and the RNC argue, wrongly, that Ninth Circuit precedent requires that all constitutional challenges to election regulations be analyzed under *Anderson-Burdick*. State's Br. 62–64; RNC's Br. 12–15. The State cites two cases in support of that claim, but, as the district court concluded, neither involved procedural due process claims; the cases are thus "best understood as placing [only] *substantive* due process and equal protection challenges to election regulations under" *Anderson-Burdick*. 1-ER-20–21 (citing and distinguishing

Soltysik, 910 F.3d at 449 n.7, and *Dudum*, 640 F.3d at 1106 n.15, on that basis).[15]

For example, the State relies on *Dudum*. But that case involved an appeal from a substantive due process claim—not a procedural due process claim. *See Dudum v. City & Cnty. of S.F.*, No. C 10-00504, 2010 WL 3619709, at *6, *15 (N.D. Cal. Sept. 9, 2010). The two claims are distinct: A procedural due process claim challenges the deprivation of a life, liberty, or property interest "*without due process of law*[,]" whereas a substantive due process claim challenges actions the government cannot take—no matter what process is in place.[16] *Zinermon v. Burch*,

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[15] The RNC adds its view that "this Court has already applied *Anderson-Burdick* to procedural due process challenges to voting laws" in *Lemons*, 538 F.3d at 1103 (emphasis omitted). RNC's Br. 14. Not so. *Lemons* cited one case in support of its procedural due process analysis, a Seventh Circuit opinion analyzing an election law procedural due process claim under *Mathews*, 538 F.3d at 1105 (citing *Protect Marriage Ill. v. Orr*, 463 F.3d 604 (7th Cir. 2006)). While *Lemons* did not expressly articulate the standard it applied, it did, consistent with *Orr*, assess the *Mathews* factors. *Id.* (balancing value of additional procedural safeguards against administrative burden to the state).

[16] The State and the RNC also erroneously argue that Appellees' due process claim is substantive. State's Br. 64–66; RNC's Br. 13 n.3. But Appellees only seek implementation of additional process to afford an otherwise eligible Arizona voter five additional days to cure the ballot. Appellees seek no new substantive right. Indeed, the right for Arizona voters to have their mail ballots counted is well-established and

494 U.S. 113, 125 (1990); *see also Oceanside Golf Inst., Inc. v. City of Oceanside*, Nos. 88-5647, 88-6056, 1989 WL 61771, at *4 (9th Cir. June 1, 1989) (noting that the procedural and substantive due process analyses differ). The State's reliance on *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018) is also misplaced; that case concerned a First Amendment violation. *See id.* at 443, 449 n.7; State's Br. 63.

Absent Ninth Circuit caselaw requiring procedural due process claims to be analyzed under *Anderson-Burdick*, the district court was bound to apply the *Mathews* test and properly did so. In any event, as the district court recognized, Appellees would have prevailed under the *Anderson-Burdick* standard, too, as they did on their undue burden claim. *See supra* II.

B. Appellees have a constitutionally-protected liberty interest.

As the district court found, the first requirement of a procedural due process claim is easily satisfied here. It is well settled that Arizona mail ballot voters have a protected "'liberty' interest which may not be confiscated without due process." *Raetzel*, 762 F. Supp. at 1357. Federal

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undisputed. *See, e.g.*, *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990).

courts have consistently held that "[w]hile it is true that [mail ballot] voting is a privilege and a convenience to voters," a state does not have "the latitude to deprive citizens of due process with respect to the exercise of this privilege" once it is extended. *Martin*, 341 F. Supp. 3d at 1338; *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").[17]

C. The Inadequate Cure Period denies Appellees' rights without adequate process.

The district court, applying *Mathews*, correctly concluded that the lack of a post-election cure period for unsigned mail ballots is constitutionally inadequate.

i. The interest here deserves significant weight.

