Nos. 20-16759, 20-16766

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

KATIE HOBBS *et al.*,
Defendants,

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

and

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

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

INTERVENOR-APPELLANTS' REPLY BRIEF

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April 12, 2021

RULE 26.1 STATEMENT

Neither the Republican National Committee nor the Arizona Republican Party has a parent corporation or a corporation that owns 10% or more of its stock.

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INTRODUCTION

Intervenor-appellants agree with all of the arguments advanced by the State of Arizona, including the dispositive effect of the motions panel decision here. But to avoid duplicative briefing, Intervenor-Appellants again incorporate by reference the Attorney General's arguments, and focus on rebutting three of the Appellees' assertions on the merits. First, Appellees ask this Court to perpetuate the error of the district court and apply a searching standard of review to the State's chosen means to advance several legitimate interests in the face of only a minimal burden on voting. Because Arizona's Election Day deadline for curing unsigned ballots imposes only a de minimis burden on voters, the State was within its discretion to employ the measure as a mechanism to advance its interests in fraud prevention, reducing administrative burden, and the orderly conduct of elections— all of which have long been recognized under *Anderson-Burdick* as legitimate and weighty state interests.

Second, Appellees can put forward no colorable argument that *Mathews v. Eldridge* rather than *Anderson-Burdick* framework applies to procedural due process claims in the election context. This Court has long recognized that *Anderson-Burdick* applies to all election claims and should reject Appellees' attempts to obfuscate this simple fact. Because Appellees' *Anderson-Burdick* claims fail, so too do their procedural due process claims.

Third, Appellees are wrong that *Purcell* has no relevance to this case. The *Purcell* principle prevents both late-breaking challenges to election laws and federal judicial

usurpation of State legislative authority over elections. And, in any event, this case *is* once again occurring on the eve of elections—Arizona is slated to hold local elections in less than two months. *Purcell* is thus still relevant to Appellees' continuing attempt to enlist the federal judiciary to upset a State election requirement that has been in force for over a century.

ARGUMENT

I. The district court erred in concluding that Appellees are likely to succeed on the merits of their *Anderson-Burdick* claim.

Appellees assert that none of the State's interests are "sufficiently weighty" to justify the Election Day cure deadline. Br. 23. Before spelling out the State's various interests in detail, it is first necessary to correct the legally erroneous standard of review Appellees and the district court employed to examine Arizona's interests.

When a burden imposed by an election regulation is minimal, "the State need not narrowly tailor the means it chooses to promote ballot integrity." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997). Instead, a "minimally burdensome voting requirement will be upheld so long as it reasonably advances important regulatory interests." *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020). Under this standard, courts are not to require the State to provide "proof that ballot rules are 'the only or the best way to further the proffered interests.'" *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1094 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020). Rather, "[w]here, as here, a state election law imposes only a de minimis burden

on a party's First and Fourteenth Amendment rights, the State 'need demonstrate only that [the statute at issue] is rationally related to a legitimate state interest.'" *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 732 (9th Cir. 2015).

Appellees cannot pretend that the district court applied the proper deferential standard. Despite correctly finding that "the challenged deadline imposes only minimal burdens," the district court went on to apply a searching standard of review inconsistent with the *Anderson-Burdick* framework. Its improper approach is most explicitly demonstrated in its acknowledgement that "the State's interest in preventing voter and election fraud is important" and that "the State's fraud prevention interest is served by imposing a deadline by which voters must sign their ballots." 1-ER-14-15. Under *Anderson-Burdick*'s minimal burden framework, that alone should have been enough to uphold the Election Day deadline. But the district court went on to require the State to prove that its deadline was "necessary" rather than reasonably related to advancing its interest in fraud prevention. *See* 1-ER-13-14 ("[T]he post-election cure periods applicable to perceived mismatched signatures and conditional provisional ballots show that the Election-Day deadline for curing missing signatures is not necessary to advance the State's fraud prevention interest."). *See also* 1-ER-14 (requiring State to prove that abandonment of longstanding procedure would significantly increase administrative burdens despite finding reasonable connection between deadline and administrative burden); 1-ER-16-17 (placing burden on State to show why its policy preference is

better than the Secretary's). *Anderson-Burdick* makes clear this approach is only appropriate for non-minimal burdens.

