

Appeal No. 20-16932

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

MI FAMILIA VOTA, *et al.*,

Plaintiffs and Appellees,

vs.

KATIE HOBBS,

Defendant and Appellee, and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

*Intervenor-Defendants and
Appellants.*

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

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR
ADMINISTRATIVE STAY; RELIEF NEEDED BY WEDNESDAY,
OCTOBER 7, 2020**



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Circuit Rule 27-3 Certificate

Intervenor-Appellants Republican National Committee and National Republican Senatorial Committee, through undersigned counsel, hereby move this Court on an emergency basis for an administrative stay of the district court's order entered on the evening of October 5, 2020. Fed. R. App. P. 8(a)(2); 9th Cir. R. 27-3. Relief is needed by Wednesday, October 7, 2020.

The district court's order enjoins enforcement of Arizona's voter-registration deadline, which expired just hours after the district court entered its order. *See generally* Ariz. Rev. Stat. § 16-120 (requiring voters to register at least 29 days before an election). This deadline has been in effect for 30 years, *see* H.B. 2074, ch. 32, § 2, 39th Leg., 2d Reg. Sess (Ariz. 1990), and is deeply interconnected with other tightly compressed deadlines integral to the reliable administration of Arizona elections. An immediate administrative stay is necessary to preserve the status quo, and the administrability of Arizona elections, while the parties brief and the Court decides a Motion for Stay Pending Appeal.

The Intervenor-Appellants expect to file their Motion to Stay Pending Appeal tomorrow, on October 7, 2020. They propose that responses and *amicus* briefs to the Motion to Stay Pending Appeal be filed on October 8, 2020, with a reply filed by noon on October 9, 2020. The administrative stay could therefore be dissolved as soon as October 9, 2020 if the Motion for Stay Pending Appeal is denied.

Undersigned counsel certifies the following the information, as required by Ninth Circuit Rule 27-3(c).

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II. Facts Showing the Existence and Nature of the Emergency

Thirty years ago, the elected Legislature of the State of Arizona prescribed a reasonable and constitutionally sound rule: while individuals may register to vote at any time, those wishing to participate in the next ensuing election must submit their registration no later than 29 days prior to Election Day. *See* Ariz. Rev. Stat. § 16-120(A). This deadline aligns with and reinforces Arizona’s inarguably constitutional 29-day durational residency requirement for new electors. *See id.* § 16-101(A)(3). It also ensures that the fifteen County Recorders who administer elections within their jurisdictions may redirect their limited resources and manpower to the dissemination, processing and tabulation of early ballots during Arizona’s lengthy, 27-day early voting period, which begins October 7 (*i.e.*, tomorrow). Pursuant to this long-settled law, voter registration for the November 3, 2020 general election would have closed just before midnight on October 5, 2020 (*i.e.*, last night).

Yesterday evening—just hours before the statutory cutoff—the District of Arizona supplanted the statutory deadline with an order extending the voter registration through October 23, 2020. In inflicting this eleventh hour change on Arizona’s electoral infrastructure, the district court’s order contravenes repeated, and recently reiterated, admonitions by this Court and the United States Supreme Court against judicial tinkering with states’ election machinery on the eve of voting.

Each moment that the district court order remains in effect, Arizona's prerogative to regulate its election processes is wrongfully abrogated, the Appellants are forced to divert vital organizational resources to maintaining voter registration parity, the risk of voter confusion is compounded, and the burden on local elections officials is amplified. This Court's intervention is necessary to restore legal certainty as voting commences, and to vindicate the uniform and consistent enforcement of Arizona's reasonable, neutral, and facially constitutional voter registration deadline.

III. Why This Motion Could Not Have Been Filed Earlier

The Plaintiff-Appellees filed the Complaint in this case just six days ago, on September 30, 2020. Yesterday afternoon the District Court held a trial on the merits. Yesterday evening the District Court issued its order in favor of the Plaintiff-Appellees, and enjoined enforcement of Arizona's voter registration deadline. This Motion is being filed at the earliest opportunity after entry of the District Court's order.

IV. Notice of This Motion to the Court and Other Parties, and Positions of the Other Parties

The Intervenor-Appellants left a voicemail for the Court's Emergency Motions staff attorneys late this morning, and spoke to an Emergency Motions staff attorney at approximately 1:00 this afternoon, to advise the Court of the upcoming filings.

The Intervenor-Appellants further notified all parties, through their respective counsel, that they (a) expected to file this Motion and a Motion for Stay Pending Appeal tonight and tomorrow, respectively; (b) would recommend that responses to this Motion and a Motion to Stay Pending Appeal be filed tonight and by Thursday, October 8, 2020, respectively; and would recommend that a reply in support of the Motion to Stay Pending Appeal be filed by noon on Friday, October 9, 2020. Additionally, this Motion will be served by the appellate CM/ECF system.