"The first factor favors [Appellees]." 1-ER-22. Rejecting an

[17] The RNC contends that the Inadequate Cure Period "does not violate any freestanding right." RNC's Br. 16 n.4. This argument conflates the liberty interest at issue—voting—with the procedures Appellees seek to protect such interest—a post-election cure period for unsigned mail ballots. Appellees' constituents have a constitutional right to vote that is "entitled to substantial weight," *Martin*, 341 F.Supp.3d at 1338, and "a constitutionally protected liberty interest in having their ballots counted." 1-ER-21–22.

otherwise valid mail ballot due to a technicality that can easily be cured after election day—as is the case for mail ballots with signature inconsistencies or voters who voted provisionally at the polls for want of adequate identification—is equivalent to denying an eligible Arizona citizen the right to vote, which the State concedes is a "strong" private interest. State's Br. 66; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Martin*, 341 F. Supp. 3d at 1338 (because "the private interest at issue implicates the individual's fundamental right to vote[, it] is therefore entitled to substantial weight"). And, the degree of potential deprivation that may be created by disenfranchising many voters is high. *Mathews*, 424 U.S. at 341; *see supra* at 7–8. Indeed, courts in this district have held that mail voting is "such a privilege . . . deserving of due process[,]" *Raetzel*, 762 F. Supp. at 1358, and, "[h]aving induced voters to vote by mail ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo*, 335 F. Supp. 3d at 217.[18]

[18] The State misunderstands *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018). State's Br. 65 n.8. The eligibility of a voter is not defined by whether a voter signs a mail ballot but rather, as an initial matter, whether the voter is even qualified to cast a ballot. *See Saucedo*, 335 F. Supp. 3d at 217.

ii. The risk of erroneous deprivation is substantial.

The risk at issue here is that an eligible voter will be erroneously deprived of their fundamental right to vote—not, as the State would have it, that a poll worker will erroneously conclude that a ballot envelope is unsigned when it is in fact signed. *See Mathews*, 424 U.S. at 335 (defining the second factor as "the risk of an erroneous deprivation of [the private] interest through the procedures used"). That risk is high.

It is virtually certain that some Democratic voters among Appellees' membership and constituencies, who are registered to vote and who timely submit their mail ballots, will inadvertently fail to sign those ballots, given that 32.5% of voters in Arizona register as Democrats. Every mail ballot that is unsigned, unless cured, will be rejected. Though voters who cast mail ballots rejected for an unsigned ballot envelope *may* be afforded the opportunity to cure their ballot until election day under the EPM, that cure period does not adequately mitigate the risk of erroneous deprivation. Given the press of other pre-election day work, there will be a delay between a county's receipt of an unsigned ballot envelope and the county recorder connecting with the voter to inform them of the issue. *See, e.g.*, SER-73–74. Thus, Appellees' constituents

may not have their completed mail ballots delivered to county recorders well in advance of election day in order for county recorders to "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 for the voter to cure the missing signature before 7:00 p.m. on election day. SER-99–100 (emphasis added).

Further, it is inevitable that county recorders will receive some unsigned ballots on or shortly before election day, when Arizona law would provide no or inadequate time for those recorders to make reasonable efforts to contact the voter and cure the ballot. The record demonstrated this was true in Santa Cruz County in 2018, when some mail ballots missing signatures arrived on November 5, the day before election day. SER-73. The same year, in Mohave County, mail ballots received without a signature were delivered within two days of the election, and the only means by which to contact the voters was by mail. SER 39–40. Other counties, including La Paz, Yuma, and Yavapai, also contact voters by mail, which extends the period of time by which voters are first informed of their missing signature. *See, e.g.*, SER-30, 35, 64. It also reduces the window for voters to either visit their local election office

to provide their signature, vote in person on election day, or, if they are even informed in time, receive and return a replacement ballot by mail.

At bottom, voters who could cure their unsigned mail ballot envelope will be deprived of a meaningful opportunity to do so and will be disenfranchised as a result. *See Martin*, 341 F. Supp. 3d at 1339 (agreeing with plaintiffs that post-election cure period for mismatched signatures was necessary, in part, because of "voters who cannot vote in person due to physical infirmity"). Accordingly, the risk is substantial that Appellees' constituents will be disenfranchised without "some form of post-deprivation notice . . . so that any defect in eligibility can be cured and the individual is not . . . denied so fundamental a right" should their mail ballots arrive at county recorders' offices too close to, or on, election day. *Raetzel*, 762 F. Supp. at 1358.

Conversely, and for the same reasons, were the same cure period available for ballots with signature inconsistencies afforded to unsigned ballots, the risk of erroneous deprivation would greatly decline. The county recorders agree that voters will, if given the chance, cure their ballots. *See* SER-40, 73, 87. The State is simply incorrect in its assertion that "[Appellees] offered no evidence that many voters would actually use

their post-election cure opportunity." State's Br. 73.[19] Where a county recorder manages to contact a voter regarding a missing signature on or shortly before election day, for instance, the additional cure period gives the voter time to cure the issue—by mail to the extent necessary. Thus, additional procedures are necessary to ensure that voters are advised of the missing signature on their ballot affidavit and have the ability to cure a simple oversight. *See Martin*, 341 F. Supp. 3d at 1339, 1343 (granting injunction allowing for post-election cure period for ballots with signature mismatches because existing cure period, which was only effective through election day, was inadequate in preventing disenfranchisement). As the district court found, "[a] post-election cure period would increase the likelihood that such voters learn of and fix such deficiencies." 1-ER-23. The State does not, and cannot, explain why this factual finding is clearly erroneous.

