Nos. 20-16759, 20-16766

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,
Plaintiffs-Appellees.
v.
KATIE HOBBS, *et al.*,
Defendants,
and
STATE OF ARIZONA, *et al.*,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01143

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STATE OF ARIZONA'S REPLY BRIEF

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INTRODUCTION

This appeal is almost entirely controlled by this Court's prior decision in *Arizona Democratic Party v. Hobbs ("Hobbs I")*, 976 F.3d 1081, 1086 (9th Cir. 2020) in this case. Plaintiffs dispute that *Hobbs I* is binding authority, relying entirely on *East Bay Sanctuary Covenant v. Trump ("East Bay I")*, 950 F.3d 1242 (9th Cir. 2020). They were wrong about that at the time, and now even more clearly so as that the *East Bay* panel has amended its opinion to omit the portions upon which Plaintiffs' arguments exclusively relied. *See East Bay Sanctuary Covenant v. Biden ("East Bay II")*, __ F.3d __, 2021 WL 1220082, at *5 (9th Cir. 2021) (holding that subsequent panels are "bound by the motions panel's published decision … where the motions panel answered precisely the same question").

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But that barely matters now given Plaintiffs' Answering Brief. Even pre-amendment, *East Bay I* acknowledged—even in Plaintiffs' own quotation—that a subsequent panel must at least "treat the motions panel's decision as *persuasive [authority]*." Answering Br.21 (quoting *East Bay I*, 950 F.3d at 1264-65) (emphasis added).

Plaintiffs, however, will not even *acknowledge* the key reasoning and holdings of the *Hobbs I* decision—let alone identify any actual error in them. This Court is thus presented with no actual argument as to why it should not follow its own at-least-persuasive (and actually binding) authority. If Plaintiffs are going to ask this Court to reject its prior reasoning and holdings as wrongly decided, they could at least do this Court the favor of explaining what it got wrong.

The four nearly-dispositive and specific holdings in *Hobbs I* were neither subtle, nor subtley raised, by the State: appearing in both comprehensive bullet-pointed/numbered lists with the same four critical holdings, Opening Br.4-5, 22-23, and then re-raised/quoted in each argument section where directly relevant, Opening Br.34, 40, 44-45, 47, 51-52, 56. Plaintiffs could not have missed them. In short: (1) "The Acts 'impose[], at most, a "*minimal*" burden,'" (2) the State's Poll-Close Deadline is "'*reasonable*,'" (3) a post-election cure opportunity "'would indeed increase the administrative burdens on the State," and (4) the "'State has offered a reasonable explanation'" for differentiating between "'"mismatched signatures" … [and] missing signatures.'" Opening Br.5 (quoting *Hobbs I*, 976 F.3d at 1085-86).

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Plaintiffs amazingly never quote a single one of these four specific holdings in their entire Answering Brief. Instead, Plaintiffs blithely dismiss *all* of them as merely "evaluating the State's '*probability* of success on the merits,' not more." Answering Br.20 (citation omitted). Not so. The State's brief carefully distinguished between those issues that the motions panel had only offered predictive assessments (*e.g.*, all claims merging into *Anderson-Burdick*) and those on which the panel had announced unequivocal determinations that were outright holdings. Opening Br.28-32, 34, 44, 51, 64. And by refusing to acknowledge the language of any of these holdings, Plaintiffs necessarily fail to establish that they were in any way equivocal/merely predictive, rather than outright holdings. Instead, they simply ignore them in the hope that this Court will too.

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Rather than engaging with this Court's *Hobbs I* reasoning/holdings, Plaintiffs resort to grandstanding and sleight of hand. Plaintiffs scrupulously ignore the actual (and minimal) burden of the requirement at issue: *i.e.*, a signing "(1) once, (2) where prominently indicated, (3) sometime in about a month—either by following simple directions in the first instance or curing such failure by Election Day."

Opening Br.40. They never contend *that* actual burden is severe, or indeed anything more than *de minimis*. Instead, they engage in misdirection: fixating on the *remedy* for violating this simple requirement rather than the burden of complying with it. In particular, Plaintiffs rely on demagogic repetition of their accusation that the Acts "disenfranchise" voters—repeating some form of the word "disenfranchise" a remarkable *31 times*.

But the same could be said of virtually any voting regulation. Having an election day itself "disenfranchises," in Plaintiffs' parlance, any citizen that seeks to vote the next day. A requirement that voters cast only one vote for President "disenfranchises" voters that select two candidates. As does the requirement of registering to vote, or presenting a form of photo identification. But such requirements routinely survive review under the *Anderson-Burdick* standard as non-severe burdens.

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So too here. The burden of *compliance* is minimal. Indeed, it would be incoherent if the burden of obtaining a photo identification in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), was not severe, but the burden here somehow was. And inordinate

repetition of the word "disenfranchise"—even thirty-one times—will not transform a minimal burden into a severe one.

Once the truly minimal burden at issue here is recognized, the remaining constitutional analysis is straightforward and *already performed* by this Court. This Court has already—and correctly—held that the Acts' Poll-Close Deadline is a "reasonable" manner of advancing the State's important interests. *Hobbs I*, 976 F.3d at 1085. No more is required.

