No. 20-16759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, et. al.,
Plaintiffs-Appellees.
v.
KATIE HOBBS et al.,
Defendants,
and
STATE OF ARIZONA, *et al.*,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01143

STATE OF ARIZONA'S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL

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Dated: September 18, 2020

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Intervenor-Defendant-Appellant the State of Arizona (the "State") respectfully submits this certificate in connection with its emergency motion to stay the injunction entered by the district court on September 10, 2020 pending resolution of the State's appeal to this Court.

This case involves a signature requirement of Arizona election law. Specifically, in order to vote by mail in Arizona, a voter is required to sign a ballot affidavit where prominently indicated. ADD-134-38. If voters fail to sign their ballot, they may cure the non-signature up until polls close on election day at 7pm. ADD-4, 91. For the vast majority of voters (around 99.9%) this presents no apparent issue. ADD-21. In the 102 years that Arizona has permitted voting by mail, it has never allowed missing signatures to be cured after election day. ADD-128.

This suit challenges Arizona's disallowance of post-election curing and contends that the U.S. Constitution demands the opportunity to cure non-signatures for five business days *after* the election. Plaintiffs' asserted claims under both (1) the Fourteenth Amendment/*Anderson-Burdick* doctrine and (2) procedural due process under the Fourteenth Amendment.

Plaintiffs filed this action on June 10, 2020 and sought a preliminary injunction. ADD-184-221. The district court consolidated the preliminary injunction with trial on the merits under Rule 65, although no evidentiary hearings were conducted. ADD-1-2. Briefing was completed on the motion on August 10.

On September 10, less than two months from the election, the district court entered judgment in favor of Plaintiffs and issued a permanent injunction requiring Defendants to "allow voters who are determined to have submitted an early ballot (referred to in this order as a VBM ballot) in an envelope without a signature the opportunity to correct the missing signature until 5:00 p.m. on the fifth business day after a primary, general or special election that includes a federal office or the third business day after any other election." ADD-24.

The State appealed the district court's judgment and injunction the same day and filed a motion for a stay pending appeal in that court on Sunday, September 13. That motion was denied today (September 18). ADD-328. The State now files this emergency motion for a stay pending appeal in this Court.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature Of The Emergency

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."). Indeed, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the

Legislature… would seriously and irreparably harm" the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The State is thus suffering irreparable harm already as it cannot enforce the election laws enacted by its duly enacted representatives. Nor could this Court reasonably resolve a full-blown appeal in this matter before the upcoming November 3, 2020 general election. The State therefore seeks expedited treatment of its motion for a stay, so that these harms can be avoided. The State further respectfully requests that this Court adjudicate this motion with sufficient time so that the State can seek relief from the U.S. Supreme Court before the general election if necessary.

The harms at issue are particularly significant because, as the Supreme Court has explained, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The district court's injunction was issued on September 10—less than two months before the general election—making these risks substantial.

Here the harms are particularly acute because the potential for voter confusion and chaos is already manifest. Arizona ballots for military and overseas voters began going out on Monday, September 14.[1] Those ballots will therefore start being

[1] *See* Maricopa County Elections Department, *2020 November General Election Plans* at 14 (Sept. 16, 2020) *available at* https://maricopa.hylandcloud.com/198AgendaOnline/Documents/ViewDocument/

returned soon, if not already. In addition, ballots for all voters that have requested mail-in ballots or are signed up for permanent mail-in balloting will go out no later than October 7. *See* A.R.S. § 16-542(C); *see also* https://recorder.maricopa.gov/elections/electioncalendar.aspx. In Arizona, that is nearly 80% of voters. ADD-121.

Based on past elections, some of those ballots will be unsigned. County recorders will therefore be required under Arizona law to assist voters in curing the lack of a signature. ADD-14. And in doing so, they will undoubtedly wish to inform the affected voters of the deadline for curing the non-signatures. But that date is uncertain while the potential for this Court or the Supreme Court granting a stay pending appeal remains open. County recorders will therefore need either to tell voters (1) that they may cure until five business days after the election and risk that this information becoming inaccurate following the grant of a stay (leading to voters not being able to have their votes counted despite reasonably relying on information provided by election officials) or (2) that the date for curing is currently uncertain and depends on litigation that is subject to change, which could easily confuse voters. *Purcell*, 549 U.S. at 4-5.

