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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The Arizona Democratic Party, et al.,

Plaintiffs,

v.

Katie Hobbs, et al.,

Defendants,

and

State of Arizona, Republican National Committee, Arizona Republican Party, and Donald J. Trump for President, Inc.,

Intervenor-Defendants.

No. CV-20-1143-PHX-DLR

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

Assigned to the Honorable Douglas L. Rayes

This Court should deny the State's motion for emergency relief ("Motion") because the State cannot meet its heavy burden to show that a stay is warranted in this case. First, the State has not demonstrated a likelihood of success on the merits of its appeal. As this Court correctly held, the requirement that officials reject unsigned mail ballot envelopes without offering the voter the chance to correct the missing signature for up to five days after election day (the "Inadequate Cure Period")[1] is unconstitutional and the Arizona Democratic Party ("ADP") has standing to bring suit.

Second, while the Court can and should deny the State's motion because the State cannot show likelihood of success, the State has also failed to show that it will suffer irreparable harm absent a stay. Its assertions regarding its purported injury are neither supported by case law nor the record before the Court. No enacted law is at issue, and any diversion of resources necessary to implement the Order is not relevant to the stay inquiry. Finally, the balance of hardships and public interest weigh against a stay.

**Argument**

"A stay is not a matter of right," and is not warranted in this case. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). This is because the State has not met its "burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Al Otro Lado*, 952 F.3d at 1006 (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

Four factors are relevant to deciding a motion to stay an order pending appeal. This Court should "consider: '(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.'" *Id.* at 1006–07 (quoting *Nken*,

[1] As the Court accurately notes in its Order, the precise length of the post-election cure period varies from year-to-year based on the races on the ballot. As the State provides a five-day cure period in 2020, for simplicity's sake, Plaintiffs refer to a five-day cure period in this opposition brief.

556 U.S. at 434). None of these factors weigh in favor of a stay.

## I. The Injunction Should Not be Stayed.

### A. The State has Not Made a Strong Showing that It Is Likely to Succeed on the Merits of Its Appeal.

The State cannot satisfy the first factor. Perhaps recognizing this, the State argues (at 2) that to obtain a stay it need only show "that 'the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear.'" (quoting *Overstreet v. Thomas Davis Med. Ctrs., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997)). But this is not the standard articulated by the Ninth Circuit.[2]

Instead, the State must make a "strong showing" that its appeal "is likely to succeed on the merits." *Al Otro Lado*, 952 F.3d at 1006 (quoting *Nken*, 557 U.S. at 434). For the reasons set forth below, however, the State has not made the requisite "strong showing" of likely success. *Id.* First, this Court correctly held (at 10–22) that the Inadequate Cure Period is unconstitutional in violation of the First and Fourteenth Amendments. Second, at a minimum, ADP has standing to bring this lawsuit.

#### 1. This Court Correctly Held that the Inadequate Cure Period Violates First Amendment and Equal Protection Guarantees.

This Court is correct (at 18–19) that the Inadequate Cure Period unconstitutionally burdens the fundamental right to vote in violation of the First Amendment and Equal Protection Clause. In reaching its holding, this Court applied the "flexible standard" laid out by the Supreme Court to resolve, among other things, Equal Protection challenges to state election laws (the "*Anderson-Burdick* framework"). *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

[2] The quoted language from *Overstreet* is from a 1983 Ohio district court opinion (*Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983)), not the Ninth Circuit. No Ninth Circuit cases have invoked the purported "serious and difficult questions of law" standard. Instead, since *Overstreet*, the Ninth Circuit has repeatedly articulated the familiar likelihood of success on the merits standard quoted by Plaintiffs, above.

Under the *Anderson-Burdick* framework, this Court first evaluated the burden imposed by the Inadequate Cure Period on the right to vote. *Anderson*, 460 U.S. at 789. In doing so, this Court held (at 13) that the burden was "minimal."[3]

The Court then turned to the second part of the *Anderson-Burdick* framework, and properly held (at 13–18) that none of the interests put forward by the State for the Inadequate Cure Period justify even a minimal burden. *Anderson*, 460 U.S. at 789. In so holding, and in five pages of analysis, this Court closely examined each of the four justifications put forward by the State against the other parties' evidence. This was not a "hyper-technical" analysis, as the State claims (at 1). Instead, this Court did exactly as the Supreme Court requires—it examined the "precise interests put forward by the State." *Anderson*, 460 U.S. at 789. The Court can scarcely be chided for conducting a careful, rather than cursory, analysis. (Indeed, had it done so, there is little doubt that it would have been chastised instead for failing to conduct the thorough analysis that it in fact did in this case). In the end, this Court was correct to conclude (at 19) that "[o]n the facts of this case, the challenged deadline fails to withstand the most deferential level of scrutiny."

