Appeal No. 20-16932

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA, *et al.*,

Plaintiffs and Appellees,

vs.

KATIE HOBBS,

Defendant and Appellee, and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants and Appellants.

On Appeal from the United States District Court
for the District of Arizona
Hon. Steven P. Logan
Case No. 2:20-CV-01903-SPL

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR A STAY PENDING APPEAL

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I. The District Court's Impermissible Injunction Irreparably Injures the Republican Committees by Causing Resource Diversion

Plaintiffs-Appellees cannot have it both ways: either a diversion of organizational resources to address the effects of a challenged governmental act or practice is an irreparable injury, or it is not. The Republican Committees, and controlling case law, maintain that it is, *see generally Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) (finding that "significant change in [organizations'] programs and a concomitant loss of funding" were irreparable injuries because the first harm "is an intangible injury" and organizations had "no vehicle for recovery" of monetary damages). But if it is not, then the Plaintiffs-Appellees themselves lack any irreparable injury that could warrant injunctive relief.

The Republican Committees introduced in the district court uncontroverted evidence that each additional week during which the voter registration deadline is extended will cost the Republican Committees approximately $37,000. The Republican Committees' personnel will also expend substantial time and resources developing alternative voter registration, get-out-the-vote drives, and Election Day operation strategies to account for the new reality and educating voters, volunteers, staff, and contractors regarding the change in Arizona's election rules. *See* Dkt. 17 (Decl. of Brian Seitchick, ¶¶ 7-8), attached hereto as Exhibit 1. In other words, the irreparable harm exacted on the Republican Committees as a consequence of the

district court's improperly issued injunction is precisely the same species of irreparable injury that undergirds the Plaintiffs-Appellees' own claim for injunctive relief.

Plaintiffs-Appellees proffer two responses. First, they contend that any post-injunction exertions by the Republican Committees are discretionary and not compelled by the district court's order. Preliminarily, the same voluntariness attended the Plaintiffs-Appellees' own alleged diversion of resources; they are not required by law or court order to conduct voter registration. More to the point, legal compulsion is not a prerequisite to an organizational injury in any event. *See Equal Rights Ctr. v. Post Props, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) ("That the [organization] voluntarily, or 'willful[ly]' diverts its resources, however, does not automatically mean that it cannot suffer an injury sufficient to confer standing."); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019) ("What matters is whether the organizations' activities were undertaken because of the challenged law, not whether 'they are voluntarily incurred or not.'").

Second, citing Twitter, Plaintiffs-Appellees note that the Republican Party has successfully registered additional voters in recent days. *See* Response at 6. That is precisely the point; these registration efforts entail substantial investments of scarce resources that Republican organizations had previously allocated to other election-related activities but redirected as a consequence of the district court's improperly

issued injunction. *See* Ex. 1 (Seitchik Decl. ¶¶ 7-8).

Plaintiffs-Appellees' facile suggestion that "a few more days of voter registration" does not irreparably injure "anyone," Response at 2, obscures the operative legal inquiry and undermines their theory of their own alleged injury. The desirability of voter registration as a normative aspiration is both undisputed and irrelevant. Voter registration, like every other facet of the electoral process, must be structured by neutral and generally applicable statutory parameters devised by elected representatives. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (emphasizing that "ability of States to operate elections fairly and efficiently"); *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (recognizing states' "important regulatory task of ensuring that elections are fair and orderly"). When those statutory predicates are capsized at the last minute by inappropriate judicial intervention, organizations that operate in the electoral sphere (such as the Republican Committees) are impelled to recalibrate their activities and to redirect funds and manpower. This frustration of purpose and diversion of resources is a cognizable harm, and is the conceptual underpinning of the Plaintiffs-Appellees' own claim of irreparable injury. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (finding injury where challenged government action "caused [organizations] to expend additional resources, and that 'but for' the [government action] they would have spent these resources to accomplish other

aspects of their organization missions"). The Republican Committees accordingly have made more than the requisite showing of "probable" harm in the absence of a stay. *See Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

