No. 20-16759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, et al.,
Plaintiffs-Appellees,
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,
Defendants,
and
STATE OF ARIZONA, et al.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:20-cv-61143

BRIEF OF 20 STATES AS *AMICI CURIAE* IN SUPPORT OF ARIZONA'S MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are the States of Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia. The Constitution empowers each State to set voter qualifications and determine "The Times, Places and Manner" for the elections the State conducts. U.S. Const. art. I, §§ 2, 4; *id.* amend. XVII. States have compelling interests in running orderly elections, promoting and safeguarding voter confidence, and deterring and detecting voter fraud. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008); *Storer v. Brown*, 415 U.S. 724, 729-30 (1974). Yet while all amici share these common goals, each State has the freedom—and the obligation—to tailor its voting laws to the unique needs of its populace. And under our federal system, the States have a shared interest in defending this autonomy as well.

The district court's erroneous ruling threatens these interests by holding that even the most minimal of burdens that advances numerous important State interests must be invalidated if the State could do a little more to make the burden a touch lighter. But the Framers did not give federal courts a mandate to micromanage State election laws. And the district court's overreach here is all the worse, as it occurred

[1] As chief legal officers of their respective States, amici may file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a)(2).

just weeks before election day. Amici States thus have an interest in this Court staying the injunction and correcting the error below.

SUMMARY OF THE ARGUMENT

Arizona is entitled to a stay for at least two reasons. First, the district court's decision is clearly wrong, and thus Arizona has shown it is "likely to succeed on the merits." *Lair v. Bullock*, 697 F.3d 1200, 12093 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Second, the district court's rewriting of Arizona election law came too close to election day, and thus an injunction should not have issued.

As to the merits, although the court below found—correctly—that the challenged provisions "impose[d] only minimal burdens" on voters, doc. 114 at 13, it nonetheless concluded that Arizona could offer no rational reason for requiring voters to submit a completed, signed ballot affidavit by election day. That was error. The Constitution imposes on States—not courts—the primary responsibility of setting the "manner" of elections. U.S. Const. art. I, § 4, cl. 1. And the Supreme Court has repeatedly emphasized that a State's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983) (collecting cases). Arizona's interests in ensuring the orderly administration of elections, promoting voter participation, preventing voter fraud, and reducing administrative burdens—all reasons the State

offered below—were more than enough to clear the low hurdle under *Anderson-Burdick* when the burden imposed is "minimal."

As to timing, under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the district court's injunction came too late. Election day—the deadline the district court altered—is just weeks away. Yet the district court failed to heed the Supreme Court's warning that "[c]ourt orders affecting elections … can themselves result in voter confusion," *id.* at 4-5, and charged ahead as Arizona's new chief election official. That, too, was error.

ARGUMENT

I. *Anderson-Burdick* Recognizes That States Have Broad Discretion In Implementing Their Constitutional Duties To Set The "Times, Places And Manner Of Holding Elections."

The Constitution is clear that the "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof." U.S. Const. art. I, § 4, cl. 1. States fulfill this obligation in myriad lawful ways; the Constitution does not mandate a particular way of securing the franchise. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969). For instance, even though "there is no constitutional right to an absentee ballot," *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020), every State offers voters some form of absentee voting or vote-by-mail. But they do not do this in the same way. Some States—like Alabama—restrict absentee voting to citizens who will be

absent on election day or who will otherwise have difficulties voting in person. *See* Ala. Code § 17-11-3; *see also Tex. Democratic Party v. Abbott*, No. 20-50407, -- F.3d --, 2020 WL 5422917, at *1 (5th Cir. Sept. 10, 2020) (rejecting challenge to Texas's absentee voting law restricting no-excuse voting to those 65 or older). Other States—like Arizona—choose to allow any voter to vote by mail. A.R.S. §§ 15-541, -542(C). The "wide leeway allowed the States" by the Constitution guarantees States this discretion. *McDonald*, 394 U.S. at 808.

Similarly, States also use different methods to verify the identity of an absentee voter. As Dr. Lonna Atkeson, Arizona's expert witness below, noted in her report, 19 States rely on methods other than signature matching to verify a voter's identification. Doc. 85-3 at 23. Those methods vary from more stringent measures such as "requiring signatures plus additional information such as witnesses or notaries, requiring a copy of an ID, [or] using other information on the outer ballot envelop (e.g. date of birth, address)," to laxer provisions such as "requiring a signature but not doing matching." *Id.* As for the 31 States that rely on signature matching to verify voter identification, 16 States offer voters the chance to cure an unqualified ballot, while 15 do not. *Id.* And of the States that have cure provisions, the stated periods for a voter to remedy the irregularity range from two days postelection (Florida) to 21 days postelection (Washington). Arizona, of course, allows ballot affidavits with mismatched signatures to be cured up to five days

postelection, while requiring that a ballot affidavit with no signature at all be cured by the end of election day. All these decisions are ones the Constitution leaves to each State to make.

The district court thus erred by holding that the Constitution forbids Arizona from requiring voters to submit a completed, signed ballot affidavit by the time the polls close on election day. Oddly enough, in coming to this wrong conclusion, the district court got most of the law right. First, it correctly recognized that Plaintiffs' challenge is reviewed under the *Anderson-Burdick* balancing test, in which the level of scrutiny depends on how severely the challenged regulation burdens the right to vote. Doc. 114 at 10-11; *see Anderson*, 460 U.S at 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Second, it correctly recognized that "there is nothing generally or inherently difficult about signing an envelope by Election Day" and that the burden imposed was therefore "minimal." *Id.* at 12-13. And third, it correctly recognized that Arizona has legitimate State interests in preventing fraud, reducing administrative burdens, ensuring orderly administration of elections, and promoting voter participation. *Id.* at 13, 14, 16, 18.