With the correct standard of review established, Appellees' arguments regarding each interest disintegrate.

A. The Election Day cure deadline reasonably advances the State's interest in fraud prevention.

As they must, Appellees concede that fraud prevention is an important interest and that signature requirements reasonably advance those interests. Br. 25. Moreover, it is indisputable that cure periods for missing signatures must have a deadline. *Arizona Democratic Party*, 976 F.3d at 1085 ("All ballots must have *some* deadline."). Appellees' only argument is that the State provided *no* evidence that its Election Day cure deadline reasonably related to preventing fraud. Br. 26-27; *see also* 1-ER-14 (district court conclusion that "there is *no* evidence that the challenged deadline reasonably prevents fraud"). But that is absurd. The State provided extensive evidence demonstrating that unsigned ballots carry with them a higher risk of fraud. Doc. 85-1, at 20-21 (citing Atkeson Report ¶70; Napolitano Decl. Exs. P-U); 2-ER-105-06, -213-312. In order to have time to effectively detect this fraud without unduly delaying election returns, the State reasonably chose to require that all unsinged ballots are cured by Election Day. This is all the State was required to show. *See Timmons*, 520 U.S. at 364 ("elaborate, empirical verification of the weightiness of the State's asserted justifications" is not required).

This evidence confirms the State's conclusion that having more rather than less time to detect and reject fraudulently cast unsigned ballots advances its goal of preventing fraud. Tellingly, the only case Appellees can cite in support of its position involved *strict scrutiny* of *severe* burdens. *See* Br. 25 (citing *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016)).[1] But the question is not whether this was the ideal path to prevent fraud, whether the district court agreed with the State's judgment of the time needed to detect fraud, or whether the district court agreed with the State's prioritization of detecting fraud on unsigned ballots over mismatched ballots. It is whether the Election Day cure deadline is reasonably related to the State's interest. *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011) ("[W]hen 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."). Because the Election Day cure deadline reasonably advances Arizona's fraud prevention interest, it must be upheld.

[1] The only case that Appellees do cite regarding minimal burdens resulted in the State's election measures being upheld. Br. 27 n.7 (citing *Feldman v. Ariz. Secr'y of State's Office*, 208 F. Supp. 3d 1074, 1091 (D. Ariz. 2016)). Appellees can only distinguish *Feldman* by conclusory asserting that "restrictions on third-party ballot collection ... could ... prevent fraud" whereas the Election Day signature cure deadline "does not and cannot purport to prevent fraud." Br. 27 n.7. But even the district court acknowledged that "the State's fraud prevention interest is served by imposing a deadline by which voters must sign their ballots." 1-ER-13. There is thus no way to distinguish this same district court's holding in *Feldman* that "Arizona 'need not show specific local evidence of fraud in order to justify preventative measures.'" *Feldman*, 208 F. Supp. 3d at 1091, *aff'd*, 843 F.3d 366, 390 (9th Cir. 2016).

B. The Election Day cure deadline reasonably advances the State's interest in avoiding administrative burdens.

Appellees do nothing to revive the district court's erroneous dismissal of the relationship between the State's interest in avoiding administrative burdens and the Election Day cure deadline. They begin by making the frivolous argument that "administrative burdens" are not a legitimate state interest in the *Anderson-Burdick* framework. Br. 28. But, as the district court recognized, "[t]he State's interest in reducing administrative burdens on poll workers is important." 1-ER-14. And uniform precedent confirms that "administrative burden[s]" are "important regulatory interests" that must be considered in *Anderson-Burdick* balancing. *Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008); *see also Ariz. Dem. Party*, 976 F.3d at 1085; *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952-53 (9th Cir. 2020) (crediting "the administrative burdens on the state"); *Dudum*, 640 F.3d at 1116 (crediting the State's interest in "alleviating the costs and administrative burdens" as ""a legitimate state objective"").

