

1 **MARK BRNOVICH**
 2 **ATTORNEY GENERAL**
 3 Joseph A. Kanefield (No. 15838)
 Chief Deputy & Chief of Staff
 4 Brunn (“Beau”) W. Roysden III (No. 28698)
 Solicitor General
 5 Drew C. Ensign (No. 25463)
 6 Michael S. Catlett (No. 25238)
 Deputy Solicitors General
 7 Jennifer J. Wright (No. 27145)
 8 Robert J. Makar (No. 33579)
 9 Anthony R. Napolitano (No. 34586)
 Assistant Attorneys General
 10 2005 N. Central Avenue
 11 Phoenix, Arizona 85004
 12 Telephone: (602) 542-5200
 13 Drew.Ensign@azag.gov

14 *Attorneys for State of Arizona*

15 **UNITED STATES DISTRICT COURT**
 16 **DISTRICT OF ARIZONA**

17 Arizona Democratic Party, et al.,
 18 Plaintiffs,
 19 vs.
 20 Katie Hobbs, et al.,
 21 Defendants,
 22 and
 23 State of Arizona,
 24 Intervenor-Defendant.

Case No: 2:20-cv-01143-DLR

**STATE’S EMERGENCY MOTION TO
 STAY THE COURT’S SEPTEMBER 10,
 2020 INJUNCTION PENDING APPEAL**

**[EXPEDITED CONSIDERATION
 REQUESTED]**

INTRODUCTION

1
2 The State of Arizona (“State”) respectfully moves for a stay pending appeal of the
3 permanent injunction entered by the Court on September 10, 2020 (“Permanent
4 Injunction”), which enjoined enforcement of Arizona’s election-day deadline for
5 submitting executed ballot affidavits. The Permanent Injunction brushes aside a state-
6 law, existent for decades, requiring absentee ballots to be completed and returned with a
7 signature by close of polls on Election Day. The Court, through judicial pronouncement,
8 has replaced that venerable deadline with a new deadline falling five business days after
9 the election. It does so based on a hyper-critical analysis of the State’s interests in
10 having an Election Day deadline—interests the Court holds are important—and the
11 Arizona Legislature’s policy decision to extend cure periods for qualitatively different
12 voting requirements. If not incorrect, the Court’s conclusions are at, at a minimum,
13 fairly contestable.

14 The Permanent Injunction also risks sowing confusion on the eve of an election,
15 creating inconsistencies in application without statewide guidance, creating a new
16 deadline in place for only a single general election, and harming one or more important
17 state interests. On the other side of the coin, a stay will effect only those voters who
18 (1) vote in the 2020 general election by mail, (2) intend to cast a valid vote, (3) forget to
19 sign the ballot affidavit, and (4) are notified of such with insufficient time to cure, or who
20 otherwise purposefully choose not to cure, by Election Day. As the Court repeatedly
21 acknowledges in its Order, this is a very small population of voters, constituting roughly
22 0.10% of voters. The Plaintiffs’ purported harms are also conjectural. Plaintiffs do not
23 know how many of those 0.10% of voters actually intended to vote or how many of them
24 actually desired to cure but were unable to because of the current deadline. Moreover,
25 many of these issues could likely been avoided had Plaintiffs timely initiated this
26 litigation, rather than waiting years—and late into this election cycle—to challenge the
27 Election Day deadline.

28 For all these reasons, the Court should grant a stay pending appeal.

1 **ARGUMENT**

2 In evaluating a request for a stay pending appeal, this Court must consider
3 “(1) whether the stay applicant has made a strong showing that he is likely to succeed on
4 the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether
5 issuance of the stay will substantially injure the other parties interested in the proceeding;
6 and (4) where the public interest lies.” *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir.
7 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The State satisfies each of
8 these four elements.

