

1 Alexis E. Danneman (SBA #030478)
Joshua L. Boehm (SBA #033018)
2 PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
3 Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
4 Facsimile: 602.648.7000
ADanneman@perkinscoie.com
5 JBoehm@perkinscoie.com
DocketPHX@perkinscoie.com

6 Kevin J. Hamilton (Wash. Bar #15648)*
KHamilton@perkinscoie.com
7 Marc Erik Elias (D.C. Bar #442007)*
MElias@perkinscoie.com
8 William B. Stafford (Wash. Bar #39849)*
WStafford@perkinscoie.com
9 Sarah Langberg Schirack (Alaska Bar # 1505075)*
SSchirack@perkinscoie.com
10 Ariel Glickman (Va. Bar #90751)*
AGlickman@perkinscoie.com
11 PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
12 Washington, DC 20005
Telephone: 202.654.6200
13 Facsimile: 202.654.6211
14 *Pro Hac Vice Application To Be Filed

15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF ARIZONA

18 The Arizona Democratic Party; The
19 Democratic National Committee; DSCC,

20 Plaintiffs,

21 v.

22 Katie Hobbs, in her official capacity as
Arizona Secretary of State; Edison Wauneka,
23 in his official capacity as Apache County
Recorder; David Stevens, in his official
24 capacity as Cochise County Recorder; Patty
Hansen, in her official capacity as Coconino
25 County Recorder; Sadie Jo Bingham, in her
official capacity as Gila County Recorder;
26 Wendy John, in her official capacity as
Graham County Recorder; Sharie Milheiro, in
27 her official capacity as Greenlee County

No.

**MOTION FOR PRELIMINARY
AND PERMANENT
INJUNCTION; MEMORANDUM
OF POINTS AND AUTHORITIES

(ORAL ARGUMENT
REQUESTED)**

1 Recorder; Richard Garcia, in his official
2 capacity as La Paz County Recorder; Adrian
3 Fontes, in his official capacity as Maricopa
4 County Recorder; Kristi Blair, in her official
5 capacity as Mohave County Recorder; Michael
6 Sample, in his official capacity as Navajo
7 County Recorder; F. Ann Rodriguez, in her
8 official capacity as Pima County Recorder;
9 Virginia Ross, in her official capacity as Pinal
10 County Recorder; Suzanne Sainz, in her
11 official capacity as Santa Cruz County
12 Recorder; Leslie Hoffman, in her official
13 capacity as Yavapai County Recorder; and
14 Robyn Stallworth Pouquette, in her official
15 capacity as Yuma County Recorder,

16
17
18
19
20
21
22
23
24
25
26
27
28
Defendants.

RETRIEVED FROM DEMOCRACYDOCKET.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Memorandum and Points of Authorities	1
Statement of the Case	1
Facts.....	2
Argument	5
I. Plaintiffs Are Likely to Succeed on the Merits	6
A. Plaintiffs Are Likely to Succeed on Their First and Fourteenth Amendment Undue Burden Claim.	6
1. The Inadequate Cure Period Imposes a Severe Burden on the Fundamental Right to Vote.	6
2. Defendants’ Interests Cannot Justify the Burdens Imposed on the Right to Vote.	7
B. Plaintiffs Are Likely to Succeed on the Merits of Their Fourteenth Amendment Procedural Due Process Claim.	9
1. Plaintiffs Have a Constitutionally-Protected Liberty Interest.....	10
2. The Inadequate Cure Period Denies Plaintiffs’ Rights Without Adequate Process.	10
a. Plaintiffs' Private Interest is of Paramount Importance	11
b. The Risk of Erroneous Deprivation of Plaintiffs’ Rights Is High, and Applying the Same Cure Period for Mismatched Signatures Would Significantly Lessen That Risk	11
c. Additional Procedures Would Further Defendants’ Interests and Involve Minimal Administrative Burdens	13
II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.....	14
III. The Public Interest and Balance of Equities Tip Sharply in Plaintiffs’ Favor.....	15
Conclusion	15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES

All for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 4, 15

Anderson v. Celebrezze,
460 U.S. 780 (1983)..... 6

Ariz. Dream Act Coal. v. Brewer,
855 F.3d 957 (9th Cir. 2017) 15

Ariz. Green Party v. Reagan,
838 F.3d 983 (9th Cir. 2016) 6

Brittain v. Hansen,
451 F.3d 982 (9th Cir. 2006) 10

Burdick v. Takushi,
504 U.S. 428 (1992)..... 6

Democratic Exec. Comm. of Fla. v. Lee,
915 F.3d 1312 (11th Cir. 2019) 7

Fla. Democratic Party v. Detzner,
No. 4:16-cv-607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16,
2016) 7, 8, 9