Every day that these issues remain open is therefore one in which voters may

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be provided with either inaccurate or confusing information. The State therefore requests a decision from this Court as soon as possible, and within 14 days if at all possible.

C. Notification Of Counsel For Other Parties

The State notified all parties of its intent to seek an emergency stay pending appeal this morning.

The State and Plaintiffs have agreed upon the following briefing schedule:

- Friday, September 18: State files its emergency motion for a stay.
- Friday, September 25: Plaintiffs' response to State's motion due.
- Tuesday, September 29: State's reply to response due.

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INTRODUCTION

The injunction issued by the district court below—less than a month before voting begins in earnest in Arizona—is confusing. The district court properly recognized that the burden on voting imposed by the challenged state laws (the "Acts") was "minimal"—repeating that "minimal" characterization *ten times*. Indeed, the burden at issue here is about as low as they come: to vote by mail in Arizona, voters must either (1) sign their name once where prominently indicated when returning their ballot, given about a month of time to do so and exceptionally clear instructions, or (2) cure their failure to sign before polls close on election day. That's it. And for approximately 99.9% of Arizona voters, that presents no apparent issue. Indeed, as the district court aptly observed, "there is nothing generally or inherently difficult about signing an envelope by Election Day." ADD-12.

Moreover, it is undisputed that Arizona law is *more generous* than numerous other states. Of the 31 states that use signatures as the primary method for verifying mail-in ballots, a full 15—*nearly half*—do not permit curing of any kind *whatsoever* for non-signatures. ADD-139. Arizona poll workers, by contrast, will actively assist voters in curing non-signatures or casting votes by alternative means, with the only limitation being that they do so by poll-close time. ADD-175-79; ADD-90-92.

But despite (1) this relative generosity of Arizona law, (2) the admitted and repeatedly observed "minimal" nature of the burden, and (3) recognition of multiple "important" state interests implicated by the State's signature requirement, the district

court nevertheless held—on the eve of voting commencing—that Arizona's refusal to provide a post-election cure period for non-signatures violates the U.S. Constitution, and necessarily did so as a *facial* matter (without ever acknowledging the standard for facial relief). In doing so, the district court upended 102 years of Arizona history in which the State has allowed voting by mail but *never* permitted curing of non-signatures after election day—all without suit by Plaintiffs for 101½ of those years.

The district court committed several legal errors that make reversal on appeal exceptionally likely. Five are particularly obvious. *First*, as explained below, Plaintiffs—who do not include any voters—lack Article III standing.

Second, because the burden of signing was only "minimal," the courts' inquiry "is limited to whether the chosen method is reasonably related to [an] important regulatory interest." *Prete v. Bradbury*, 438 F.3d 949, 971 (9th Cir. 2006). Two such interests are readily apparent and served by the deadline: (1) The State has an uncontested interest in using the signature requirement to "preserv[e] the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Notably, the signature requirement only works if it has a deadline attached to it. ADD-18-19. And there is nothing unconstitutionally unreasonable about an election day deadline—it is, after all, also the uncontroversial deadline for voting in person. Moreover, the State's election-day cure deadline is at least as tailored as the three other states that use it, and patently more tailored than the 15 states that disallow curing entirely—all of which are violating the Constitution under the district court's reasoning. (2) The administrative

burden at issue is more than sufficient to justify the Acts. Indeed, this Court has specifically held that the Constitution does *not* require an opportunity to cure mismatched signatures and that avoiding the "administrative burden" of cure procedures meant that the Oregon law at issue "must be upheld." *Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008). The same result should obtain here.

Third, the district court's non-existent facial analysis of Plaintiffs' facial-only claims fairly demands reversal. Plaintiffs do not include any actual voters and admit that their "claims are facial in nature." ADD-282 n.4. But the district court failed to analyze the claims under the governing *Salerno* standard (or any other facial standard) completely. Because "circumstances exist[] under which the [Acts] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), Plaintiffs' facial-only claims necessarily fail. In particular, if a voter receives three weeks of opportunity to cure a non-signature *pre*-election, the absence of five additional business days post-election cannot conceivably violate the Constitution.

Fourth, the consequence of the district court's injunction is that, once again, "no good deed goes unpunished." *Winter v. NRDC*, 555 U.S. 7, 31 (2008). Specifically, the reasoning is overwhelmingly based on the premise that because the State created a post-election "cure" period for signature mismatches—which is for the qualitatively different task of voters verifying to election officials that the existing signatures are actually theirs, not whether the ballot affidavit was executed at all—it was constitutionally compelled to provide one for non-signatures. ADD-13. But this is a

policy choice for the Legislature, not an invitation for federal courts to micromanage election procedures to ameliorate concededly "minimal" burdens.

