

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARIZONA DEMOCRATIC PARTY;
DEMOCRATIC NATIONAL
COMMITTEE; DSCC,
Plaintiffs-Appellees,

v.

KATIE HOBBS, in her official
capacity as Arizona Secretary of
State,
Defendant-Appellee,

STATE OF ARIZONA,
Intervenor-Defendant-Appellant,

and

EDISON WAUNEKA, in his official
capacity as Apache County
Recorder; DAVID STEVENS, in his
official capacity as Cochise County
Recorder; PATTY HANSEN, in her
official capacity as Coconino County
Recorder; SADIE JO BINGHAM, in her
official capacity as Gila County
Recorder; WENDY JOHN, in her
official capacity as Graham County
Recorder; SHARIE MILHEIRO, in her
official capacity as Greenlee County

No. 20-16759

D.C. No.
2:20-cv-01143-
DLR

Recorder; RICHARD GARCIA, in his official capacity as La Paz County Recorder; ADRIAN FONTES, in his official capacity as Maricopa County Recorder; KRISTI BLAIR, in her official capacity as Mohave County Recorder; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; F. ANN RODRIGUEZ, in her official capacity as Pima County Recorder; VIRGINIA ROSS, in her official capacity as Pinal County Recorder; SUZANNE SAINZ, in her official capacity as Santa Cruz County Recorder; LESLIE HOFFMAN, in her official capacity as Yavapai County Recorder; ROBYN POUQUETTE, in her official capacity as Yuma County Recorder,

Defendants,

REPUBLICAN NATIONAL COMMITTEE;
ARIZONA REPUBLICAN PARTY;
DONALD J. TRUMP FOR PRESIDENT,
INC.,

Intervenor-Defendants.

ARIZONA DEMOCRATIC PARTY;
DEMOCRATIC NATIONAL
COMMITTEE; DSCC,
Plaintiffs-Appellees,

v.

KATIE HOBBS, in her official
capacity as Arizona Secretary of
State,
Defendant-Appellee,

REPUBLICAN NATIONAL COMMITTEE;
ARIZONA REPUBLICAN PARTY;
DONALD J. TRUMP FOR PRESIDENT,
INC.,
Intervenor-Defendants-Appellants,

and

EDISON WAUNEKA, in his official
capacity as Apache County
Recorder; DAVID STEVENS, in his
official capacity as Cochise County
Recorder; PATTY HANSEN, in her
official capacity as Coconino County
Recorder; SADIE JO BINGHAM, in her
official capacity as Gila County
Recorder; WENDY JOHN, in her
official capacity as Graham County
Recorder; SHARIE MILHEIRO, in her
official capacity as Greenlee County
Recorder; RICHARD GARCIA, in his
official capacity as La Paz County

No. 20-16766

D.C. No.
2:20-cv-01143-
DLR

ORDER

Recorder; ADRIAN FONTES, in his
official capacity as Maricopa County
Recorder; KRISTI BLAIR, in her
official capacity as Mohave County
Recorder; MICHAEL SAMPLE, in his
official capacity as Navajo County
Recorder; F. ANN RODRIGUEZ, in her
official capacity as Pima County
Recorder; VIRGINIA ROSS, in her
official capacity as Pinal County
Recorder; SUZANNE SAINZ, in her
official capacity as Santa Cruz
County Recorder; LESLIE HOFFMAN,
in her official capacity as Yavapai
County Recorder; ROBYN
POUQUETTE, in her official capacity
as Yuma County Recorder,

Defendants,

STATE OF ARIZONA,

Intervenor-Defendant.

Filed October 6, 2020

Before: Diarmuid F. O'Scannlain, Johnnie B. Rawlinson,
and Morgan Christen, Circuit Judges.

Order

SUMMARY*

Civil Rights

The panel granted an emergency motion for a stay pending appeal, sought by the State of Arizona and others, in an action challenging Arizona's law requiring early voters to have signed their ballots by 7:00 PM on Election Day in order to have their votes counted.

Arizona requires early voters to return their ballots along with a signed ballot affidavit in order to guard against voter fraud—a requirement the plaintiffs do not challenge. These early ballots must be received by polling officials by 7:00 PM on Election Day so that they can be counted. To enforce these requirements, any ballot with an insufficient affidavit (including one that is missing a signature) will be disallowed by polling officials. If an early voter returns a ballot with an unsigned affidavit, Arizona has afforded him or her an opportunity to cure the problem, but only until the general Election Day deadline.

On September 10, 2020, the district court enjoined the law and ordered Arizona to create and to institute a new procedure that would grant voters who failed to sign their ballots up to five days after voting has ended to correct the error. The State of Arizona and others appealed and sought, in the meantime, a stay of the district court's injunction pending adjudication of the appeal.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In evaluating the motion for a stay pending appeal, the panel first held that Arizona had shown a likelihood of success on the merits. The panel held that Arizona’s Election Day signature deadline imposes, at most, a “minimal” burden on those who seek to exercise their right to vote. Citing the “*Anderson-Burdick*” framework for evaluating ballot-access laws, the panel held that a nondiscriminatory, minimally burdensome voting requirement will be upheld so long as it reasonably advances important regulatory interests.