Appellees next try to dress up the district court's legal conclusion that a post-Election Day cure period would impose no "meaningful administrative burdens on election officials" as a factual finding entitled to clear-error deference. Br. 28-29. But the district court's determination that the State's administrative burden is not "meaningful" and therefore outweighed by the burden is a conclusion of law under *Anderson-Burdick* that must be reviewed de novo.

The State easily established a rational connection between the Election Day cure deadline and the State's interest in reducing administrative burdens. The district court itself acknowledged that a post-Election Day cure deadline "might impose marginally greater administrative burdens." 1-ER-15. And the record was replete with evidence of a connection between the Election Day deadline and reduced administrative burden. *See, e.g.*, 2-ER-137 (even under current deadline, Pima County struggles to tabulate in time); 2-ER-107-09 (noting stress vote by mail has put on existing system).[2] As the motions panel correctly concluded, "there can be no doubt (and the record contains evidence to show) that allowing a five-day grace period beyond Election Day to supply missing signatures would indeed increase the administrative burdens on the State to some extent." *Arizona Democratic Party*, 976 F.3d at 1085.

Despite finding a rational connection between the Election Day cure deadline and the State's important interest in reducing administrative burden, the district court erroneously concluded that this burden was rebutted by the Secretary of State's contrary conclusion. 1-ER-15. In conducting *Anderson-Burdick* balancing, it is not the court's role to wade into intra-State government disputes between laws enacted by the legislature and the preferences of cabinet officers. This type of analysis allows State cabinet officers

[2] Appellees argue that the State failed to "explain, let alone support, why" election results will take longer to process if a post-Election Day cure deadline for unsigned ballots is implemented in light of the State's allowance of a post Election Day cure period for mismatched signature ballots. Br. 32. The State was not required to spell out the obvious reality that the more ballots it has to cure, the longer it will take to cure ballots. *Cf. Timmons*, 520 U.S. at 364.

to circumvent the legislative process and have their policy preferences enacted by federal courts—despite the Arizona Constitution vesting such decisions in the Legislature. That is not the function of *Anderson-Burdick*. *See Ariz. Libertarian Party*, 798 F.3d at 733 ("This cost-benefit analysis is the kind of judgment that the *Legislature* was entitled to make.") (emphasis added). Rather, the court was confined to examining whether there was any rationale connection between the State's interest and the Election Day cure deadline. Once it found such a connection, as it did, the court was required to uphold Arizona's law.

C. The Election Day cure deadline reasonably advances the State's interest in the orderly administration of elections.

Appellees offer only two arguments to attempt to bolster the district court's erroneous holding that the Election Day cure deadline is not reasonably related to the State's indisputably important interest in the orderly administration of elections. *See Lemons*, 538 F.3d at 1104 (State's interest "in the orderly administration of elections [is] weighty and undeniable"); *see also Arizona Democratic Party*, 976 F.3d at 1085 ("All ballots must have some deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion.").

First, Appellees again argue that the Secretary's opinion is entitled to greater deference than Arizona's legislature. Br. 33-34. However, as explained above, it is the

judgment of the State legislature that is entitled to deference. The Secretary may have had a policy preference for one form of uniformity—that of cure dates. But the legislature elevated another form of uniformity—a single cut-off date for signing ballot affidavits, delivering absentee ballots, and voting in person. Both forms of uniformity are reasonably related to the orderly conduct of elections. The district court again elevated the Secretary's policy preference over the Arizona Legislature's. Appellees' and the district court's position eviscerates Arizona's "specific interest in incremental election-system experimentation." *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018). State legislatures may experiment with election administration measures within reasonable bounds and State cabinet officials cannot enlist federal courts to prevent this experimentation based on policy disagreements. *Id.* ("[O]ur democratic federalism 'permits states to serve as laboratories for experimentation to devise various solutions where the best solution is far from clear.'").