9 **I. The State Is Likely To Prevail In Its Appeal, Which Raises Serious And**
10 **Difficult Questions of Law.**

11 As this Court has recognized, “[c]ourts have interpreted th[e] first [stay-pending-
12 appeal] criterion as requiring that the movant show that ‘the appeal raises serious and
13 difficult questions of law in an area where the law is somewhat unclear.’” *Overstreet v.*
14 *Thomas Davis Med. Ctrs., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz, 1997). That standard
15 is easily satisfied here.

16 Under the *Anderson/Burdick* framework, the Court correctly held that the burden
17 challenged by Plaintiffs is the burden of submitting an executed ballot affidavit (i.e., a
18 complete ballot) by 7:00 p.m. on Election Day, not the burden imposed by law if a voter
19 fails to do so. [Dkt. 114 at 11-12.] The Court also correctly concluded that the burden of
20 complying with an Election Day deadline is “minimal.” [*Id.* at 12-13.] The Court
21 correctly concluded that the State has important interests in preventing voter and election
22 fraud, reducing administrative burdens on poll workers, ensuring the orderly
23 administration of elections, and promoting voter participation and turnout. [*Id.* at 13, 14,
24 16, 18.] But the Court erred in holding that Arizona’s Election Day deadline to submit a
25 completed, signed ballot affidavit does not further at all any of those four interests. The
26 Court further erred in holding that Plaintiffs met their burden to establish standing and
27 that they had established the other elements required for permanent injunctive relief.

28 This Court is one of only few, *if any*, courts to hold that a state may not require

1 submission of a complete ballot, including with a signature, by poll closing on Election
2 Day. Not only does the Court’s ruling displace a state-law requirement that has been in
3 existence for decades, taken to its logical end, the Court’s decision calls into question the
4 State’s other election deadlines. For example, does closing polls at 7 p.m. sufficiently
5 relate to the State’s strong interests when there are surely poll workers who would be
6 willing to man the polls until midnight (or at least 8pm)? Does providing only a five-day
7 cure period for completed ballots with mismatched signatures or for submission of
8 proper identification sufficiently relate when election officials might be able to spend a
9 few more days attempting to cure? If a voter can prove she waited in line at a poll but
10 left because the line was too long or she had more pressing matters to tend to, does
11 refusing her a few days after the election to cast her vote sufficiently relate to the State’s
12 strong interests? Of course, the answer to each question is “yes,” which necessarily
13 means the Court’s decision regarding the Election Day deadline for signed ballots is
14 inconsistent with *Anderson/Burdick* and the State’s interests in enforcing Election Day
15 deadlines. *See Republican Nat’l Committee v. Democratic Nat’l Committee*, —U.S.—,
16 140 S.Ct. 1205, 1207 (April 6, 2020) (“Extending the date by which ballots may be cast
17 by voters—not just received by the municipal clerks but cast by voters—for an additional
18 six days after the scheduled election day fundamentally alters the nature of the
19 election.”).

20 The State is mandated by federal law to hold elections for federal office on a date
21 certain, *see, e.g.*, 2 U.S.C. § 7, and it otherwise has a sovereign right to legislatively
22 select times and dates for state and local offices. That necessarily means that the State
23 may require completed ballots be received on Election Day. The Court has now called
24 that requirement into question. The Court has also called into question the laws of
25 *numerous* other states that do not allow unsigned ballots to be cured *at all* or that allow a
26 cure period but not beyond Election Day.

27 Ultimately, the Court holds that the State must extend a five-day cure period for
28 unsigned ballots because it extended a five-day cure period for mismatched ballots and a

1 cure period for those who physically vote without identification. But in doing so the
2 Court makes the same mistake that it says Plaintiffs make, treating the remedy for failure
3 to comply with a voting requirement as the burden itself. The Constitution does not
4 require states to treat all election requirements equally or authorize federal courts to
5 micromanage those requirements. To the contrary, states have tremendous leeway in
6 structuring the time and manner in which elections are conducted, which is why there is
7 so much variation among state election requirements and deadlines, including the
8 existence and duration of cure periods.