II. The Republican Committees Are Likely to Succeed on the Merits

A. The Injunction Cannot Remedy Past Diversions of Resources

The Plaintiffs-Appellees' internally incoherent theory of organizational standing obscures that they themselves have never established any injury that is both traceable to state action and redressable by injunctive relief. The district court hence was never vested with subject matter jurisdiction over their claims in the first place, rendering the resulting injunction void. *See Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."). Even at this late date, the Plaintiffs-Appellees remain unable to answer the question upon which their Article III standing pivots: how does the ***prospective*** injunction they obtained from the district court redress the ***past*** diversions of organizational resources that undergird their claim of injury? The three anemic arguments proffered in Plaintiffs-Appellees' Response only underscore the absence of any redressable injury.

First, Plaintiffs-Appellees contend that the injunction has "enable[ed] Plaintiffs to continue to register voters for this election." Response at 14. While the

Republican Committees do not dispute that the Plaintiffs-Appellees' organizational missions include the registration of voters, a hindrance of "abstract social interests" is not a cognizable injury. *Havens*, 455 U.S. at 379. Rather, the fulcrum of organizational standing is not only a purported frustration of purpose but **also** "a diversion of resources" in response to the challenged governmental action. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Plaintiffs-Appellees, however, allege only that they have had to redirect manpower and resources to voter registration because of difficulties created by the pandemic. Even if those averments are true, they do not illuminate how a prospective injunction to extend the registration deadline could or would spare the Plaintiffs-Appellees from such resource diversions going forward. Indeed, if anything, Plaintiffs-Appellees apparently are directing even *more* resources to voter registration as a consequence of the district court's order.

Second, Plaintiffs-Appellees' organizational mission of registering voters has never been impeded by any state action at all; they have always been free to register individuals twenty-four hours a day, seven days a week—with or without an injunction. Perhaps recognizing that the absence of any governmentally-imposed encumbrance on voter registration is fatal to their Article III standing, the Plaintiffs-Appellees now insist that their organizational purpose actually is "to register voters *for the November 3 general election*." Response at 14. While Plaintiffs-Appellees

may desire to register a certain number of individuals in the 2020 election, there is no evidence that this temporal benchmark is a constitutive component of their organizational mission or that they will permanently terminate their registration activities after the 2020 election period. More fundamentally, Plaintiffs-Appellees' position on this point is untenable; it would render Article III standing an endogenous and circular concept, rather than an external constitutional standard. An organization cannot engineer standing by formulating impracticable internal goals and then casting as a state-inflicted "injury" the inability to meet them because of a generally applicable statutory deadline.

Third, Plaintiffs-Appellees contend that Plaintiff Ulises Ventura has independent standing for himself—*i.e.*, he does not claim third party standing—because the statutory deadline "impair[ed] his ability to register voters for the upcoming election." Response at 14. But Mr. Ventura undisputedly can register individuals to vote irrespective of whether the district court's injunction remains in place. The novel notion that Mr. Ventura has a constitutional right to register any given individual by a *particular date* in order to participate in a *particular election* finds no sustenance in the law or logic.

B. The Statutory Registration Deadline Did Not "Severely" Burden Any Person's Voting Rights

The Plaintiffs-Appellees' defense of the district court's finding that the October 5 voter registration deadline exerted a "severe" burden on First and

Fourteenth Amendment rights is afflicted with three substantial flaws.

First, Judge Logan's application of the *Anderson-Burdick* framework is subject to this Court's *de novo* review—not the deferential "clear error" rubric. *See, e.g.*, *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (applying *de novo* review in context of *Anderson-Burdick* analysis); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1013 (9th Cir. 2002); *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (district court's characterization of burden is "not a factual finding, but a legal determination subject to de novo review.").