Second, Appellees mischaracterize the district court's actual holding to distract from the court's obvious error in drawing a false analogy between mismatched and unsigned ballots. While the district court did not find that "inconsistent signatures must invariably be identical to missing signatures," Br. 34-35, it did fail to credit the State's rationale. Instead, it erroneously stated that "the State has not explained how its fraud prevention interest would be harmed if voters could cure missing signatures in the same post-election timeframe applicable to these other identification issues." 1-ER-15. But the State *did* offer an eminently reasonably explanation for the disparity, the higher risk

of fraud inherent with unsigned rather than mismatched ballots: "[T]he potential risk of fraud is greater with non-signatures. Many would-be cheaters may hesitate before signing hundreds of fraudulent ballots because doing so would both provide extensive handwriting samples that could be traced back to the fraudster. ... But submission of unsigned ballots runs much less risk of being traced back to the perpetrator, given the absence of evidence for investigators." Doc. 85-1, at 20-21 (citing Atkeson Report ¶70; Napolitano Decl. Exs. P-U)**;** 2-ER**-**105-06, -213-312.[3]

The district court's "case-specific, factual analysis" of "the claims presented in *this* case," Br. 35, wrongly disregarded the State's interest in the orderly conduct of elections. *See Ariz. Democratic Party*, 976 F.3d at 1086 ("[T]he State has offered a reasonable explanation for why it has granted a limited opportunity to correct such 'mismatched' signatures but not to supply completely missing signatures: whereas the failure to sign one's ballot is entirely within the voter's control, voters are not readily able to protect themselves against the prospect that a polling official might subjectively find a ballot signature not to match a registration signature.").

[3] Contrary to Appellees' assertion, Br. 35-37, the laws of other States are relevant to show that the district court's holding is out of line with the overwhelming weight of authority upholding election deadline rules. Election regulations that impose minimal burdens are routinely upheld in federal court. *See, e.g.*, *Feldman*, 843 F.3d at 391; *Ariz. Libertarian Party*, 925 F.3d at 1094; *Fight for Nevada v. Cegavaske*, 2020 WL 2614624, at *5 (D. Nev. May 15, 2020); *Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *15 (N.D. Cal. Sept. 9, 2008); *Disability Law Ctr. of Alaska*, 484 F. Supp. 3d 693 (D. Alaska 2020); *cf. Mi Familia Vota*, 977 F.3d at 952. States reasonably rely on this judicial consensus in enacting ballot cure deadlines.

D. The Election Day cure deadline imposes, at most, a minimal burden on the right to vote.

As a last desperate redoubt, Appellees ask this Court overturn district court's finding that the Election Day cure deadline imposes a minimal burden. But, as the district court correctly recognized, Appellees' burden arguments are groundless. 1-ER-11-13 ("Here, there is nothing generally or inherently difficult about signing an envelope by Election Day.").

Several binding precedents expressly preclude a finding of anything more than a minimal burden. First, this Court's holding in *Lemons* specifically held that an election law that allowed no cure period for mismatched signatures whatsoever imposed only a minimal burden. 538 F.3d at 1104 ("[T]he absence of notice and an opportunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights.").[4] Accordingly, Arizona's Election Day cure deadline, which allows a generous cure period, imposes a minimal burden at most under *Lemons*. Recognizing their dilemma, Appellees make a strained attempt to distinguish *Lemons* on the basis that it involved a referendum. Br. 43. But *Lemons* itself never make such a distinction. Indeed, *Lemons* expressly acknowledged that referendums "implicate the fundamental right to vote" and thus applied the same *Anderson-Burdick* framework required for all election