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Plaintiffs' alternative procedural due process argument fails because it is subsumed into the *Anderson-Burdick* framework. Plaintiffs notably do not identify any reason why this Court's prior reasoning and holdings—which were *categorical*—would not control here. Instead, they simply argue that the merger rule should not apply to procedural due process claims because this Court has not yet formally applied its categorical rule to one of them specifically. Once again, controlling precedent cannot be evaded or ignored so easily.

The district court also abused its discretion in balancing the equities by (1) violating *Purcell* doctrine, (2) discounting and miscalculating Plaintiffs' delay in bringing suit, (3) ignoring the

concededly "minimal" burden imposed by the Acts when balancing harms, and (4) failing to apply the standard for mandatory injunctions, which the relief that Plaintiffs seek plainly is.

ARGUMENT

I. THIS COURT'S PRIOR *HOBBS I* DECISION RESOLVES THIS APPEAL, EITHER AS BINDING AUTHORITY OR UNANSWERED PERSUASIVE AUTHORITY

A. *Hobbs I* Opinion Is Binding Here

Plaintiffs' contention that *Hobbs I* is not binding authority at all ultimately rests on a single basis: this Court's decision in *East Bay I*, which distinguished *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015) as dicta. Plaintiffs' argument was weak at the time it was asserted for the reasons previously explained. *See* Opening Br.30-31 n.4. But is now wholly untenable, since *East Bay II* amended the prior decision to remove the crucial components upon which Plaintiffs' arguments indispensably relied.

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Specifically, Plaintiffs' relied upon *East Bay I*'s statement that a motion panel decision "'does not, forever bind the merits of the parties' claims.'" Answering Br.17-18 (quoting *East Bay I*, 950 F.3d at 1264). But *East Bay II* eliminates that. Instead, it struck that portion of the opinion and instead now makes clear that there are "circumstances

where a motions panel *does* answer the same legal question that is presented to the merits panel," and that such "a question already answered in binding precedent will be controlled by that answer when the same question is presented in the future." 2021 WL 1220082, at *9 n.3. That is just so here: the *Hobbs I* panel answered "the same legal question[s]" presented here *outright* in a published, binding precedent.

Moreover, Plaintiffs' argument was wrong even when written. Plaintiffs never explain either (1) how *East Bay I* had authority to dismiss *Lair*'s holding as mere "dicta" in light of this Court's clear precedents to the contrary or (2) how *East Bay I*'s own reasoning was not similarly dismissible as mere dicta given that it ultimately *followed* what the prior motions panel had held. Opening Br.30-31 n.4.

More fundamentally, Plaintiffs never answer the central and inescapable question here: why would motions panels elect to publish their opinions if that decision had no effect at all? And it plainly doesn't under Plaintiffs' arguments. Plaintiffs do not deny motions panels' authority to issue published opinions. But surely the decision to publish must make some difference in the real world? Plaintiffs, however, give it none at all.

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Finally, Plaintiffs appear to contend that the purported infeasibility of seeking further appellate review undermines *Hobbs I*'s binding effect, arguing (at 20) that "Appellees could not feasibly seek review of that decision in time to have any impact for the November election." That is both incorrect and irrelevant. Wrong because the Supreme Court has granted stays in as little as 24 hours in election cases, *see Arizona Secretary of State's Office v. Feldman*, 137 S. Ct. 446 (2016)—as Plaintiffs well know as parties in *Feldman*. And this Court can outright reverse itself en banc in election cases in a mere eight days. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003).

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Plaintiffs' contention is also irrelevant because this case involves a *permanent* injunction, not one merely limited to the 2020 election. And Plaintiffs absolutely could have—but refused to—seek rehearing en banc of *Hobbs I*. Indeed, local elections were held on March 9, 2021 without a post-election cure period under the *Hobbs I* stay.[1]

[1] *See City of Phoenix March 9, 2021 Runoff Election Official Results,* https://www.phoenix.gov/cityclerksite/Documents/March%209%2c%202021_Citywide%20Summary%20Results.pdf

B. The Pertinent *Hobbs I* Holdings Were Not Tentative Or Probabilistic In Nature

Plaintiffs also attempt to escape the binding effect of *Hobbs I* by contending (at 20) that "the *Hobbs I* court made clear throughout its opinion that it was evaluating the State's '*probability* of success on the merits,' not more." That is specious.

As the State explained, "[t]his Court's *Hobbs I* decision already resolved several critical issues conclusively, rather than merely expressing a prediction as to which parties were likely to prevail on them on appeal." Opening Br.28. Specifically, while the *Hobbs I* panel offered only predictive judgments as to issues like the State's arguments that Plaintiffs' independent due process argument was barred, Opening Br.64, *none* of the four relevant holdings cited by the State was remotely so qualified. Instead, they were all *unequivocal holdings*. Opening Br.5, 22-23.

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Plaintiffs tellingly do not even attempt to engage with the relevant reasoning to attempt to show that it was probabilistic rather than outright holdings. For good reason: such an attempt would be futile.