In its Motion, the State nowhere challenges this Court's analysis of the burdens or attempts to counter any of the facts on which the Court rested its conclusion. Nor could it. Indeed, as was true in its briefing on plaintiffs' preliminary injunction motion and at oral argument, the State remains incapable of articulating any colorable burden on the State that the current deadline avoids.

Instead, the State attempts to mischaracterize and extend this Court's narrow holding. This Court did not hold, as the State claims (at 2–4), that election officials cannot set deadlines or that the Constitution "require[s] states to treat all election requirements equally." Rather, this Court examined the claims presented in *this* case and engaged in the

[3] Plaintiffs' position remains that the burden imposed by the Inadequate Cure Period is more than minimal. [*See* Doc. 96 at 8–13 (articulating various reasons)] It is not necessary, however, for this Court to examine this holding for the purposes of resolving this Motion.

careful, case-specific, factual analysis that is necessary to resolve claims under the *Anderson-Burdick* framework. *See Soltysik v. Padilla*, 910 F.3d 438, 445 (9th Cir. 2018) (holding that factual evidence is necessary to resolve a challenge under the *Anderson-Burdick* framework).

In doing so, this Court held that under the particular facts of this case, relief is warranted. Among other things, this is a case in which the State already provides the same requested cure period for other ballots. It is a case where the State's chief election official and some county election officials have advocated for the requested cure period to ensure uniformity and supported plaintiffs' request for relief. It is also a case where the State has failed to put forth any discernable reason why the requested cure period should not be extended to missing signature ballots. In short, some election deadlines withstand constitutional scrutiny, and others do not. The specific instances matter. This is one of the instances in which a state's chosen election deadline is not justified. *See Anderson*, 460 U.S. at 806 (deadline for filing nomination petitions imposed a substantial and unconstitutional burden); *Nader v. Brewer*, 531 F.3d 1028, 1039 (9th Cir. 2008) (deadline burdensome and unconstitutional).

Additionally, this Court has not, as the State suggests (at 3) "called into question the laws of numerous other states that do not allow unsigned ballots to be cured at all or that allow a cure period but not beyond election day." Individual assessment of each state's law and the burden it imposes is required. *See, e.g.*, *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 547 n.7 (6th Cir. 2014) ("[W]e do not find that other states' electoral laws and practices are relevant to our assessment of the constitutionality or legality" of Ohio law.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Anderson*, 460 U.S. at 789 (explaining challenges "cannot be resolved by any 'litmus-paper' test that will separate valid from invalid restrictions").

In any event, as a factual matter, the State's extension of the cure period to some voters and not others makes it an "outlier." [Order at 17] Again, "Arizona currently is the

only state that sets a different deadline for curing a missing signature than a perceived mismatched signature." [*Id.* at 17–18]. Even if other states' laws were germane to the Court's decision here, the fact that no other state in the country does what Arizona does supports plaintiffs' position, not the State's.

At bottom, the State has not made a "strong showing" that its appeal of plaintiffs' First and Fourteenth Amendment claim will be successful. And so, the State is not entitled to a stay of this Court's order pending appeal. *Al Otro Lado*, 952 F3d. at 1006.

**2. This Court Correctly Held that the Inadequate Cure Period Violates Procedural Due Process Guarantees.**

Next, this Court properly held (at 20) that the Inadequate Cure Period is unconstitutional under the framework for analyzing procedural due process claims.[4] This is because the Inadequate Cure Period results in "(1) a deprivation of a constitutionally protected liberty . . . interest, and (2) a denial of adequate procedural protections." *Franceschi v. Yee*, 887 F.3d 927, 935 (9th Cir. 2018).

As to the first prong, this Court held (at 20–21) "that Plaintiffs—specifically, the ADP member voters on whose behalf Plaintiffs sue—have a constitutionally protected liberty interest in having their ballots counted." The State does not dispute this holding.