Instead, the State argues that the risk is minimal because the overall rate of rejection of mail ballots due to missing signatures was

[19] Indeed, if the State does not believe post-election cure periods will be utilized by some voters, it is hard to fathom why the State requires post-election cure periods for every kind of identification verification issue but for missing signature ballots.

below 0.1% in the 2018 general election. State's Br. 68–69. However, "even one disenfranchised voter . . . is too many." *League of Women Voters of N.C.*, 769 F.3d at 244; *see also Saucedo*, 335 F. Supp. 3d at 217 ("[E]ven rates of rejection well under one percent translate to the disenfranchisement of dozens, if not hundreds, of otherwise qualified voters, election after election."). Given this, courts adjudicating challenges to signature cure procedures in other states have found simple procedural safeguards to add significant probative value where potential disenfranchisement was in an even smaller range. *See id.* (so holding, where potential "disenfranchisement of dozens, if not hundreds, of otherwise qualified voters" was at issue); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) (where 1,100 mail ballots were rejected for signature mismatches, "the risk of erroneous deprivation" is "not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote").

Moreover, there is evidence here that thousands of eligible voters may be affected: In Maricopa County alone, the county recorder rejected 1,856 unsigned mail ballots in the 2018 general election and 2,209 in the

2016 general election. SER-44. Given these facts, the second *Mathews* factor weighs significantly in favor of Appellees as well.

The State also takes a crabbed view of erroneous deprivation, arguing it can deprive citizens of a right deserving of significant protection based on error. State's Br. 70. That is incorrect. *See, e.g.*, *Zessar*, 2006 WL 642646, at *9 (finding "fact that . . . absentee voters may have been deprived of their vote through a good-faith error, rather than outright fraud, does not eliminate their due process interest in preserving their right to vote"). There is no reason to deny thousands of eligible voters their right to adequate procedures to have their vote counted. The State acknowledges the risk of deprivation created by the signature requirement it imposes as a means of verifying voter identity—it does provide a cure period for missing signature ballots. It does so precisely because it acknowledges that some voters—who, after all, invested the time and energy to obtain, complete, and return a mail ballot in the first place—will neglect to sign and be deprived of their right to vote otherwise.

iii. Additional process furthers the State's interest in election integrity and imposes minimal burden.

The district court found, after a trial on the merits, that the "State's

interests in maintaining its Election-Day deadline for curing unsigned [ballots] are weak." 1-ER-23. Neither the State nor the RNC explain why, or how, the district court's rigorous procedural due process analysis is legally flawed or incomplete.

Rather, as explained above, *supra* II.A, the Inadequate Cure Period does not advance any of the three interests that the State put forward. The fact that the Secretary recently proposed the very same cure period that Appellees request for unsigned mail ballots in the October 2019 Draft EPM underscores that such a cure period would not be administratively burdensome.

A five-day post-election cure period for unsigned mail ballots would not otherwise harm the State's interest in any perceptible way. It would not remove any of the identification requirements under Arizona law that the State argues might prevent fraud. And it would not delay completion of the state canvassing process since there is already a five-day cure period for inconsistent signatures. It would simply ensure that voters have an adequate opportunity to cure a missing signature. If anything, the cure period Appellees seek would further the State's interest in ensuring that no mail ballot is erroneously rejected. *See, e.g.*, *Saucedo*,

335 F. Supp. 3d at 220–21 ("[A]dditional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised . . . [and] only serve to enhance voter confidence in elections.").

For these reasons, the third *Mathews* factor, like the first and second factors, weighs strongly in Appellees' favor. Thus, under the *Mathews* balancing test, Appellees are likely to show that the Inadequate Cure Period denies the right to vote without adequate process.

