No. 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 Appellants,

and

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

On Appeal from the United States District Court
for the District of Arizona

INTERVENOR-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL

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September 21, 2020

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Intervenor-Appellants respectfully submit this certificate in connection with their emergency motion to stay the injunction entered by the district court on September 10, 2020 pending resolution of the Intervenor-Appellants' appeal to this Court.

Less than two months before the 2020 general election, the district court issued an order compelling Arizona officials to allow voters a five day period after election day in which to cure unsigned ballots—upending a century of election practice in Arizona. The State and Intervenors immediately appealed this order and also filed a motion for a stay pending appeal in the district court. The district court denied the stay motion in a brief order. Like the State, Intervenors now seek an emergency stay pending appeal to prevent irreparable harm to its members as a result of the district court's erroneous order.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this motion.

B. Nature Of The Emergency

On the eve of an election, the district court issued an order fundamentally altering Arizona's long established system for curing unsigned absentee ballots—upsetting the reliance interests of both voters and state officials. The Court's holding

in *Purcell v. Gonzalez* demonstrates the emergency nature of this appeal. 549 U.S. 1 (2006). There, the Court observed "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. The Court's injunction was issued less than two months before the election day deadline, and courts have invoked *Purcell* in proceedings conducted on a similar timeframe as this one. *See, e.g.*, *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (election day was "months away but important, interim deadlines … [we]re imminent" and "moving or changing a deadline or procedure now will have inevitable, other consequences").

Moreover, the "particular circumstances of [this] case" viewed "in light of the concerns expressed by the *Purcell* court" further demonstrate the need for an immediate stay. As explained in the motion, the district court's order, issued less than two months before an election, will inevitably create voter confusion by upending Arizona's absentee ballot signature cure processes that have been in place for over a century. Additionally, this case requires an immediate stay because overseas ballots have already been distributed and absentee ballots are set to be mailed in a matter of weeks. Intervenors thus join the State in requesting a decision from this Court as soon as possible.[1]

[1] Intervenor-Appellants notified opposing counsel of this motion by email on September 21, and have moved as expeditiously as possible in filing this motion.

C. Notification Of Counsel For Other Parties

Intervenor-Defendants notified all parties of its intent to seek an emergency stay pending appeal this evening.

Intervenor-Defendants and Plaintiffs have agreed upon the following briefing schedule:

- Monday, September 21: Intervenor-Appellants file emergency motion for a stay.
- Monday, September 28: Plaintiffs' response to State's motion due.
- Tuesday, September 29: Intervenor-Appellants' reply to response due.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenor-Appellants the Republican National Committee, Arizona Republican Party, and Donald J. Trump for President ("Intervenor-Appellants") hereby petition the Court for an Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal.[2] Specifically, Intervenor-Appellants agree that a stay is warranted because the district court, by requiring the State to provide a new process for "curing" missing signatures five days after the election despite finding any burden on voters to be "minimal," committed blatant errors of law. And given the need to allocate resources and inform voters of the process for correctly voting, the decision irreparably increases the risk of voter confusion and should be stayed under *Purcell v. Gonzales*, 549 U.S. 1 (2006).

LEGAL STANDARD

In considering a stay pending appeal application, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). "The first two factors of the traditional standard are the most critical." *Id.*

[2] The State has also moved for a stay in the companion case, No. 20-16759. Because the cases challenge the same final order, Intervenor-Appellants suggest they be consolidated.

ARGUMENT

I. The district court erred in concluding that Plaintiffs are likely to succeed on the merits of their equal protection and procedural due process claims.

A. Plaintiffs are not likely to succeed on the merits of their equal protection claim under *Anderson-Burdick*.

The district court correctly found that Arizona's Election Day deadline for curing unsigned ballots imposes only a "minimal" burden on voters, *Arizona Democratic Party v. Hobbs*, 2020 WL 5423898, at *7 (D. Ariz. Sept. 10, 2020),[3] but it erred as a matter of law when it held that this de minimis burden nonetheless outweighed the State's interest in enforcing a 102-year old election standard. When evaluating a challenge to a state election law under the *Anderson-Burdick* test, courts "weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). When, as here, the burden imposed by the law 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). Rather, the State must show only that law "reasonably further[s] Arizona's important regulatory

[3] All subsequent references to the district court's opinion will be cited as "Op."

interests." *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1094 (9th Cir. 2019). It has done so.

