

No. 20-16759
No. 20-16766

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARIZONA DEMOCRATIC PARTY; DEMOCRATIC NATIONAL
COMMITTEE; DSCC,

Plaintiffs/Appellees/Appellants,

KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,

Defendant/Appellee,

REPUBLICAN NATIONAL COMMITTEE; ARIZONA REPUBLICAN PARTY;
DONALD J. TRUMP FOR PRESIDENT, INC.,

Intervenor Defendants/Appellants,

and

STATE OF ARIZONA,

Intervenor Defendant/Appellant.

Appeal from the United States District Court
District of Arizona
CV-20-1143-PHX-DLR

RESPONSE TO MOTIONS TO STAY PENDING APPEAL

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Introduction

Arizona Secretary of State Katie Hobbs (“Secretary”) submits this combined response to the Motions for Stay Pending Appeal [No. 20-16759 Dkt. 4-1; No. 20-16766 Dkt. 2] filed by Intervenor-Defendant-Appellants State of Arizona (“Attorney General”) and Republican National Committee, Arizona Republican Party, and Donald J. Trump for President, Inc. (“Republican Party”).

The Secretary takes no position on the likelihood of success on the merits, and she will continue to take a nominal position relating to Appellants’ merits arguments; however, the Secretary opposes Appellants’ request for a stay pending appeal. The 2020 General Election is underway and early voting has already begun by military and overseas voters. Staying the injunction would interfere with election officials’ ongoing efforts to administer an orderly 2020 General Election, and it could lead to voter confusion and some Arizonans’ ballots not being counted.

Background

A.R.S. § 16-550(A) allows voters whose ballot signatures vary from their voter registration records to correct or confirm their inconsistent signatures until the fifth business day after an election that includes a federal office or the third business day after any other election (“post-election cure period”). Because this statute is silent on the cure period for ballots with missing signatures, the Secretary sought to

fill this gap in the Elections Procedures Manual (“EPM”). [ADD-3¹]; *see also* A.R.S. § 16-452(A), (B) (granting the Secretary authority to prescribe rules in the EPM “to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.”).

In 2019, the Secretary drafted an EPM that included a uniform post-election cure period for ballots with inconsistent signatures, ballots with missing signatures, and conditional provisional ballots.² The Secretary included the same period for all three voter identification “cures” to ensure uniformity, efficiency, and impartiality. [See ADD-3] The Secretary also adopted these uniform cure procedures to ensure that eligible voters would not be excluded from the democratic process simply because they forgot to sign their name or misunderstood the instructions on their ballots. And because county officials already provided post-election cure periods for ballots with inconsistent signatures and conditional provisional ballots, the Secretary believed that using the same period for unsigned ballot affidavits would not impose an administrative burden. [See ADD-15]

¹ “ADD” refers to the Attorney General’s Addendum. [No. 20-16759 Dkt. 4-2]

² Voters who fail to provide valid identification on Election Day must cast a conditional provisional ballot. A.R.S. § 16-579(A)(2). The post-election cure period gives them a chance to present valid proof of identity. 2019 Elections Procedures Manual Ch. 9 § IV.

When the Secretary submitted the draft EPM, however, the Attorney General refused to approve it with the post-election cure period for ballots with missing signatures. [ADD-3] While the Attorney General does not have the final say on the draft, the EPM does not have the force and effect of law without his and the Governor's approval. A.R.S. § 16-452(B). As a compromise with the Attorney General, the Secretary ultimately agreed to adopt a 7:00 p.m. Election Day cure deadline for ballots with missing signatures. [See ADD-3-4]

Plaintiffs-Appellees sought an injunction requiring election officials to provide a post-election cure period for unsigned ballot affidavits. [ADD-4] The Secretary took a nominal position in the case, but she provided the parties and the District Court with relevant information about the facts at issue. The District Court asked the Secretary for her expertise at the preliminary injunction hearing, and she provided her input on the State's interests and Plaintiffs' requested relief. [ADD-67-71] In granting the injunction, the District Court relied on the Secretary's judgment as Arizona's chief election officer. [ADD-16]