As to the second prong, this Court was correct to hold (at 21–22) that, on balance, plaintiffs are likely to show a denial of adequate procedural protections based on consideration and balancing of the three factors in *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). Specifically, this Court properly held the first *Mathews* factor favors plaintiffs because "'[t]he private interest at issue implicates the individual's fundamental right to vote and is therefore entitled to substantial weight.'"[5] [Doc. 114 at 21 (quoting *Martin v. Kemp*,

[4] This Court correctly analyzed the procedural due process claim under the traditional framework, contrary to the State's assertion (at 6). As this Court recognized (at 19–20), no Ninth Circuit authority has required procedural due process claims to be reviewed under the *Anderson-Burdick* framework. And multiple district courts have analyzed procedural due process claims outside of the *Anderson-Burdick* framework.

[5] While unclear, the State seems to argue (at 6) that the right to vote is not implicated

341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018))]

In evaluating the second *Mathews* factor—"the risk of an erroneous deprivation" of the right at issue "through the procedures used" and the value of any additional safeguards, *Mathews*, 424 U.S. at 349 —this Court held (at 21) evidence was "mixed." While the State's motion is not entirely clear, the State appears to take issue with this Court's holding (at 22) that for some voters "a post-election cure likely would be valuable." Without explanation, the State argues (at 6) that there is "no evidence" that "an additional five-day period would have any appreciable impact on the miniscule rejection rate for mail-in ballots lacking a signature." But plaintiffs presented evidence that voters, when presented with an opportunity to do so, cure their ballots. *See, e.g.*, Pl. Ex. 7 (identifying ballots cured by voters during available cure period). It is hard to square the State's made-for-litigation claim that there is little value in a post-election cure period with the State's provision of a post-election cure period for provisional ballots and "signature mismatch" ballots.

Finally, as to the third *Mathews* factor, the Court correctly held that the evidence of the government's interest in the Inadequate Cure Period is minimal. And the State in its motion presents no argument as to why the Court's holding on this point is incorrect.

Accordingly, the State is unlikely to succeed in appealing this Court's order on plaintiffs' procedural due process claim.

**3. The ADP has Standing to Bring this Suit.**

Finally, this Court rightly held that ADP has standing to challenge the Inadequate Cure Period under two separate and independent theories: (1) associational standing and (2) organizational standing. Given the Court's conclusion as to ADP's standing, the Court appropriately found it unnecessary to conduct a standing analysis as to the other two

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"because Plaintiffs presented no evidence that the Election Day deadline itself has actually deprived any voter of the right to vote." But even assuming this is relevant, the State's claim is belied by the record. Plaintiffs produced a substantial amount of uncontradicted evidence that votes were not counted because they were submitted without a signature. *See, e.g.*, Pl. Ex. 16.

plaintiffs.

First, ADP has associational standing. As this Court held (at 9), associational standing exists because, among other things, ADP's members or constituents who would otherwise have standing to sue individually are directly harmed by the Inadequate Cure Period.

The State nonetheless asserts baldly that ADP's members do not include registered Democrats in Arizona. Not so. Registered Democrats in Arizona have enough "indicia of membership" in ADP to "satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a 'personal stake in the outcome of the controversy.'" *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003); *see also* Pl. Ex. 16 at ¶ 5.

Further, the State takes issue (at 5) with plaintiffs' failure to identify voters who have in the past, or would in the future, have a ballot rejected for a missing signature. But, the Ninth Circuit has made clear that where, as here, it is "relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by" the Inadequate Cure Period, and the State "need not know the identity of a particular member to understand and respond to [plaintiffs'] claim of injury." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015). As this Court found (at 9), "[r]oughly a third of Arizona voters are registered with the Democratic Party . . . and in past elections there has been at least one such voter whose ballot was rejected due to a missing signature . . . ." It is therefore "relatively clear" that one of the ADP's members will be adversely affected by the Inadequate Cure Period. *Cegavske*, 800 F.3d at 1039; *see also* Pl. Ex. 16. ¶ 16 (ADP's executive director is unaware of an election where a Democratic voter did not have their ballot rejected for a missing signature).

Second, ADP has organizational standing because it demonstrated "(1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular

[injurious behavior] in question." *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019). As to the first prong, and as this Court properly held (at 9), "[r]ejection of ballots reflecting voters for Democratic candidates frustrates the ADP's organization mission" of, among other things, electing Democrats in Arizona.

