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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mi Familia Vota; Arizona Coalition for
Change; and Ulises Ventura,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as
Arizona Secretary of State,

Defendant.

No. 20 Civ. 1903 (SPL)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION
AND IN OPPOSITION TO COMMITTEES' MOTION TO INTERVENE**

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1 **I. THE BURDEN IS SEVERE AND REDRESSABLE**

2 This case does not challenge the constitutionality of the Governor’s orders to
3 protect the public from COVID-19. Rather, this case challenges the constitutionality of
4 the Voter Registration Cutoff, as applied during this year’s unprecedented pandemic.
5 The Governor told the State at the end of June, over *three months* after COVID-19 first
6 hit Arizona: “Right now, Arizonans are safer at home. And when you’re away from
7 home, don’t forget to limit social gatherings, stay six feet from others, wash your hands
8 and wear a mask.”¹ These restrictions were necessary for the protection of the public
9 health, but had an undeniable effect on voter registration efforts. Enforcement of the
10 Voter Registration Cutoff in the wake of them severely burdens Plaintiffs’ rights to
11 register voters. Similarly, after a hurricane struck Florida and Georgia a month before
12 the 2016 general election, the plaintiffs did not challenge the states’ evacuation orders;
13 rather, they successfully attacked the constitutionality of those states’ voter registration
14 cutoffs, as applied in the wake of the disaster. *See* Pl. Br. (Dkt. 2) at 10.

15 The severe burden on Plaintiffs’ rights is evident not only in Plaintiffs’ voter
16 registration data, *id.* at 6-7, but also Defendant’s own publicly-available statewide
17 registration data, which clearly shows that from January to August 2020, Arizona netted
18 only 62,565 new registrations, as compared to 146,214 during the same eight-month
19 period in 2016, Salzman Decl. ¶¶ 1-7, Exs. A-D. It is a red herring for Defendant to
20 argue “more Arizonans are registered to vote in 2020 than were registered to vote . . . in
21 2016.” Dkt. 16 at 12. Arizona’s total population is larger in 2020 than in 2016,² so
22 necessarily there are more Arizonans registered in 2020. Defendant’s own numbers
23 show the *rate* of registration indisputably dropped during the pandemic.³

24 ¹ Office of the Governor, *Governor Ducey: “Arizonans Safer At Home”* (June 25,
25 2020), <https://bit.ly/2VljtyF> (Salzman Decl. Ex. E).

26 ² *See* Office of the Governor, *New Census Report Ranks Arizona Third in*
27 *Percentage Growth Rate* (Dec. 31, 2019), <https://bit.ly/2QfykJ0> (Salzman Decl. Ex. G).

28 ³ The Governor’s and Committees’ argument that some ballot petition circulators
managed to collect the required signatures is another red herring. Petition circulating
and voter registration are apples and oranges: the former lending itself to socially distant

1 This severe burden on Plaintiffs’ constitutional rights confers standing.
2 Defendant mistakenly attributes Plaintiffs’ injury to their inability to meet their own
3 voter registration goals. Defendant confuses the symptoms of Plaintiffs’ injury for the
4 injury itself. Plaintiffs are unconstitutionally burdened by Defendant’s enforcement of
5 the Voter Registration Cutoff because it is preventing them from registering thousands
6 of eligible Arizonans. That they are unable to meet their own target registration goals is
7 just evidence of the severity of this burden.⁴

8 Finally, the data cited in Defendant’s papers and undisputed evidence in the
9 record prove that Plaintiffs’ injury is redressable. Defendant’s own Elections Director
10 reports an increase of 234,266 registered voters since January 1, 2020. Dul Decl. (Dkt.
11 18-3) ¶ 10. Considering the State netted only 62,565 registered voters between January
12 and August, Salzman Decl. ¶ 7, the State clearly saw a massive spike of registrations—
13 approximately 171,710 additional voters—*after* restrictions were lifted in August.
14 Indeed, Defendant highlights in her papers that 45,024 new or updated registrations
15 were logged on September 22, 2020 alone. Dul Decl. ¶ 11. Defendant’s data shows an
16 average of 2,960 additional voters registered each day since the restrictions lifted; if that
17 rate continues, approximately 65,120 additional voters will be registered between
18 October 6 and 27, 2020. Salzman Decl. ¶ 8. Plaintiffs estimate their two organizations
19 alone will be able to register approximately 2,000 voters in the extension period, and
20 their broader coalition will be able to register over 25,000. Bravo Suppl. Decl. ¶ 3;
21 Bolding Suppl. Decl. ¶¶ 2,7.