Since the District Court's Order on September 10, 2020, voting in Arizona for the 2020 General Election has begun. Counties have mailed ballots to overseas and military voters pursuant to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). Indeed, the deadline to begin mailing ballots under UOCAVA

was September 19, 2020.³ Thus, some military and overseas voters may have already returned their ballots, and some may be unsigned. To the extent counties have begun contacting voters to cure unsigned ballots, their instructions—including the stated deadline—to cure a missing signature follow the District Court’s Order that is currently in effect. If this Court were to stay the District Court’s Order at this late stage, it is possible that at least some overseas and military voters who have been told they have until five days after Election Day to cure their missing signature would be deprived the right to vote.⁴

Argument

The Secretary takes no position on the likelihood of success on the merits. She does contend, however, that Appellants are not entitled to a stay pending appeal because: (1) the balance of equities and public interest weigh against a stay; and (2) *Purcell* does not support a stay and, in fact, weighs against a stay.

I. The Balance of Hardships and Public Interest Weigh Against a Stay.

First, the balance of equities and public interest weigh against a stay. The Attorney General argues [at 37] that enjoining election officials from enforcing an Election Day cure deadline “would seriously and irreparably harm” the State, and

³ Regular early voting for all other voters begins on October 7, 2020.

⁴ Contacting military and overseas voters is not an easy feat and if the District Court’s Order is stayed, counties will be tasked with the additional burden of reaching voters and making them understand that a different cure deadline applies.

that this harm outweighs the potential harm to Arizona's voters. The Secretary disagrees. The enjoined cure period is in the Secretary's EPM, which she first drafted to include the post-election cure period for unsigned ballots to ensure fairness, uniformity, and efficiency.

In the Secretary's view, the State will not suffer any harm if the injunction remains intact pending appeal. The county election officials (none of whom appealed the District Court's order or sought a stay), are already required and prepared to implement the post-election cure period for ballots with mismatched signatures and conditional provisional ballots. The injunction simply requires county officials to extend the same cure period to unsigned ballot affidavits. In fact, some of them may have already provided instructions consistent with the injunction to UOCAVA voters who have returned their ballots with a missing or mismatched signature. Maintaining this consistency in handling ballots provides clear guidance for election officials so they can focus on administering an orderly and efficient General Election and avoid ensuing voter confusion.

On the other hand, staying the injunction could deprive Arizona's voters of the right to vote. A voter who could cure their missing signature under the injunction might have their ballot discarded if the injunction is stayed. The risk of that harm to Arizonans far outweighs the harm of enjoining the State from enforcing the Attorney General's preferred cure deadline.

II. *Purcell* Does Not Require a Stay and, In Fact, Weighs Against It.

Second, a stay is not warranted under *Purcell v. Gonzalez*. There, the Supreme Court advised against altering election rules on the eve of an election when the change can “result in voter confusion and consequent incentive to remain away from the polls.” 549 U.S. 1, 4-5 (2006). That risk does not exist here. Rather, issuing a stay at this stage may produce the harms that *Purcell* seeks to prevent.

Appellants argue that the injunction will cause “voter confusion” because election officials must inform voters, “within a month and a half of the election,” that they can cure their unsigned ballots after Election Day. [No. 20-16766 Dkt. 2 at 24; No. 20-16759 Dkt. 4-1 at 36] But the injunction requires election officials to perform an administrative function after voters return their ballots. It does not require them to educate all voters, in advance, about their right to cure unsigned ballots after Election Day if they forget to sign their ballots. To the contrary, county officials notify voters of their right to cure their ballots (and the deadline for doing so) if there is an issue with the voter’s ballot affidavit. If anything, it will reduce voter confusion to give an identical deadline to all voters who need to cure their ballots.

Further, for the reasons discussed above, county officials may have already started implementing the lower court’s injunction. Overseas and military voters were mailed ballots starting on September 19, 2020. To the extent any of those voters have

already returned their ballots and their ballots are unsigned, county officials may have instructed them about the process for curing their ballot, including the five-day post-Election Day cure deadline pursuant to the lower court's ruling. Trying to determine who may have received such information, causing county officials to contact overseas and military voters and change their prior instructions, and expecting overseas and military voters to receive and comply with changed instructions at this late stage is exactly the type of administrative burden *Purcell* cautions against.

Conclusion

For these reasons, the Secretary respectfully requests that the Court deny Appellants' requests for a stay pending appeal.

Respectfully submitted this 25th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Defendant/Appellee Secretary of State Katie Hobbs' **RESPONSE TO MOTIONS TO STAY PENDING APPEAL** on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted this 25th day of September, 2020.

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