The State argues that ADP cannot show its mission is frustrated because (1) it did not identify specific voters; (2) a relatively small number of voters will likely be affected by the Inadequate Cure Period; and (3) ADP did not allege that more Democrats than Republicans are affected by the Inadequate Cure Period. The State cites no authority for any of these arguments. None withstand scrutiny.

For one thing, in establishing standing, plaintiffs cannot and need not identify individual voters to establish harm to their organizational mission. *Cf. Cegavske*, 800 F.3d at 1039. Additionally, and even if this were theoretically relevant to the organizational standing inquiry (it is not), depriving even one qualified voter of the opportunity to have their vote counted harms the ADP's mission of electing Democrats—particularly in close elections. *Cf. League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[T]he basic truth [is] that even one disenfranchised voter . . . is too many . . . .").

Moreover, the State offers no support for the proposition that a political party must show that the law will impact more voters of that party than another to establish organizational standing. This makes good sense. As this Court recognized (at n.12), such an argument would "set[] an impossibly high standard, as it cannot be known in advance how many voters will neglect to sign their ballot envelopes, who they will vote for, or how close those elections will be."

As to the second prong of the organizational standing inquiry, and as this Court recognized (at 10), ADP put forth evidence of various ways in which it is required to divert its resources to combat the Inadequate Cure Period. Notwithstanding the State's suggestion to the contrary (at 6), ADP's evidence established that if the Inadequate Cure Period were

enjoined, ADP would be able to "redirect resources currently spent combating the specific challenged conduct to other activities that would advance its mission." *Rodriguez*, 930 F.3d at 1134; *see also* Pl. Ex. ¶¶ 26, 28 (describing ways in which ADP would use resources but for the inadequate cure period).

In sum, it is unlikely that the State would succeed on appeal in arguing that ADP lacked either associational or organizational standing to bring this suit.

**B. The State has Failed to Establish That It Will Suffer Irreparable Injury in the Absence of a Stay.**

The State has not met its burden to "show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Al Otro Lado*, 952 F.3d at 1007 (quotation marks omitted). This is a "minimum threshold showing for a stay pending appeal," and "'simply showing *some* possibility of irreparable injury' is insufficient." *Id.* (quoting *Nken*, 556 U.S. at 434) (emphasis added). An applicant "must show that an irreparable injury is the more probable or likely outcome." *Id.* (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)).

The State suggests three forms of injury if the injunction is not stayed, none of which withstand scrutiny. First, the State claims (at 7) that it will incur irreparable harm if a stay is not entered because it will be "precluded from carrying out the laws passed by its democratic processes." But here, the lack of an equitable cure period does not stem from any law passed by democratic processes. Rather, it is the result of a law that does not address the issue, and the Attorney General's resulting, unilateral rejection of the Secretary's proposed Election Procedures Manual. *See* Order at 2-3 (noting that the Secretary "sought to fill" the gap in the law, which "does not expressly address whether ballot envelopes with missing signatures may be cured").

Even if some duly enacted law were at issue, in the cases the State cites, the mere fact that a state was enjoined from "effectuating statutes enacted by representatives of its people" was not the prime consideration in evaluating the state's potential injury. *Maryland*

*v. King*, 567 U.S. 1301, 3 (2012). For example, in *Maryland*, the Court reasoned that there would be "an ongoing and concrete harm to Maryland's law enforcement and public safety interests" if a stay were entered. *Id.* At issue was whether Maryland could collect DNA from individuals arrested for violent felonies, which had proven to be a "valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population." *Id.* There is of course no similar countervailing consideration here. In any event, as other courts have recognized and discounted appropriately, *Maryland* was a non-precedential stay opinion issued by a single justice. *See, e.g.*, *Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 7565389, at *3 (D. Md. Nov. 14, 2019).

And in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997), also cited by the State, the motion for a stay was *denied* because granting it would have been "tantamount to extending the preliminary injunction," which this Court had "already held rests on an erroneous legal premise." *Id.*

Perhaps there is no better way to illustrate the point than to articulate the "injury" the State would suffer: More eligible Arizonan voters will have a chance to have their vote counted. That is no injury at all. More broadly, it cannot be that in every instance where a law is held to be unconstitutional that any injury from such a holding, absent more, counsels in favor of a stay pending appeal. If that were the case, such stays would be the rule (and would arguably be automatic), not the exception. *See Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020) (rejecting government's argument that it would suffer "irreparable injury" if presidential proclamation were enjoined because it would prevent the president "from taking action effectuating an Act of Congress," and holding that if this constituted irreparable harm "no act of the executive branch asserted to be inconsistent with a legislative enactment could be the subject of a preliminary injunction").