The State offered "four interests" behind "the challenged deadline: (1) fraud prevention; (2) reducing administrative burdens on poll workers; (3) orderly administration of elections; and (4) promoting voter participation and turnout." Op. at 8. The district court held that the Election Day deadline violated Plaintiffs' equal protection rights because, in its view, the State could achieve some of its interests through less restrictive measures and did not provide sufficient evidence that the Election Day deadline would serve its other asserted interests. The district court acknowledged that voting deadlines deter fraud, for example, but it nevertheless held that the Election Day deadline was unreasonable because a post-election deadline would deter fraud just as effectively. *Id.* at 8. But that is not the law.

For laws that impose burdens as slight as this one—which only requires voters to sign their name on their official voting documents—the State is not required to provide "proof that [the deadline is] the only or the best way to further [its] proffered interests." *Ariz. Libertarian Party*, 925 F.3d at 1094. To the contrary, because the cure deadline imposes only the slightest burden on voting, the State only needs to demonstrate that the deadline reasonably furthers an important state interest. Under this standard, the district court's 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" justifies the deadline on its own. Op. at 8.

Indeed, the district court's ruling is further undermined by its own previous opinions. *Compare* Op. at 8 ("Because there is no evidence that the challenged deadline reasonably prevents fraud, the Court finds that fraud prevention does not justify the minimal burdens imposed.") (Rayes, J.), *with Feldman v. Ariz. Secr'y of State's Office*, 208 F. Supp. 3d 1074, 1091 ("[Plaintiffs] argue that [the law] is unjustified because there is no evidence of verified absentee voter fraud perpetrated by ballot collectors ... [But] Arizona need not show specific local evidence of fraud in order to justify preventative measures.") (Rayes, J.) ("*Feldman I*"); *see also Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 391 (9th Cir. 2016) ("The district court did not err in crediting Arizona's important interest in preventing fraud even in the absence of evidence that voter fraud had been a significant problem in the past. . . . [States] need not restrict themselves to a reactive role: [they] are permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.") ("*Feldman II*") (upholding *Feldman I*).

Furthermore, fifteen other states do not allow voters to cure unsigned ballots under any circumstance; another fifteen allow voters for cure such ballots within time windows that range from two days to three weeks after the election. This wide disparity of approaches highlights the policy-driven nature of the district court's opinion. States have a vast menu of absentee ballot policies to choose from, all of which further the same fundamental interest of safeguarding the integrity of American elections. But

instead of asking whether Arizona's unsigned-ballot rules fell within this universe of reasonable approaches—which it clearly does—the district court sided with the Arizona Secretary of State's policy preferences over those of the State's Attorney General. Op. at 9 ("[T]he Secretary believes that a uniform cure period for all three of these identification issues would promote the orderly administration of elections by reducing voter confusion ... The Court gives great weight to the Secretary's judgment."). That, it cannot do.

The district court also held that the State did not provide enough evidence that the Election Day deadline would reduce administrative burdens to a sufficiently "meaningful" extent. Op. at 9. In the process, it once again inverted the constitutional standard for voting laws that impose de minimis burdens. In short, the district court "require[d] a particularized," evidentiary "showing" that the State's deadline would achieve its stated interests—something this Court has repeatedly said States are not required to do. *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 733 (9th Cir. 2015). By parsing the State's evidence to evaluate the magnitude of the costs saved by the State's chosen deadline, the district court implicitly acknowledged that the State's chosen deadline *does* further its stated goal of reducing administrative burdens and then substituted its own policy judgment for that of the State, even though that "cost-benefit analysis [was] the kind of judgment that the [State] was entitled to make." *Id.*

The district court's decision is divorced from precedent. The court simply asserted that "the government's asserted interests were illegitimate," without citing "any