Counsel for *amicus* Governor Doug Ducey advised that he supports a stay. Counsel for the Plaintiff-Appellees advised that they oppose this Motion and a Motion to Stay Pending Appeal. Counsel for the Defendant-Appellee Katie Hobbs, the Arizona Secretary of State, advised that she takes no position on a stay.

V. Why a Stay Was Not Requested in the District Court

The arguments to stay the District Court order pending appeal are also the arguments against granting the injunctive relief requested by the Plaintiff-Appellees. Each of these arguments was briefed in the District Court two business days ago, and reiterated during oral argument just yesterday afternoon. The District Court rejected those arguments yesterday evening. Moreover, the injury arising from the District Court's order—namely, the statewide disruption of early voting and Election Day preparations and the resulting diversion of the Appellants' organizational and financial resources—is real, ongoing, and neither offset by a security bond nor

redressable through monetary damages. In this context, moving the District Court for a stay pending appeal would only result in redundant proceedings in rapid succession, unnecessary delay, and additional disruption of Arizona elections—all without any practical likelihood of success. This is, therefore, the rare case in which it is impracticable to request a stay in the District Court. *See* Fed. R. Civ. App. P. 8(a)(2)(A)(i).

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 6, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

Arizona law has long provided that to cast a ballot in the succeeding election, an individual must register to vote no later than twenty-nine days prior to Election Day. *See* Ariz. Rev. Stat. § 16-120(A). On September 30, 2020, the Plaintiffs—two nonprofit organizations and one of their individual employees—filed a complaint and motion for temporary restraining order or preliminary injunction seeking an extension of the voter registration deadline until October 27, 2020. *See* Dkt. 1, 2. The Appellants moved to intervene on the grounds that, if granted, the requested relief would impel them to redirect substantial funds and manpower to restarting their voter registration efforts in Arizona, and to educate prospective Republican registrations about the extended registration deadline, at an estimated cost of \$37,000 for each week the deadline is extended. *See* Dkt. 15 (Motion to Intervene), 17 (Decl. of Brian Seitchik). The district court granted the motion to intervene on October 2. *See* Dkt. 25.

Following a consolidated hearing on the Plaintiffs’ motion and trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2) on October 5, 2020, the district court entered an order and judgment granting the temporary restraining order and preliminary injunction, as modified to provide for an extended registration deadline

of October 23, 2020. *See* Dkt. 35. The Appellants filed a notice of appeal later in the evening of October 5. *See* Dkt. 36.

ARGUMENT

I. **The Court Should Grant an Emergency Stay to Preserve the Status Quo**

This Court recently “definitively resolved which standard applies to administrative stay motions.” *Nat’l Urban League v. Ross*, --F. 3d --, 2020 WL 5815054, at *3 (9th Cir. Sept. 30, 2020) (citing *Doe #1 v. Trump*, 944 F.3d 1222 (9th Cir. 2019)). Specifically, the “touchstone is the need to preserve the status quo.” *Nat’l Urban League*, 2020 WL 5815054, at *3; *see also Al Otro v. Wolf*, 945 F.3d 1223, 1224 (9th Cir. 2019) (noting that an emergency temporary stay “is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits”). Appellants will, within the next 36 hours, file a motion for stay pending appeal. In the interim, however, an administrative stay is warranted.

A. **The *Purcell* Principle Instructs That Preservation of the Status Quo Is Especially Crucial in the Electoral Context**

The imperative of maintaining the status quo assumes singular salience in election-related litigation. Deadlines governing the political process are vital and interdependent components of an electoral infrastructure designed to ensure the integrity of the voter rolls and the reliability of election results. For this reason, the Supreme Court has long cautioned against eleventh hour judicial tinkering with such

parameters, recognizing “voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *see also Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018) (“[T]he Supreme Court has warned us many times to tread carefully where preliminary relief would disrupt a state voting system on the eve of an election.”).

Vindicating the so-called *Purcell* principle, this Court just hours ago stayed another ruling of the District of Arizona that similarly would have upended settled election procedures by unilaterally extending by five days the statutory deadline in which voters could cure missing signatures on the envelopes accompanying early ballots, emphasizing that “the public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure . . . at the eleventh hour.” Order, *Arizona Democratic Party v. Hobbs*, No. 20-16759, -- F.3d -- (9th Cir. Oct. 6, 2020) at p. 8. The Court’s order in *Arizona Democratic Party* was immediately preceded by the United State Supreme Court’s intervention (without noted dissent) yesterday to stay a Fourth Circuit ruling enjoining the enforcement of a state statute requiring the presence of a witness when an absentee voter signs his or her ballot. *See Andino v. Middleton*, -- S. Ct. --, 2020 WL 5887393 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring) (“[F]or many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election.”).