Because the *Hobbs I* panel's outright and unequivocal holdings are binding here, reversal is all-but mandated.

C. Even If *Hobbs I* Were Only Persuasive Authority, Its Holdings Are Unacknowledged And Unanswered

Even if Plaintiffs were correct about the *binding* effect of *Hobbs I*, Plaintiffs concede that *Hobbs I* is at least "'persuasive'" authority. Answering Br.21. But Plaintiffs do not even *acknowledge* *Hobbs I*'s reasoning and holdings, let alone attempt to explain what is unpersuasive about them.

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Ultimately, if Plaintiffs are going to ask this Court to reverse its prior published holdings without en banc proceedings, they could at least deign to address this Court's *Hobbs I* actual reasoning directly and offer some explanation as to what this Court got wrong in it. Plaintiffs steadfastly refuse to do so. Indeed, Plaintiffs even refuse to accord *Hobbs I* the respect it would command if it were merely an unpublished memorandum decision.

Because Plaintiffs completely fail to identify anything unpersuasive in *Hobbs I*'s (unacknowledged) reasoning, the difference between controlling and persuasive authority here is ultimately a distinction without a difference.

II. PLAINTIFFS' *ANDERSON-BURDICK* CLAIM FAILS

A. Plaintiffs' Facial-Only Claim Fails Under *Salerno*

As an initial matter, Plaintiffs' *Anderson-Burdick* claim fails because Plaintiffs concede it is facial-only in nature and because they cannot satisfy the no-set-of-circumstances standard of *United States v. Salerno*, 481 U.S. 739 (1987). Plaintiffs also do not dispute the State's argument that the district court "granted facial relief without even acknowledging the standard for facial claims," Opening Br.59, or point to any language that even conceivably be deemed to apply the *Salerno* standard.

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Plaintiffs' principal contention seems to be that *Salerno* does not apply, citing solely a *First* Circuit case. Answering Br.21 n.3. But *this Court* has been perfectly clear that *Salerno* applies to all facial claims that are not First Amendment or abortion claims. *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) ("[W]e will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so."); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir. 2003); *Kim v. Ziglar*, 276 F.3d 523, 527 (9th Cir. 2002) (same).

Plaintiffs are welcome to challenge Massachusetts's election-day cure deadline (which mirrors Arizona's) under the First Circuit's more-lenient standard. But having filed suit in the Ninth Circuit, they must satisfy *Salerno*. Nor should this case law come as a surprise to Plaintiffs, since the State previously cited *all* of it in this Court. State's Stay Reply (Doc. 21) at 6. But Plaintiffs continue to have no answer to it—other doubling down on their reliance purely on First Circuit authority. Plaintiffs' Stay Opp. (Doc. 19) at 15 n.8.

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Plaintiffs also make a cursory contention (at 21 n.3) that they "satisfy" *Salerno*'s no-set-of-circumstances standard. But they do not even attempt to answer the State's example that "if a voter receives notice of an absent signature three weeks before the election and opportunity to cure until election day, there is no reason to believe the absence of a further five-business-day-post-election cure period imposes an unconstitutional burden," Opening Br.58—thereby effectively conceding the existence of constitutional circumstances. Under *Salerno*—which unequivocally governs in *this Circuit*—that concession is fatal.

B. The Burden On Plaintiffs' Voting Rights Is Minimal

While otherwise extolling the district court's reasoning, Plaintiffs reject one of its central premises: that the burden imposed by the Acts is minimal. Plaintiffs instead spill considerable ink contending that was error and that the burden is actually severe. Not so.

1. This Court's Prior Holding That The Acts Impose "At Most" A "Minimal" Burden Is Binding

As explained above and previously, this Court outright held in *Hobbs I* that the Acts "impose[], at most, a 'minimal' burden." 976 F.3d at 1085. That holding was unequivocal and was not in any manner qualified as mere prediction. It is therefore binding authority. Opening Br.34; *supra* at Section I.

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Nor do Plaintiffs ever actually attempt to argue otherwise, or indeed quote the relevant language even once.

2. Plaintiffs Wrongly Conflate The Burden Of Compliance With The Remedy For Non-Compliance

Even if *Hobbs I*'s minimal-burden determination were not binding and/or dispositive as unanswered persuasive authority, Plaintiffs' severe-burden argument would still fail. In particular, Plaintiffs' argument relies almost entirely on conflating the burden of *compliance*,

with the *remedy for non-compliance*. That squarely violates the Supreme Court's decision in *Crawford*.

In *Crawford*, as here, the remedy for non-compliance was vote disqualification. That much is undisputed. And the actual burden of compliance was greater in *Crawford*—there the "inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph." 553 U.S. at 198 (plurality opinion).

In those circumstances, the Supreme Court squarely held that the burden "surely does not qualify as a substantial [one] on the right to vote." *Id.* The same result should obtain here, particularly as the actual compliance burden is concededly lower. Nor does Plaintiffs' repetition of the word "disenfranchise" 31 times change anything because the same accusation can—and was—hurled in *Crawford*. To no avail.