cases directly on point" to justify that assertion. *Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK, 2020 WL 5351595, at *7 (D. Alaska Sept. 3, 2020). Indeed, despite the proliferation of voting-rights cases spurred by the COVID-19 pandemic, no court in this circuit has ever vacated an election law for imposing a "minimal" burden on citizens' right to vote. To the contrary, Ninth Circuit courts have uniformly upheld voting laws that impose de minimis burdens on voters while advancing legitimate governmental interests. *See, e.g.*, *Feldman II*, 843 F.3d at 391 ("By asserting its interest in preventing election fraud and promoting public confidence in elections, . . . Arizona bore its burden of establishing important regulatory interests sufficient to justify the minimal burden imposed by [state law]."); *Ariz. Libertarian Party*, 925 F.3d at 1094 (State's "signature requirements reasonably further Arizona's important regulatory interests and therefore justify" a small burden on party's right to ballot access); *Fight for Nevada v. Cegavaske*, No. 220-cv-00837-RFBEJY, 2020 WL 2614624, at *5 (D. Nev. May 15, 2020) (upholding minimal burden imposed by signature deadline under rational-basis review); *Paralyzed Veterans of Am. v. McPherson*, No. C064670SBA, 2008 WL 4183981, at *15 (N.D. Cal. Sept. 9, 2008) (rejecting motion for preliminary injunction because "plaintiffs have failed to provide evidence of anything other than minimal burdens on their right to vote"); *Disability Law Ctr. of Alaska*, 2020 WL 5351595, at *7 (similar).

Federal courts across the country routinely uphold election laws posing minimal burdens, as well. Such laws are only invalidated when a state has either asserted a

governmental interest that conflicts with Supreme Court precedent or failed to assert *any* governmental interest. *See, e.g.*, *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 314 (S.D.N.Y. 2020) (vacating election law because, "when pressed at trial to provide a legitimate interest, the State was repeatedly unable to do so"); *Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253, 1268-69 (D. Utah 2015) (invalidating county school board districts because county's justification conflicted with Supreme Court precedent). This case fits neither situation.

B. Plaintiffs are not likely to succeed on the merits of their procedural due process claim.

The district court also erred by assessing Plaintiffs' procedural due process claims under the standard announced in *Matthews v. Eldridge*, 424 U.S. 319 (1976).[4] *Matthews* is the normal standard and applies to the vast majority of procedural due process challenges, but it is not the appropriate standard in the election law context. As this Court and multiple other circuit courts have recognized, *Anderson-Burdick* applies to *all* claims brought under the First and Fourteenth Amendments, including procedural due

[4] Intervenor-Appellants agree with the State that there is no need for this Court to conduct a procedural due process inquiry at all, because Plaintiffs are attempting to recategorize a substantive due process claim as a procedural due process claim. Br. of State of Ariz., No. 20-16759, ECF 4-1, at 17 (Sept. 18, 2020). Plaintiffs are not requesting a new *procedure* for voters to cure unsigned ballots; they are clearly happy with the current method for doing so. Rather, Plaintiffs seek a *substantive* change to the *date on which such procedures are no longer available*. State law provides voters with a process for curing unsigned mail ballots—it merely requires voters to take advantage of that process before the polls are closed to in-person voting and ballot counting begins. This elementary restriction is no different from a statute of limitations or any other temporal restriction the law routinely applies to legal processes of all sorts. Plaintiffs' complaint is with the substance of the law on its face, not the procedures used to enforce it.

process claims. *See Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008) (noting that a "more flexible standard applies for analyzing election laws that burden the right to vote" under *Anderson-Burdick* and affirming denial of procedural due process claim); *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").

The district court cited a few opinions from the small minority of district courts that have continued to use *Matthews* to evaluate election laws, but the only opinion it cited from a court within the Ninth Circuit predates *Burdick* by two years and this Court's dispositive cases by at least eighteen years. *See* Op. at 11 (citing *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp 1354, 1355-58 (D. Ariz. 1990)). In *Lemons*, this Court reviewed a procedural due process challenge to Oregon's voting laws and applied *Burdick* to affirm the district court's denial of a preliminary injunction. *Lemons*, 538 F.3d at 1105. The opinion never mentioned *Matthews*. In *Dudum v. Arntz*, this Court stated in no uncertain terms that "First Amendment, Due Process, [and] Equal Protection claims" under state voting laws are "addressed under [the] single analytic framework" outlined in *Anderson* and *Burdick*. 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). And in *Soltysik v. Padilla*, this Court reaffirmed once again that First and

Fourteenth Amendment claims are all "folded into the *Anderson/Burdick* inquiry" in the election law context. 910 F.3d 438, 449 n.7 (9th Cir. 2018).

The district court never acknowledged that *Lemons* involved a procedural due process claim, and it attempted to distinguish *Dudum* and *Soltysik* by noting that they involved Fourteenth Amendment claims other than procedural due process claims. Op. at 11. But there is no reason to believe that this Court included an unstated exception for procedural due process claims when it stated that First and Fourteenth Amendment challenges to voting laws are "folded into the *Anderson/Burdick* inquiry" and addressed under a single framework. *Id.* That assertion is all the more dubious in light of the fact that this Court has *already* applied *Anderson-Burdick* to procedural due process challenges to voting laws. *See Lemons*, 538 F.3d at 1105.

