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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota; et al.,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as Arizona Secretary of State; et al.,

Defendants.

Case No. CV-21-01423-PHX-DWL

PLAINTIFFS' OPPOSITION TO MOTION TO STAY (ECF NO. 58)

This lawsuit challenges two laws enacted by the Arizona legislature in the wake of the 2020 election that are designed to make it harder for Arizonans to vote. The first (SB 1485) restricts Arizona's permanent early voting list ("PEVL") by purging certain voters—who will disproportionately be voters of color—from the PEVL. The second (SB 1003) irrationally requires unsigned mail-in ballots to be cured by election night, while allowing ballots that contain mismatched signatures an additional five-day cure period.

Plaintiffs bring three claims: (1) that SB 1485 and SB 1003, individually *and collectively*, are an undue burden on Arizonans' right to vote as guaranteed by the First and Fourteenth Amendments and the Supreme Court's *Anderson/Burdick* framework; (2) that SB 1485 and SB 1003 violate the Fourteenth and Fifteenth Amendments because the legislature enacted them with racially discriminatory intent; and (3) that SB 1485 and SB 1003 violate Section 2 of the Voting Rights Act for the same reason. On October 4, 2021, this Court granted the Plaintiff-Intervenors' motion to intervene and their subsequently-filed complaint in intervention makes similar claims.[1]

The Attorney General—but not any of the Defendants who actually administer elections in Arizona—has moved to stay briefing on Plaintiffs' *Anderson/Burdick* claims only and solely as to SB 1003. As explained below, this request should be denied. Most importantly, fragmenting the claims in this case will not serve judicial economy. In addition, a stay will prejudice Plaintiffs, while Defendants will suffer no prejudice if the motion is denied.

BACKGROUND

Arizona has a long history of discrimination and voter suppression. (*See* Compl. ¶¶ 97–126, ECF No. 1.) In 2021, shortly after an election in which voter turnout by voters of color surged and the presidential candidate preferred by Arizonan voters of color won, and amid baseless accusations of improprieties in that election, the legislature passed new

[1] In accordance with this Court's order granting the motion to intervene, which designated the original Plaintiffs as responsible for coordinating the prosecution of this case, Plaintiffs have conferred with Plaintiff-Intervenors, who join in this motion. The term "Plaintiffs" as used throughout this brief accordingly refers to both sets of plaintiffs, collectively.

laws intended to make it harder for Arizonans, and especially Arizonans of color, to vote. This lawsuit challenges two such laws. The first, SB 1485, will purge from Arizona's permanent early voting list any voter who does not cast a mail-in ballot in two consecutive election cycles. (*Id.* ¶¶ 69–84.) The second, SB 1003, requires voters who submit mail-in ballots without a signature to cure the ballots by 7:00 p.m. on election day, irrationally treating unsigned ballots differently than ballots alleged to have mismatched signatures or provisional ballots cast by in-person voters lacking an acceptable form of identification, both of which are permitted a five-day cure period. (*Id.* ¶¶ 85–96; Compl. In Intervention ¶ 52, ECF No. 55.)

At issue in the Attorney General's motion to stay are Plaintiffs' claims that the laws individually and cumulatively impose an undue burden on Arizonans' right to vote, as guaranteed by the First and Fourteenth Amendments. (*Id.* ¶¶ 127–35; *see also* Compl. In Intervention ¶¶ 122–31) (the "*Anderson/Burdick* Claims"). Plaintiffs also bring claims alleging that the laws were enacted by a legislature which knew and intended that the laws would disproportionately impact voters of color, in violation of the Fourteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act (Compl. ¶¶ 136–45; Compl. In Intervention ¶¶ 132–41) (the "Intentional Discrimination Claims").

The Attorney General's motion relates only to the *Anderson*/*Burdick* Claims and only in so far as those claims apply to SB 1003. Nearly two years before the legislature passed SB 1003, Defendant Katie Hobbs, Secretary of State, sought to issue guidance that missing signatures could be cured on the same timeline as mismatched signatures—until 5:00 p.m. on the fifth business day after the election. (Compl. ¶ 85, n.21.) After the Attorney General blocked this guidance over the objection of Secretary Hobbs and several county recorders, the Secretary issued guidance that missing signatures would have to be cured by 7:00 p.m. on election day. (*Id.*; Compl. In Intervention ¶ 80.)