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To evade *Crawford*, Plaintiffs rely on the Eleventh Circuit's decision in *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1324–25 (11th Cir. 2019). With remarkable audacity, Plaintiffs cite (at 41) *Lee* and boldly assert that it is a "case[] considering similar signature-related laws have found they imposed significant burdens on the right to vote." But Plaintiffs ignore that *Lee* actually drew a *sharp*

distinction between signature mismatches and non-signatures and did not consider them "similar" at all. Instead, *as quoted* in the State's Opening Brief—and completely ignored by Plaintiffs—"'[I]t is one thing to fault a voter if she fails to follow instructions about how to execute an affidavit to make her vote count.' But this case actually *is* that 'one thing.'" Opening Br.56-57 (quoting *Lee*, 915 F.3d at 1324-25).

Lee thus addresses the burden of vote disqualification in circumstances that often involve "no fault of the voter," which is fundamentally different in nature than here. 915 F.3d at 1316. It did not address the burden of following simple instructions. And, even if it did, it is simply wrong under *Crawford*, which makes clear that the relevant burden is the burden of *compliance*, not the remedy for non-compliance.[2]

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The logic of Plaintiffs' arguments—at least if fairly applied—would make election law unadministrable. Most voting requirements result in disqualification if violated. But the *Anderson-Burdick*

[2] *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018) similarly involved *mismatches*—not missing signatures. And to the extent it conflated them, *Deztner* was overruled by *Lee*, which forcefully rejected such equivalency.

framework recognizes that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Under Plaintiffs' logic, however, all of the following would be subject to strict scrutiny and presumptive invalidation because they "disenfranchise" (in Plaintiffs' nomenclature) voters:

- Having an Election Day at all, which disqualifies voters that arrive at polling places the next day;
- Requiring voter registration;
- Closing polls at 9pm (or any time);
- Requiring mail-in ballots arrive by election day (or any day);
- Requiring voters select only one Presidential candidate;
- Requiring voters to complete a line next to their desired candidate, rather than circle the name; and
- Requiring a signature at all (no matter what the cure opportunities are).

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But this has never been the law. Instead, *Crawford* makes clear that the relevant question is the actual burden of compliance. And that

makes perfect sense given this Court's observation that "voting regulations are *rarely* subjected to strict scrutiny." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (emphasis added). But if Plaintiffs' arguments were correct, this Court would need to substitute "rarely" with "virtually always."

3. Plaintiffs' Arguments Violate Other Precedents

Plaintiffs' arguments rely upon untenable distinctions of controlling and persuasive authority that cannot withstand scrutiny.

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a. *Lemons*

Plaintiffs attempt (at 43-45) to distinguish *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008) on the basis that it involved "*referendum* signatures" rather than the right to vote. Oregon tried that one too in *Lemons*. Unsuccessfully. This Court was perfectly clear that the right at issue in *Lemons* "'implicate[d] the *fundamental right to vote*." Opening Br.36 n.5 (quoting 538 F.3d at 1102) (emphasis added). But although the right to vote was at issue, the complete absence of any cure period whatsoever imposed only a "minimal" burden. *Lemons*, 538 F.3d at 1104.

Plaintiffs also point (at 44) to the "procedural safeguards" that were "'weighted in favor of *accepting* questionable signatures." But that

is hardly a meaningful distinction here: the question of whether a ballot is signed or not is straightforward and—unlike mismatches—does not involve substantial ambiguity and subjectivity. There is no evidence that a weight in favor of "signed" (versus "not signed") determinations would make even the slightest difference here.

b. *Nader*

Plaintiffs twice cite *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) for the proposition that some "deadlines related to voting impose significant and impermissible burdens." Answering Br.45-46, 35-36. True enough, but *Nader* actually reveals the minuteness of the burden here relative to those found to be "severe." In *Nader*, the regulation at issue involved ballot access for third-party presidential candidates. 531 F.3d at 1031. And the timing of the requirement was so onerous that "no independent presidential candidate ha[d] appeared" on the ballot in the 15 years since the law went into effect. *Id.* at 1038. The deadline was thus tantamount to a complete prohibition on third-party candidates, and hence a "severe" burden. *Id.* By contrast, a simple requirement of signing one's own name once by election day is *several orders of magnitude* less onerous than that in *Nader*.

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c. *Short v. Brown*

Plaintiffs' attempted distinction of *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018), is also unavailing. In *Short*, this Court held that the burden of "register[ing] to receive a mailed ballot … [wa]s an extremely small one." *Id.* at 677. Plaintiffs do not deny that the actual burden of signing a ballot is even smaller here. Instead, they offer the non-sequitur that "Appellees do not challenge the signature requirement itself, but rather the Inadequate Cure Period." Answering Br.46. That fails for two reason: *first*, if a voter signs their ballot the first time (which is concededly a less-than-"extremely small"-burden), the cure opportunities are irrelevant. *Second*, Plaintiffs' argument ignores that the timing of the signature requirement is part and parcel of the signature requirement itself, and not some independent requirement. To put this in perspective: a requirement that a voter sign their ballot in a particular 60-second period could easily be a "severe" burden; a requirement of signing sometime within about a month is not.