Second, the Plaintiffs-Appellees deride as "speculation" the premise that only certain subsets of the Arizona population may have been severely burdened in registering to vote, Response at 11—but that is in fact the supposition of the district court, not the Republican Committees, *see* Dkt. 35 at 7-8 ("Registering to vote has never been easier for *some*, though others are not so fortunate."). This point is important. While not a model of clarity, the district court's order appears not to find that the statutory deadline imposed a severe burden on prospective registrants *generally*, and indeed there is no record evidence to sustain such a conclusion in any event. Rather, it appears to posit only that certain demographic or geographic population subsets (which are never identified with any particularity) were severely burdened by pandemic related exigencies. Such a determination, even if true, is not a valid predicate for a statewide injunction categorically prohibiting enforcement of

the October 5 deadline. *See Crawford v. Marion County*, 533 U.S. 181, 199 (2008) ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."); *Husted*, 834 F.3d at 631 ("[T]he record does not establish that [the challenged statute]—as opposed to non-state-created circumstances—*actually makes voting harder* for African Americans. Plaintiffs do not point to any individual who . . . will be precluded from voting."); *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019).

Third, Plaintiffs-Appellees' heavy reliance on cases featuring ballot measure petitions is unavailing. The cited cases all involved jurisdictions that had enacted "stay at home" measures restricting First Amendment activities, such as petition circulation and voter registration. *See, e.g.*, *Fair Maps Nevada v. Cegavske*, 320CV00271MMDWGC, 2020 WL 2798018, at *3 (D. Nev. May 29, 2020) ("[N]one of the orders include a carve-out for activities protected by the First Amendment."); *Essahki v. Whitmer*, 813 Fed App'x 170 (6th Cir. 2020). By contrast, courts have repeatedly considered and rejected arguments of "severe" state-imposed burdens on ballot access in jurisdictions that—like Arizona—expressly exempted First Amendment activities from COVID-induced regulatory restrictions. *See, e.g.*, *Thompson v. DeWine*, 959 F.3d 804, 809 (6th Cir. 2020) (emphasizing that Ohio "specifically exempted conduct protected by the First Amendment from its

stay-at-home orders"); *Arizonans for Second Chances v. Hobbs*, 471 P.3d 607, 619 (Ariz. 2020) (finding no "severe" burden on signature collection).[1] Further, unlike ballot measure committees in Arizona, which can obtain signatures only by direct, in-person contact with prospective signers, Plaintiffs-Appellees retained an array of means and methods to communicate with, and facilitate the registration of, potential voters that did not entail physical interactions (*e.g.*, phone calls, door-drops of registration forms, etc.). In short, the district court erred as a matter of law in finding that Arizona's neutral and non-discriminatory statutory voter registration deadline inflicted a "severe" burden on the constitutional rights of Plaintiffs-Appellees.

C. The State's Vital Interests in Orderly Election Administration and the Prevention of Voter Confusion Justify the Statutory Deadline

In assessing the full nature and extent of administrative upheaval and dislocations precipitated by the district court's order, this Court need not rely on the representations of the Republican Committees; it can simply heed the words of a bipartisan coalition of ten of Arizona's 15 County Recorders. *See* 9th Cir. Dkt. 38 (Brief of *Amici Curiae* Governor Ducey, *et al.*). As the Yuma County Recorder explained to the Secretary of State, the district court's injunction portends "a high likelihood of inadequate supplies and staffing . . . as well as voters receiving multiple

[1] Notably, the Supreme Court stayed two district court decisions that would have modified neutral, non-discriminatory state laws governing ballot access for initiative measures. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Clarno v. People Not Politicians*, -- S. Ct. --, 2020 WL 4589742 (U.S. Aug. 11, 2020).

ballots. There is also the possibility of a voter being able to vote in more than one county due to voter registration backlogs." *Id.* Ex. 1. The Pima County Recorder's Office voiced similar concerns with managing concomitant and competing obligations of processing new registrations while finalizing precinct rosters and disseminating early ballots, noting that "[t]he problem with moving one election deadline is that it impacts dozens of others." *Id.* Ex. 2.