In any event, there are entirely reasonable bases to distinguish between signature mismatches and non-signatures. Unlike mismatches (1) the risk of error for no-signature determinations is extremely low and (2) the resulting disqualification is typically the exclusive fault of the voter, not the government. Notably, Plaintiffs' *own cases* made these vital distinctions clear. And it is eminently reasonable to distinguish between documents that appear to be executed and ones that plainly are not.

Fourth, the district court's injunction violates the *Purcell* doctrine and fails to account properly for Plaintiffs' delay in bringing suit. Despite Arizona law precluding post-election curing of non-signatures for over a century, Plaintiffs waited until June of this election year to file suit. And the injunction issued on September 10 is far too close to the general election to survive under *Purcell* doctrine, which notably reversed *unanimously* an injunction issued on October 5, 2006.

Moreover, the State will suffer irreparable harm in the absence of a stay due to the injunction against its laws and the burdens imposed by the injunction. And the balance of equities and public interest strongly favor a stay pending appeal given: (1) the admittedly "minimal" burden on voting rights, (2) Plaintiffs' colossal delay in bringing this suit, and (3) *Purcell* doctrine and the imminent—and completely unnecessary but for Plaintiffs' delay—proximity to the November election.

For all of these reasons, this Court should grant the State's emergency motion for a stay pending appeal.

BACKGROUND

Voting in Arizona. Arizona is a leader among states in making it easy for its citizens to cast votes. ADD-120-26. Arizona does so through a variety of means, including (1) online registration, (2) not requiring any excuse to obtain an absentee/mail-in ballot, (3) making it easy to sign up for permanent mail-in balloting, (4) pre-paying postage, (5) maintaining polling places despite high vote-by-mail usage, (6) placing voting drop boxes in areas with limited mail service, and (7) requiring nothing more than a timely signature to vote by mail (unlike other states that require witnesses or notarization). *Id.* That last requirement is directly at issue here.

Absentee/Mail-In Balloting. For nearly all of its history, *i.e.*, 1918-2020, Arizona has (1) always required a signature to cast a vote by mail and (2) never permitted "curing" of non-signatures after election day. ADD-178.

Signature Mismatches. In 2019, the Arizona Legislature enacted a bill permitting curing of signature mismatches for five business days post-election. ADD-126-27. It did not provide an equivalent cure period for non-signatures. "County Recorders historically viewed these two types of ballot problems differently," however, ADD-127, and have long had different procedures for them. ADD-127-32.

Although Arizona law does not permit post-election curing of non-signatures, it does permit curing up until polls close. ADD-124, 130-32. Its Election Procedures

Manual affirmatively mandates that county recorders take efforts to facilitate such curing. ADD-131. County officials further expend considerable efforts to assist voters in doing so in time. ADD-127-32; 175-78, 314-15, 320-23.

The signature requirement is the subject of extensive notice. Examples and pictures of notices provided to Maricopa County voters are included. ADD-134-37. Although Arizona law has precluded post-election curing of non-signatures for 102 years and the statute providing post-election curing only for signature mismatches was signed into law on April 1, 2019, Plaintiffs did not bring this suit until June 10, 2020, and the district court did not issue an injunction until September 10.

LEGAL STANDARD

In evaluating a motion for stay pending appeal, a court considers "four factors: '(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.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted).

ARGUMENT

I. THE STATE IS LIKELY TO PREVAIL ON APPEAL

A. Reversal Is Likely Because Plaintiffs Lack Article III Standing

As an initial matter, the State is likely to prevail in its appeal because Plaintiffs lack standing. The district court's conclusions that Arizona Democratic Party

("ADP") had established associational and organization standing (ADD-8-10) rest on manifest legal errors, and would also occasion a square circuit split if affirmed.

1. Plaintiffs Lack Associational Standing

To establish association standing, the Supreme Court has repeatedly "required plaintiff-organizations to make specific allegations establishing that *at least one identified member* had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). It is undisputed that Plaintiffs did not identify any members, ADD-236-37, which should have been fatal to their associational standing.