Franceschi v. Yee,
887 F.3d 927 (9th Cir. 2018) 10

Johnson v. Halifax Cty.,
594 F. Supp. 161 (E.D.N.C. 1984)..... 13

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 7, 12, 14, 15

Martin v. Kemp,
341 F. Supp. 3d 1326 (N.D. Ga. 2018) 10, 11, 12, 13

Mathews v. Eldridge,
424 U.S. 319 (1976)..... 10, 11, 13, 14

Melendres v. Arpaio,
695 F.3d 990 (9th Cir. 2012) 14, 15

1 *Ne. Ohio Coal. for Homeless v. Husted,*
2 696 F.3d 580 (6th Cir. 2012) 7

3 *Norman v. Reed,*
4 502 U.S. 279 (1992) 6, 8

5 *Obama for Am. v. Husted,*
6 697 F.3d 423 (6th Cir. 2012) 14

7 *Puente Ariz. v. Arpaio,*
8 821 F.3d 1098 (9th Cir. 2016) 6, 15

9 *Raetzl v. Parks/Bellefont Absentee Election Bd.,*
10 762 F. Supp. 1354 (D. Ariz. 1990) 10, 11

11 *Saucedo v. Gardner,*
12 335 F. Supp. 3d 202 (D.N.H. 2018) 10, 12, 14

13 *Soltysik v. Padilla,*
14 910 F.3d 438 (9th Cir. 2018) 6

15 *Stewart v. Blackwell,*
16 444 F.3d 843 (6th Cir. 2006) 7

17 *Taylor v. Louisiana,*
18 419 U.S. 522 (1975) 13, 15

19 *Touchston v. McDermott,*
20 234 F.3d 1133 (11th Cir. 2000) 14

21 *Wash. State Grange v. Wash. State Republican Party,*
22 552 U.S. 442 (2008) 6

23 *Williams v. Salerno,*
24 792 F.2d 323 (2d Cir. 1986) 14

25 *Winter v. Nat. Res. Def. Council, Inc.,*
26 555 U.S. 7 (2008) 5

27 *Yick Wo v. Hopkins,*
28 18 U.S. 356 (1886) 11

Zessar v. Helander,
No. 05 C 1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006) 12

1 *Zinerman v. Burch*,
2 494 U.S. 113 (1990) 8

3 **STATUTES**

4 A.R.S. § 16-452(A)..... 5

5 A.R.S. § 16-452(B)..... 3

6 A.R.S. § 16-541 2

7 A.R.S. § 16-545 1

8 A.R.S. § 16-548 2

9 A.R.S. § 16-550(A)..... passim

10 **OTHER AUTHORITIES**

11 Federal Rules of Civil Procedure Rule 65(a)(2)..... 1, 15

12 U.S. Const. amend. XIV, § 1 9

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

RETRIEVED FROM DEMOCRACYDOCKET.COM

1 For the reasons set forth in this memorandum, Plaintiffs—the Arizona Democratic
2 Party (“ADP”), the Democratic National Committee (“DNC”), and the DSCC (collectively,
3 “Plaintiffs”)—move the Court pursuant to Rule 65(a)(2) of the Federal Rules of Civil
4 Procedure to preliminarily and permanently enjoin enforcement by Defendants of any
5 source of state law that requires election officials to reject unsigned mail ballot envelopes
6 without offering the voter the opportunity to correct the omission of a signature on the ballot
7 envelope until five days after election day—as voters whose ballots are turned in with
8 “mismatched” signatures are permitted to do. This law impermissibly burdens the
9 fundamental right to vote and provides constitutionally inadequate process for voters with
10 unsigned mail ballot envelopes. It will disenfranchise a significant number of voters in the
11 upcoming general election unless this Court enters injunctive relief. This motion is based
12 on the memorandum of points and authorities included in this memorandum.

13 **Memorandum and Points of Authorities**

14 **Statement of the Case**

15 Every election, Arizona election officials initially reject mail ballots that are cast by
16 lawful Arizona voters because they determine they cannot verify the voter’s identity based
17 on the voter’s signature—or lack thereof—on the ballot envelope.¹ Unless such voters are
18 allowed to remedy this determination, their ballots are rejected, and they are
19 disenfranchised. But in the upcoming 2020 general election (the “2020 General Election”),
20 Arizona voters whose mail ballots are rejected because of a lack of signature will *not* have
21 an equal opportunity to “cure” their ballots as those voters whose ballots are flagged for
22 rejection based on a perceived signature mismatch. Voters in the latter category are afforded
23 an opportunity to correct their signature after election day (“Election Day”), for up to five
24 days. But voters whose mail ballots are rejected based on a determination that the voter’s
25 signature, executed on the envelope containing the ballot, is missing have no similar

26
27 ¹ Mail ballots are often referred to as “early ballots” under Arizona law. A.R.S. § 16-
28 545.