[4] Appellees focus on the Court's recognition of the signature verification process in *Lemons*. But Appellees have made no arguments that similar procedural safeguards are lacking here to guard against the erroneous rejection of ballots. Instead, they attack only the lack of a post-Election Day cure period, which is foreclosed by *Lemons*' express holding that no cure period at all is required.

challenges. *Lemons*, 538 at 1102. Contrary to Appellees' mischaracterization, Br. 44, the only time the court ever even mentions a difference between referenda and ballots is in its analysis of the State's interests, *Lemons*, 538 F.3d at 1104. It does not once make such a distinction in its analysis of burden. *Id.*

Second, as the district court correctly concluded, the Court's holding in *Crawford* forecloses holding that the Election Day cure deadline imposes anything beyond a minimal burden. The Court there found that much greater burdens—"the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph"—"surely does not qualify as a substantial burden on the right to vote." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008). Rather, such requirements are part and parcel of "the usual burdens of voting." *Id.*; *accord id.* at 205 (Scalia, J., concurring in the judgment) ("Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe."). *Crawford*'s holding that more significant burdens than those imposed by the Election Day cure deadline are not "substantial," forecloses a holding that the deadline is anything more than a de minimis burden on the right to vote. *Id.*; *see also Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) ("[I]f [voters'] plight can be characterized as disenfranchisement at all ... [it was caused by] their own failure to take timely steps" to register to vote and enroll in a party "prior to the cut off date"); *Short*, 893 F.3d at 677 ("To the extent that having to register to receive a mailed ballot could be viewed as a burden, it is an extremely small one, and certainly not one that demands serious constitutional scrutiny.").

In the face of this binding precedent, Appellees can cite only a smattering of out of circuit cases that offer their arguments no succor. The Northern District of Florida's unpublished opinion in *Detzner* involved a challenge to the lack of any signature cure period rather than a signature cure deadline. *Detzner*, 2016 WL 6090943. The Eleventh Circuit's decision in *Lee* involved a pre-Election Day signature cure deadline for mismatched signatures rather than an Election Day signature cure deadline for unsigned ballots. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019). Not only are these decisions distinguishable—they are in direct conflict with binding circuit precedent holding that the lack of any cure period is only a minimal burden. *See Lemons*, 538 F.3d at 1104. And *Husted* explicitly found that an election measure involving rejecting ballots for missing signatures was a "minimal, unspecified burden" that was "easily justif[ied]" by the State's "legitimate interests in election oversight and fraud prevention." *Northeastern Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 599-600 (6th Cir. 2012).

Finally, Appellees continue to conflate the number of voters disenfranchised and burden a challenged law imposes on voting. Br. 39-40. The rejection of flawed ballots in accordance with lawful ballot regulations does not transform minimal burdens to severe burdens. As the district court recognized, "[a]lthough the number of voters whose votes are not counted can be evidence of the severity of the burdens imposed by a challenged law, the fact that those votes are not counted is not itself the burden." 1-ER-11. Yet Appellees continue to assert that because "thousands of 'would-be

voters'" may have had their ballots rejected, the district court was required to find a "significant burden." Br. 39-40. "[T]he usual burdens of voting" will always result in ballot rejection. *Crawford*, 553 U.S. at 198. The relevant consideration under *Anderson-Burdick*, however, is not the consequence of failure to comply with an election regulation, but the severity of the burden imposed by the regulation. *Id.* Indeed, taken to its logical conclusion, Appellees' position would mean that "every voting prerequisite would impose the same burden and therefore would be subject to the same degree of scrutiny." 1-ER-11. "But this cannot be true because 'not every voting regulation is subject to strict scrutiny.'" 1-ER-12 (quoting *Pub. Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016)).

