

No. 20-16932

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

MI FAMILIA VOTA; ARIZONA COALITION FOR CHANGE;
AND ULISES VENTURA,

Plaintiffs/Appellees,

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

Defendant/Appellee,

REPUBLICAN NATIONAL COMMITTEE; AND NATIONAL REPUBLICAN
SENATORIAL COMMITTEE,

Intervenor Defendants/Appellants,

and

STATE OF ARIZONA,

Proposed Intervenor Defendant/Appellant.

Appeal from the United States District Court
District of Arizona
CV-20-01903-PHX-SPL

SECRETARY OF STATE'S STATEMENT OF POSITION

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As ordered by the Court [Dkt. 43], Arizona Secretary of State Katie Hobbs (“Secretary”) submits this statement to inform the Court of the following:

(1) While the Secretary did not initially intend to appeal the trial court’s order because she desired certainty and finality, the instant appeal and stay requests have still caused significant uncertainty and that ongoing uncertainty, coupled with the disruption to election administration, warrants the Secretary’s involvement;

(2) The Secretary now intends to appeal; and

(3) The Secretary requests leave to appear at oral argument on Monday, October 12, to briefly address the Court regarding the information provided in this statement.

I. The Secretary’s Position Below and Initial Decision Not to Appeal.

The Secretary supports and encourages efforts to expand the franchise in Arizona and to ensure that more Arizonans can participate in elections. That is why she devoted significant efforts and resources to make registering to vote accessible and easy, supported nonpartisan voter registration drives, and encouraged all Arizonans to register to vote. [See Dist. Ct. Dkt. 16 at 3-4] But when Plaintiffs/Appellees (“Plaintiffs”) made a last-minute request to extend the voter registration deadline, the Secretary opposed it because the sudden and unplanned change in the law would create administrative burdens for election officials, including the County Recorders who are independent, elected officials primarily

responsible for voter registration and who were not named in the lawsuit, among other complications. [Dist. Ct. Dkt. 16] As the Secretary argued below, an injunction extending the voter registration deadline would have a series of cascading effects to other longstanding requirements of Arizona law, thus disrupting a “delicate framework that has been refined to accurately process millions of votes in a safe, secure, and efficient manner.” [*Id.* at 13] Unfortunately, what was true then remains true today and in fact escalates as we draw closer to Election Day.

Over the Secretary’s strong objection, the district court entered an order extending Arizona’s voter registration deadline from October 5 to October 23. Once that happened, the Secretary announced that she did not intend to appeal to avoid yet another change in voter registration laws and procedures. She feared that an appeal – including a request for a stay – and subsequent certiorari petitions to the Supreme Court would only create more uncertainty, disruption, and voter confusion. In other words, the Secretary was prepared to accept the district court’s order and work to implement it despite the hardship it causes for Arizona’s election administrators.

Unfortunately, the administrative complications predicted by the Secretary below has manifested itself. Because of this appeal and the pending stay requests, the Secretary, county recorders, and voters alike face the very uncertainty that she sought to avoid. And as the Secretary and the counties have worked through the necessary adjustments and implications of the lower court’s order, it has become

apparent that extending the deadline to October 23 comes at the cost of and risk to other important administrative work and timelines necessary to ensure the orderly administration of the election, and imposes a heavy burden on some counties. These risks and burdens compound the longer the deadline is extended, particularly if it is extended through October 23, 2020, as required under the current injunction.

Thus, for the same reasons she did not initially file an appeal, the Secretary believes that a final resolution as soon as possible as to the applicable voter registration cut-off is in the best interest of Arizona's election officials and Arizona's voters. Given the circumstances, competing interests, and proximity to Election Day (with early voting well under way), the Secretary favors an Order from this Court providing for: (1) the entry of a stay after a reasonable grace period for voters, for example, effective October 16, 2020; and (2) confirmation that voters who properly registered during the extension period will be deemed timely-registered and not subject to challenge based solely on the timing of their registration. Of course, the most optimal outcome would be for all parties to reach a compromise and agree to the foregoing terms, as well as an agreement that there will be no further appeals and final dismissal of this action. The Secretary has been and remains open to such a compromise.