1 opportunity (the “Inadequate Cure Period”).

2 The result is an unjustifiable burden on Arizonans’ fundamental right to vote, as well
3 as the deprivation of that right without constitutionally adequate procedures, in violation of
4 the First and Fourteenth Amendments of the U.S. Constitution.

5 Without immediate relief from this Court, a significant number of lawful Arizona
6 voters, whose votes should count in the upcoming election, will be unconstitutionally
7 disenfranchised.

8 **Facts**

9 Under Arizona’s no excuse absentee ballot system, any registered voter may cast a
10 mail ballot. A.R.S. § 16-541. Arizona employs a system by which election officials verify
11 that a given ballot was, indeed, cast by the voter in question by reviewing the signature on
12 the mail ballot envelope. *See* A.R.S. § 16-548 (“The early voter shall make and sign the
13 affidavit and shall then mark his ballot in such a manner that his vote cannot be seen.”).

14 To verify the voter’s identity, signatures are reviewed by the “county recorder or
15 other officer in charge of elections” A.R.S. § 16-550(A). Specifically, in evaluating mail
16 ballots, Arizona law requires that “the county recorder or other officer in charge of elections
17 shall compare the signatures thereon with the signature of the elector on the elector’s
18 registration record.” *Id.*

19 Using signature “matching” to verify voter identity is an inherently dubious process.
20 Election officials are not handwriting experts, and the simple fact is that signatures change
21 all the time for any number of reasons. Perhaps in recognition of the fact that the signature
22 verification process invariably disenfranchises lawful voters, the Arizona legislature
23 amended A.R.S. § 16-550(A), effective August 27, 2019, to include a cure period for
24 signature mismatches in mail ballots.

25 The statute now provides that “[i]f the signature is inconsistent with the elector’s
26 signature on the elector’s registration record, the county recorder or other officer in charge
27 of elections shall make reasonable efforts to contact the voter, advise the voter of the

1 inconsistent signature and allow the voter to correct or the county to confirm the
2 inconsistent signature.” *Id.* As to those mail ballots where an election official determines
3 that the signatures do not “match,” “[t]he county recorder or other officer in charge of
4 elections shall allow signatures to be corrected not later than the fifth business day after a
5 primary, general or special election that includes a federal office or the third business day
6 after any other election” (the “Signature Mismatch Cure Period”). *Id.*

7 The statute does not provide that a voter may similarly be permitted to correct or
8 confirm a missing signature. In fact, it is silent on cure periods for missing signatures.² The
9 current version of the Elections Procedures Manual (the “Manual”)—which was approved
10 by the Governor and Attorney General in December 2019, as required by statute, A.R.S. §
11 16-452(B)—does address this issue. But it does so in a way that treats missing signatures
12 arbitrarily and unreasonably different from mismatched signatures.

13 According to the Manual, “[i]f the early ballot affidavit is not signed, the County
14 Recorder shall not count the ballot.” Unlike the Signature Mismatch Cure Period, which, in
15 most cases, extends the cure period for five days after Election Day, the Manual only
16 requires the County Recorder to make a “reasonable and meaningful attempt to contact the
17 voter” and explain how the missing signature can be cured “before 7:00pm on Election
18 Day.” [Declaration Ex. 1].

19 Because Arizona law does not provide a cure period for missing signatures following
20 Election Day, disenfranchisement will result. In recent general elections, a significant
21 number of mail ballots have been rejected in Arizona for missing signatures. For example,
22 in the general elections from 2008 to 2018, Maricopa County election officials alone

23
24 ² In the most recent legislative session a legislator introduced a bill to amend A.R.S.
25 § 16-550 to add: “If the signature is missing, the county recorder or other officer in charge
26 of elections shall make reasonable efforts to contact the elector, advise the elector of the
27 missing signature and allow the elector to add the elector’s signature not later than 7:00
28 p.m. on election day.” This bill has not yet passed. *See* Bill History of SB 1032, ARIZ.
LEGISLATURE, <https://apps.azleg.gov/billStatus/BillOverview/72575> (last visited June 4,
2020). Even if this bill were to pass, it would not remedy the issue giving rise to this
lawsuit—the unequal treatment of “missing” and “mismatched” signatures.