The district court excused this patent violation of *Summers* based on *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). But *Cegavske* at most recognizes an exception "where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury." *Id.* But here that is plainly not the case. Understanding what *pre-election* notices and cure opportunities that Plaintiffs' members received is critical to understanding their claims of injury and the marginal value of *post*-election procedures. And identifying individual members would likely have turned up additional proof of constitutional applications of the Acts that are fatal to Plaintiffs' facial-only claims. *See infra* at 13-14.

Moreover, this Court would have to create a square split with the Eleventh Circuit to affirm the associational standing holding, since that court specifically enforced the *Summers* requirement to political parties in an election case. *Jacobson v. Fla. Sec'y of State*, __ F.3d __, 2020 WL 5289377, at *7 (11th Cir. Sept. 3, 2020).

2. Plaintiffs Lack Organizational Standing

The district court's holding that ADP had organizational standing is also flawed for three reasons. *First*, organizational standing requires "frustration of [the organization's] mission." *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). And ADP has steadfastly refused even to allege it. In particular, Plaintiffs refused to allege (let alone prove) that "voters who fail to sign … [were] more likely to vote for Democratic candidates than Republican candidates." ADD-238. Absent such an allegation, it is entirely (and equally) plausible that the Acts actually *benefit* ADP by costing Republican candidates more net votes. ADP cannot derive organizational standing from statutes that *assist* their mission. Nor would spending money to enhance the amount of that *benefit* confer standing. Not only can an organization not "manufacture the injury by … simply choosing to spend money fixing a problem that otherwise would not affect the organization at all," *Lake Forest*, 624 F.3d at 1088, but moneys spent to enhance the amount of a *benefit* never amount to "injury-in-fact" along the way. *Summers*, 555 U.S. at 494-95.

Second, ADP's resource diversion is *far* too lacking in detail to suffice. Organizational standing requires that Plaintiffs "explain[] what activities [they] would divert resources away from in order to spend additional resources on combatting the [challenged harms]." *Jacobson*, 2020 WL 5289377 at *9. But ADP only alleged that the Acts divert "resources that it would otherwise spend on other efforts to accomplish its mission in Arizona." ADD-189. Given that it only operates *in Arizona*, that is no

actual detail at all, and certainly not remotely "particularized." *Summers*, 555 U.S. at 493.

Third, "[a]n organization's general interest in its preferred candidates winning as many elections as possible is still a 'generalized partisan preference' that federal courts are 'not responsible for vindicating.'" *Jacobson*, 2020 WL 5289377 at *7 (cleaned up) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)). ADP's mere allegation that the Acts "decreas[e] the overall likelihood that ADP will be successful in its mission to help elect Democratic candidates," ADD-188-89, is precisely that sort of "generalized partisan preference."

The district court thus erred in holding ADP had alleged/proved organizational standing and any affirmance would create a square split with the Eleventh Circuit.

B. The District Court's "Minimal" Burden Holding Renders Its Injunction Unsustainable

The district court got one thing quite right: the requirement of either signing a ballot affidavit correctly the first time or curing the error by election day is indeed "minimal"—which it repeated ten times. ADD-13-14, 16, 18-19, 24. Indeed, it is exceedingly minimal—about as low as voting burdens come without being zero. But that holding all but compels a conclusion that the Acts are constitutional. The district court erred in concluding otherwise.

Given the admittedly minimal burden, "the State need not narrowly tailor the means it chooses to promote ballot integrity." *Timmons v. Twin Cities Area New Party*,

520 U.S. 351, 365 (1997). Instead, "there is *no requirement* that the rule is the *only or the best way to further the proffered interests*." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011) (emphasis added). And this Court's inquiry "is limited to whether the chosen method is reasonably related to [an] important regulatory interest," *Prete*, 438 F.3d at 971," and it is "not obliged to consider whether [the challenged laws] could or should be more narrowly tailored." *Pest Comm. v. Miller*, 626 F.3d 1097, 1110 (9th Cir. 2010)

The district court turned that standard on its head. As it acknowledged, signature requirements are useless for securing elections without deadlines attached to them. ADD-13. And Arizona's poll-close deadline is eminently reasonable and certainly amongst the ways of "further[ing] the proffered interests." *Dudum*, 640 F.3d at 1114. Of the 31 relevant states, 15 do not provide any cure opportunity *whatsoever*. ADD-139 & Appendix. The Acts are *far* more tailored than these 15 states—all of whom would have their laws invalidated under the district court's reasoning. And three other states (Georgia, Massachusetts, and Michigan) also use a poll-close deadline for curing non-signatures—and are thus equally tailored. ADD-125. And the remaining states provide a variety of time periods post-election for curing. *Id.*