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Plaintiffs also attempt to distinguish *Short*'s specific recognition of an important state interest in acting incrementally by contending (at 24 n.4) that "the State has not affirmatively raised it." Not so: "The

district court's reasoning also runs afoul of this Court's decision in *Short v. Brown*, which recognized a 'specific state interest in incremental election-system experimentation that can adequately justify' laws imposing minimal burdens." Opening Br.54 (quoting *Short*, 893 F.3d at 679) (cleaned up). No more was required. Nor do Plaintiffs explain why the Acts would not be reasonably tailored to such an interest.

d. *Rosario*

As explained previously, *Rosario v. Rockefeller* held that there is no constitutional violation where a party simply fails to act "prior to the cutoff date," and the disqualification is due to a voter's "own failure to take timely steps." 410 U.S. 752, 758 (1973).

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Plaintiffs attempt to distinguish *Rosario* by contending that the Acts "result[] in ballots cast *before* election day going uncounted." Answering Br.45. But, under Arizona law, a ballot is not validly *cast* unless signed. A.R.S. §16-552(B). And there is no indication that *Rosario* would have come out differently if would-be voters sent in unsigned registration forms by the deadline.

Plaintiffs also distinguish *Rosario* on the basis that "[t]he relevant comparison is to the State's varying cure periods for mail ballots with

inconsistent signatures." Answering Br.45. But that once again ignores this Court's controlling holding that the State reasonably distinguishes between the two. *Hobbs I*, 976 F.3d at 1086.

e. *Husted I*

Plaintiffs relied extensively upon *Northeast Ohio Coalition for the Homeless v. Husted ("Husted I")*, 696 F.3d 580 (6th Cir. 2012) below. And while they continue that reliance here, they now admit that "in considering a ballot affirmation requirement, the [*Husted I*] court found the burden 'minimal[.]'" Answering Br.38 n.11. So too here.

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Indeed, *Husted I* specifically reversed an injunction and held that the burden was minimal where the disqualification resulted from "'voters' failure to follow the form's rather simple instructions' to sign." Opening Br.57 (quoting *Husted I*, 696 F.3d at 598-99). That is *this* case.

4. The Actual Burden Imposed Is Truly Minimal

Plaintiffs' Answering Brief remarkably elides the *actual burden* of the State's signature requirement and accompanying Poll-Close Deadline. Plaintiffs do not ultimately dispute that actual burden of simply "sign[ing] once, where prominently indicated, sometime within roughly a month" is trivially low. Opening Br.37. Instead, Plaintiffs' burden analysis focuses on just about *everything else* except the actual

burden of signing itself (or curing by poll-close time). In particular, Plaintiffs rely on inapposite case law, an analogy to signature mismatches that this Court has already definitely rejected, and table-pounding repetition of "disenfranchisement" (31 times).

Plaintiffs' burden arguments also ignore or accept many of the State's related arguments about the magnitude of the burden. *See* Opening Br.37-40. In particular, Plaintiffs:

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- Do not appear to take any issue with the sufficiency of the notice of the signature requirement and deadline (which is ample). Opening Br.38.
- Do not dispute that the numbers of affected voters are exceedingly low (around 0.1%). Opening Br.39.
- Offer only a conclusory denial (at 47) that "Arizona is a clear leader in *removing* burdens to voting." Opening Br.38.
- Do not deny that the Acts are "'generally applicable, even-handed and politically neutral,'" Answering Br.47 n.13 (quoting State Br.38-39) (cleaned up), although they attempt to obscure the legal effect of that concession by bizarrely

postulating a requirement that voters "wade through a pool of venomous snakes to reach a polling place," *id.*

  - To be clear: (1) the State does not contend that "generally applicable, even-handed and politically neutral laws" *categorically* impose only minimal burdens, only that such characteristics are highly probative evidence to that effect and a minimal-burden determination will typically follow, and (2) the State concedes that *Anderson-Burdick* doctrine precludes siccing venomous snakes on voters.

- Plaintiffs ignore the affirmative curing assistance requirement imposed by State law (Opening Br.12-13, 72) when analyzing the applicable burden.

All of these considerations further underscore the minimal nature of the burden here.

C. The Acts Are Constitutional Under The *Anderson-Burdick* Standard

Plaintiffs notably do not appear to contest that all of the State's interests asserted are at least "important" (and outright compelling for securing its elections). Opening Br.43-55. Instead, Plaintiffs only

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appear to contest the constitutional tailoring of the Poll-Close Deadline under *Anderson-Burdick*. Those contentions fail.

1. Plaintiffs Misstate The Record And Standard Of Review

Much of Plaintiffs' argument is encapsulated in their accusation that the State "mischaracterize[s] the record," supposedly repeatedly ("once again"). Answering Br.29. But that "mischaracterization" appears to consist of describing the record exactly as the *Hobbs I* panel also saw it—descriptions by this Court that Plaintiffs studiously and completely ignore. *Hobbs I*, 976 F.3d at 1085-86. If the State's view of the record is indeed a "mischaracterization," it is at least in good company with multiple judges on this Court who unanimously share that view.