1 rejected a total of 18,420 mail ballots because they had missing signatures. Specifically, in
2 Maricopa County the following number of mail ballots were rejected for having “no
3 signature”: 1,856 in the 2018 general election; 2,209 in the 2016 general election; 3,749 in
4 the 2014 general election; 4,610 in the 2012 general election; 3,352 in the 2010 general
5 election; and 2,644 in the 2008 general election. [Declaration Exs. 2–7] Other counties in
6 Arizona have rejected mail ballots based on a voter’s failure to sign, as well. For example,
7 in Pinal County, 131 ballots were rejected for, among other things, missing signatures
8 during the 2018 general election. [Declaration Ex. 8]

9 Over the past decade, early voting by mail has grown exponentially in Arizona. In
10 the 2016 and 2018 general elections, respectively, 2.0 million and 1.9 million Arizonans
11 voted by mail ballot. [Declaration Exs. 9, 10] The increase in early voting by mail has been
12 further accelerated this election cycle by the spread of a highly infectious novel coronavirus,
13 which causes the dangerous and sometimes deadly disease COVID-19. Considering this
14 crisis, the Secretary and other election officials have encouraged increased voting by mail.
15 [Declaration Exs. 11, 12] Based on both past data and current events, the number of mail
16 ballots cast in the 2020 General Election promises to be significant.³

17 In the end, county recorders will inevitably receive some of those unsigned voter
18 ballots on or shortly before Election Day, when Arizona law would provide no or inadequate
19 time for those recorders to make reasonable efforts to contact the voter and cure the ballot.

20 To the extent the cure process is conducted via physical mail, the failure of A.R.S.
21 § 16-550(A) to provide a post-Election Day cure period for unsigned ballots only heightens
22 the likelihood of wrongful disenfranchisement due to the lag time in sending and receiving
23 physical mail.⁴ This happens in Maricopa County, where the cure process for unsigned mail

24
25 ³ It is inevitable that eligible Democratic voters within Plaintiffs’ memberships and
26 constituencies will submit unsigned mail ballots in the 2020 General Election, too, whether
27 for a simple oversight or based on a misunderstanding of the instructions. As of April 1,
2020, there were nearly 1.3 million registered Democratic voters in Arizona, 32.5% of the
total number of registered voters in Arizona (just over 3.9 million). [Declaration Ex. 13]

⁴ For example, the average time of first-class mail delivery in the United States is 1–

1 ballots is conducted by mail. [Declaration Ex. 15 (“In the case of a missing signature, the
2 unopened packet is sent back to the voter along with a letter explaining why it was returned
3 and a postage paid envelope for the voter to send it back signed.”)] This could also happen
4 where, for instance, the county recorder only has a voter’s mailing address (but not a phone
5 number) on file, or where a voter is unable to remedy the missing signature in person and
6 must instead obtain and submit a new ballot by mail.

7 These heightened risks are worsened by present conditions, where the United States
8 Postal Service is facing serious funding shortfalls and significant challenges delivering mail
9 given complications due to the ongoing global pandemic. [See Declaration Exs. 16, 17]
10 Simply put, voters who timely submit their mail ballot may be deprived of a meaningful
11 opportunity to prove their identity to election officials and have their vote counted.⁵

12 It would impose little to no administrative burden to extend the Signature Mismatch
13 Cure Period, a procedure that Defendants already have in place, to voters whose mail ballots
14 lack signatures. In fact, the Secretary was required by Arizona law to consult with each
15 county board of supervisors when preparing the Draft Manual, A.R.S. § 16-452(A), which
16 contained such a cure opportunity.

17 **Argument**

18 To obtain preliminary injunctive relief, a plaintiff must establish that it is (1) “likely
19 to succeed on the merits,” (2) “likely to suffer irreparable harm in the absence of preliminary
20 relief,” (3) “that the balance of equities tips in” their “favor,” (4) and “that an injunction is
21 in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A
22 preliminary injunction is also appropriate when “a plaintiff raises ‘serious questions’ as to
23 the merits and ‘the balance of hardships tips sharply in [plaintiff’s] favor,’” so long as the

24 _____
25 3 business days. [Declaration Ex. 14] Though, as discussed below, these are not typical
times and the United States Postal Service is experiencing significant and unusual delays.

26 ⁵ This risk is more than just speculative. It has happened. In the recent elections in
27 Wisconsin, the United States Postal Service struggled to deliver mail ballots to voters in
Wisconsin, with some ballots being delayed, and others not arriving at all. [Declaration Ex.
18]

1 plaintiff still establishes irreparable harm and that the injunction is in the public interest.
2 *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016) (alteration in original)
3 (quoting *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

4 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

5 **A. Plaintiffs Are Likely to Succeed on Their First and Fourteenth**
6 **Amendment Undue Burden Claim.**

7 The Inadequate Cure Period unconstitutionally burdens the fundamental right to vote
8 and is impermissible. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,
9 451 (2008). The Supreme Court has laid out a “flexible standard” to resolve challenges to
10 state election laws that burden voting rights in violation of the Fourteenth Amendment.
11 *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434
12 (1992). “This is a sliding scale test, where the more severe the burden, the more compelling
13 the state’s interest must be, such that ‘a state may justify election regulations imposing a
14 lesser burden by demonstrating the state has important regulatory interests.’” *Ariz. Green*
15 *Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016) (quoting *Ariz. Libertarian Party v.*
16 *Reagan*, 798 F.3d 723, 729–30 (9th Cir. 2015)).

