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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The Arizona Democratic Party, et al.,

Plaintiffs,

v.

Katie Hobbs, et al.,

Defendants,

and

State of Arizona, Republican National Committee, Arizona Republican Party, and Donald J. Trump for President, Inc.,

Intervenor-Defendants.

No. CV-20-1143-PHX-DLR

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Assigned to the Honorable Douglas L. Rayes

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Rules

Plaintiffs respectfully submit that the Court should enjoin any requirement under Arizona law that election officials reject unsigned mail ballot envelopes without offering the voter the chance to correct the missing signature until five business days after election day (the "Inadequate Cure Period"). The Inadequate Cure Period unconstitutionally burdens Arizonans' fundamental right to vote and provides constitutionally inadequate process for such voters. The State does not and cannot dispute that the Inadequate Cure Period has disenfranchised thousands of voters in past elections. Without the relief from this Court sought by Plaintiffs, thousands of Arizonans will be similarly disenfranchised in the upcoming 2020 general election (the "2020 General Election").

ARGUMENT

I. Plaintiffs Have Adequately Alleged and Will Prove Standing.

The State is wrong to urge this Court to find that Plaintiffs have not adequately alleged standing. They have. "[A]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct" suffice to establish standing, because the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations and citations omitted). It is well-settled that "in an injunctive case," such as this, a court "need not address standing of each plaintiff if it concludes that one . . . has standing." *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009). ADP, DNC, and DSCC have adequately alleged standing on two distinct grounds: as (a) associations on behalf of their members and (b) as organizations.

A. Plaintiffs Have Adequately Alleged Associational Standing.

Plaintiffs have adequately alleged associational standing because their "members would otherwise have standing to sue in their own right, the interests at stake are germane to [each Plaintiff] organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*, 528 U.S. 167, 181 (2000).

Each Plaintiff has alleged that its members or constituents who would otherwise have standing to sue in their own right are directly harmed by the Inadequate Cure Period. [Compl. ¶¶ 18, 22, 25] Because (a) Democratic Party voters represent nearly a third of all registered voters in Arizona, (b) millions of Arizonans vote by mail ballot, and (c) thousands of Arizonans did not sign mail ballots in recent elections, it is virtually certain that some Plaintiff members or constituents will mail a ballot without a signature in 2020. [*Id*.] These Plaintiff members or constituents face an imminent threat of having their vote denied in 2020 due to the Inadequate Cure Period. [*Id.*] The Inadequate Cure Period is germane to Plaintiffs' organizational purpose, and each Plaintiff alleges that it can obtain relief for its members or constituents without their individual participation. [*Id.*] Nothing more is required to establish associational standing.

The State (at 8–9) nonetheless challenges Plaintiffs' associational standing in two respects: first, that Plaintiffs "have failed to identify any specific members that would be harmed," and second, that Plaintiffs' alleged injuries are "self-inflicted." Both arguments misread the Complaint and controlling precedent.

First, it is "relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by" the Inadequate Cure Period, and the State "need not know the identity of a particular member to understand and respond to [Plaintiffs'] claim of injury." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015). In such circumstances, there is "no purpose to be served by requiring an organization to identify by name the member or members injured." *Id.*

Plaintiffs' credible allegations of "virtually certain" harm are substantially more concrete and imminent than a "statistical probability," as the State incorrectly asserts, citing *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (2020), and *Mecinas v. Hobbs*, __ F. Supp. 3d __, No. CV-19-05547, 2020 WL 3472552, at *9 (D. Ariz. June 25, 2020). *Jacobson* and *Mecinas* are therefore distinguishable, even assuming the standing decisions

in those cases are upheld on appellate review.[1] *Cegavske* provides the controlling standard here, and Plaintiffs' allegations far surpass the applicable "relatively clear" threshold.

Exactly whom among Plaintiffs' membership will be disenfranchised due to the Inadequate Cure Period cannot be known until the election and so cannot be identified in a lawsuit seeking injunctive relief. The whole point is to prevent this harm in advance. Recognizing these practical realities, federal courts routinely find associational standing without identified members in similar cases. *See Fla. Democratic Party v. Detzner*, No. 4:16cv607, 2016 WL 6090943 at *4 (N.D. Fla. Oct. 16, 2016) ("Plaintiffs need not identify specific voters [who] are registered as Democrats that will have their vote-by-mail ballot rejected due to apparent mismatched signatures"); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (similar holding and reasoning).

The State's lengthy response amply shows its ability to (unconvincingly) respond to Plaintiffs' claim of injury without knowing the identity of specific members. For these reasons, Plaintiffs need not identify specific members and have adequately alleged associational standing. *Cegavske*, 800 F.3d at 1039.