9 This is particularly true where, as here, the election requirements being compared
10 are qualitatively quite different. The Court correctly acknowledges that it is “true” that
11 “there is a meaningful difference between unsigned envelopes and those with perceived
12 mismatched signatures.” [Dkt. 114 at 17.] Unsigned ballots are incomplete, while
13 signed ballots and ballots submitted in person without identification are complete (the
14 State merely requires additional confirmation of the identity of the individual submitting
15 the completed ballot). This is why an individual who submits an unsigned ballot may
16 still vote through other means, because she has not yet submitted a valid vote. The Court
17 acknowledges but then disregards this distinction along with the record evidence that the
18 distinction matters in terms of administrative burden imposed and the orderly
19 administration of elections through enforcement of Election Day deadlines.

20 The Court’s conclusion that the Arizona Democratic Party (“ADP”) has standing
21 to assert the claims in this litigation is also incorrect. The Court wrongly held that ADP
22 has both associational and organizational standing.

23 For associational standing, the Court held that ADP has standing because there is
24 a statistical likelihood that at least one person registered as a democratic will mail in a
25 ballot lacking a signed affidavit. To establish associational standing, however, ADP
26 “must [establish] that its members, or any of them, are suffering immediate or threatened
27 injury as a result of the challenged action of the sort that would make out a justiciable
28 case had the members themselves brought suit.” *Warth v. Seldin*, 422 U.S. 490, 511

1 (1975). ADP’s “membership” does not consist of all voters who are merely registered as
2 democrats. Rather, ADP has defined membership structures that do not include all
3 democratic voters. [See Exh. 110 at 1, 6-7, 10, 14.] ADP does not allege, let alone
4 establish, that any of its actual members have ever had a ballot rejected for failure to
5 complete the ballot affidavit prior to poll closing. The Court’s holding that ADP has
6 associational standing based on some statistical likelihood that at least one unidentified
7 democratic voter will have a legitimate ballot¹ rejected is inconsistent with recent
8 decisions from the Eleventh Circuit and this Court. See *Jacobson v. Fla. Sec’y of State*,
9 957 F.3d 1193, 1204-05 (11th Cir. 2020); *Mecinas v. Hobbs*, —F.3d—, 2020 WL
10 3472552, *9 (D. Ariz. June 25, 2020) (Humetewa, J.) (“[T]he Court will not assume,
11 based on a single affidavit, that ‘millions’ of Arizonans who vote for Democratic
12 candidates “consider themselves” to be ‘members’ of the Democratic Party.”).

13 Regarding organizational standing, ADP was required to establish “(1) frustration
14 of its organizational purpose; and (2) diversion of its resources to combat the adverse
15 effects of the challenged law.” [Dkt. 114 at 9.] ADP made neither showing. Again,
16 ADP did not establish that any democratic voter had a legitimate vote rejected in prior
17 elections. ADP cannot establish that its organizational purpose is somehow frustrated by
18 an issue that affects no more than 0.10% of total voters. Moreover, ADP admitted that it
19 did not even allege that more Democratic votes were affected than Republican votes.
20 And if more Republican votes are affected, ADP’s organizational purposes would
21 actually be *furthered*—not frustrated—by the challenged laws. ADP cannot extract
22

23 ¹ ADP did not prove that any ballot rejected for lack of signature in prior elections
24 actually contained a legitimate vote. There are myriad situations where a ballot would be
25 returned without an executed ballot affidavit because the individual returning the ballot
26 did not intend to cast a legitimate vote. For example, a family member may receive the
27 ballot for a deceased individual and seek to inform the State of the voter’s passing on the
28 ballot itself without also signing the deceased individual’s name to the ballot affidavit.
Or a voter may intend to protest the available candidates by sending back an unsigned
protest ballot writing in sham candidates for office (e.g. Mickey Mouse or Harambe the
gorilla). See <https://www.bbc.com/news/blogs-trending-37925961> (last visited
09/11/2020).