II. The district court erred in concluding Appellees are likely to succeed on the merits of their due process claim.

Appellees fail to escape this Circuit's straightforward and binding instruction that *Anderson-Burdick*, not *Mathews v. Eldridge*, applies to all election claims brought under the "First Amendment, Due Process, or Equal Protection." *Dudum*, 640 F.3d at 1106 n.15. This Court has never made an exception for procedural due process or indicated that "Due Process" means only "substantive Due Process." Instead, it has unambiguously held that such claims are to be addressed "collectively using a single analytic framework." *Id.*; *Ariz. Democratic Party*, 976 F.3d at 1086 n.1 ("The State is also likely to succeed in showing that the district court 'erred in accepting the plaintiffs' novel procedural due process argument,' because laws that burden voting rights are to be

evaluated under the *Anderson/Burdick* framework instead."); *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018) (election law claims are all "folded into the *Anderson/Burdick* inquiry"); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("[T]he district court also erred in accepting the plaintiffs' novel procedural due process argument. The standard is clear: '[W]e must evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*.'"); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) ("In *Burdick v. Takushi*, the Court emphasized that [the *Anderson-Burdick*] test applies to *all* First and Fourteenth Amendment challenges to state election laws." (emphasis in original)); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (*Anderson-Burdick* is the "single standard for evaluating challenges to voting restrictions"); *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998) (*Anderson* requires "a single basic mode of analysis" for claims "under the Due Process and Equal Protection Clauses").

Appellees cannot cite a single case—in any federal court—creating an exception to this unified framework for procedural due process claims. *Cf. New Ga. Project*, 976 F.3d at 1282 (noting absence of "binding cases from any court that apply the *Mathews* test to a State's election procedures"). Instead, they resort to piecing together esoteric clues from *Lemons* to assert that the court impliedly applied *Mathews* to an election procedural due process claim. Br. 51 n.15. But the *Lemons* court explicitly stated that it applied the same mode of analysis to the procedural due process claim as it did for the other election claims. *See* 538 F.3d at 1104 ("We reject plaintiffs' procedural due process

argument for the same reasons."). If *Lemons*—which does not cite *Mathews* once—used similar language to *Mathews* it is because the *Anderson-Burdick* framework already accounts for procedural due process concerns, including (1) the right at stake; (2) potential burdens to that right; and (3) the public interests and the extent to which election laws are serving those interests. *Compare Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), *with Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). And to dispel any doubt as to the framework it employed, *Lemons* concludes its discussion of the procedural due process claim by expressly citing *Burdick*—not *Mathews*. *See* 538 F.3d at 1105 ("Under the circumstances, the administrative burden of the additional process plaintiffs propose outweighs any marginal benefit that would result from additional procedures. Thus, Oregon's 'important regulatory interests' are sufficient to justify the state's 'reasonable, nondiscriminatory restrictions.'") (quoting *Burdick*, 504 U.S. at 434).

Moreover, even if there is an unstated procedural due process exception to *Anderson-Burdick* lurking out there, Appellees' challenge would not qualify because it is a substantive rather than procedural due process claim. Appellees are happy with the current procedure for curing ballots. What they are seeking, and what the district court granted, is creation of a *substantive right* to cure unsigned ballots *after election day*.

Finally, even if *Mathews* applies, and even if Appellees' claim is procedural rather than substantive in nature, such a procedural due process claim is expressly foreclosed by precedent. Assuming that *Lemons* applied *Mathews*, which they must, gets Appellees nowhere because *Lemons* held, in the context of signature curing, that "[t]he value of

additional procedural safeguards ... is negligible, and the burden on plaintiffs' interests from the state's failure to adopt their proposed procedures is slight at most." 538 F.3d at 1105. *Lemons* thus forecloses any argument that heightened signature cure procedures are required by procedural due process. Moreover, voters have no constitutional or statutory right to correct ballot infirmities after Election Day that were caused by the inaction of those same voters. *See Burdick*, 504 U.S. at 433 ("It does not follow, however, that the right to vote in any manner . . . [is] absolute."). Accordingly, for these reasons, and for the same reasons their *Anderson-Burdick* claims fail, Appellees' procedural due process claims are meritless.