22
23 signature drives with people who “are already civically engaged,” as opposed to the
24 latter, which is “time-consuming,” involves a “detailed registration form,” and “almost
25 always entails a lengthy conversation with the potential voter,” who is necessarily not
26 familiar with the registration process. Bravo Suppl. Decl. ¶ 16. Tellingly, these non-

27 parties do not cite any data to dispute the *drop in voter registration* established by
28 Defendant’s own data.
⁴ MFV and ACFC have organizational standing because the record demonstrates
their missions are frustrated by enforcement of the Voter Registration Cutoff and they
diverted resources to respond. Pl. Br. (Dkt. 2) at 4-5. In any event, Plaintiff Ulises
Ventura clearly has standing as an individual.

1 The *Anderson Burdick* analysis is fact-specific; Plaintiffs’ strong showing of
2 burden distinguishes this case from those cited by Defendant and the Committees.⁵

3 **II. THERE IS NO EVIDENCE OF COMPELLING STATE INTEREST**

4 Because the evidence establishes a severe burden on Plaintiffs’ constitutional
5 rights, Defendant must prove that strict enforcement of the Voter Registration Cutoff is
6 “narrowly drawn to advance a state interest of compelling importance.” *Burdick v.*
7 *Takushi*, 504 U.S. 428, 434 (1992) (citation omitted). Although this Court specifically
8 directed Defendant to focus their briefing on this issue, tellingly, neither Defendant, the
9 Governor, nor the Committees did so. All three briefly asserted boilerplate state
10 interests without evidence.

11 The only specific concerns identified are already-existing features of Arizona
12 election procedures, even without an extension of the Voter Registration Cutoff. *First*,
13 there is no showing of voter confusion: voters who registered by the original deadline of
14 October 5 are unaffected by the extension; everyone else will either benefit from the
15 extension or will remain unregistered just as they are without an extension. *Second*,
16 there is no showing that Arizona cannot process registrations while voting is going on;
17 the Secretary tellingly does not and cannot say that all registrations filed by October 5
18 would be processed by October 7 when early voting begins and does not dispute that
19 Arizona already processes some registrations until 7:00 pm on election day. Pl. Br.
20 (Dkt. 2) at 11; Martin Decl. (Dkt. 2-3) ¶¶ 37-39. *Third*, Arizonans can request to vote by
21 mail at any time by making a one-time request for a ballot-by-mail; this means that,
22 with or without a registration extension, some voters seeking to vote by mail will miss

24 ⁵ In *New Georgia Party v. Raffensperger*, for example, the evidence of burden was
25 weak, consisting of data from a different State and ignoring Georgia’s low absentee
26 ballot rejection rates during COVID-19. No. 20-13360-D at 4-5 (11th Cir. Oct. 2, 2020).
27 Similarly, in *Common Sense Party v. Padilla*, the burden was weak because plaintiffs
28 had made only “minimal progress” in gathering signatures before the pandemic ever hit.
No. 20 Civ. 01091, 2020 WL 3491041 at *6 n.6 (E.D. Cal. June 26, 2020).

1 the deadline for this year.⁶ *Fourth*, Arizona’s residency requirement is already enforced
2 by requiring voters to show proof of Arizona residency when they vote, not when they
3 register.⁷ *Fifth*, Arizonans are already required to submit proof of citizenship to register
4 to vote in state and local elections; if they fail to do so, they vote on a provisional ballot
5 and their vote is counted only if they timely supply proof of citizenship. The same
6 process will apply to voters who register during the extension.⁸ Martin Decl. ¶ 41.

7 In short, unlike in cases cited by Defendant and the Committees,⁹ here, there is
8 no evidence that an extension of the Voter Registration Cutoff would prevent elections
9 officials from handling these existing features of Arizona election procedure the same
10 way they do every other year in the absence of an extension. *See id.* ¶¶ 19-22, 35-49.
11 The only difference is that an extension will mean they apply these procedures for the
12 benefit of more voters. “Elections administrators are accustomed to meeting urgent
13 needs, particularly in the interest of voter enfranchisement. It is the nature of the work.”
14 *Id.* ¶ 34; *see also id.* ¶ 20.

15 Finally, as this Court already held, the County Recorders are not necessary
16 parties. *Arizona Democratic Party v. Reagan*, No. 16 Civ. 03618, 2016 WL 6523427, at
17 *6 (D. Ariz. Nov. 3, 2016) (Logan, J.). Nor does the remedy require any changes to
18 Arizona law or Elections Manual. If the Court finds enforcement of the Voter
19 Registration Cutoff unconstitutional as applied this year, Defendant will be compelled
20

21 ⁶ Ariz. Sec’y of State, *Voting by Mail: How to Get a Ballot-by-Mail*,
22 <https://azsos.gov/votebymail> (last visited Oct. 5, 2020) (Salzman Decl. Ex. H).