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Plaintiffs also repeatedly contend that the district court's factual findings are entitled to deference. Answering Br.14, 28-29, 32, 58. But the tailoring inquiry of *Anderson-Burdick* is actually a question of law, which this Court reviews de novo. *See*, *e.g.*, *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (*Anderson-Burdick* case); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1013 (9th Cir. 2002) (same).

2. The Acts Satisfy Any Applicable Tailoring Requirement

The Acts are sufficiently tailored under several important state interests, any one of which is sufficient to sustain the Acts.

a. Securing Electoral System

Plaintiffs' arguments attempt to sever the signature requirement's cure deadline from the requirement itself and contend that the *deadline* does not serve the State's anti-fraud interests. Answering Br.25-27, 61-62. But the deadline is part and parcel of the signature requirement itself. Indeed, Plaintiffs do not dispute the State's contention that "a signature requirement is ineffectual—indeed virtually useless—without a deadline attached to it." Opening Br.47. And this Court has already held as much *in this case*. *Hobbs I*, 976 F.3d at 1085 ("All ballots must have *some* deadline.").

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Because a signature requirement cannot serve the State's interests in securing elections without a deadline attached to it, the only question is whether the deadline is reasonable, not whether the specific deadline prevents fraud in-and-of itself. Opening Br.47. And this Court has already squarely held that "*it is reasonable* that Arizona

has chosen to make that deadline Election Day itself." *Hobbs I*, 976 F.3d at 1085 (emphasis added). That holding is dispositive here.

Plaintiffs also make no effort to address the State's argument that "a five-business-day-post-election deadline does not prevent fraud any better than an election-day deadline," and thus Plaintiffs' proposed remedy "would thus simply substitute one unconstitutional deadline for another if [their] reasoning were correct." Opening Br.48. Plaintiffs' arguments thus fail under their own terms and provide no basis for affirmance.

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b. Reducing Administrative Burdens

Hobbs I squarely held that "it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in … facilitat[ing] its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." 976 F.3d at 1085. Plaintiffs' respond to this controlling holding by ignoring it: never acknowledging it, or attempting to distinguish it.

Instead, Plaintiffs' audaciously claim (at 32) that "there is no way to read the record to overturn the district court's factual finding with regard to administrative burden." But not only is the burden's

magnitude vis-à-vis the State's interest actually a legal holding subject to de novo review, *supra* at 24, *this Court* already *has read* the record precisely as Plaintiffs contend it cannot be read. Specifically, this Court explained that "*there can be no doubt* (and the record contains evidence to show) that allowing a five-day grace period … would indeed increase the administrative burdens on the State to some extent," and further that the State's Election-Day Deadline was accordingly "*reasonable*." *Hobbs I*, 976 at 1085 (emphases added).

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Plaintiffs' characterization of the record is thus irreconcilable with how this Court has already characterized it.

c. Conducting Orderly Elections

Similarly, this Court has already held that the State's Election-Day Deadline "promote[s] [Arizona's] unquestioned interest in administering an orderly election." *Hobbs I*, 976 F.3d at 1085. This never-acknowledged holding is controlling here.

Plaintiffs' contrary contentions rely largely on the Secretary's opinions. Answering Br.33-34. But those views were infected by the Secretary's legally erroneous belief that Arizona law does not affirmatively preclude post-election-day curing, Opening Br.60-62,

which Plaintiffs now concede. *Infra* at 29-30. Nor do Plaintiffs answer the State's other arguments as to why such deference was misplaced. *See* Opening Br.53-54.

d. Incremental Change

The State's interest in being able to take incremental change, whether considered independently as a distinct interest or as an aspect of tailoring as to other interests, is also dispositive here. Opening Br.54-55. Plaintiffs' only response is to deny that the State raised any such argument under *Short*. But it plainly did. *Supra* at 19-20.

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D. The District Court's Extensive Reliance On An Analogy To Signature Mismatches Was Error

Plaintiffs repeatedly rely on an analogy between signature mismatches and non-signatures. But Plaintiffs refuse to answer the State's arguments why the two are distinct (*i.e.*, the inherent subjectivity and lack of fault of voters as to the former). Opening Br.55-57. And they further ignore entirely this Court's holding that the State "offered a reasonable explanation" for treating the two distinctly and that the State may "reasonably decline to assume such burdens" for allowing curing of non-signatures that it does for mismatches. *Hobbs I*,

976 F.3d at 1086. If there is any means of reconciling Plaintiffs' arguments with *Hobbs I*'s holdings, Plaintiffs refuse to provide it.

E. Affirmance Would Gravely Threaten The Laws Of At Least 15 Other States

Plaintiffs fail to offer any convincing rationale under which acceptance of their reasoning would not lead to virtually certain invalidation of the laws of at least15 other states. Plaintiffs point (at 35) to *Anderson-Burdick* "requir[ing] an individualized assessment." True to a point, but Plaintiffs never answer the State's fundamental argument that "there simply is no tenable legal reasoning under which Arizona law—which *does provide* an opportunity for curing up to poll-close time—could ever be found *less tailored* than the 15 states that *deny entirely any* opportunity to cure." Opening Br.60. Absent any such rationale—and Plaintiffs supply none—the district court's reasoning would doom the laws of at least 15 states, and likely those of Georgia, Massachusetts, and Michigan as well, no matter what "individualized assessments" were formally conducted.