17 A challenged election regulation imposing “severe” restrictions, at the far end of the
18 scale, is subject to strict scrutiny. *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018)
19 (citation omitted). But even if the burden is less than severe, the challenged law must be
20 justified by state “interest[s] sufficiently weighty to justify the limitation.” *Norman v. Reed*,
21 502 U.S. 279, 288–89 (1992). This analysis considers only “‘the precise interests put
22 forward by the State as justifications for the burden imposed by its rule,’ taking into
23 consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s
24 rights.’” *Burdick*, 504 U.S. at 434.

25 **1. The Inadequate Cure Period Imposes a Severe Burden on the**
26 **Fundamental Right to Vote.**

27 The fact that Defendants will reject a significant number of mail ballots for lack of
28

1 signature in the 2020 General Election—without opportunity to cure them in the five days
2 following Election Day, as it does for other mail ballots—presents a severe, or at the very
3 least, significant burden on Arizona voters’ right to vote.

4 It is all but certain that, if not provided a further cure period, a significant number of
5 voters will be disenfranchised because election officials determine their ballot envelopes
6 lack signatures. Based on past elections, a significant number of ballots will be cast without
7 signatures on the ballot envelopes. And not all of these ballots will be able to be cured prior
8 to Election Day. [*See, e.g.*, Declaration Ex. 7 (Maricopa County did not count 1,856 ballots
9 in 2018 because of determination ballot envelopes did not have signatures.)]
10 Disenfranchisement of a significant number of voters severely burdens the fundamental
11 right to vote, as federal courts have repeatedly held. *See Fla. Democratic Party v. Detzner*,
12 No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If
13 disenfranchising thousands of eligible voters does not amount to a severe burden on the
14 right to vote, then this Court is at a loss as to what does.”); *Stewart v. Blackwell*, 444 F.3d
15 843, 871–72 (6th Cir. 2006) (finding “severe” burden where unreliable punch card ballots
16 and optical scan systems resulted in thousands of votes not being counted).

17 In the context of voting rights, “the basic truth [is] that even one disenfranchised
18 voter—let alone several thousand—is too many[.]” *League of Women Voters of N.C. v.*
19 *North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also Democratic Exec. Comm. of*
20 *Fla. v. Lee*, 915 F.3d 1312, 1318, 1321 (11th Cir. 2019) (same). And courts have found a
21 severe burden even where relatively small numbers of votes were not counted. *See Ne.*
22 *Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012) (disqualifying
23 provisional ballots that constituted less than 0.3% of total votes inflicted “substantial”
24 burden on voters).

25 **2. Defendants’ Interests Cannot Justify the Burdens Imposed on the**
26 **Right to Vote.**

27 Because the burden on Arizona voters’ fundamental right to vote is severe, the
28

1 government must advance a corresponding interest that is “sufficiently weighty” to justify
2 the burden and show that the scheme producing the burden is narrowly drawn to further that
3 interest. *Norman*, 502 U.S. at 288–89. Defendants cannot justify the burdens that the
4 Inadequate Cure Period imposes on Plaintiffs’ right to vote with any regulatory interest, let
5 alone a “sufficiently weighty” one.

6 The Inadequate Cure Period does nothing to further a perceptible regulatory interest,
7 such as preventing voter fraud or ensuring timely counting of ballots. Where a person is
8 provided an opportunity to cure an unsigned ballot envelope and can produce a signature
9 that matches prior records, then the State’s interest in preventing fraud is met just the same
10 as it is under the Signature Mismatch Cure Period. In this lawsuit, Plaintiffs do not challenge
11 the process of signature verification; only Arizona’s failure to afford voters who cast a mail
12 ballot with a “missing” signature to remedy that issue to the State’s satisfaction. That is,
13 providing an additional cure period would work to prevent fraud and minimize the severe
14 burden of disenfranchisement that the law places on lawful, eligible voters. *See Detzner*,
15 2016 WL 6090943, at *7 (“[L]etting mismatched-signature voters cure their vote by proving
16 their identity *further* prevents voter fraud[.]”). And because A.R.S. § 16-550(A) already
17 includes the Signature Mismatch Cure Period, providing the same cure period for unsigned
18 mail ballots would not delay election results further or affect election finality since it would
19 merely extend the same opportunity in the case of missing signatures.

20 The existence of the Signature Mismatch Cure Period also undercuts any argument
21 Defendants may proffer as to the negligible administrative burden of Plaintiffs’ requested
22 relief. Because Defendants already provide mail ballot voters with mismatched signatures
23 five days after Election Day to cure their ballot, no new procedures would be required to
24 apply those same efforts to unsigned mail ballots. *See Zinermon v. Burch*, 494 U.S. 113,
25 136 (1990) (“[W]e cannot say that predeprivation process was impossible . . . [where the
26 state] already has an established procedure.”). Any incremental administrative burden
27 would consist solely of making reasonable efforts, for five additional days, to contact voters

1 with unsigned mail ballots and help them cure their ballots to ensure their vote counts. That
2 incremental burden is minimal by any objective measure.