The states thus show there are a variety of methods to address non-signatures—none of which have ever previously been found unconstitutional. Arizona's approach is plainly reasonable—and indeed the same as, or substantially more generous than, a majority of relevant states. The election-day deadline thus reasonably advances the State's interest in securing its elections. Given the minimal

burden, no more is required. But the district court effectively upended the governing standard by holding the Constitution demands a post-election cure period of at least five business days, thereby effectively holding there was an "*only or … best way to further the proffered interests*." *Dudum,* 640 F.3d at 1114 (emphasis added).

In addition to the State's interest in securing its elections, its important interest in reducing administrative burdens is amply sufficient to sustain the Acts. Indeed, this Court has squarely rejected the proposition that the Constitution demands an opportunity to cure signature mismatches in *Lemons*. 538 F.3d at 1104-05. And, as explained below, the constitutional arguments for non-signatures are far weaker than signature mismatches. *See infra* at 14-16.

Lemons is ultimately controlling here. It held that Oregon's outright denial of *any* opportunity to cure a signature mismatch—*i.e.*, not merely a time-restricted cure period—imposed only a "minimal" burden (a characterization it repeated five times). *Lemons*, 538 F.3d at 1102, 1104. It further rejected both *Anderson-Burdick* and procedural due process arguments, holding that the "administrative burden" of adding cure procedures meant that the law at issue "must be upheld." *Id.* at 1105. And unlike *Lemons*, the State will permit voters to cure non-signatures as long as they do so by poll close. Similarly, the Sixth Circuit recognized that administrative burdens were sufficient to justify "minimally burdensome" regulations without requiring any actual quantification of the burdens. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 634 (6th Cir. 2016).

Ultimately, the district court's reasoning appears to amount to holding that—even where the burdens involved are "minimal"—the Constitution demands whatever "would not impose meaningful administrative burdens." ADD-15-16. But that is directly contrary to the governing standard, *supra* at 9-10, and unworkable in practice. For example, there is no argument that the State's polling hours (6am – 7pm) impose anything more than a "minimal" burden. But it is also likely the case that the State could probably feasibly keep polls open until 7:30pm without imposing a significant administrative burden. Under the district court's reasoning, the Constitution would therefore demand ever-later closing hours, just as it putatively demands a post-election cure period for non-signatures.

The district court's conclusion that the administrative burden was not "meaningful" is also clear legal error. The Roads declaration explains that a post-election cure would impose material administrative burdens and that Pima County's resources are already stretched to their breaking point. ADD-179. Indeed, Pima County already requires all ten days allotted to it to canvass results following primary elections, and there is little or no spare capacity to take on new burdens and still satisfy the ten-day deadline. *Id.* This evidence easily satisfies the State's burden—particularly because when the laws "are not unduly burdensome, the *Anderson-Burdick* analysis never requires a state to actually *prove* 'the sufficiency of the 'evidence.'" *Husted*, 834 F.3d at 632 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)); *accord Timmons*, 520 U.S. at 364 (citing *Munro*, 479 U.S. at 195-96).

That Pima County, Arizona's second most populous county, specifically explained in detail how the burden assigned by the injunction awarded could prevent it from certifying election results on time is far more than what *Anderson-Burdick* requires.[2]

C. The District Court's Failure To Address The Facial-Only Nature Of Plaintiffs' Claims Is Patent Reversible Error

Plaintiffs do not include any voters and Plaintiffs do not assert any as-applied challenges to prior vote disqualifications. Instead, Plaintiffs admit the purely facial nature of their claims. ADD-282 n.4. And the State prominently challenged Plaintiffs' failure to satisfy the governing *Salerno*/"no set of circumstances" test, both in briefing and at oral argument. ADD-99-100; ADD-232.

The district court, however, simply failed to consider whether Plaintiffs were entitled to facial relief—*i.e.*, the only relief they could conceivably obtain on their facial-only claims. Notably, the words "face" and "facial" are simply nowhere to be found in its opinion, even though the court asked a pre-announced question at oral argument that is squarely relevant to the issue. ADD-54-55, 112.