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F. Arizona Law Affirmatively Precludes Post-Election Curing Of Non-Signatures

Plaintiffs notably do not address the State's contention that Arizona law affirmatively precludes post-election curing of non-

signatures, Opening Br.60-62—thereby conceding the issue. All of Plaintiffs' (and the Secretary's) arguments relying on potential inclusion of a post-election cure process in the Election Procedure Manual are thus misplaced.

III. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM FAILS

A. Plaintiffs' Freestanding Due Process Claim Violates This Court's Precedents

Plaintiffs' attempt to evade this Court's *categorical* rule precluding freestanding constitutional challenges outside of the *Anderson-Burdick* framework is unavailing. Plaintiffs notably do not deny that the *language* of the Court's holdings in *Dudum* and *Soltysik* are categorical. *See* Answering Br.50-52. Nor could they: *Dudum* and *Soltysik* are both perfectly clear that "a single analytic framework" governs, *Dudum*, 640 F.3d at 1106 n.15, and that all constitutional claims are "folded into the *Anderson/Burdick* inquiry." *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018). *Accord* Opening Br.62-64. If there is any manner of reading this Court's *actual reasoning* in those cases to be non-categorical, Plaintiffs do not provide it. And none exists.

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Plaintiffs also do not address this Court's other precedents applying this Court's merger rule categorically. *See* Opening Br.63

(citing *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 729 n.7 (9th Cir. 2015) and *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019)). Instead, they ignore both *Reagan* and *Hobbs*, and wrongly assert that the State only "cite[d] two cases" in support of its argument. Answering Br.50. Together, *Dudum, Soltysik*, *Reagan*, and *Hobbs* demonstrate that this Court has uniformly applied the merger rule categorically in *every* instance where it was applicable—now four times in all.

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Attempting to evade *Dudum* and *Soltysik*, Plaintiffs assert "neither *involved* procedural due process claims." Answering Br.50 (emphasis added). True, but nothing in their actual—and ignored—*holdings* would exclude procedural due process claims. Plaintiffs' argument is akin to saying that *Soltysik* only addressed a "2018 Free Speech claim" and not one in 2020/2021. True enough, but there is no reason why its reasoning would not apply equally there.

Plaintiffs are similarly wrong (at 52) in contending that "[a]bsent Ninth Circuit caselaw requiring procedural due process claims to be analyzed under *Anderson-Burdick*, the district court was bound to apply the *Mathews* test." But the actual reasoning and holdings of *Dudum*,

Sotlysik, *Reagan* and *Hobbs* easily constitute such "Ninth Circuit caselaw."

Plaintiffs also provide no basis for applying a different rule to procedural rather than substantive due process claims. Their only argument seems to be the truism that the "[t]wo claims are distinct." Answering Br.51. True, but so what? First Amendment claims are "distinct" from substantive due process and equal protection claims, but this Court had no difficult in applying its categorical rule to all of them. And Plaintiffs provide *no reason why* procedural due process should be placed outside this Court's categorical rule.

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Finally, Plaintiffs do not address the precedents of the D.C., Sixth, Seventh, and Eleventh Circuits, Opening Br.63, or deny that *all* of them apply a categorical rule that would be dispositive here. This Court would therefore be required to create a square (and distinctly lopsided) circuit split to affirm the district court's procedural due process holding. There is no reason to do so—particular where Plaintiffs refuse to provide any.

B. Plaintiffs' Due Process Claim Is Substantive In Character

Plaintiffs offer only a conclusory footnote (at 51 n.16) addressing the State's argument that their claim is actually substantive in nature. But while contending that they "only seek implementation of additional process," they never answer the State's basic argument: that Arizona law imposes a *substantive* requirement of signing by election day, and any asserted right to *violate* state law by invoking *federal due process* is necessarily substantive in nature.

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This case stands in stark contrast to Plaintiffs' signature *mismatch* cases where voters sought "[a]dditional procedures would simply allow for more probative extrinsic evidence to be considered" as to whether voters had *complied* with state substantive law. *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 220 (D.N.H. 2018). In those cases, the voters were asserting that they had *complied* with state law and requested additional *procedures* to prove as much. Not so here: Plaintiffs concede the violation of Arizona substantive law. They simply seek to trump it with new federal substantive law. A *procedural* due process claim can do no such thing.

C. Plaintiffs' Claim Fails Under *Mathews* Balancing

Even if this case were governed by the *Mathews* balancing test, Plaintiffs' arguments on appeal fail for five reasons.

First, Plaintiffs never address the State's argument that, under *Mathews*, the strength of the private interest must be evaluated with particularity, rather than at the highest level of generality. Opening Br.66-68. Plaintiffs, however, continue to argue the latter: *i.e.*, "the right to vote" free from "technicalit[ies]." Answering Br.54. That rationale—which presumably would similarly recognize a strong private interest in voting the day after election day, with election day being wholly arbitrary and a "technicality"—is far too general under *Mathews*.

