Nos. 20-16759, 20-16766

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,
Plaintiffs-Appellees,

v.

KATIE HOBBS, *et al.*,
Defendants,

STATE OF ARIZONA, *et al.*,
Intervenor-Defendants-Appellants,

and

REPUBLICAN NATIONAL COMMITTEE and ARIZONA REPUBLICAN PARTY,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona
Case No. 2:20-cv-01143
Hon. Douglas L. Rayes

APPELLEES' PROPOSED SUR-REPLY

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INTRODUCTION

The State relies heavily on *East Bay Sanctuary Covenant v. Biden (East Bay II)*, __ F.3d __, 2021 WL 1220082 (9th Cir. Mar. 24, 2021), in doubling down on its incorrect assertion that this appeal is "almost entirely controlled" by the motions panel's order granting a stay in *Arizona Democratic Party v. Hobbs (Hobbs I)*, 976 F.3d 1081 (9th Cir. 2020). State's Reply Br. 1. *East Bay II* was not addressed in Appellees' answering brief because it was issued more than a month after that brief was due and filed. This short surreply addresses why the State is incorrect to claim that *East Bay II*, which amended *East Bay Sanctuary Covenant v. Trump (East Bay I)*, 950 F.3d 1242 (9th Cir. 2020), forecloses the argument that *Hobbs I* is not binding on this panel.

ARGUMENT

I. *East Bay II* confirms that the motions panel's decision in *Hobbs I* is not binding on this panel.

In an effort to rescue its mistaken argument that *Hobbs I* is binding on this panel, the State misreads *East Bay II*. Although it is true that *East Bay II* amends some of the language in *East Bay I* that Appellees quoted in their brief, *see* Answering Br. 17-21, the new language supports the conclusion that the motions panel's decision does not bind this merits

panel in the sweeping way Appellants suggest. Indeed, *East Bay II* held: "The published motions panel order may be binding as precedent for other panels deciding the same issue, but it is not binding here." 2021 WL 1220082, at *8. *East Bay II* merely restated the rule that a merits panel is bound by an earlier motions panel's answers to "[1] pure questions of law [2] for which preexisting binding authority necessarily compelled the answer." 2021 WL 1220082, at *9 n.3. These are not the circumstances at issue here.

First, the motion's panel's "holdings" are not answers to "pure questions of law," but involve mixed questions of law and fact. Each of the four "unequivocal holdings" that the State asserts are binding here speak to some aspect of the *Anderson-Burdick* inquiry. That test considers, first, the magnitude of the burden imposed on impacted voters by the challenged law, and, second, whether the state's specific interests in imposing that burden outweigh it. Both steps require factual analysis. At step one, the magnitude of the burden imposed on voters "is a factual question." *See Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122–24 (9th Cir. 2016) (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)); *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007)

(whether an election law imposes a severe burden is an "intense[ly] factual inquiry"). Likewise, the State's (and the RNC's) contention that the second question *Anderson-Burdick* asks, about the state's justification for the law and whether it outweighs the burden on voting rights is a "pure legal question," is not well founded. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 448-449 (9th Cir. 2018); *Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 595-96 (6th Cir. 2012).

Second, even the State does not argue that any "preexisting binding authority necessarily compelled" any of the motions panel's conclusions in *Hobbs I*. Rather, the State characterizes *Hobbs I itself* as the controlling "binding precedent." State's Reply Br. 6-7. But *East Bay II* explains that a motions panel's answer to a legal question is only binding on a merits panel when the former's "specific holding on th[e] pure question of law was neither based on an assessment of probability nor an exercise of discretion—it was *necessarily compelled by preexisting* binding precedent." 2021 WL 1220082, at *9 n.3 (emphasis added). In *Hobbs I*, none of the four "holdings" that the State enumerates fit that definition. *See* State's Reply Br. 2 (quoting *Hobbs I*, 976 F.3d at 1085-86, and nothing else).

Third, the motions panel did *not* "answer the same legal question that is presented to the merits panel." 2021 WL 1220082, at *9 n.3. In fact, the State here advances the same position that was *rejected* in *East Bay II*—that a motion panel's resolution of the "likelihood of success on the merits" element binds the merits panel, because "the motions panel is predicting rather than deciding what our merits panel will decide." 2021 WL 1220082, at *8. That is true here even though the motions panel did not couch every sentence of its opinion in probabilistic terms. What matters is that each of the conclusions that the State characterizes as "unequivocal holdings," State's Reply Br. 9, were made in the context of the motions panel's likelihood analysis. *See Hobbs I*, 976 F.3d at 1085-86 ("[T]he State has shown that it is likely to succeed on the merits."). *East Bay II* held: "[s]uch a predictive analysis should not, and does not, forever decide the merits of the parties' claims." *East Bay II*, 2021 WL 1220082, at *9.

II. *East Bay II* does not override the policy and practical concerns underpinning *East Bay I*.

Although *East Bay II* cut *some* of *East Bay I*'s discussion of the "policy and practical reasons" underpinning that merits panel's treatment of the motions panel's decision, it retained key language

making clear that reasoning remains salient. *Compare East Bay II*, 2021 WL 1220082, at *8-9 *with East Bay I*, 950 F.3d at 1263-64; *see also* Answering Br. 18-21. The State's position would allow nearly every losing party in district court to take their chances on appeal with expedited briefing and no oral argument; including in cases like this one, where fundamental constitutional rights are at stake. As *East Bay II* recognizes, "[t]his sort of 'pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to act responsibly, rather than doling out justice on the fly.'" 2021 WL 1220082, at *9 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (quotation marks omitted)).

CONCLUSION

The district court's judgment should be affirmed.

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