Here, there are myriad constitutional applications of the Act. Where, for example, a voter receives three weeks of opportunity to cure a non-signature *before* an

[2] The district court's injunction also violates *Rosario v. Rockefeller*, which held that there is no constitutional violation where a voter simply fails to act "prior to the cutoff date," (there registering with a party). 410 U.S. 752, 758 (1973). In those circumstances, "if [plaintiffs'] plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps." *Id.* The same result should obtain here as any rejection of a mail-in ballot will also result from the voter's "failure to take timely steps."

election, there is no reason why the Constitution should demand a fourth, post-election cure week. Similarly, where the voter intentionally chose not to sign (*e.g.*, as a protest), there is no reason why the Constitution demands an opportunity to "cure."

The district court's injunction thus rests on a patent error requiring reversal: it granted facial relief without even acknowledging the standard for facial claims.

D. The State Permissibly Distinguishes Between Signature Mismatches And Non-Signatures

Much of the district court's reasoning rests on another flawed premise: because Arizona permits voters to cure suspected signature mismatches for five business days after the election it is constitutionally compelled to provide the same treatment for non-signatures. ADD-13-14, 23. In essence, "no good deed goes unpunished." *Winter*, 555 U.S. at 31. By acting to provide a cure mechanism for one issue, the Arizona Legislature purportedly violated the Constitution by not extending it to all possible signature issues. That is wrong for two reasons.

First, where—as here—the burden on voting rights is minimal, the discretion of the state legislatures is substantial: "Legislatures … should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro*, 479 U.S. at 195-96. That is precisely the case here: the district court held that the impingement on the voting rights of Plaintiffs' members is "minimal"—*i.e.*, not "significant[]." Indeed, this Court has

recognized that states have a "specific interest in incremental election-system experimentation [that can] adequately justify" a law with a minimal burden. *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018). But the district court instead rejected Arizona's incremental step and instead held that adoption of a post-election cure period for signature mismatches effectively compelled the same for non-signatures.

The Arizona Legislature was thus free to provide a post-election cure period for signature mismatches as a matter of legislative grace without being constitutionally compelled to accord equal treatment to the entirely separate issue of non-signatures. That is particularly true as 15 relevant states provide no cure period *at all*. Arizona's more-generous system is clearly constitutional.

Second, there are eminently reasonable, and constitutionally sound, reasons to distinguish between signature mismatches and non-signatures. In particular: (a) given the inherent subjectivity in analyzing signatures and a variety of factors that may cause both signatures and determinations to vary, courts have found the risk of error in signature matching to be material—thus creating value for additional procedural protections; and (b) when votes are disqualified for signature *mismatches*, the voter is often entirely blameless. ADD-17, 247-49. But for completely absent signatures, the disqualification will nearly always be the *exclusive fault* of the affected voters. Notably Plaintiffs' own cases make these distinctions amply clear.[3] And Arizona officials have

[3] For example, *Democratic Exec. Comm. of Fla. v. Lee* (cited at ADD-212, 284), expressly

long distinguished between the two issues. ADD-177-78. But the district court disregarded these critical distinctions.

E. The District Court's Procedural Due Process Holding Is Flawed

The district court also rested its injunction on Plaintiffs' procedural due process claim. ADD-19-22. That holding is erroneous for four reasons.

First, this Court has repeatedly refused to permit freestanding constitutional challenges to electoral regulations outside of the *Anderson-Burdick* framework. Instead, *all* constitutional challenges to election regulations are governed by "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework. *Dudum*, 640 F.3d at 1106 n.15; *accord Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018).

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contrasts mismatches/no-signatures by explaining: "It is one thing to fault a voter if she fails to follow instructions about how to execute an affidavit to make her vote count." 915 F.3d 1312, 1324-25 (11th Cir. 2019). But this case actually *is* that "one thing." In contrast, "signature-match scheme can result in the rejection … *through no fault of the voter*." *Id.* at 1316 (emphasis added).

Similarly, *Saucedo v. Gardner*, (cited at ADD-215, 217, 219) explains that "handwriting analysis … is fraught with error" and that "Plaintiffs seek no more than to … [allow] evidence from the best source−the voter." 335 F. Supp. 3d 202, 219 (D.N.H. 2018) . But determining whether a ballot is signed at all is *not* similarly "fraught with error" and Plaintiffs do not merely seek consideration of new evidence here, but rather to supersede the undisputed evidence of non-signature.