Second, the State suggests (at 7), without legal or factual citation, that some sort of irreparable harm will occur while the appeal is pending because defendants will have to expend resources to quickly implement the order. This argument is seemingly in tension

with the State's argument that only a very small number of voters will take advantage of the post-election cure period. In any event, to the limited extent that there might be some diversion of government resources to implement the stay—Coconino County Recorder Patty Hanson's declaration confirms that doing so would be straightforward and not burdensome, *see* Dkt. 97-1, at 108-111—"money, time[,] and energy expended" do not warrant a stay. *Al Otro Lado*, 952 F.3d at 1008 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Moreover, the State cites nothing for its assertion (at 7) that there will be no "statewide guidance" on how to implement the injunction. Presumably the Secretary will comply with her statutory duty to provide rules to govern voting procedures. *See* A.R.S. § 16-452.[6] Even if she did not, any resulting injury would be to the *county defendants*—none of whom joined the appeal—not to the State.

And third, the State suggests (at 7) that it will suffer irreparable harm "if the Ninth Circuit eventually reverses the Court's judgment." But that misapprehends the irreparable injury inquiry at this stage. A stay pending appeal is only potentially warranted if there is irreparable harm "while the appeal is pending." *Al Otro Lado*, 952 F.3d at 1007; *id.* at 1008 ("[T]he record here does not show cognizable irreparable harm to the government over the relatively short period before the appeal of the preliminary injunction is resolved."). Whatever happens *after* the Ninth Circuit finally adjudicates the appeal is irrelevant to whether a stay is now appropriate. It is not. More broadly, it is hard to fathom what injury the State could face from the injunction at *any* point. Again, the practical effect of the Court's ruling, simply put, is that a higher number of eligible voters who cast a given ballot will have their ballot counted. Plaintiffs would have thought that eligible voters participating in state elections is the State's goal, not an injury to be avoided.

The State has thus failed to establish that it will suffer any cognizable injury—let

[6] To the extent that the State might thwart the Secretary from issuing any guidance or rules regarding the post-election missing signature cure period required by the Order, such self-inflicted harm would "severely undermine[]" its claim for relief. *Al Otro Lado*, 952 F.3d at 1008. "Self-inflicted wounds are not irreparable injury." *Id.*

alone irreparable injury—in the absence of a stay.

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

Because the State has not met its burden to make a "strong showing" that it will likely succeed on the merits or be irreparably injured absent a stay, this Court "need not dwell on the final two factors—'harm to the opposing party' and 'the public interest.'" *Al Otro Lado*, 952 F.3d at 1014-15 (quoting *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018)). Even so, the balance of equities and public interest weigh against a stay.

**1. The Balance of Hardships Weighs Against a Stay**

"The third factor, 'whether issuance of the stay will substantially injure the other parties interested in the proceeding,' weighs heavily against the stay." *Id.* at 1015 (quoting *Nken*, 556 U.S. at 434). As this Court has already concluded, absent an enforceable injunction, plaintiffs will suffer irreparable injury. *See* Order at 23 ("The loss of one's vote constitutes an irreparable harm for which there is no adequate remedy at law, and which could be mitigated with the implementation of post-election cure procedures."). This is in line with past voting rights jurisprudence, in which "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C.*, 769 F.3d 224, at 247.

For at least three reasons, the State is incorrect (at 8) that plaintiffs' harm is theoretical because they "have not identified a single 'member'" impacted by the Inadequate Cure Period. First, plaintiffs need not and cannot identify specific members who will be prospectively harmed by the lack of a post-election missing signature cure period. *See Cegavske*, 800 F.3d at 1039 (the State "need not know the identity of a particular member to understand and respond to [plaintiffs'] claim of injury"). Second, as this Court has already found, plaintiffs' harm is inevitable, even though we cannot yet know which *particular* ADP members will see their ballots rejected. *See* Order at 23 ("In every election, the ballots of some otherwise eligible voters inevitably will be rejected due to missing

signatures, and some of those voters certainly will be members of the ADP."). Indeed, as noted above, per unrefuted evidence in the record, ADP's executive director is unaware of a single election in which a Democratic voter did not have their ballot rejected for a missing signature. Pl. Ex. 16. ¶ 16. And third, plaintiffs' harm is real and irreparable even if only a "small" number of voters (i.e., hundreds or thousands, as in earlier elections) are ultimately affected. The balance of equities favors an enforceable injunction where even only a small number of voters are impacted. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (problem impacting .248% of the ballots cast). It is therefore beyond doubt that plaintiffs will suffer real harm if the injunction is stayed, which tips the balance of the equities in plaintiffs' favor.