Such a resolution will not only provide much-needed certainty but will alleviate the significant administrative burdens facing election administrators, while

ensuring eligible voters who have yet to register – possibly relying on the lower court’s injunction extending the deadline to October 23, 2020 – receive a reasonable grace period during which they can submit a timely registration. In short, the Secretary urges a final resolution of this matter as quickly as possible and, to that end, supports a prospective stay of the injunction that preserves the rights of voters who relied on the injunction and alleviates the burdens on election administrators, which compounds significantly if the registration period remains extended until October 23, 2020.

II. The Effect of the Injunction on Election Administration.

The Secretary, not the Attorney General, is Arizona’s Chief Election Officer. She oversees elections for the State and works in concert with Arizona’s fifteen counties in administering elections. Her office has been in close communication with county election officials about the impact of the district court’s injunction. The Secretary’s involvement in this appeal has thus become necessary because, unlike the Attorney General and the Republican Party Intervenors, she has the relevant knowledge and expertise to (1) advise the Court about the burdens on election officials and (2) recommend a stay that appropriately balances the interests of Arizona voters and elections officials alike. There can be no disputing that extending the registration deadline to October 23, 2020, creates significant administrative burdens on county officials. Contrary to the district court’s order, the Secretary

described in her motion and at oral argument the administrative burdens and conflicting statutory deadline that would be created by extending the voter registration deadline. [See Dist. Ct. Dkt. 16].

First, the significant extension to the voter registration deadline requires counties to continue accepting and processing voter registrations during the early voting period, when the same staff (in some counties, only 2-3 people) normally would be focused on mailing ballots to voters on the Permanent Early Voting List (“PEVL”), processing early ballot requests and mailing ballots to non-PEVL voters who request a mail ballot by the October 23, 2020, statutory deadline, processing early ballots mailed back or otherwise returned before Election Day, including conducting signature verification on each ballot, so the elections department can begin tabulating those early ballots, and preparing final rosters of eligible registered voters for Election Day voting locations. Many counties do not have capacity to onboard, train, and provide the workspace and necessary technology and equipment for new temporary staff to fulfill all these duties in such a short time frame and with no notice.¹

Second, extending the voter registration deadline to October 23 interferes with county officials’ deadline to complete precinct registers and e-pollbooks. A.R.S.

¹ The Secretary explained this fundamental disruption to elections officials – among others – to the district court. [Dist. Ct. Dkt. 16 at 13]

§ 16-168(A) requires counties to, by October 24, “prepare from the original registration forms or from electronic media at least four lists that are printed or typed on paper, or at least two electronic media poll lists, or any combination of both, of all qualified electors in each precinct in the county, and the lists shall be the official precinct registers.”

This deadline is just one day after the extended registration deadline. Based on the time it takes to process voter registrations, especially paper registration forms and registrations containing non-standard addresses in rural and tribal areas, counties are unlikely to be able to process all registrations within one day after the voter registration deadline. These counties would need to print supplements to paper rosters or load updates to e-pollbooks for all voting locations close to the election, or require voters to vote provisional ballots because the county could not process their registration in time to include their names in the official precinct registers, or a combination of both. Ensuring these last-minute changes are implemented correctly is a significant logistical undertaking given the number of voting locations and rosters/e-pollbooks and the need to ensure timely delivery of the correct equipment and supplies to each voting location, some of which may be a day’s travel away from the County Recorder’s office. Further, having more provisional ballots to process after the election could cause significant delays in reporting election results. Indeed, if counties are also behind on processing registrations and early ballots, there is a

risk that some counties (especially those with limited capacity to onboard and train new temporary staff at this late stage) might not meet the election canvass deadline. A.R.S. § 16-642(A) (counties must complete canvass within twenty days after the election).²

Third, the injunction could interfere with the counties' deadline for filing computer programs with the Secretary's office. A.R.S. § 16-445(A) requires counties that use vote tabulating devices to file, by October 17, "a copy of each computer program for each election." Some counties' computer programs include the number of registered voters as of the registration deadline for the election. But under the district court's injunction, the voter registration deadline (October 23) is after the deadline for filing election programs with the Secretary (October 17). Counties will thus need to pull interim voter registration totals and later manually update the totals in the election management system, and then file an updated program with the Secretary.