Husted, (cited at ADD-212) is even worse for Plaintiffs. It notably *reversed*, as an *abuse of discretion*, an injunction regarding a "deficient-affirmation remedy," such as "missing or misplaced … voter signature[s]"—*i.e.*, a strikingly similar claim to what is presented here. *Northeastern Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 584, 587 (6th Cir. 2012) (citation omitted). The Sixth Circuit there contrasted "right-place/wrong-precinct ballots" which mostly "result … from poll-worker error," *id.* at 595 (cleaned up) with "voters' failure to follow the form's rather simple instructions" to sign. *Id.* at 598-99.

Second, Plaintiffs' due process claim is actually *substantive* in nature: Plaintiffs do not seek new *procedures* to address whether no-signature determinations were actually correct but instead seek to have votes counted notwithstanding their uncontested violation of Arizona's poll-close deadline. ADD-91-92.

Third, Plaintiffs lack a cognizable liberty interest. "A liberty interest may arise from either of two sources: the due process clause itself or state law." *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009). State law precludes any post-election cure and the Due Process Clause does not supply a liberty interest itself as there is no right to cast an absentee ballot at all. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020).

Fourth, the *Matthews* balancing supports the State. The burden at issue (and thus private interest) is admittedly "minimal"—particularly given the 99.9% compliance rate and that "procedural due process rules are shaped by … the generality of cases." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). Furthermore, given that the rate of error for non-signature determinations is not even alleged to be material, ADD-245, there is little value to additional procedures. Indeed, this Court has held that where the determination is straightforward, the "value of additional procedures and the risk of erroneous deprivation are *quite minimal*." *Brittain v. Hansen*, 451 F.3d 982, 1001 (9th Cir. 2006) (emphasis added).

F. The Balancing Of Harms Rests On Legal Error

The district court also committed legal error and/or abused its discretion in

balancing the harms in three ways:

- In balancing the harms the district court failed to account for the "minimal" nature of the burden *whatsoever*. ADD-23. Instead, the admitted minimal nature of the burden somehow *never* factored into the equitable weighing.

- *T*he district court wrongly discounted Plaintiffs' enormous delay in bringing suit. ADD-23. That court ignored uncontested evidence that Arizona has never permitted post-election curing in 102 years of allowing mail-in balloting. ADD-178. Instead, it focused on the December 2019 approval of the Election Procedures Manual, which it viewed as creating the "unjustified differential treatment" between signature mismatches and non-signatures. ADD-23. But that distinction was actually drawn by *statute* on April 1, 2019, A.R.S. §§ 16-548(A), 552(B); ADD-91-92, which the district court committed legal error in ignoring. In any event, the differential treatment is wholly justified by the differing nature of the defects. *Supra* at 14-16.

- The district court failed entirely to consider the *per se* irreparable harm that states suffer when their laws are enjoined. *Infra* at 19-20.

G. The District Court's Injunction Violates *Purcell* Doctrine

Finally, the injunction runs squarely afoul of *Purcell* doctrine. As an initial matter, the district court's discussion fails to address *the* critical consideration of that doctrine: *i.e.*, the proximity of the upcoming election. ADD-23-24. Indeed, the district court ignored that the election was less than two months away.

The district court appeared to believe that *Purcell* doctrine was categorically inapplicable because Plaintiffs sought to have election officials "continue applying the same procedures they have in place now, but for a little longer." ADD-23-24. But alteration of the status quo by injunction close to an election is the essence of *Purcell* doctrine. 549 U.S. at 4-5. For example, prior to the district court's injunction, county recorders would tell voters that failed to sign ballots that they needed to cure the non-

signature by election day. Now, they presumably will need to tell voters that they may do so by five business days after the election—unless the injunction is stayed by this Court or the Supreme Court. That sort of contradictory information is precisely the sort of "conflicting orders [that] can themselves result in voter confusion and consequent incentive to remain away from the polls," which *Purcell* seeks to avoid. *Id.* And it was entirely avoidable if Plaintiffs had brought suit earlier.