3 Notably, the Secretary's draft of the Manual (the "Draft Manual"), which was not
4 approved by the Governor and Attorney General, would have allowed for a five-day cure
5 period post-Election Day for mail ballots with missing signatures. [Declaration Ex. 19
6 ("Voters must be permitted to correct or confirm an inconsistent or missing signature until
7 5:00 p.m. on the fifth business day after a primary, general, or special election that includes
8 a federal office or the third business day after any other election.")] So, Defendants could
9 hardly contend that the missing signature cure period Plaintiffs request would be too
10 burdensome when they proposed that very same cure period in the Draft Manual just nine
11 months ago.

12 In the end, even assuming some lesser level of scrutiny applies (which it does not),
13 the Inadequate Cure Period would still be unconstitutional. In *Detzner*, 2016 WL 6090943,
14 the State of Florida provided a cure period for unsigned mail ballots but no cure period for
15 mail ballots with mismatched signatures: the mirror image of this case. *Detzner* concluded
16 that it is "illogical, irrational and patently bizarre for the State of Florida to withhold the
17 opportunity to cure from mismatched-signature voters while providing that same
18 opportunity to no-signature voters." *Id.* at *7. For the same reason, the Inadequate Cure
19 Period would "not even survive rational basis review." *Id.*

20 **B. Plaintiffs Are Likely to Succeed on the Merits of Their Fourteenth**
21 **Amendment Procedural Due Process Claim.**

22 Plaintiffs are equally likely to succeed on the merits of their procedural due process
23 claim against the Inadequate Cure Period.

24 The Due Process Clause of the Fourteenth Amendment provides that a state shall not
25 "deprive any person of life, liberty, or property, without due process of law." U.S. Const.
26 amend. XIV, § 1. A procedural due process claim under the Due Process Clause requires a
27 showing of a "(1) a deprivation of a constitutionally protected liberty . . . interest, and (2) a

1 denial of adequate procedural protections.” *Franceschi v. Yee*, 887 F.3d 927, 935
2 (9th Cir. 2018). Plaintiffs are likely to satisfy each of these requirements.

3 **1. Plaintiffs Have a Constitutionally-Protected Liberty Interest.**

4 The first requirement of a procedural due process claim is easily satisfied here. It is
5 well settled that Arizona mail ballot voters have a protected “liberty interest which may not
6 be confiscated without due process.” *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762
7 F. Supp. 1354, 1357 (D. Ariz. 1990). Federal courts have consistently held that “[w]hile it
8 is true that [mail ballot] voting is a privilege and a convenience to voters,” a state does not
9 have “the latitude to deprive citizens of due process with respect to the exercise of this
10 privilege” once it is extended. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018);
11 *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (“Having induced
12 voters to vote by absentee ballot, the State must provide adequate process to ensure that
13 voters’ ballots are fairly considered and, if eligible, counted.”).

14 **2. The Inadequate Cure Period Denies Plaintiffs’ Rights Without**
15 **Adequate Process.**

16 When a constitutionally-protected interest is at stake, as here, a court must next
17 determine whether that interest is deprived without adequate process. To make that
18 determination, courts use the three-part test from *Mathews v. Eldridge*, which requires
19 balancing of: “first, the private interest that will be affected by the official action; second,
20 the risk of an erroneous deprivation of such interest through the procedures used, and the
21 probable value, if any, of additional or substitute procedural safeguards; and finally, the
22 Government’s interest, including the function involved and the fiscal and administrative
23 burdens that the additional or substitute procedural requirement would entail.” *Brittain v.*
24 *Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006) (*quoting Mathews v. Eldridge*, 424 U.S. 319,
25 349 (1976)). Under the *Mathews* balancing test, Plaintiffs are likely to show that the
26 Inadequate Cure Period denies the right to vote without adequate process.

1 **a. Plaintiffs' Private Interest is of Paramount Importance.**

2 When Defendants erroneously reject an unsigned mail ballot envelope, an eligible
3 Arizona citizen is denied the most "precious" of all rights: the right to vote in our
4 democracy. *Yick Wo v. Hopkins*, 18 U.S. 356, 370 (1886). For this reason, the private
5 interest affected by A.R.S. § 16-550(A) is of paramount importance. *See Martin*, 341 F.
6 Supp. 3d at 1338 ("the private interest at issue," in mail ballot case, "implicates the
7 individual's fundamental right to vote and is therefore entitled to significant weight");
8 *Raetzl*, 762 F. Supp. at 1358 (adequate process required before mail ballot voters are
9 "denied so fundamental a right"). The first *Mathews* factor therefore weighs strongly in
10 Plaintiffs' favor.