The State cites no legal authority (nor are plaintiffs aware of any) for its suggestion (at 8) that plaintiffs' timeline in filing this suit is somehow relevant to the narrow question when balancing the equities of "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Al Otro Lado*, 952 F.3d at 1015. In any event, the State is wrong as a factual matter. Plaintiffs timely filed suit. In late 2019, the Attorney General rejected the Secretary's Draft Election Procedures Manual that had added the requested post-election cure period. *Id.* at 4-5. It was not until that point that the need for this suit first arose. To be sure, plaintiffs did their due diligence before filing suit. There is no rule that a plaintiff must sue when an action by a state first injures its fundamental rights, or else forever suffer that injury without judicial redress. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 638-39 (1975) (holding portion of Social Security Act of 1935 unconstitutional); *Harper v. Va. State Bd. of Elect.*, 383 U.S. 663, 664-66 (1966) (holding poll tax added in Virginia constitution of 1902 unconstitutional). This Court was thus correct to find that, "[t]hough Plaintiffs could have brought this suit sooner than they did," the delay does not "undermine the harms alleged." Order at 23.

**2. The Public Interest Weighs Against a Stay.**

The fourth factor—the public interest—also weighs against a stay. With this Court's

injunction in place, lawful voters will be allowed to address technical errors in submitting their ballot to verify their identity and save their lawful votes from being rejected. This unquestionably serves the public interest since "[t]he public has a strong interest in exercising the fundamental right to vote," and in "permitting as many qualified voters to vote as possible." *League of Women Voters of N. C. v. North Carolina*, 769 F.3d 224, 247, 248 (4th Cir. 2014) (quotation omitted). *That* is the public interest at issue here—not the purported interest the State suggests it has in continuing to enforce the Attorney General's prerogatives over the objection of the State's chief election officer.

The State asserts that part of the public interest derives from "setting specific election deadlines," which is "part and parcel of a state's generalized interest in the orderly administration of elections." Mot. at 7 (quoting *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020)). True as that may be, the injunction does set a deadline: voters have five days after an election to cure missing signatures.[7] As the cases the State cites highlight, the key concern in this regard is whether a "deadline provides a certainty and reliability that enable election officials to direct their efforts to the essential tasks of election preparation and thus minimizes the degree of disorder and the risk of error and even chaos." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008). Arizona election officials now have that certainty two full months before the November election. Because the injunction provides a clear date certain, there is no public interest in this regard that warrants a stay.

Finally, the State argues (at 8) that there will be "significant voter and administrative confusion" if, due to appellate review, "the extended deadline for ballot affidavit signatures will be a single-election anomaly," citing *Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006). But

[7] To the extent the State suggests (at 7) that only "policy decisions of its elected representatives" can ensure the orderly administration of elections, it bears repeating that the legislature said nothing about any deadline—either before or after an election—for curing unsigned ballots. *See* Order at 2-3 (noting that the Secretary "sought to fill" the gap in the law, which "does not expressly address whether ballot envelopes with missing signatures may be cured").

that is the wrong inquiry: what an appellate court ultimately decides logically and temporally cannot have any bearing on the public interest beyond the likelihood of success of the inquiry above. More importantly, the State misrepresents the concerns in *Purcell*. *Purcell* cautioned against instances in which there is "inadequate time to resolve the factual disputes," and urged courts to consider whether a last-minute change is likely to sow widespread voter confusion, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *Id.* at 5-6. None of those concerns are implicated here. The requested injunction would not change the process for submitting a mail ballot or confuse voters to their detriment since defendants would implement the requested relief administratively (and without insurmountable administrative burdens, *see* Dkt. 97-1, at 108-11) on the back end of the voting process. In any event, "*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists." *People First of Alabama v. Sec'y of State for Alabama*, 815 F. App'x 505, 514 (11th Cir. 2020). On balance, the equities and public interest thus weigh against a stay.

**Conclusion**

For these reasons, plaintiffs respectfully request that this Court deny the State's Motion.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 16, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to all parties.

s/ Indy Fitzgerald