23 ⁷ Ariz. Sec’y of State, *Voting In This Election*, [https://azsos.gov/elections/voting-](https://azsos.gov/elections/voting-election)
24 [election](https://azsos.gov/elections/voting-election) (last visited Oct. 5, 2020) (Salzman Decl. Ex. F).

25 ⁸ *See also* Ariz. Sec’y of State, *Proof of Citizenship Requirements*,
26 <https://azsos.gov/elections/voting-election/proof-citizenship-requirements> (last visited
27 Oct. 5, 2020) (Salzman Decl. Ex. I).

28 ⁹ For example, in *Thompson v. Dewine*, defendant introduced evidence that “the
witness and ink requirements help prevent fraud by ensuring that the signatures are
authentic. And the deadlines allow them time to verify signatures in an orderly and fair
fashion, while also providing initiative proponents time to challenge any adverse
decision in court.” 959 F.3d 804, 811 (6th Cir. 2020). No such evidence exists here.

1 by Court order to direct the County Recorders to continue doing what they already are
2 doing, for three more weeks, so that thousands more voters can be registered.

3 **III. PURCELL DOES NOT APPLY TO REGISTRATION EXTENSION**

4 “[T]he factors that animated the Supreme Court’s concern in *Purcell* are not
5 present” here because “the injunction at issue here does not involve any change at all to
6 the actual election process.” *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 368
7 (9th Cir. 2016). An extension of the voter registration period would simply allow more
8 people to register and vote using the processes already in place. “[I]n our case, in
9 contrast to *Purcell*, an injunction will not confuse election officials or deter people from
10 going to the polls for fear that they lack the requisite documentation. The election
11 process is unaffected.” *Id.* Judge Rayes reached the same conclusion a few weeks ago
12 when he enjoined the State to extend the cure deadline for unsigned vote-by-mail
13 ballots, reasoning: “Plaintiffs are not asking election officials to devise new rules out of
14 whole cloth. They are asking those officials to continue applying the same procedures
15 they have in place now, but for a little longer.” *Ariz. Democratic Party v. Hobbs*, No. 20
16 Civ. 1143, 2020 WL 5423898, at *13 (D. Ariz. Sept. 10, 2020).

17 *Purcell* was also a facial challenge, not an as-applied challenge brought in
18 the midst of the most severe pandemic the world has seen in over a century. *See*
19 *Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 770 (W.D. Wis. 2020)
20 (rejecting *Purcell* argument because “some accommodation is necessary to preserve
21 citizens’ right to vote amidst this unprecedented public health crisis”); *People Not*
22 *Politicians Or. v. Clarno*, No. 20 Civ. 1053, 2020 WL 3960440, at *7 (D. Or. July 13,
23 2020) (rejecting *Purcell* argument because “when these rules collide with
24 unprecedented conditions that burden First Amendment access to the ballot box, their
25 application must temper in favor of the Constitution.”).¹⁰

26
27 ¹⁰ The Supreme Court recently declined to apply *Purcell* to strike down an
28 extension of time for the mailing of absentee ballots; it applied it only to that part of the
district court’s decision that modified election procedures for the counting of absentee

1 Finally, neither *Purcell* nor laches applies because there was no undue
2 delay. “In the context of election matters, the laches doctrine seeks to prevent dilatory
3 conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing
4 party or the administration of justice.” *Democratic Nat’l Comm. v. Ariz. Sec’y of State’s*
5 *Office*, No. 16 Civ. 01065, 2017 WL 11503449, at *2 (D. Ariz. Apr. 13, 2017) (citation
6 omitted). The undisputed evidence is that Plaintiffs brought this case as soon as it
7 became clear that an extension would allow thousands of additional people to be
8 registered. *See* Bravo Decl. (Dkt. 2-1) ¶¶ 34-38; Bolding Decl. (Dkt. 2-2) ¶¶ 22-31.
9 While their injury is now clearly redressable (*supra* Part I), it would not have been had
10 they brought the case earlier. Nor has there been any showing of prejudice. *Supra* Part
11 II.

12 **IV. POLITICIZED INTERVENTION SHOULD BE DENIED**

13 “[A]n applicant seeking to intervene as of right has the burden to show that all
14 four elements are met.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647
15 F.3d 893, 897 (9th Cir. 2011) (citations omitted). The Committees fail to carry their
16 burden on two elements: significant protectable interest and inadequate representation.

17 Their asserted interest—“winning election or reelection” (Dkt. 15 at 4)—is not
18 sufficient because “[t]he requirement of a significantly protectable interest is generally
19 satisfied when the interest is protectable under some law.” *Arakaki v. Cayetano*, 324
20 F.3d 1078, 1084 (9th Cir. 2003), *as amended* (May 13, 2003) (internal quotation marks
21 omitted). No law protects the right to win an election. An extension of the voter
22 registration period does not favor or disadvantage any particular political party. The
23 proper forum for defending the Committees’ interest in electoral victory is on the
24 campaign trail, not in the courtroom.

