MARK BRNOVICH
ATTORNEY GENERAL
Joseph A. Kanefield (No. 15838)
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III (No. 28698)
Solicitor General
Drew C. Ensign (No. 25463)
Michael S. Catlett (No. 25238)
Deputy Solicitors General
Jennifer J. Wright (No. 27145)
Robert J. Makar (No. 33579)
Anthony R. Napolitano (No. 34586)
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5200
Drew.Ensign@azag.gov

Attorneys for State of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,
Plaintiffs,

vs.

Katie Hobbs, et al.,
Defendants,

and

State of Arizona,
Intervenor-Defendant.

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

STATE'S REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY THE COURT'S SEPTEMBER 10, 2020 INJUNCTION PENDING APPEAL

[EXPEDITED CONSIDERATION REQUESTED]

The State of Arizona ("State") hereby files this optional reply in support of its emergency request for a stay pending appeal of the permanent injunction entered by the Court on September 10, 2020 ("Permanent Injunction"), which enjoined enforcement of Arizona's election-day deadline for submitting executed ballot affidavits.

ARGUMENT

The response from the Arizona Democratic Party ("ADP") fails to refute the State's arguments for issuance of a stay pending appeal to allow Arizona's election law to be implemented as written for the 2020 General Election.

I. The State Has A Strong Likelihood of Success And The Case Raises Difficult Question Of Law In An Unclear Area.

With respect to the merits of the State's appeal, ADP does not dispute that "the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Overstreet v. Thomas Davis Med. Ctrs., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997). Indeed, ADP argues only that the State must make a different showing that it will win on appeal. While the State has made that showing, ADP misstates the standard. Curiously, ADP even makes the bold statement that "[n]o Ninth Circuit cases have invoked the purported 'serious and difficult questions of law' standard." [Dkt. 123 at 2 n.2.] This is flat wrong.

To the contrary, the Ninth Circuit and this Court have repeatedly recited that as the correct standard. In fact, ADP's primary case, *Al Otro Lado*, explains that a "sliding scale approach applies to the consideration of stays pending appeal." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (citing *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011)). In *Leiva-Perez*, the Ninth Circuit adopted the "serious questions" standard, explaining that "[a] more stringent requirement would either, in essence, put every case in which a stay is requested on an expedited schedule, with the parties required to brief the merits of the case in depth for stay purposes, or would have the court attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument." 640 F.3d at 967; *see also Golden Gate Restaurant*

Assoc. v. City and Cty. of San Francisco, 512 F.3d 1112, 1115-16 (9th Cir. 2008) (on a motion to stay pending appeal, "the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor"); *FR 160 LLC v. Flagstaff Ranch Golf Club*, 2013 WL 4507745, *3 (D. Ariz. 2013) (Snow, J.) ("Flagstaff Ranch strongly contests these points, but FR 160 has shown that there are at least serious questions surrounding the merits of his Motion for Leave to Appeal. That is all it must show at this point."); *MDY Indus. v. Blizzrd Ent. Inc.*, 2009 WL 649719, *2 (D. Ariz. 2009) (Campbell, J.) (to obtain a stay pending appeal, applicant can show "that serious legal questions are raised and that the balance of hardships tips sharply in its favor").

Notably, just two months ago, two of the three plaintiffs here (DNC and DSCC) argued to Judge Humetewa that "[a]n injunction pending appeal should be granted if the movant demonstrates *serious questions going to the merits on appeal* and the balance of the hardships tips sharply in their favor." *Mecinas v. Hobbs*, 2:19-CV-05547-DJH, Doc. 77 at 4 (plaintiffs also argued that "[c]ommon sense dictates …. that the standard cannot … require that a district court confess to having erred in its ruling") (emphasis added). Plaintiffs were right about the legal standard then, and wrong now.

This case clearly involves difficult and serious legal questions in an unclear area of law. Neither the Court nor the Plaintiffs have cited any prior case where a court determined, let alone in favor of the plaintiffs, whether a state is required to extend the deadline to complete ballot affidavits beyond Election Day. No prior case addresses whether a state is required to extend all cure periods once it extends one cure period. No prior case addresses whether a State has sufficient regulatory and administrative interests to require completed ballots by close of polls on Election Day. And binding decisions addressing a similar lack of cure period for referendum petitions have held that a state's "important interests justify this minimal burden on the right to vote." *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). Moreover, a significant number of states have ballot affidavit laws that are *less* tailored (*i.e.*, no cure or only Election Day cure)

than the State's law, which allows cure for completed ballots with unverified signatures but not for uncompleted ballots with no signature. Plaintiffs do not dispute that the case involves serious questions in an unclear area of law—they instead argue they are bound to win on those issues (again, the wrong standard). For the reasons provided in the State's Motion to Stay and Response to the Motion for Preliminary Injunction, the State has a strong likelihood of success on appeal, but even if the Court disagrees, the issues here are undoubtedly serious and unclear.

II. A Stay Is Necessary To Avoid Likely Irreparable Harm.

The State has also demonstrated it will suffer irreparable harm if it is prevented from enforcing its election laws and procedures while appeal is pending. With its permanent injunction, the Court took sides in a policy dispute between, on one side, the Arizona Legislature, Governor Ducey, Attorney General Brnovich, and several county recorders, and, on the other side, Secretary Hobbs and several other county recorders. In so doing, the Court struck down state statues requiring that Arizona voters submit executed ballot affidavits by close of business. *See* A.R.S. § 16-548(A) ("The early voter shall make and sign the affidavit[.] . . . In order to be counted and valid, the ballot must be received by the county recorder or other officer in charge of elections or deposited at any polling place in the county no later than 7:00 p.m. on election day."); A.R.S. § 16-550(A). The Court also necessarily altered the Election Procedures Manual, which has the force of law, and has no provision allowing for cure of missing signatures after Election Day. *See* A.R.S. § 16-452(B), (C). In this way, along with the administrative burden, resource expenditure, and confusion that will result on the eve of an election, the State will suffer irreparable harm without a stay.