The panel held that the public interest was well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour. Plaintiffs by contrast stand to face only the “minimal” burden of ensuring that voters sign their ballot affidavits by 7:00 PM on Election Day if the law remains in effect.

COUNSEL

Joseph A. Kanefield, Chief Deputy & Chief of Staff; Brunn W. Roysden III, Solicitor General; Mark Brnovich, Attorney General; Drew C. Ensign and Michael S. Catlett, Deputy Solicitors General; Jennifer J. Wright and Robert J. Makar, Assistant Attorneys General; Office of the Attorney General, Phoenix, Arizona; Kory Langhofer and Thomas Basile, Statecraft PLLC, Phoenix, Arizona; Thomas McCarthy and Cameron T. Norris, Consovoy McCarthy PLLC, Arlington, Virginia; Patrick Strawbridge, Consovoy McCarthy PLLC, Boston, Massachusetts; for Intervenor-Defendants-Appellants.

Alexis E. Danneman and Joshua L. Boehm, Perkins Coie LLP, Phoenix, Arizona; Kevin J. Hamilton, Mark Erik Elias, William B. Stafford, Sarah Langberg Schirack, and Ariel Brynne Glickman, Perkins Coie LLP, Washington, D.C.; for Plaintiffs-Appellees.

Roopali H. Desai, D. Andrew Gaona, and Kristen Yost, Coppersmith Brockelman PLC, Phoenix, Arizona, for Defendant-Appellee.

Gregory G. Jernigan, General Counsel, Arizona State Senate, Phoenix, Arizona; Andrew G. Pappas, General Counsel, Arizona House of Representatives, Phoenix, Arizona; for Amici Curiae Russell Bowers, Speaker of the Arizona House of Representatives, and Karen Fann, President of the Arizona State Senate.

Steve Marshall, Attorney General; Edmund G. LaCour Jr., Solicitor General; A. Barrett Bowdre, Deputy Solicitor General; Office of the Attorney General, Montgomery, Alabama; Leslie Rutledge, Attorney General, Little Rock, Arkansas; Christopher M. Carr, Attorney General, Atlanta, Georgia; Lawrence G. Wasden, Attorney General, Boise, Idaho; Curtis T. Hill Jr., Attorney General, Indianapolis, Indiana; Derek Schmidt, Attorney General, Topeka, Kansas; Daniel Cameron, Attorney General, Frankfort, Kentucky; Jeff Landry, Attorney General, Baton Rouge, Louisiana; Lynn Fitch, Attorney General, Jackson, Mississippi; Eric S. Schmitt, Attorney General, Jefferson City, Missouri; Tim Fox, Attorney General, Helena, Montana; Douglas J. Peterson, Attorney General, Lincoln, Nebraska; Dave Yost, Attorney General, Columbus, Ohio; Mike Hunter, Attorney General, Oklahoma City, Oklahoma; Alan Wilson, Attorney General, Columbia, South Carolina; Jason Ravnsborg, Attorney General, Pierre, South Dakota; Herbert Slatery III,

Attorney General, Nashville, Tennessee; Ken Paxton, Attorney General, Austin, Texas; Sean D. Reyes, Attorney General, Salt Lake City, Utah; and Patrick Morrissey, Attorney General, Charleston, West Virginia; for Amici Curiae 20 States.

Jason Torchinsky, Dallin B. Holt, Kenneth C. Daines, Holtzman Vogel Josefiak Torchinsky PLLC, Haymarket, Virginia, for Amicus Curiae The Honest Elections Project.

ORDER

In this case, the Arizona Democratic Party and others have challenged Arizona's law requiring early voters to have signed their ballots by 7:00 PM on Election Day in order to have their votes counted. *See* Ariz. Rev. Stat. §§ 16-548(A), 16-552(B). On September 10, 2020, less than two months before the upcoming presidential election, the district court enjoined the law and ordered Arizona to create and to institute a new procedure that would grant voters who failed to sign their ballots up to five days *after* voting has ended to correct the error. The State of Arizona and others have appealed that decision to our court and have sought, in the meantime, a stay of the district court's injunction pending adjudication of the appeal.