This risk is already upon us. Ballots for military/overseas voters went on September 14, and will shortly start being returned with some unsigned. *Supra* at iii-iv. And ordinary mail-in ballots will be sent to most Arizona voters on October 7. *Id.*

This Court similarly attempted to sidestep *Purcell* in 2016, holding that *Purcell* doctrine did not apply because the injunction issued "preserve[d] the status quo prior to the recent [challenged statute]." *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 369 (9th Cir. Nov. 4, 2016) (en banc). But the Supreme Court disagreed: issuing a stay the next day (a Saturday) without any noted dissent. 137 S. Ct. 446 (Nov. 5, 2016). Thus, *Purcell* cannot be disregarded by simply characterizing the injunction at issue as a preservation or minor modification of the status quo.

II. ARIZONA WILL SUFFER IRREPARABLE HARM ABSENT A STAY

The State is certain to suffer irreparable harm absent 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 Econ. 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). Indeed, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature… would seriously and irreparably harm" the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

Moreover, the district court correctly observed that the State has multiple important interests at stake. ADD-14-18. But it wrongly discounted their applicability, and hence harm to the State. *Supra* at 12-13, 17-18. In particular, the court wrongly discounted evidence that its injunction could prevent counties from meeting applicable election deadlines. *Supra* at 12.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR A STAY

The balance of equities/harms and public interest also both strongly favor a stay. The district court's balancing of the harms was largely a byproduct of its legal errors. *Supra* at 17-18. And once Plaintiffs' harms are properly discounted for their enormous delay and the oft-observed "minimal" nature of the burden, they are sharply outweighed by the State's harms—including the *per se* and "serious" harm that is occasioned any time a state election law is enjoined. *Abbott*, 138 S. Ct. at 2324.

In addition, as explained above, the public interest strongly tips in favor of a stay pending appeal due to *Purcell* doctrine. *Supra* at 18-19.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court stay the district court's injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th 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 and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign

APPENDIX A

Table 1. 50 State Absentee Vote-By-Mail Policies

State	Drop Off at any Early Voting Location	Drop off at any Election Day Voting Location	Ballot Drop - boxes	On-line System to Track VBM ballots	Pays for Post-age	Election Day or Before VBM Receipt Deadline	Signature Matching Problem Cure Period (# of days)	No Signature Cure Period (# of days)
Alabama						✓	NA	NA
Alaska	✓	✓		✓			NA	NA
Arizona	✓	✓	✓	✓	✓	✓	5	ED
Arkansas						✓	NA	NA
California	✓	✓	✓	*	✓		2 days prior to certification	2 days prior to certification
Colorado	✓	✓	✓	✓		✓	8	8
Connecticut						✓	NA	NA
Delaware				✓	✓	✓	0	0
Florida				✓		✓	2	2
Georgia						✓	ED	ED
Hawaii	✓	✓			✓	✓	5	5
Idaho				✓	✓	✓	0	0
Illinois							14	14
Indiana					✓	✓	0	0
Iowa				✓	✓		NA	NA
Kansas	✓	✓	✓		✓		0	0
Kentucky						✓	0	0
Louisiana						✓	NA	NA
Maine						✓	0	0
Maryland				✓			NA	NA
Massachusetts				✓		✓	ED	ED
Michigan						✓	ED	ED
Minnesota				✓	✓	✓	NA	NA
Mississippi						✓	NA	NA
Missouri					✓	✓	NA	NA
Montana	✓	✓	✓	✓		✓	1	1
Nebraska			✓	✓		✓	0	0
Nevada					✓		7	7
New Hampshire						✓	NA	NA
New Jersey							0	0
New Mexico	✓	✓	✓		✓	✓	NA	NA
New York							0	0
North Carolina	✓	✓					NA	NA
North Dakota				✓			0	0
Ohio				✓			7	7
Oklahoma						✓	NA	NA

Oregon	✓	✓	✓	✓	✓	✓	14	14
Pennsylvania						✓	0	0
Rhode Island					✓	✓	7	7
South Carolina				✓		✓	NA	NA
South Dakota						✓	0	0
Tennessee						✓	0	0
Texas							0	0
Utah	✓	✓	✓	✓	✓		7-14	7-14
Vermont						✓	NA	NA
Virginia						✓	NA	NA
Washington	✓	✓	✓	✓	✓		21	21
West Virginia				✓	✓		0	0
Wisconsin					✓	✓	NA	NA
Wyoming						✓	NA	NA
Total State	12	12	10	19	18	34	NA	NA

Note: ED stands for Election Day, NA stands for Not Applicable, these states do not rely on signature verification or signature verification alone to verify ballot eligibility.
* Some counties have ballot tracking.

Source: Atkeson Expert Report, ADD-125-26.