1 Article III injury-in-fact from a potential benefit not even alleged to be an injury.

2 In addition, ADP cannot establish standing based on the timing of spending
3 resources pre-election instead of post-election, particularly when those efforts regardless
4 of timing are to obtain the benefit of additional democratic votes counted, which is
5 consistent with its usual and routine organizational mission and practices. *See NAACP v.*
6 *City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (rejecting organizational standing
7 because “Plaintiffs have not explained how the activities described . . . differ from the[ir]
8 routine lobbying activities.”).

9 Finally, regarding Plaintiffs’ procedural due process claim, the Court was wrong
10 to analyze that claim outside of the *Anderson/Burdick* framework. For the reasons
11 explained above, the Election Day deadline for completed ballots easily passes muster
12 under *Anderson/Burdick*. Even under the *Matthews* rubric, however, Plaintiffs’ claim
13 fails because Plaintiffs presented no evidence that the Election Day deadline itself has
14 actually deprived any voter of the right to vote or that an additional five-day period
15 would have any appreciable impact on the miniscule rejection rate for mail-in ballots
16 lacking a signature.

17 At the very least, this case involves issues of first impression in both this District
18 and the Ninth Circuit. Even nationally, this case is one of very few, if any other, cases
19 holding that a State may not enforce an Election Day deadline for submission of a
20 completed ballot. It also one of very few cases holding that a State election requirement,
21 in place for decades, is not even rationally tailored to justify a minimal burden on the
22 right to vote. At a bare minimum, the merits of Plaintiffs’ standing and constitutional
23 claims are fairly contestable and a stay is warranted to preserve the decades-long status
24 quo pending the State’s appeal to the Ninth Circuit.

25 **II. The State Will Suffer Irreparable Harm Absent A Stay.**

26 The State is certain to suffer irreparable harm absent a stay. The Court’s
27 mandatory injunction alters Arizona’s Election Procedures Manual and upends the
28 requirement under Arizona law that signed ballots be received prior to 7 p.m. on Election

1 Day, and does so less than two months prior to the general election and only
2 approximately one month prior to the mailing of absentee ballots. The State by
3 definition suffers irreparable harm when it is precluded from carrying out the laws
4 passed by its democratic processes. *See, e.g., Coalition for Economic Equity v. Wilson*,
5 122 F.3d 718, 719 (9th Cir. 1997) (“[A] state suffers irreparable injury whenever an
6 enactment of its people or their representatives is enjoined.”); *Maryland v. King*, 122 S.
7 Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (“Any time a State is enjoined by a court
8 from effectuating statutes enacted by representatives of its people, it suffers a form of
9 irreparable injury.”). Such harm is particularly acute here where county election officials
10 will be required to implement the Court’s injunction in extremely short order and without
11 statewide guidance. Moreover, if the Ninth Circuit eventually reverses the Court’s
12 judgment—something Plaintiffs and the Court must acknowledge is at least a
13 possibility—then the one-time exemption from the Election Day deadline for a single
14 election will result in administrative and voter confusion.

15 **III. The Remaining Factors Favor A Stay Pending Appeal.**

16 While “[t]he first two factors of the traditional standard are the most critical,”
17 *Nken v. Holder*, 556 U.S. 418, 434 (2009), the balance of the remaining factors also
18 favors granting a stay pending appeal. The public interest clearly favors a stay. Here,
19 the Arizona Legislature has made the reasonable policy decision to require all mail-in
20 ballots to be returned with a signature prior to close of polls on Election Day. The State
21 has a strong interest in seeing the policy decisions of its elected representatives—
22 particularly those dealing with the ordering of elections—carried out without
23 interference. *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) (“The public
24 interest in the maintenance of order in the election process is not only important, it is
25 compelling.”). And the State has an interest in setting its own specific election
26 deadlines. *See Thomas v. Andino*, —F. Supp. 3d—, 2020 WL 2617329, *26 (D. S.C.
27 May 25, 2020) (citing *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020)) (“In terms of
28 the state’s interests: setting specific election deadlines is part and parcel of a state’s