Having gotten that much right, it is perplexing that the court went awry at the stage of the process that should've been the easiest: determining whether Arizona's election day deadline for curing ballot affidavits missing signatures passes the minimal level of review consonant with a "minimal" burden. *See id.* at 13-19; *see*

also Dudum v. Arntz, 640 F.3d 1098, 1115 n.27 (9th Cir. 2011) (noting "that a sliding-scale balancing analysis, rather than pre-set tiers of scrutiny, apply to challenges to voting regulations"). As the Supreme Court has explained, "when a state election provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788); *see also Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (invoking rational basis review when the burden on voters was "slight"). Under this standard, "[l]egislatures are presumed to have acted constitutionally … and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald*, 394 U.S. at 809.

Considering that the district court itself found that the State's offered reasons—preventing fraud, reducing administrative burdens, ensuring orderly administration of elections, and promoting voter participation—were "important," doc. 114 at 13, 14, 16, 18, the burden incumbent on Plaintiffs should have been far too heavy for them to bear. Instead, the court below second-guessed every rationale Arizona offered and found that the challenged provision could not be rationally related to any legitimate interest because Arizona had chosen to offer different "accommodations … for ballots in envelopes with perceived mismatched signatures." *Id.* at 18.

But it is not irrational for a State to "take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Short*, 893 F.3d at 679 (quoting *McDonald*, 394 U.S. at 809 (internal quotation marks omitted)). So when the Arizona Legislature met last year and enacted a five-day postelection cure period for ballot envelopes with perceived mismatched signatures, it did not have to provide that remedy for every other ballot irregularity.

Nor is it irrational for Arizona to treat different situations differently. And there are important differences between unsigned ballot affidavits and those with mismatched signatures. The former are incomplete ballots—a voter who submits one can still go vote in person—while the latter are complete but can't be counted until the State confirms the voter's identity. *See* doc. 114 at 17.

Finally, it is not irrational for a State—a separate sovereign in our federal system—to eschew the company of other States. The district court faulted Arizona for being "the only state that sets a different deadline for curing a missing signature than a perceived mismatched signature," *id.* at 17-18, and concluded that "Arizona's outlier status … suggests that setting different deadlines for curing these two identification problems is not rational or orderly," *id.* at 18. But States are not bound by the district court's herd requirement. Nowhere does the Constitution say that once

a certain number of States have decided something that all others must fall in line.[2] Instead, the Constitution gives to each State the responsibility of setting the "manner" of its elections. Perhaps the State will choose wisely; perhaps not. But "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Unless a State chooses a "manner" of election that is not simply unwise but which unconstitutionally infringes on the right to vote, courts should yield to the policy choice of the State. That is the case here with Arizona's policy decisions.

II. Injunctions Entered On The Eve Of Elections Harm States, Confuse Voters, And Violate *Purcell*.

Plaintiffs are likely to lose for another reason: *Purcell*. The Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citations omitted), because such orders "can themselves result in voter confusion and consequent incentive to remain away

[2] In any event, the court below was talking about the 15 other States that allow voters—in different ways and within different time periods—to cure mismatched signatures. That's hardly a consensus against Arizona's position.

from the polls," *Purcell*, 549 U.S. at 4-5. The district court's injunction was issued just weeks before the election day deadline—well within the timeframe pertinent to *Purcell*'s admonition. *See, e.g.*, *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705 (U.S. June 25, 2020) (denying application to vacate Sixth Circuit's stay of district court's order suspending Ohio's enforcement of in-person signature requirements, where stay was entered "months away" from election day); *Husted v. Ohio State Conf. of NAACP*, 573 U.S. 988 (2014) (staying injunction entered 61 days before election day).

Indeed, just this year the Supreme Court has already signaled at least six different times that federal courts should refrain from interfering with a State's election rules unless doing so is absolutely necessary. *See, e.g.*, *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (granting stay of district court's injunction relaxing Oregon's election procedures); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. Jul. 30, 2020) (granting stay of district court's injunction relaxing Idaho's rule for ballot initiatives); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 360409 (U.S. Jul. 2, 2020) (granting stay where district court enjoined Alabama's photo identification and witness requirements for absentee voting); *Thompson*, 2020 WL 3456705, *supra*; *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (denying application to vacate Fifth Circuit's stay of district court's injunction requiring Texas to implement no-excuse absentee voting);

Republican Nat'l Comm., 140 S. Ct. at 1208 (granting stay of district court's injunction requiring Wisconsin to count late postmarked absentee ballots for primary election). Though these cases involved challenges to States' election procedures in light of the COVID-19 pandemic, that distinction simply underscores the importance with which the Court views the *Purcell* principle.

In this case, the district court's injunction will cause voter confusion by rendering Arizona's past election guidance void, creating mixed messaging from election officials, and raising in voters' minds questions about what the signature requirements really are. All of that can be avoided by staying the district court's injunction. This Court, therefore, should follow the consistent teaching of the Supreme Court and stay the district court's injunction.

CONCLUSION

This Court should grant Arizona's motion for a stay pending appeal.

Dated: September 22, 2020

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Circuit Rules 27-1(1)(d) and 32-3(2) and in Fed. R. App. P. 29(a)(5) and 27(d)(2)(A). This brief contains 2,319 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, pursuant to Fed. R. App. P. 27(d)(1)(E), this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: September 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System, which will serve an electronic copy on all registered counsel of record.

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