UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MI FAMILIA VOTA; ARIZONA COALITION FOR CHANGE; ULISES VENTURA, Plaintiffs-Appellees, v. KATIE HOBBS, Defendant-Appellee, REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE, Intervenor-Defendants-Appellants.	No. 20-16932 On Appeal from United States District Court for Arizona, Phoenix Honorable Steven P. Logan Case No. 20 Civ. 1903 (SPL) **PLAINTIFFS-APPELLEES' OPPOSITION TO INTERVENORS' EMERGENCY MOTION FOR AN ADMINISTRATIVE STAY**

PRELIMINARY STATEMENT

Plaintiffs-Appellees Mi Familia Vota, Arizona Coalition for Change, and Ulises Ventura ("Plaintiffs") are voter registration organizers in Arizona. They filed this case to extend Arizona's voter registration cutoff of October 5 ("Voter Registration Cutoff"), arguing that this year, in the context of the COVID-19 pandemic, the Voter Registration Cutoff had severely burdened their constitutional rights to register voters and was unconstitutional as applied.

The District Court (Hon. Steven P. Logan) agreed and issued an injunction yesterday which directed the Defendant, the Arizona Secretary of State, to continue to accept voter registrations in Arizona through October 23 to permit the registration of approximately 65,000 more voters. The Secretary of State declined to appeal in the interest of affording clarity to Arizonans seeking to register and vote.[1]

Now, the Republican National Committee and the Republication National Senatorial Committee (the "Republican Committees"), who were permitted to intervene below, seek an emergency administrative stay pending their filing of a motion for a stay pending appeal that they intend to file tomorrow.

The Republican Committees lack standing to pursue this appeal (which Plaintiffs have moved to dismiss, *see* Dkt. 2) and have failed to articulate any harm if a stay is not granted by tomorrow. All that is happening right now as a result of the District Court's order is that Arizona is continuing to process voter registrations—the same activity it has been engaged in all year long. The Secretary of State does not believe a stay is necessary—she, and all the local elections officials who serve at her direction, are implementing the District Court's order. To grant a stay would disrupt that process, burden elections officials, confuse the

[1] @SecretaryHobbs, Twitter (Oct. 6, 2020; 1:37 AM), https://mobile.twitter.com/secretaryhobbs/status/1313352717407006725.

voting public, and harm Plaintiffs' efforts to register voters. Nor have the Republican Committees even attempted to show the other factors required for a stay. This Court should exercise its discretion to deny the stay.

ARGUMENT

"A request for a stay pending appeal is committed to the exercise of judicial discretion." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (citing *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). To secure a stay, the Republican Committees bear the burden of showing: (1) "a strong showing of the likelihood of success on the merits;" (2) that "they will be irreparably injured absent a stay;" (3) that a stay will not "substantially injure other parties;" and (4) that a stay is "in the public interest." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). "The first two factors . . . are the most critical." *Id*. (quoting *Nken*, 556 U.S. at 434).

I. THERE IS NO IRREPARABLE HARM TO INTERVENORS

To obtain a stay, the Republican Committees must show that "irreparable harm is probable, not merely possible." *Id*. at 1059-60 (citing *Nken*, 556 U.S. at 434). They fail to carry that burden here because they submit only "conclusory factual assertions and speculative arguments that are unsupported in the record." *Id.*

First, there is no record of any "burden on local elections officials." *Contra* Int. Br. at 7. On the contrary, the Secretary of State has not appealed because she believes it is better to implement the District Court's decision than to challenge it. As the Secretary said: "With the General Election less than a month away, Arizonans deserve a quick resolution to this matter. Providing clarity is more important than pursuing this litigation."[2] The District Court also determined, on the record here, that: "Defendant and Defendant-Intervenors have failed to show the administrative burden on the state outweighs the burden on Plaintiffs' First and Fourteenth Amendment rights." Order at 9. Nevertheless, the District Court still tailored the injunction to extend the registration deadline only to October 23 (not the longer deadline sought by Plaintiffs) to address the concerns asserted by the Secretary of State below. *Id.* at 9-10. In any case, for reasons explained more fully below, even if there were evidence of a burden on local officials, that would, at most, be a harm to the State, not the Republican Committees.

Second, there is no record of any voter confusion and the Republican Committees' assertion of such is belied by common sense. *Contra* Int. Br. at 7. As the District Court already found: "voter confusion will be minimal. Voters who are already registered will not need to bother with the new deadline, and those voters

[2] @SecretaryHobbs, Twitter (Oct. 6, 2020; 1:37 AM), https://mobile.twitter.com/secretaryhobbs/status/1313352717407006725.

that were unable to register before October 5, 2020 now have extra time." Order at 8.