11 **b. The Risk of Erroneous Deprivation of Plaintiffs' Rights Is**
12 **High, and Applying the Same Cure Period for Mismatched**
13 **Signatures Would Significantly Lessen That Risk.**

14 It is virtually certain that some Democratic voters, who are registered to vote and
15 who timely submit their mail ballots, will inadvertently fail to sign their mail ballots, given
16 that 32.5 percent of voters in Arizona register as Democrats. Every mail ballot that is
17 unsigned, unless cured, will be rejected. While voters who cast mail ballots rejected for an
18 unsigned ballot envelope *may* be afforded the opportunity to cure their ballot until election
19 day under the Manual, that cure period does not adequately mitigate the risk of erroneous
20 deprivation. Given the press of other pre-election day work, there will be a delay between
21 a county's receipt of an unsigned ballot envelope and the county recorder connecting with
22 the voter to inform them of the issue. Further, it is inevitable that county recorders will
23 receive some unsigned Democratic voter ballots on or shortly before Election Day, when
24 Arizona law would provide no or inadequate time for those recorders to make reasonable
25 efforts to contact the voter and cure the ballot. County recorders and voters will likely
26 conduct at least some cure processes via physical mail, for instance, if the voter is
27 unreachable by phone or unable to cure a ballot in person. There is always some lag time
28 with physical mail, creating a higher baseline risk that unsigned mail ballots won't be cured

1 whenever physical mail is used. But that risk is especially high today, where the United
2 States Postal Service faces significant funding gaps and the global pandemic has slowed its
3 service.

4 At bottom, voters who could cure their unsigned mail ballot envelope will be
5 deprived of a meaningful opportunity to prove their identity to election officials and have
6 their vote counted. *See Martin*, 341 F. Supp. 3d at 1339 (agreeing with plaintiffs that post-
7 Election Day cure period for mismatched signatures was necessary, in part, because of
8 “voters who cannot vote in person due to physical infirmity”).

9 These factors combine to create a substantial risk of erroneous deprivation of
10 Plaintiffs’ rights.

11 Conversely, and for the same reasons, an extra five days to cure unsigned mail ballots
12 would significantly lessen the risk that Plaintiffs’ rights will be erroneously deprived.
13 Where the county recorder manages to contact a voter regarding a missing signature on or
14 shortly before Election Day, for instance, the additional cure period gives the voter time to
15 fix the missing signature—and by mail to the extent necessary. Potentially thousands of
16 eligible voters may be affected: in Maricopa County alone, the county recorder rejected
17 1,856 unsigned mail ballots in the 2018 general election and 2,209 in the 2016 general
18 election.

19 But, again, “even one disenfranchised voter . . . is too many.” *League of Women*
20 *Voters of N.C.*, 769 F.3d at 244. Given this, courts adjudicating challenges to signature cure
21 procedures in other states have found simple procedural safeguards to add significant
22 probative value where potential disenfranchisement was in an even smaller range. *See*
23 *Saucedo*, 335 F. Supp. 3d at 217 (so holding, where potential “disenfranchisement of
24 dozens, if not hundreds, of otherwise qualified voters” was at issue); *Zessar v. Helander*,
25 No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) (where 1,100 mail ballots
26 were rejected for signature mismatches, “the risk of erroneous deprivation” is “not
27 enormous, but the probable value of an additional procedure is likewise great in that it serves

1 to protect the fundamental right to vote”).

2 Given these facts, the second *Mathews* factor weighs significantly in favor of
3 Plaintiffs as well.

4 **c. Additional Procedures Would Further Defendants’**
5 **Interests and Involve Minimal Administrative Burdens.**

6 To the extent there is any additional administrative burden entailed by the cure period
7 Plaintiffs request, it is negligible. Defendants need only do what they already do for
8 “mismatched” signatures: try for five more days to contact voters who didn’t sign their mail
9 ballots, help those voters understand how to cure their ballots, and count the additional
10 cured ballots. *Martin*, 341 F. Supp. 3d at 1339–40 (“Because many of the procedures
11 Plaintiffs request are already in place, the Court finds that additional procedures would
12 involve minimal administrative burdens . . .”). No new procedures would be required to
13 apply those same efforts for unsigned mail ballots.