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Second, Plaintiffs do not meaningfully address the State's argument that not counting unsigned/not-timely-cured ballots are "*correct* disqualifications under Arizona's signature requirement," rather than an erroneous ones. Opening Br.70. Instead, Plaintiffs' only response is simply to substitute their own view of when a vote is "erroneously" disqualified for that provided in Arizona substantive law. Answering Br.55. That is simply unresponsive to the State's essential point that "[p]rocedural due process does not protect against the 'risk'

that a state will *correctly* apply its own law to the facts at hand." Opening Br.70. And Plaintiffs do not cite any precedent holding otherwise.

Third, even assuming Plaintiffs' view of "erroneous deprivation" is correct, the rate of such deprivations is *exceedingly low*: Plaintiffs do not dispute that it is no higher than 0.1%—*i.e.*, at least 99.9% correct. Opening Br.68. And Plaintiffs were perfectly clear below in their refusal to attempt to quantify the estimated rate of error, contending instead it had "'minimal, if any, probative worth." Opening Br.69 (quoting 2-ER-162).

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Rather than focus on the *rate* of error, Plaintiffs instead dwell upon the mere possibility that it will happen to *someone*: "It is virtually certain that *some* Democratic voters" would be affected, of unquantified number. Answering Br.55 (emphasis added). That might suffice for associational standing (although the State contested that below, 1-ER-10, and it is not at issue on appeal). But the Supreme Court has made clear that: "'procedural due process rules are shaped by the *risk of error* inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.'" *Walters v. National Ass'n of Radiation*

Survivors, 473 U.S. 305, 321 (1985) (emphasis added). And certainly the Acts impose no trouble to voters whatsoever in the "generality of cases."

Ultimately, Plaintiffs' position dispenses with rate of error altogether, attempting to sever the numerator from the denominator and claim (at 55) that the "risk of erroneous deprivation is substantial" simply because the numerator is some non-zero number.

Fourth, Plaintiffs' arguments about the value of additional process are similarly premised on the mistaken view of what an "erroneous deprivation" is in this context. Opening Br.66-73.

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Fifth, Plaintiffs' arguments about the government's interests flout *Hobbs I*, which recognized the strength of those interests. Opening Br.43-55.

IV. THE DISTRICT COURT ABUSED ITS EQUITABLE DISCRETION

Plaintiffs' defense of the district court's equitable analysis is similarly unpersuasive.

A. The District Court Violated *Purcell* Doctrine

Plaintiffs do not deny that the district court categorically refused to apply *Purcell* doctrine. This Court has already held that was error and applied *Purcell* doctrine itself. *Hobbs I*, 976 F.3d at 1086.

Plaintiffs contend (at 63) the *Purcell* issue is moot because "the next federal election is almost two years away." But Plaintiffs ignore that *other* state and local elections will occur regularly in that time. And while Plaintiffs apparently do not care about them, *Purcell* doctrine does. Nor is ultimate resolution of this case, with possible en banc or Supreme Court review, certain before the eve of the 2022 election. And, as Republican Intervenors explain in greater detail, Plaintiffs' *Purcell* arguments are unpersuasive.

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B. The District Court Abused Its Discretion In Balancing The Harms

Plaintiffs' arguments about the balance of harms are also unavailing. Plaintiffs' delay arguments are based on the belief that the Election Procedure Manual could have included a post-election cure period. Answering Br.64. But they never answer the State's argument that Arizona law affirmatively precludes it, *supra* at 29-30, thereby conceding both that issue and the delay one as well.

Plaintiffs also do not offer any genuine response to the State's argument that the district court's balancing of harms ignored the "minimal" burden on voting rights, Opening Br.78-79, other than a conclusory assertion (at 65-66) that the district court weighed them: never identifying any language showing that it did.

Finally, Plaintiffs' mandatory injunction arguments are specious. The requested injunction plainly "'goes well beyond simply maintaining the status quo *pendente light*,'" and is thus a mandatory injunction. *Stanley v. USC*, 13 F.3d 1313, 1320 (9th Cir. 1994). Plaintiffs' reliance (at 66-67) on the "prevents future constitutional violations" language of *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017), fails because that was merely describing the *effect* of the particular injunction at issue there, rather than holding that all injunctions preventing alleged constitutional violations are categorically prohibitory in nature.

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Plaintiffs' argument further fails as a matter of logic: as a prohibitory injunction, Plaintiffs' requested relief is wholly ineffective. Absent affirmative *creation* of a new curing opportunity, no voters could avail themselves of it. Plaintiffs' cure opportunity cannot be effectuated through mere prohibitions, it could only be brought into existence

through affirmative *mandates*. If that is not a mandatory injunction, this Court's prohibitory/mandatory distinction is incoherent and should be revisited en banc. But this case law is actually clear—and clearly violated—by Plaintiffs' arguments.

Plaintiffs further do not dispute that the district court never *applied* the heightened standard for mandatory injunctions, thereby conceding the lower court's error if the injunction is mandatory in nature. Which it is.

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CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 20-16759, 20-16766

I am the attorney or self-represented party.

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