I

The Arizona law at issue is straightforward. First, Arizona requires early voters to return their ballots along with a signed ballot affidavit in order to guard against voter fraud—a requirement the plaintiffs do not challenge. Ariz. Rev. Stat. § 16-548(A). These early ballots must be received by polling officials by 7:00 PM on Election Day so that they

can be counted. *Id.* And, to enforce these requirements, any ballot with an insufficient affidavit (including one that is missing a signature) will be disallowed by polling officials. *Id.* § 16-552(B). If an early voter returns a ballot with an unsigned affidavit, Arizona has afforded him or her an opportunity to cure the problem, but only until the general Election Day deadline. *See* State of Arizona, *Elections Procedures Manual* 68–69 (Dec. 2019).

II

In evaluating a motion for a stay pending appeal, we consider whether the applicant has made a strong showing of likelihood of success on the merits, whether the applicant will be irreparably injured without a stay, whether a stay will substantially injure the other parties, and where the public interest lies. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006–07 (9th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

Here, as explained below, the factors weigh in favor of a stay.

A

First, the State has shown that it is likely to succeed on the merits. As observed by the district court, Arizona’s Election Day signature deadline imposes, at most, a “minimal” burden on those who seek to exercise their right to vote. Under the familiar “*Anderson-Burdick*” framework for evaluating ballot-access laws, a nondiscriminatory, minimally burdensome voting requirement will be upheld so long as it reasonably advances important regulatory interests. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *De La Fuente v. Padilla*, 930 F.3d 1101, 1105 (9th Cir. 2019). The State has made a strong

showing that its ballot-signature deadline does so. All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion. Indeed, though the parties dispute the magnitude of the additional burden, there can be no doubt (and the record contains evidence to show) that allowing a five-day grace period beyond Election Day to supply missing signatures would indeed increase the administrative burdens on the State to some extent.

The plaintiffs argue that the State's interest is undermined by the fact that Arizona recently enacted a narrow exception to the general Election Day deadline for instances in which a polling official believes that the signature on a ballot affidavit does not match the voter's signature in the voter registration record. In such a case, the voter will be notified and he or she may cure the problem within five days after Election Day. *See* Ariz. Rev. Stat. § 16-550(A). But the State has offered a reasonable explanation for why it has granted a limited opportunity to correct such "mismatched" signatures but not to supply completely missing signatures: whereas the failure to sign one's ballot is entirely within the voter's control, voters are not readily able to protect themselves against the prospect that a polling official might subjectively find a ballot signature not to match a registration signature. It is rational, then, that the State might voluntarily assume some additional administrative costs to guard against the risk of losing such votes at potentially no fault of the voters. But the State may still reasonably decline to assume such burdens simply to give voters who completely failed to sign their ballots additional time after Election Day to come back and fix the

problem. *See also New Ga. Project v. Raffensperger*, — F.3d —, 2020 WL 5877588, at *3 (11th Cir. 2020) (concluding that Georgia’s Election-Day absentee ballot deadline is “easily” justified by the State’s interests in “conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud”).¹

B

The standard for granting a stay is a “sliding scale.” *Al Otro Lado*, 952 F.3d at 1007. Under this approach, the elements of the test are “balanced, so that a stronger showing of one element may offset a weaker showing of another.” *Id.* (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). This consideration drives our decision here: even though the plaintiffs contend that the changes to Arizona’s law will likely affect only a small number of voters and create a relatively low administrative burden on the State, the State’s probability of success on the merits is high. *See also Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018) (recognizing irreparable harm to a State’s interests where a court order “barr[ed] the State from conducting this year’s elections pursuant to a [constitutionally permissible] statute enacted by the Legislature”). And, as we rapidly approach the election, the public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State

¹ The State is also likely to succeed in showing that the district court “erred in accepting the plaintiffs’ novel procedural due process argument,” because laws that burden voting rights are to be evaluated under the *Anderson/Burdick* framework instead. *New Ga. Project*, — F.3d —, 2020 WL 5877588, at *3; *see also Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (observing that “a single analytic framework” applies in voting-rights cases, rather than “separate analyses for . . . First Amendment, Due Process, or Equal Protection claims”).

scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour. Indeed, 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 Committee v. Democratic Nat’l Committee*, 140 S. Ct. 1205, 1207 (2020) (per curiam); see also, e.g., *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.) (staying a lower court order that changed election laws thirty-two days before the election); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (mem.) (staying a lower court order that changed election laws sixty-one days before the election); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam) (staying a lower court order that changed election laws thirty-three days before the election). As discussed, the plaintiffs by contrast stand to face only the “minimal” burden of ensuring that voters sign their ballot affidavits by 7:00 PM on Election Day if the law remains in effect.

III

The appellants’ Emergency Motions for a Stay Pending Appeal (Docket Entry No. 4 in 20-16759 and Docket Entry No. 2 in 20-16766) are **GRANTED**.²

² We also **GRANT** the motions to file amicus briefs in support of the State of Arizona’s emergency motion (Docket Entry Nos. 8, 15, and 17 in 20-16759) and the State of Arizona’s Motion for Leave to File a Consolidated Reply Brief (Docket Entry No. 21 in 20-16759).