14 Any incremental administrative burden of making reasonable efforts, for five
15 additional days, to contact additional voters with unsigned mail ballots and help them cure
16 their ballots would be minimal and would not justify the burden on Plaintiffs’ rights. *Taylor*
17 *v. Louisiana*, 419 U.S. 522, 535 (1975) (“administrative convenience” cannot justify
18 practices that impinge upon fundamental rights); *Johnson v. Halifax Cty.*, 594 F. Supp. 161,
19 171 (E.D.N.C. 1984) (“[A]dministrative and financial burdens on the defendant . . . are not
20 . . . undue in view of the otherwise irreparable harm to be incurred by plaintiffs.”). The fact
21 that Defendants have recently proposed the very same cure period that Plaintiffs request for
22 unsigned mail ballots, in the October 2019 Draft Manual, underscores that such cure period
23 would not be administratively burdensome.

24 A five-day, post-Election Day cure period for unsigned mail ballots would not
25 otherwise harm Defendants’ interest in any perceptible way. It would not remove any of the
26 identification requirements under Arizona law which Defendants will argue prevent fraud.
27 And it would not delay counting votes since there is already a five-day cure period for

1 missing signatures. Rather, it would simply ensure that voters have an adequate opportunity
2 to cure a missing signature. If anything, the cure period Plaintiffs seek would further
3 Defendants' interest in ensuring that no mail ballot is erroneously rejected. *See, e.g.,*
4 *Saucedo*, 335 F. Supp. 3d at 220 (“[A]dditional procedures further the State’s interest in
5 preventing voter fraud while ensuring that qualified voters are not wrongly
6 disenfranchised . . . [and] only serve to enhance voter confidence in elections.”).

7 For these reasons, the third *Mathews* factor, like the first and second factors, weighs
8 strongly in Plaintiffs’ favor. Thus, under the *Mathews* balancing test, Plaintiffs are likely to
9 show that the Inadequate Cure Period denies the right to vote without adequate process.

10 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN** 11 **INJUNCTION.**

12 For the reasons set forth above, Defendants’ failure to allow voters who have not
13 signed their ballots to cure them after Election Day, as it does for other voters, violates the
14 First and Fourteenth Amendments. “It is well established that the deprivation of
15 constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*,
16 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

17 Further, “[c]ourts routinely deem restrictions on fundamental voting rights
18 irreparable injury.” *League of Women Voters of N.C.*, 769 F.3d at 247. In this case, without
19 extending the cure period to cover ballots with no signatures—as opposed to only ballots
20 with mismatched signatures—votes will not be counted in the 2020 General Election.
21 “[O]nce the election occurs, there can be no do-over and no redress” to those voters that
22 were improperly disenfranchised. *Id.* Thus, courts have long recognized that
23 disenfranchisement constitutes irreparable injury. *Obama for Am. v. Husted*, 697 F.3d 423,
24 436 (6th Cir. 2012); *see also Touchston v. McDermott*, 234 F.3d 1133, 1158–59
25 (11th Cir. 2000) (“[B]y finding an abridgement to the voters’ constitutional right to vote,
26 irreparable harm is presumed and no further showing of injury need be made.”); *Williams*
27 *v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of the right to vote is “irreparable

1 harm”).

2 **III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES TIP SHARPLY**
3 **IN PLAINTIFFS’ FAVOR.**

4 As a general matter, “[t]he public interest and the balance of equities favor
5 prevent[ing] the violation of a party’s constitutional rights.” *Ariz. Dream Act Coal. v.*
6 *Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (quoting *Melendres*, 695 F.3d at 1002). This is
7 particularly so where voting rights are at issue because “[t]he public has a ‘strong interest
8 in exercising the fundamental right to vote,’” *League of Women Voters of N.C.*, 769 F.3d at
9 248 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)), and in “permitting as many
10 qualified voters to vote as possible,” *id.* at 247 (quoting *Husted*, 697 F.3d at 247)). The
11 threatened injury of voter disenfranchisement as a result of the Inadequate Cure Period
12 outweighs whatever administrative inconvenience Defendants will experience (if any) in
13 contacting additional voters to cure their ballots. *See Taylor*, 419 U.S. at 535; *Johnson*, 594
14 F. Supp. at 171.

15 In all events, Plaintiffs have raised “‘serious questions’ as to the merits.” *Puente*
16 *Ariz.*, 821 F.3d at 1103 n.4. Those serious questions, combined with the fact that the
17 “balance of hardships tips sharply in plaintiff[s]’ favor,” favors the requested relief. *See All*
18 *for the Wild Rockies*, 632 F.3d at 1132.

19 **Conclusion**

20 For the reasons stated above, Plaintiffs respectfully request that the Court enter a
21 preliminary injunction as set forth in the proposed order. Further, Plaintiffs believe that a
22 hearing on this motion can be consolidated with a trial on the merits. Plaintiffs request that
23 the Court consolidate any trial on the merits with a hearing on this Motion. Fed. R. Civ. P.
24 65(a)(2).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 10, 2020

PERKINS COIE LLP

By: /s/ Alexis E. Danneman
Alexis E. Danneman
Joshua L. Boehm

RETRIEVED FROM DEMOCRACYDOCKET.COM