It is well-established that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating [its] statutes … it suffers a form of irreparable injury.").

Plaintiffs attempt (at 9-10) to distinguish *Wilson* and *Maryland* on their facts. But those cases recognize a categorical and per se rule of irreparable harm that controls here. Plaintiffs, for example, simply refuse to give *Maryland*'s "any time a State is enjoined" language its plain and obvious meaning: it applies any time a state law is enjoined.

Similarly, *Wilson* did not tie its irreparable-harm finding to its analysis of the merits of the appeal whatsoever. *Wilson*, 122 F.3d at 719. Instead, its separate analysis of a separate stay factor is just that—entirely separate. And, as if to underscore the independence of the factors, the Ninth Circuit separately numbered its analysis of each factor, highlighting their distinctness. *Id.* The independence of the *Wilson* merits and irreparable-harm holdings is underscored by Wilson's reliance on *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers), which also did not condition its rule of per se irreparable harm on the constitutional merits, *id.* at 1351; *see also Planned Parenthood of Greater Tx. Surgical Health Servs. v. Abbott*, 571 U.S. 1061 (Scalia, J., concurring in denial of application to stay) ("With respect to the second factor, the Court of Appeals reasoned that the State faced irreparable harm because 'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.' The dissent does not quarrel with that conclusion either.").

Plaintiffs also appear to argue (at 10-11) that the State does not suffer any irreparable harm when the burdens fall on its political subdivisions. This ignores that the Court's injunction materially alters the *State's* statutes and the *State's* Election Procedures Manual. Regardless, Plaintiffs cite nothing for this proposition and there is no reason to believe that the State lacks authority to assert the harms of its subdivisions—which are pure creations of the State and its laws, and ultimately subordinate to it.

Finally, Plaintiffs misstate (at 11) the State's arguments. The State does not argue that it will suffer irreparable harm "'if the Ninth Circuit eventually reversed the Court's judgment.'" A reversal by the Ninth Circuit, after all, would be a victory for the State

and not the cause of any irreparable harm. Instead, the State's argument is that it is suffering irreparable harm wrongly now and will continue to do so while this Court's injunction is on appeal. That is an entirely proper basis for a stay pending appeal.

III. The Balance of Hardships Tips Strongly In Favor Of The State.

Issuance of a stay will not substantially harm Plaintiffs' interests. On the State's side of the ledger, the Court's injunction overrules a State requirement that has been in place for decades. The Court has acknowledged that the State has at least four important interests when it comes to the administration and integrity of elections. The Court's injunction potentially upsets those interests on the eve of an important election. In fact, military and overseas ballots are to be mailed out by September 19 (on information and belief, some counties have already mailed them), and so county recorders will soon be in a position where they will need to inform voters of the deadline to sign their returned ballots. County recorders will need to hurriedly create and implement post-election procedures for curing unsigned ballots, which unlike mismatched signatures requires at least two in-person observers. [*See* Exh. 107 ¶¶ 15, 18-19.] Much of this rush was created by Plaintiff's delay in commencing this litigation, delay for which they have no explanation.[1] Finally, the number of voters affected will be small.

On Plaintiff's side of the ledger, the State acknowledges that there may be voters who intend to cast a valid ballot but will not do so prior to close of polls on Election Day. But based on the statistics from prior elections, which capture total ballots returned unsigned and not those actually containing valid votes, any such number will make up a small percentage of voters. While Plaintiffs may not be able to identify future voters who will not sign their ballots, they have not identified a single past voter who attempted

[1] Plaintiffs attempt to justify their delay because they did not know until December 2019 whether the Election Procedures Manual would include a cure period for missing signatures. But Arizona law has been clear for decades that there is no such cure period and the statute extending such a cure period for mismatching signatures went into effect in August 2019. That Plaintiffs were hoping the Secretary of State could prevail upon the Governor and Attorney General to approve a cure period *under Arizona law* is no excuse for their failure to challenge the lack of such a period *under the U.S. Constitution*.

to cast a valid vote and was not able to do so because of the lack of a cure period. Plaintiff's hardship argument is pure guesswork.

Moreover, as the Court correctly held, the burden of signing and returning a ballot affidavit by Election Day is minimal. Given the risks inherent in the Court's injunction, requiring Arizona voters to comply with that minimal burden for at least one more election, when they have been required to do so for decades and Plaintiffs waited so long to file suit, is the equitable thing to do. *See Humane Society of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (granting stay pending appeal, in part, because "any stay of the NMFS Approval by this court at this time will affect only the 2008 salmon run at the Bonneville Dam, as we expect this case will be resolved on the merits before next year's salmon run").

CONCLUSION

The State respectfully requests that the Court stay its injunction pending appeal. The State also respectfully requests that this Court resolve this motion quickly so that it can, if necessary, begin seeking relief from the Ninth Circuit. To that end, the State does not seek a reasoned order if that will delay resolution of the State's motion.

As mentioned, military and overseas ballots must go out within the next two days (and, on information and belief, have already gone out), and they may start being returned with a small fraction unsigned imminently. When that occurs, county recorders may need to inform voters of the deadline for curing non-signatures—which in turn will depend on whether a stay is in place. The sooner the State's request for a stay pending appeal is resolved, the sooner election officials can give voters a conclusive (and correct) answer to that question.

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Respectfully submitted this 17th day of September, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

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

Attorneys for State of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on this 17th 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