IV. The district court did not abuse its discretion in evaluating the requirements for injunctive relief.

The State's argument that the district court "erred/abused its discretion in evaluating the other equitable requirements for injunctive relief" is equally flawed. State's Br. 73.[20]

First, the State bewilderingly contends that the district court's *Purcell* analysis constitutes reversible error. However, even if the district court failed to appropriately address "the proximity of the [2020 general] election" in its weighing of the equitable factors (it did not), any such

[20] The State does not challenge the district court's rulings that Appellees suffered irreparable harm and that the injunction was "in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

failure is now irrelevant to whether Appellees are entitled to a permanent injunction. State's Br. 73–75. After all, *Hobbs I* stayed the injunction before the 2020 general election, and the next federal election is almost two years away.

In any event, the fact that the district court did not interpret *Purcell* to categorically preclude its entry of injunctive relief was correct even at the time of its decision. After all, the district court issued its injunction almost two months in advance of the general election, based on a full record. This was not a case in which there was "inadequate time to resolve the factual disputes," which is what the Court cautioned against in *Purcell*. 549 U.S. at 5–6.

Nor does *Purcell* establish a per se rule against enjoining voting laws in an election year. *See U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008) (denying stay of injunction issued just three weeks before election day because "*Purcell* . . . demands 'careful consideration' of any legal challenge that involves 'the possibility that qualified voters might be turned away from the polls'"). Rather, *Purcell* urged courts to consider whether a last-minute change is likely to sow widespread voter confusion, undermine confidence in the election, or

create insurmountable administrative burdens on election officials. 549 U.S. at 5–6. There is no evidence of any of that here. The injunction as entered would not have changed the process for submitting a mail ballot or confused voters to their detriment. The State would have implemented the requested relief administratively on the back end of the voting process. Indeed, by the State's own account, the "contradictory, ping-ponging instructions" that ultimately may have resulted in voter confusion in the 2020 general election were the result of the stay that the State itself requested—not the injunction that Appellees sought. State's Br. 74–75.

Second, the district court did not abuse its discretion, as the State claims, in rejecting the argument that Appellees' supposed delay in filing suit "undermine[d] the harms alleged." 1-ER-24; State's Br. 75–78. It was not until December 2019 that it became clear the requested cure period would not be in the EPM. 1-ER-4. Appellees thereafter commenced a review of the merits of a potential claim, prepared a complaint and a preliminary injunction motion, and filed suit just six months later and well before election day.

To the extent the State attempts—implicitly or otherwise—to

invoke the doctrine of laches, it does not apply. After all, Appellees seek only *prospective* injunctive relief to protect their rights in *future* elections, and laches ordinarily does not bar such an action. *See, e.g.*, *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters., Int'l*, 533 F.3d 1287, 1321 (11th Cir. 2008); *Env't. Def. Fund v. Marsh*, 651 F.2d 983, 1005, n.32 (5th Cir. 1981); *Lyons P'Ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001); *Cruise Lines Int'l Ass'n Alaska v. City and Borough of Juneau*, 356 F. Supp. 3d 831 (D. Alaska 2018). Thus, courts have not applied laches in voting rights cases, like this one, where plaintiffs seek prospective relief to address "ongoing" injury, rather than to undo or overturn a prior election's result. *Garza*, 918 F.2d at 772 (voting rights action not barred by laches "[b]ecause of the ongoing nature of the violation"); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (voting rights action not barred because "the injury alleged by the plaintiffs is continuing, suffered anew each time a[n] . . . election is held").

Third, the district court did not abuse its discretion by, as the State claims, failing to account for the "minimal" burden presented in balancing the equities. State's Br. 78–79. The district court considered "the harms . . . a preliminary injunction might cause to defendants" and

"weigh[ed] these against plaintiff's threatened injury." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). It is beyond dispute that absent an injunction, some votes will not be counted. 1-ER-24. The district court's conclusion that this was significant injury was not "illogical, implausible, or without support" in the record. *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017) (citation omitted).

Finally, the district court did not err in failing to apply what the State describes as a "heightened mandatory-injunction standard." State's Br. 79. As an initial matter, the injunction entered was "a classic form of prohibitory injunction" because it would "prevent[] future constitutional violations." *Hernandez*, 872 F.3d at 998. Even if characterized as a mandatory injunction, as the State asserts, it is still warranted because "the facts and law clearly favor the moving party." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)). Moreover, absent an injunction, there is a risk of "extreme or very serious damage" to Appellees and countless Arizonans' right to vote. *Hernandez*, 872 F.3d at 999 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879

(9th Cir. 2009)). "Mandatory injunctions are most likely to be appropriate," where, as here "the status quo . . . is exactly what will inflict the irreparable injury upon complainant." *Id.* (alteration in original) (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment and entry of a permanent injunction.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Numbers 20-16759, 20-16766

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