The Arizona Democratic Party, DSCC, and DNC subsequently challenged the 2019 guidance. *Arizona Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1082 (D. Ariz. 2020) ("*Hobbs*"). In September 2020, the district court enjoined that rule, finding that it

unconstitutionally burdened Arizonans' right to vote, and directed Arizona to permit curing of unsigned ballots until 5:00 p.m. on the fifth business day after the election. *Id.* at 1095–96. By the time the case was resolved, it was late in the 2020 election cycle. The Attorney General and Republican Party intervenors appealed and, in September 2020, the Ninth Circuit granted their emergency motion for a stay of the injunction pending that appeal. *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1087 (9th Cir. 2020). A merits panel heard oral argument on July 7, 2021, but has not yet ruled. As a result, the election day deadline for curing missing signature ballots remains operative and inconsistent with the deadline for either mismatched signature ballots or ballots of in-person voters who fail to bring identification with them on election day, both of which are curable for five days after the election.

In the meantime, the Arizona legislature enacted SB 1003, providing as a matter of statute (rather than Secretary Hobbs's guidance) a cure deadline for missing signatures only of 7:00 p.m. on election day.

Because of the pendency of the *Hobbs* appeal in the Ninth Circuit, the Attorney General requests that the Court stay briefing of Plaintiffs' *Anderson/Burdick* Claims—but *only* with respect to SB 1003. (Attorney General's Mot. Stay Resolution of Pls' *Anderson-Burdick* Non-Signature Curing Claim, ECF No. 58 ("AG Br.").) Plaintiffs' *Anderson/Burdick* Claims with respect to SB 1485 would not be stayed, nor would Plaintiffs' Intentional Discrimination Claims. The Attorney General proposes that this partial stay last 60 days, "to be revisited" if the Ninth Circuit has not issued its decision in *Hobbs* by then. (*Id.*)

LEGAL STANDARD

A district court has discretionary power to stay proceedings in its own court. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). In deciding whether to stay a pending proceeding, a court should weigh "the competing interests which will be affected," including "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may

suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962)).

ARGUMENT

I. Judicial Economy Is Not Served By A Stay.

A. *Hobbs* Will Not Resolve Plaintiffs' *Anderson/Burdick* Claims As To SB 1003.

Contrary to the Attorney General's contention, *Hobbs* does not control the outcome of Plaintiffs' *Anderson/Burdick* Claims. Not only is the claim here broader than the claim at issue in *Hobbs*, but Plaintiffs' claims in this lawsuit are based on the electoral system as it exists *today* in the aftermath of the 2020 election and resulting legislation.

In *Hobbs*, the plaintiffs alleged only that the guidance analogous to SB 1003 is an undue burden in violation of the First and Fourteenth Amendments. *Hobbs*, 485 F. Supp. 3d at 1082. Here, Plaintiffs challenge *both* SB 1485 and SB 1003, arguing that they violate the First and Fourteenth Amendments individually *and* cumulatively. (*See* Compl. ¶ 132 ("[SB 1485] and [SB 1003], individually and collectively, severely burden Arizona's voters through each individual restriction and through the cumulative effect of the suppressive measures which impose barriers to voting.").) The claims are not identical. Further, Plaintiffs' claims will be based on a record that reflects what actually happened in the 2020 election—an election with historic voter turnout in which the cure-period deadline may have had a much greater impact than in the past. In addition, this case is about (at least in part) what actually motivated the Arizona legislature in *2021* to enact SB 1003, which was not at issue in *Hobbs*. Thus, a decision in *Hobbs* may be relevant to Plaintiffs' *Anderson/Burdick* Claims, but it will not be dispositive.

In addition, when evaluating the constitutionality of election laws, the election scheme must be considered as a whole. *See Montana Green Party v. Jacobsen*, No. 20-35340, 2021 WL 5173989, at *5 (9th Cir. Nov. 8, 2021) ("In determining the

constitutionality of election laws, we analyze a ballot access scheme as a whole." (citing *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015)); *see also Clingman v. Beaver*, 544 U.S. 581, 607–08 (2005) (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition."). Thus, this Court must consider not only the cumulative effects of SB 1485 and SB 1003. It must also consider the effects of SB 1003—legislation with permanence, not guidance—in Arizona as the electoral system exists now, not as it existed at the time of trial in *Hobbs*.