25 Even if the Committees had a legally cognizable interest—which they do not—
26 Defendant adequately represents such interests. “The most important factor in assessing
27
28 ballots. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207-08
(2020).

1 the adequacy of representation is how the interest compares with the interests of
2 existing parties.” *Citizens for Balanced Use*, 647 F.3d at 898 (internal quotation marks
3 and citation omitted).

4 *First*, there is “an assumption of adequacy here when the government is acting on
5 behalf of a constituency that it represents, which must be rebutted with a compelling
6 showing.” *Id.* (quotation marks and citation omitted). As this Court noted in *Reagan*, the
7 Secretary of State “is Arizona’s chief election officer who is responsible for overseeing
8 and administering elections in Arizona.” 2016 WL 6523427, at *6 (citing Ariz. Rev.
9 Stat. § 16-142(A)). Because Defendant is the State’s highest elections official, a
10 presumption of adequacy of representation exists.

11 *Second*, adequacy of representation is further presumed because Defendant and
12 the Committees seek the same ultimate objective: to defend the Voter Registration
13 Cutoff. *See Citizens for Balanced Use*, 647 F.3d at 898 (citation omitted) (holding that
14 adequacy is presumed when an intervenor and existing party “share the same ultimate
15 objective”). Here, according to the Committees, “both [Defendant] and the Proposed
16 Intervenors take the position that the voter registration deadline . . . is constitutionally
17 sound and fully enforceable.” Committees’ Br. (Dkt. 15) at 7. The Committees’ briefing
18 makes the same arguments Defendant’s makes. *See* Def. Opp. (Dkt. 16) at 15 (arguing
19 that “[t]he Deadline does not violate the Constitution.”).

20 *Third*, “[b]ecause [the Committees] and [Defendant’s] interests are essentially
21 identical, the [Committees] may only defeat the presumption of adequate representation
22 with a ‘compelling showing’ to the contrary.” *Perry v. Proposition 8 Off. Proponents*,
23 587 F.3d 947, 952 (9th Cir. 2009) (citation omitted). The Committees’ speculation that
24 they may have a different motivation than Defendant fails to carry this heightened
25 burden. “[M]ere differences in litigation strategy are not enough to justify intervention
26 as a matter of right.” *Id.* at 954 (quotation marks and citation omitted).¹¹ As Chief Judge

27 ¹¹ The Committees’ claim that Defendant may not pursue an appeal of an adverse
28 ruling is entirely speculative and fails to rebut the presumption of adequacy. *See*

1 Snow found last month in rejecting a similar politically-motivated intervention by the
2 Committees, the Secretary of State “is more than capable of defending the
3 constitutionality of the [Voter Registration Cutoff] without the Committees’ assistance.”
4 *Yazzie v. Hobbs*, No. 20 Civ. 8222, Dkt. 45 at 7 (D. Ariz. Sept. 16, 2020).

5 The Court should deny permissive intervention for the same reasons. *See United*
6 *States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying
7 permissive intervention where the government party to the case made the same
8 arguments as the intervenors, and would adequately represent the intervenors’ interests).

9 **V. WITHOUT AN EXTENSION, THERE WILL BE IRREPARABLE HARM**

10 Absent an extension of the Voter Registration Cutoff, Plaintiffs will suffer
11 irreparable harm. Defendant’s data shows approximately 65,120 new voters would be
12 registered with an extension until October 27, 2020. Salzman Decl. ¶ 8. Plaintiffs’
13 organizations alone will be able to register approximately 2,000 and their broader
14 coalition will be able to register over 25,000. Bravo Suppl. Decl. ¶ 3; Bolding Suppl.
15 Decl. ¶¶ 2,7. If an extension is not granted, Plaintiffs’ voter registration efforts will be
16 halted by the State. At best, Defendant articulated a minimal burden which is wholly
17 insufficient to justify severely burdening Plaintiffs’ rights and the disenfranchisement of
18 thousands of voters. The balance of the equities favors Plaintiffs, as well as the public’s
19 interest in expanding the voting franchise.

20 DATED this 5th day of October, 2020.

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23 By s/ Zoe Salzman

24
25 *Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (“[I]f the
26 mere possibility that [Defendant] *might* decline to appeal were sufficient to rebut the
27 presumption of adequacy, then nearly every case involving [Defendant] would be
28 subject to intervention as of right.”). Defendant has every right to decide not to appeal
based on the uncertainty that an appeal would create during the extended registration
period—a decision the Committees have no right to override.

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