Third, the extension does not threaten "voter registration parity." *Contra* Int. Br. at 7. The extension is non-partisan and applies equally to all Arizonans, regardless of their political beliefs. It is difficult to conceive of a more conjectural and nebulous injury than this. The Republican Committees cannot prove something that is unknowable: the voting intentions of Arizonans who *may* take advantage of the extension and register to vote between today and October 23, and then *may* go on to vote in the general election, and then *may* vote for a party other than the Republican party. The Republican Committees cannot dress up potential electoral loss as an Article III injury.

The Republican Committees' failure to articulate, much less show, any irreparable harm is fatal to their motion: "if a stay applicant cannot show irreparable harm, a *stay may not issue*." *Doe #1*, 957 F.3d at 1061-62 (quotation omitted) (emphasis added).

II. THERE IS NO SHOWING OF THE OTHER THREE FACTORS REQUIRED FOR A STAY

Without a showing of irreparable harm, the Republican Committees' motion to stay must fail "regardless of the [their] proof regarding the other stay factors." *Id.* But the Republican Committees have not even attempted to show that they can satisfy the other three factors required to issue a stay. Nor can they.

First, the Republican Committees are not likely to succeed on the merits of their appeal. Under black-letter Supreme Court precedent, they lack standing as intervenors to prosecute an appeal after the Secretary declined to appeal. *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (denying stay sought by intervenor RNC); *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013) (holding the Supreme Court has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to."). Plaintiffs have moved to summarily dismiss the appeal on this basis. *See* Dkt. 2. In any event, the District Court judiciously applied the *Anderson Burdick* analysis to the record of this case and crafted a carefully tailored injunction. The Republican Committees' emergency motion does not articulate any basis to disturb the District Court's sound reasoning.

Second, a stay pending appeal *would cause irreparable harm* to Plaintiffs, who are now in the process of registering thousands of voters; to the voters themselves who are benefiting from this extension; and to local election officials who are even now implementing the District Court's order. A stay would severely burden Plaintiffs' constitutional rights to register voters (exactly the harm the District Court sought to prevent), deny as many as 65,000 Arizonans the chance to register in time for the election, and burden local elections officials by making

them stop and then re-start registration operations when the Republican Committees' appeal is ultimately dismissed. Every day matters to voter registration: the election is just weeks away.

As Judge Logan held: "a core tenet of democracy is to be ruled by a government that represents the population. Due to COVID-19, a portion of the population is prevented from registering to vote, and thus the integrity of the election is undermined in a different way; that portion is going unrepresented. Extending the deadline would give more time for those voters to register and let their voices be heard through the democratic process." Order at 9; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionable constitutes irreparable injury.").

III. APPELLANTS' FAILURE TO FIRST SEEK A STAY IN THE DISTRICT COURT IS FATAL TO THEIR MOTION

The Republican Committees' failure to first seek a stay in the District Court, as Rule 8 requires in all but what the Republican Committees admit are "rare cases," is a fatal procedural defect. Rule 8(a) provides that an application for a stay "must ordinarily be made in the first instance in the district court," unless the movant is able to "show that moving first in the district court would be impracticable." Fed. R. Civ. App. P. 8(a)(2)(A)(i). This is not one of the rare cases where this high standard is met. In their papers, the Republican Committees, *without citing a single case*, insist that moving the District Court for a stay pending

appeal would result in "redundant proceedings . . . without any practical likelihood of success" because they made similar arguments before the District Court. Int. Br. at 8-9. In nearly every case, parties seeking a stay from the district court are required to reiterate arguments—that is the nature of an appeal. This routine process does not make Rule 8's mandate "redundant." The Republican Committees "do[] not even attempt to explain why it would be 'pointless' to move first in the district court. . . . The [Republican Committees] appear[] to apply a presumption of bad faith on the part of the district court when the appropriate presumption is of course just the opposite." *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) (citing *Evans v. Michigan*, 568 U.S. 313, 325-26 (2013)). The Republican Committees' failure to move first in the district court for a stay or explain with particularity why doing so was impracticable "constitutes an omission [the Court] cannot properly ignore." *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001).

CONCLUSION

The Republican Committees have not shown any irreparable harm to them at all; on the contrary, a stay would irreparably harm Plaintiffs and the public at large by denying an estimated 65,000 Arizonans the right to register to vote. The Republican Committees also have not established they are likely to succeed on the merits of the appeal: they lack standing to pursue this appeal and the District

Court's reasoning was sound. The motion for an emergency administrative stay pending a decision on the Republican Committees' yet to be filed motion for a stay pending appeal should be denied.

DATED this 6th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020, 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.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Dymond Wells