In addition to validating the state's important interests in the enforcement of its statutory voter registration deadline, the County Recorders' brief reinforces that "the public interest is well served by preserving Arizona's existing election laws, rather than by sending the State scrambling to implement and to administer" district court's order. *Arizona Democratic Party v. Hobbs*, --F 3.d --, 2020 WL 5903488, at *2 (9th Cir. Oct. 6, 2020).[2]

CONCLUSION

For the reasons set forth above and in the Motion, the Court should grant an emergency stay of the district court's injunction during the pendency of this appeal.

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[2] In resisting application of the *Purcell* principle, the Plaintiffs-Appellees rely almost singularly on this Court's conclusion in *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366 (9th Cir. 2016), that an injunction prohibiting enforcement of Arizona's ban on ballot harvesting did "not involve any change at all to the actual election process" and thus did not implicate *Purcell*. Response at 15. The Supreme Court, however, apparently disagreed; it stayed the injunction just days later. *See* 137 S. Ct. 446 (2016). Plaintiffs-Appellees' argument that *Feldman* warrants the denial of the Republican Committees' motion hence is as doctrinally unsound as it is puzzling.

Dated: October 10, 2020

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By: */s/ Thomas J. Basile*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 10, 2020

By: */s/ Thomas J. Basile*
Thomas J. Basile

CERTIFICATE OF COMPLIANCE

This Reply complies with the type-volume limitation of Rule 27(d)(2) because it contains 2,396 words, excluding the parts that can be excluded. This response further complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word in 14-point Times New Roman font.

Dated: October 10, 2020

/s/ Thomas Basile
Thomas Basile

Exhibit 1

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota, *et al.*, Plaintiffs, v. Katie Hobbs, in her official capacity as the Arizona Secretary of State, Defendant.	No. 2:20-cv-01903-SPL **DECLARATION OF BRIAN SEITCHIK IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE**

I, Brian Seitchik, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I have reviewed and make this Declaration in support of the Motion to Intervene being filed by the Republican National Committee ("RNC") and the National Republican Senatorial Committee ("NRSC" and, together with the RNC, the "Republican Committees").

3. I am the Regional Political Director for the West Region for the RNC. As Regional Political Director for the West Region, I oversee RNC political activities in several states, including Arizona. That role also requires me to remain informed of the political activities of the NRSC and the Arizona Republican Party.

4. The RNC is the national organization of the Republican Party. A critical part of the RNC's mission is to support Republican candidates at all levels—local, state, and national—in elections throughout the country, including in Arizona. The RNC is an

unincorporated organization registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

5. The NRSC is the Republican Hill committee for the United States Senate, working to elect Republicans to that body. It is registered with the Federal Election Commission as a political party committee.

6. In the 2020 election, the Republican Committees will be supporting a full slate of candidates for local, state, and national offices, up to and including the Office of President. As part of this effort, the Republican Committees engage in voter registration, get-out-the-vote ("GOTV"), Election Day Operations ("EDO") and voter education efforts to encourage and enable their supporters to register and cast effective, valid ballots.

7. The Republican Committees and the Arizona Republican Party have spent substantial resources, worth at least hundreds of thousands of dollars, developing and executing voter registration, GOTV, and EDO plans for Arizona this election cycle.

8. If Arizona's statutory deadline for voter registration is extended, the Republican Committees will be compelled to extend their expensive and labor-intensive voter registration efforts in Arizona, forcing them to expend additional resources or shift existing resources away from other activities designed to encourage voters who have already registered to cast their ballot. Based on the existing efforts and contracts, I estimate that each additional week of additional voter registration will cost the Republican Committees approximately $37,000. The Republican Committees' personnel will also be compelled to expend substantial time and resources developing alternative voter

registration, GOTV, and EDO strategies to account for the new reality and educating voters, volunteers, staff, and contractors regarding the change in Arizona's election rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 2, 2020.

Brian Seitchik
RNC Regional Political Director