Fourth, the injunction might delay the reporting and finalizing of election results by interfering with counties' ability to begin tabulating early ballots before Election Day. Last year, the Legislature amended Arizona law to allow counties to start tabulating early ballots fourteen days before an election, rather than seven days.

² As the Secretary told the district court, "Plaintiffs do not acknowledge the clear tension between their proposed deadline and other statutory deadlines with which county officials must comply." [Dist. Ct. Dkt. 16 at 17]

A.R.S. § 16-550(B). Election officials welcomed this change, which would help avoid long post-election delays in reporting results from early ballots (close to 90% of Arizonans voted early in the March 17, 2020 Presidential Preference Election and the August 4, 2020 Primary Election). But counties may be unable to use this earlier tabulation period if they are still processing registration forms two weeks before the election and cannot turn to processing and tabulating early ballots.

III. The Secretary Supports a Prospective Stay to Ensure Finality and Allow the Counties to Efficiently Administer the Election.

As the State's Chief Elections Officer, the Secretary has a significant interest in ensuring that eligible Arizonans get to participate in the democratic process, and appreciates that many Arizonans have benefited from the extended voter registration deadline. But the Secretary also has an important duty to ensure the fair, uniform, and orderly administration of elections. *See* A.R.S. § 16-452; *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *6 (D. Ariz. Nov. 3, 2016). Given the significant administrative burdens and risks described above and that have become apparent since the injunction was entered, the Secretary is concerned that leaving the registration period open through October 23 will interfere with the orderly administration of the election and voter confidence in the process.

For these reasons, the Secretary supports the Intervenors' request for a prospective stay of the district court's injunction, and requests that the Court provide a reasonable grace period for voters to complete their registrations. To be clear, the

Secretary does not support a stay that applies retroactively.³ If the Intervenors had requested a stay that invalidates all voter registrations submitted under the district court's injunction, a stay would pose significant due process concerns, cause irreparable harm to Arizona's voters, and damage the public interest.

The Secretary also only supports a stay that gives the public notice, so voters who are working on (but have not yet submitted) their voter registration forms can complete the process. The Supreme Court recently stayed a district court injunction that invalidated South Carolina's witness requirement for absentee voting, but the stay specified that "any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement." *Andino v. Middleton*, __ S. Ct. __, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). The two-day grace period protected voters who relied on the district court's injunction when they voted their absentee ballots without witnesses. In that same vein, if this Court stays the district court's injunction, the Secretary requests that it not become effective immediately and instead include a grace period, for example, until Friday, October 16.

³ The Attorney General [Dkt. 32 at 13] states that he "only seeks a stay prospectively. Specifically, those voters who have completed registration under the terms of the district court's injunction—*i.e.*, those have been told that they will be permitted to vote by the terms of the injunction—should be excluded from the stay pending appeal." Counsel for the Republican Party Intervenors has informed the Secretary's counsel that they are amenable to a prospective stay, which would permit voter registrations after October 5 through the date of the stay to stand.

IV. Conclusion

In sum, the Secretary urges final resolution of this matter as soon as possible, and, to that end, supports a prospective stay that would give County election officials and Arizona's voters the finality they need. Because some Arizonans have relied on the district court's injunction, the Court should give them notice and a grace period so they can complete their registration. But in the end, leaving the deadline as October 23 will interfere with the orderly administration of the General Election.

Respectfully submitted this 11th day October, 2020.

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Certificate of Service

I hereby certify that on October 11, 2020, I electronically filed the foregoing **Secretary of State's Statement of Position** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted this 11th day of October, 2020.

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