III. *Purcell* remains applicable and further forecloses Appellees' claims.

Appellees assert the *Purcell* is "irrelevant" because the 2020 election has passed. This argument reads *Purcell* too narrowly. To be sure, the *Purcell* principle strongly counsels against judicial interference close to an election. But *Purcell* also generally mandates caution in judicial interference with policy decisions by the political branches charged and vested with the power to make them. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (targeting "[*c*]*ourt orders* affecting elections") (emphasis added); *see also Clingman v. Beaver*, 544 U.S. 581, 586 (2005) ("The Constitution grants States broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives.") (internal quotation marks omitted). *Purcell* thus not only guards against voter confusion, but, more fundamentally, federal judicial usurpation of the power of State legislatures to regulate elections. *See RNC v. DNC*, 140 S. Ct. 1205, 1207

(2020) ("[T]he wisdom of the *Purcell* principle [is to] avoid ... *judicially created* confusion.") (emphasis added); *Ariz. Dem. Party*, 976 F.3d at 1086 ("[T]he Supreme Court 'has repeatedly emphasized that *lower federal courts* should ordinarily not alter the election rules on the eve of an election.'") (emphasis added); *see also New Ga. Project*, 976 F.3d at 1283 (*Purcell*'s "mantra has consistently pointed the Supreme Court in one direction—allowing the States to run their own elections").

Additionally, Appellees' contention that any confusion would be a "result of the stay that the State itself requested—not the injunction that Appellees sought," Br. 64, is expressly foreclosed by the Court's holding in *RNC v. DNC*, 140 S. Ct. at 1207. *Purcell* focuses on the harms resulting from judicial usurpation of the legislative role—not the harms stemming from appellate courts' attempt to mitigate such harm. *Id.* ("The Court would prefer not to [intervene at this late date], but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."); *see also New Ga. Project*, 976 F.3d at 1284 (the *Purcell* principle "promotes confidence in our electoral system—assuring voters that all will play by the same, *legislatively enacted* rules") (emphasis added). Thus, *Purcell*'s federalism rationale is not affected by the completion of the 2020 election.

In any event, Appellees are wrong that this case in no way implicates *Purcell*'s timeliness rationale. Arizona has a slate of local elections next month that will feature absentee and mail ballots and could thus be impacted by this litigation. *See* Ariz. Sec'y of State, *Elections Calendar & Upcoming Events*, https://bit.ly/31YLNdh. Early voting

begins in just weeks and election day is less than two months away. *See id.* Moreover, another round of local elections are slated to begin in July. *See id. Purcell*'s concern with last minute judicial alterations of election regulations thus continue to apply. *See Ariz. Democratic Party*, 976 F.3d at 1084-85, 1086-87 (collecting cases and noting concern with altering election rules less than two months before an election).

Finally, the fact that election has passed does not excuse Appellees' failure to bring this challenge in a timely manner. As the State exhaustively demonstrates, Ariz. Br. 76-78, the lack of the post-Election Day cure period that Appellees assert is unconstitutional has been on the books for over a century. And by Appellees' own admission, they had been considering a challenge *for six months* prior to filing suit. Br. 64. These dilatory tactics are precisely the type of last minute attack on longstanding election regulations the *Purcell* principle prevents. *Ariz. Democratic Party*, 976 F.3d at 1086 ("[A]s we rapidly approach the election, the public interest is well served by preserving Arizona's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour.").

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

/s/ Patrick Strawbridge
Counsel for Intervenor-Appellants

CERTIFICATE OF COMPLIANCE

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

I am the attorney or self-represented party.

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I hereby certify that this brief is identical to the version submitted electronically on April 12, 2021.

/s/ Patrick Strawbridge
Counsel for Intervenor-Appellant