1 generalized interest in the orderly administration of elections.”). The Court recognizes
2 that the State has at least four important state interests at stake. While the Court
3 ultimately concludes that an Election Day deadline for executed ballot affidavits does not
4 sufficiently serve those interests, the Court surely recognizes that if the Court is
5 ultimately determined to be incorrect, then the Court’s ruling will negatively impact one
6 or more of those interests. The Court should enter a stay pending appeal to avoid that
7 risk.

8 Moreover, if the Court is determined to have ruled incorrectly, and the injunction
9 is therefore dissolved, the extended deadline for ballot affidavit signatures will be a
10 single-election anomaly. This will create significant voter and administrative confusion.
11 *See Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections,
12 especially conflicting orders, can themselves result in voter confusion and consequent
13 incentive to remain away from the polls. As an election draws closer, that risk will
14 increase.”).

15 The balance of harms also tips sharply in favor of a stay. Plaintiffs’ harms are not
16 substantial and indeed are overwhelmingly theoretical. And this Court expressly held
17 that the burden on voting was only “minimal.” As explained, Plaintiffs have not
18 identified a single “member” who has had a legitimate vote rejected because of the
19 Election Day deadline. At most, only 0.10% of voters have had their ballots rejected for
20 lack of signature in the last two general elections. Any stay will affect only the
21 upcoming election, and voters will still be able to submit a complete ballot so long as
22 they do so prior to poll close on Election Day.

23 Any hardship that Plaintiffs may suffer is the result of Plaintiffs’ failure to timely
24 initiate this litigation. As explained, the Election Day deadline has been in place for
25 decades—indeed, since 1918. The Arizona Legislature passed the statute extending a
26 cure period for mismatched signatures in 2019 and, by December 2019, the Election
27 Procedures Manual had been finalized. In fact, the Secretary of State let ADP know on
28 December 19, 2019 that litigation regarding the Election Day deadline for signatures

1 would be required. [See Exh. 113.] Yet Plaintiffs did not bring this lawsuit for another
2 six months—guaranteeing that the laws they thought were unconstitutional would apply
3 to their own voters in the August 2020 primaries. Thus, any potential hardship that
4 Plaintiffs may suffer from a stay pending appeal is largely self-inflicted. Little harm, if
5 any, will result from a stay of a deadline that has been in place for decades.

6 **CONCLUSION**

7 The State respectfully requests that the Court grant a stay of the permanent
8 injunction pending appeal. Given the impending election, the State also requests that the
9 Court expedite the briefing schedule, to the extent the Court wants additional briefing,
10 and expedite ultimate consideration of the State’s request.

11
12 Respectfully submitted this 13th day of September, 2020.

13
14 MARK BRNOVICH
15 ATTORNEY GENERAL

16 *By: s/ Michael S. Catlett*
17 Joseph A. Kanefield (No. 15838)
18 *Chief Deputy & Chief of Staff*
19 Brunn (“Beau”) W. Roysden III (No. 28698)
20 *Division Chief*
21 Drew C. Ensign (No. 25463)
22 Michael S. Catlett (No. 25238)
23 *Deputy Solicitors General*
24 Jennifer J. Wright (No. 27145)
25 Robert J. Makar (No. 33579)
26 Anthony R. Napolitano (No. 34586)
27 *Assistant Attorneys General*
28 2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5200
Drew.Ensign@azag.gov

Attorneys for State of Arizona

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 13th 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, which will send notice of such filing to all registered CM/ECF users.

s/ Michael S. Catlett

Michael S. Catlett

Attorney for State of Arizona