As *Andino* attests, circumstances produced by the COVID-19 pandemic have in no way enervated the *Purcell* principle or excused its application. To the contrary, the Supreme Court just months ago again “emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election,” in staying an order that would have permitted absentee ballots cast in Wisconsin’s primary election to be mailed or postmarked after election day. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020). Heeding the Supreme Court’s directive, the other Circuits have consistently interdicted recent district courts refashioning deadlines or other procedural strictures governing the election process. *See, e.g., New Georgia Project v. Raffensperger*, -- F.3d. --, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020) (staying district court order extending absentee ballot receipt deadline, explaining that “a stay preserves the status quo and promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules”); *Texas All. for Retired Americans v. Hughs*, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) (staying district court order enjoining statute that eliminated straight-ticket voting, reasoning that “the injunction openly defies the Supreme Court’s instruction . . . not to interfere with state election laws on the eve of an election”); *see also Tully v. Okeson*, No. 20-2605, slip op. at 2 (7th Cir. Oct. 6, 2020) (affirming denial of request for “preliminary injunction requiring Indiana to permit unlimited absentee voting”); *Yazzie v. Hobbs*, CV-20-

08222-PCT-GMS, 2020 WL 5834757, at *4 n.2 (D. Ariz. Sept. 25, 2020) (citing *Purcell* in concluding that request to extend ballot receipt deadline for certain voters “will cause voter confusion . . . complicate ballot processing, and clash with the mandated timelines for other election laws”).

In short, “[t]he principle from these cases is clear: court changes of election laws close in time to the election are strongly disfavored.” *Texas All. For Retired Americans*, 2020 WL 5816887, at *2. This Court should act immediately to correct the district court’s errant disregard of the *Purcell* principle, and reinstate the neutral, reasonable and non-discriminatory registration deadline devised by the Arizona Legislature.

B. The District Court’s Order Is Disrupting the Orderly Administration of the November Election, Sowing Voter Confusion, and Portending Voting Complications

This case personifies precisely the concerns that underpinned *Purcell*, *RNC* and *Andino*. Issued less than four hours before the scheduled close of the statutory voter registration window, the district court’s order demands that Arizona elections officials abruptly and hastily restructure their operational processes to redirect scarce resources away from ballot distribution, processing and tallying.

Embedded in the district court’s order are multiple obstructions and complications frustrating the efficient administration of the impending election.

First, the statutory voter registration deadline effectively functions as a mechanism for enforcing Arizona's 29-day durational residency prerequisite to qualified elector status. *See* Ariz. Rev. Stat. § 16-101(A)(3). Because registrants are not required to aver on the registration form that they have satisfied the 29-day residency rule, an extension of the registration deadline would leave election officials without any consistent metric to verify that such late registrants are *bona fide* residents as of the residency deadline.

Second, because precinct registers must be prepared no later than 10 days prior to the election, *see id.* § 16-168(A), the district court has tasked the County Recorders with the impossible feat of finalizing voter rolls while concomitantly processing late registrations and adding those registrants to the precinct registers.

Third, in contrast to the vast majority of states, Arizona conditions eligibility to vote in state and local elections on the registrant's production of documentary proof of U.S. citizenship. *See* Ariz. Rev. Stat. § 16-166(F). Although elections officials will attempt, by drawing on motor vehicle division and Social Security Administration records, to independently verify new registrants' citizenship status, *see* Ariz. Elections Procedures Manual (rev. 2019) at p. 22, this process necessitates a temporal buffer before Election Day.

Fourth, late registrants who indicate on their registrations a desire to vote by mail may not actually receive a ballot sufficiently in advance of the election,

precipitating confusion concerning how and in what manner they should cast a ballot. Conversely, late registrants who are issued an early ballot but who—either out of confusion or because they did not timely receive a ballot—appear at the polling place on Election Day will be forced to vote a provisional ballot, which requires further post-election processing. *See id.* §§ 16-579(B), -584.

Fifth, requiring early voting to proceed in-tandem with an extended voter registration period also engenders potential risks to election integrity. Because it appears that Arizona’s statewide voter registration database is not equipped to monitor requests for, and submissions of, ballots across different counties, a currently registered voter who casts an early ballot in one county but then re-registers in another county could conceivably submit two ballots in the November 3, 2020 general election.

In sum, the district court’s order embodies an unwarranted, “transformative and intrusive” incursion on Arizona’s internal administration of its elections. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618 (July 30, 2020) (Roberts, C.J., concurring) (staying injunction requiring state to alter its processes for ballot measure petition signatures). Although the district court’s order is fraught with other errors of law—to include its disregard of the absence of any legal injury to the Plaintiffs/Appellees that can be redressed by a prospective injunction, and its misapplication of the so-called *Anderson-Burdick* framework—those issues will be

addressed in the Appellants' forthcoming motion for a stay pending appeal. In the interim, however, the critical necessity of preserving Arizona's statutory voter registration deadline impels an emergency administrative stay.

CONCLUSION

For the foregoing reasons, the Court should grant an emergency administrative stay of the district court's order pursuant to 9th Cir. R. 27-3 until such time as the Court resolves Appellants' forthcoming motion for a stay pending appeal pursuant to Fed. R. App. P. 8(a)(2).

Dated: October 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 6, 2020

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