For all of these reasons, the Ninth Circuit's forthcoming decision in *Hobbs*, while relevant, will not resolve Plaintiffs' *Anderson/Burdick* Claims as a matter of law. Speculation that after the Ninth Circuit's decision in *Hobbs* only "a simple paragraph or two" of analysis will be required to dispose of Plaintiffs' claims in this case is an insufficient basis for a stay. *See Zabriskie v. Fed. Nat. Mortg. Ass'n*, No. CV-13-02260-PHX-SRB, 2015 WL 3712072, at *2 (D. Ariz. Mar. 30, 2015) ("[T]he Court . . . cannot conclude that a stay of the proceedings pending the appeal of *McCalmont* would necessarily promote judicial economy because it is too speculative to determine how, or on what grounds, the Ninth Circuit will rule.").

B. A Stay Will Be Inefficient.

Successive motions to dismiss for failure to state a claim upon which relief can be granted are disfavored when they would not serve the interests of judicial economy and would delay disposition of the case on the merits. *Cf. In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 319 (9th Cir. 2017), *aff'd sub nom. Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019). Here, there is no reason to do this piecemeal. If the Ninth Circuit rules in *Hobbs* in the near term, the parties can submit supplemental briefing at that time on its impact, if any, on this case. The Court is fully capable of applying intervening authority, just as the parties are capable of submitting supplemental briefing. That is why the District of Arizona's Local Rules permit parties to move for reconsideration of any decision when there is new relevant case law. *See* L.R. Civ. 7.2(g)(1).

The Attorney General's proposed alternative is simply wasteful. His approach would have the parties brief the merits of dismissal for two-and-a-half of Plaintiffs' claims now, through three sets of briefs (opening, response, reply); then await the Ninth Circuit's decision, which could be months off; and only then brief one-half of one claim. The most efficient course is for the parties to brief all of the claims now and submit any supplemental authority as necessary, if and when the Ninth Circuit resolves the pending *Hobbs* matter.

II. Plaintiffs Will Be Prejudiced By A Stay.

Plaintiffs will be prejudiced by a stay. Plaintiffs filed this litigation in August 2021 and the Plaintiff-Intervenors moved to intervene shortly thereafter. A 60-day stay "to be revisited" if a decision in *Hobbs* is not issued will hold up this litigation for months, potentially delaying or complicating discovery, and making it difficult for Plaintiffs to adequately protect their rights in advance of future elections.

None of the parties know when a decision in *Hobbs* will be issued. The Ninth Circuit is not required to decide the appeal in any particular timeframe. Although the Attorney General suggests "revisit[ing]" the necessity of a stay at the beginning of 2022 (AG Br. at 8), that merely introduces still more complications. If *Hobbs* is not decided in the next 60 days, the parties will either have to initiate briefing on one-half of Plaintiffs' *Anderson/Burdick* Claims separate from the rest of claims in the case, or the Court will need to pick another arbitrary period for a further stay. Either way, Plaintiffs will be prejudiced because they will be unable to defend their claims as pled—as a cohesive whole. This delay could preclude Plaintiffs from ever obtaining relief.

Moreover, in voting rights cases, the Court must always be mindful that there will come a time in the election cycle when, under the "*Purcell* doctrine," it may be prudentially deemed too late to afford the plaintiffs with any injunctive relief in that election cycle. Indeed, it is this doctrine that the motions panel in *Hobbs* heavily focused on when it issued the stay order that the Attorney General relies upon. *See Hobbs*, 976 F.3d at 1086–87. 2022 is a major election year in which Arizona will hold elections for (among many other offices) a U.S. Senator and representatives to the U.S. Congress. It is also a year in which

the election official defendants will be tasked with running elections under new congressional and state legislative maps.

This Court is thus faced not simply with a question of whether, in ordinary litigation, staying the one claim may promote some efficiencies, but whether, in doing so, the Court risks creating a situation where the delay may ultimately itself operate to deny Plaintiffs' requested relief. In addition, putting off case activity related to any of Plaintiffs' claims could serve to exacerbate the burdens on litigating this case as the state election official defendants are in the midst of preparing for the coming 2022 elections. Denying the Attorney General's motion will ensure that, whatever the Ninth Circuit ultimately does in *Hobbs* (whether that occurs in the next 60 days or later), this matter can proceed in its entirety (including with whatever portion of the *Anderson-Burdick* Claims that may need to still be resolved) expeditiously.