Furthermore, *Anderson-Burdick* would apply to Plaintiffs' claim even if this issue had not already been decided by circuit precedent (which it has). Because *Anderson* and *Burdick* were decided after *Matthews*, the most logical interpretation of those cases is that the Court carved out an exception to the usual *Matthews* inquiry when it announced a separate framework for First and Fourteenth Amendment challenges to voting laws. Moreover, 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*, 504 U.S. at 433-34, *with Matthews*, 424 U.S. at 335 (outlining procedural due process factors). And *Anderson-Burdick* inherently recognizes the procedural reality that

"that government must play an active role in structuring elections … if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433.

Before analyzing Plaintiffs' claims under the *Matthews* framework, the district court held in the alternative that, if *Anderson-Burdick* did apply, its analysis of Plaintiffs' procedural due process claim would mirror its analysis of their equal protection claim. Op. at 11. Because Plaintiffs' *Anderson-Burdick* claims fail, *supra* I.A, so too do their procedural due process claims.[5]

II. The district court's order should be stayed under *Purcell*.

The Supreme Court's holding in *Purcell* demonstrates why the district court's order should be stayed to prevent the irreparable damage caused to Arizona's voting system caused by the district court's order. *Purcell* warns against last-minute orders altering election procedures, noting that "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4-5. The Court's injunction was issued less than two months before the election day deadline, and courts have invoked *Purcell* in proceedings conducted on

[5] Intervenor-Appellants respectfully assert that Plaintiffs' procedural due process claim fails even under the erroneous *Matthews* framework applied by the court. A state law requiring voters to cure unsigned ballots after the Election Day deadline does not violate any freestanding right—voters simply do not have a 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."). If that were the case, then the laws of the fifteen states that do not allow ballot curing at any point during the voting period must necessarily be unconstitutional as well.

a similar time frame as this one. *See, e.g.*, *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying a lower-court order that changed election laws 61 days before election day); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (election day was "months away but important, interim deadlines … [we]re imminent" and "moving or changing a deadline or procedure now will have inevitable, other consequences"); *Perry v. Perez*, 565 U.S. 1090 (2011) (22 days before the candidate-registration deadline); *Purcell*, 549 U.S. at 4-5 (33 days before election day); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (32 days before election day).

The district court held that no confusion is likely, but failed to consider how the change itself will render past guidance and instructions void. Op. at 9. The State has *never* allowed post-election curing for non-signed ballots. In reliance on this practice, state and local officials have instructed voters that they cannot cure a non-signature after the election. The district court's order thus represents a sea change in this practice on the eve of the election that upends a century of practice in Arizona. The court cursorily dismisses this concern by noting that officials can simply extend their existing practice for curing signatures beyond election day. *Id.* at 8-9. But the problem is not merely the lack of the mechanics to cure signatures, it is the guidance officials have given voters in reliance on the system that had been in place before the court's order. Before the district court's injunction, election officials were required to inform voters that they could not cure unsigned ballots after election day. Under the injunction they

would have to tell voters precisely the opposite—all within a month and a half of the election.

Making matters worse, the district court ignored that overseas ballots have already been distributed and may be voted and mailed back to the State at any time. Moreover, absentee ballots are set to be mailed in a matter of weeks. See Ariz. Rev. Stat. §16-558.01 (requiring the mailing of ballots to those who requested them "[n]ot more than twenty-seven days before the election"). Inevitably some of these ballots will be unsigned and state officials and voters need clear guidance on when this defect can be cured. Avoiding such "conflicting orders" on the eve of an election that "themselves result in voter confusion" is the heartland of *Purcell*. A stay is needed because "[a]s an election draws closer, that risk will increase." *Id.*

CONCLUSION

For the foregoing reasons, the Court should stay the district court's injunction pending appeal.

STATEMENT OF RELATED CASE

The State of Arizona has separately appealed the district court's order. That case has been docketed in this court as No. 20-16759. Because the cases are companion cases challenging the same district court order, Intervenor-Appellants recommend consolidation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, 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
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 27-1(d) because it is less than 20 pages, excluding the portions exempted by Fed. R. App. P. 27(a)(2)(B) and Fed. R. App. P. 32(f). The motion's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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