The Attorney General's argument that Plaintiffs have rested on their rights for "102 years" (AG Br. at 6–7) is disingenuous. Arizona instituted no-excuse vote by mail in 1991 and the PEVL was created in 2007. (Compl. ¶ 42.) Until 2019, counties determined whether and how voters could cure mismatched signature and unsigned ballots. *Arizona Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1081–82 (D. Ariz. 2020) (*appeal filed*). The legislature then enacted the five-day cure period for ballots with mismatched signatures, while remaining silent on cure for unsigned ballots. *Id.* Not until 2021 did the Arizona legislature enshrine an irrational distinction between missing and mismatched signatures in the election laws. Plaintiffs hardly could have sued over a law that did not yet exist, let alone did not yet exist in the electoral scheme as it is now. Further, the *Hobbs* plaintiffs sued and litigated the precursor to this irrational law not long after the Secretary first issued that guidance. Given the upcoming 2022 election, it is important that this case move forward at a reasonable pace to allow for a decision in advance of that election.

III. Defendants Will Not Be Prejudiced In The Absence Of A Stay.

The request for a stay is particularly unconvincing because the motion identifies no tangible benefit to keeping half of Plaintiffs' *Anderson/Burdick* Claims in limbo. The only

purported burden that the Attorney General identifies in the absence of a stay is having to brief an issue that he believes has been fully briefed already. (*See* AG Br. at 5–6.) The premise of that argument is incorrect; for the reasons discussed above, the issues here are materially different than in *Hobbs*. But regardless, there is no prejudice. If the Attorney General thinks that he already has briefed these issues, he can make the same arguments he made in *Hobbs* in his motion to dismiss in this case. *See Lockyer*, 398 F.3d at 1112 ("being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity'").

IV. The *Hobbs* Motions Panel's Stay Order Is Not Binding On This Court.

Finally, the Attorney General's implication that the *Hobbs* motions panel's stay decision is binding not only on the Ninth Circuit, but also this Court, is misplaced. That order was issued in the context of emergency briefing on the Attorney General's stay motion in the final weeks leading up to the November 2020 election. It had neither the benefit of full briefing or argument nor the luxury of time to methodically consider the record or relevant authority, and, in its very brief discussion of the merits of that case, elided over much of the complexities that inform undue burden challenges.[2]

Furthermore, the Attorney General's argument ignores that, as the Ninth Circuit has repeatedly and unequivocally emphasized, *Anderson/Burdick* claims are highly fact specific. It may well be that this Court could determine, *based on the evidence presented to it*, that the burden of the missing signature deadline was more significant than the district court found in *Hobbs* (which that court repeatedly stressed was based on the evidence before it, *e.g.*, 485 F. Supp. 3d at 1081, 1083, 1089, 1092), which would then fundamentally change the nature of the showing that the state would have to make to avoid judgment for

[2] Although not squarely at issue here, the Attorney General's continued argument that this order may be binding on the merits panel is refuted by very recent precedent of the Ninth Circuit itself. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 & n.3 (9th Cir. 2021) (confirming rule that a merits panel is bound by an earlier motions panel's answers to "[1] pure questions of law [2] for which preexisting binding authority necessarily compelled the answer").

the Plaintiffs. *See Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018).[3]

Each case must be judged on its own merits; and postponing discovery on the *Anderson/Burdick* claim here, while the parties await the Ninth Circuit's decision on the merits in *Hobbs*, unduly hampers Plaintiffs' ability to build a record showing that the burden is more significant (and consequently requires a more demanding showing from the state to justify the rule, thus rendering it invalid even if the Ninth Circuit *were* to reverse the district court's permanent injunction in *Hobbs*). Indeed, in *Cooper v. Harris*, the U.S. Supreme Court considered a case that challenged the North Carolina congressional map as a racial gerrymander. The exact same claim proceeded, on slightly different evidence, before a federal district court and a North Carolina State Court. The Supreme Court was clear: The plaintiffs in each case are entitled to make their case and courts of review must be highly deferential to the fact findings of the lower courts, which are necessarily based on the record before that court—not some other court considering similar or even identical claims. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). This logic and precedent similarly strongly counsels against granting the Attorney General's motion to stay.

[3] To be clear, Plaintiffs do not concede that the motions panel's application of *Anderson/Burdick* was correct, including its conclusion that a state need only establish, where a burden is minimal, that a restriction "reasonably advances" its specific interests. Specifically, the panel's conclusion that the state satisfied its burden so long as the restriction avoids *any* additional administrative burden (no matter how small), *Hobbs*, 976 F.3d at 1085, cannot be reconciled with precedent establishing that mere administrative burdens, on their own, *cannot* justify burdening the right to vote. *See*, *e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) ("Although these reforms may result in some administrative expenses . . . , such expenses are likely to be minimal and are far outweighed by the fundamental right at issue.").

CONCLUSION

For the foregoing reasons, this Court should deny the Attorney General's motion to stay.

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Respectfully submitted,

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