Second, the State's assertion that Plaintiffs' alleged harms are "self-inflicted" is unfounded and premised on a factual assumption Plaintiffs do not plead. Plaintiffs allege (at 11) that their members who cast unsigned ballot affidavits will do so *inadvertently*. This contrasts sharply with the cases the State cites, where plaintiffs unsuccessfully sought to "manufacture standing merely by inflicting harm on themselves." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 418 (2013); *Mendia v. Garcia*, 768 F.3d 1009, 1013 n.1 (9th Cir. 2014). "An injury is 'self-inflicted' so as to defeat standing only if 'the injury is so completely due to the plaintiff's own fault as to break the causal chain.'" *Backer ex rel.*

[1] In the former case, there is an outstanding petition for rehearing *en banc*, and in the latter, merits briefing is later this year. Both, moreover are about the order in which candidate names appear on the ballot, not about a state practice that disenfranchises thousands of voters each election. Thus, neither case has bearing on the Court's standing and injury analysis in this case even if either did control, which they do not.

Freedman v. Shah, 788 F.3d 341, 344 (2d Cir. 2015) (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000)). Here, Plaintiffs plausibly allege that at least some members will inadvertently submit unsigned ballots that could be cured but for the Inadequate Cure Period. Thus, the injury to Plaintiffs' members is caused at least "in part by" the Inadequate Cure Period. *Id.* This is more than enough to allege Article III standing. *See id.* (finding standing where appellee caused her injury "in part"). The State's speculation that some of Plaintiffs' members will purposefully disenfranchise themselves is not just unfounded, but also contrary to Plaintiffs' allegations.

B. Plaintiffs Have Adequately Alleged Organizational Standing.

Each Plaintiff has also adequately alleged that it has direct standing to sue, as an organization, on the basis of two independent harms.

First, each Plaintiff has alleged "(1) frustration of its organizational mission; and (2) diversion of its resources" to combat the effects of the Inadequate Cure Period. *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). All Plaintiffs allege that they have had to—and will continue to have to—expend and divert additional funds and resources that they would otherwise spend on efforts to accomplish their mission in Arizona to combat the effects that the Inadequate Cure Period has on Democratic voters. [Compl. ¶¶ 17, 21, 24] This will decrease the overall likelihood that they will be successful in their missions: to elect Democratic candidates to office. [*Id.*]

Contrary to the State's claims, the Ninth Circuit has held that "a diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is 'broadly alleged.'" *Cegavske*, 800 F.3d at 1040 (9th Cir. 2015) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Plaintiffs' allegations meet this threshold. *Id.* (so holding where "complaint specifically alleges that Plaintiffs expended additional resources that they would not otherwise have expended, and in ways that they would not have expended them"). ADP, to illustrate, alleged (Compl. ¶ 17) that it anticipates needing to focus additional educational resources on areas with low English

literacy rates to account for the Inadequate Cure Period. *See Lujan*, 504 U.S. at 560–61; *see also Smith*, 358 F.3d at 1105–06 (allegations organization had "to divert scarce resources from [its] other efforts" in response to a law sufficient at motion to dismiss stage).

Courts routinely find similar allegations more than enough to plead organizational standing. The Supreme Court's decision in *Crawford* is dispositive here. There, a state Democratic Party challenged a law requiring voters to show ID at the polls. The Supreme Court affirmed the lower court's determination that "the Democrats had standing to bring a facial challenge" because "'the law may require the Democratic Party . . . to work harder to get every last one of their supporters to the polls.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 188 (2008) (plurality) (quoting *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007)). The same is true here, and other cases are in accord.[2]

In addition to their diversion-of-resources harm, Plaintiffs allege that the Inadequate Cure Period harms the "election prospects" of Democratic candidates because it is inevitable that Democratic voters will not have their vote counted as a result of the Inadequate Cure Period. [Compl. ¶¶ 16, 20, 24] Far from a mere "setback to the organization's abstract social interests," as the State asserts (at 10), this is an independent basis for standing, which has been recognized by the Ninth Circuit and at least seven other Circuits. The entity Plaintiffs here are each official committees of the Democratic Party.

It is binding Ninth Circuit law that political parties have standing to challenge election laws that harm their political prospects. *See Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981). The weight of outside authority is the same. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 (5th Cir. 2006) (holding that a "basis for the [Texas

[2] *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620, 2018 WL 4467891 at *4 (D. Ariz. Sept. 18, 2018) (finding standing where plaintiff "diverted resources to register voters rather than spending time, staff, and money on other activities related to their organizational missions" due to law); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333–35 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga.*, No. 18-14503, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (same, where plaintiff would have to divert resources to warn voters about signature mismatch risks under law).

Democratic Party's] direct standing is harm to its election prospects" and that "a political party's interest in a candidate's success is not merely an ideological interest"); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (similar); *Smith v. Boyle*, 144 F.3d 1060, 1062 (7th Cir. 1998) (similar); *Schiaffo v. Helstoski*, 492 F.2d 413, 422 (3d Cir. 1974) (similar). Against all this, the State relies solely on the out-of-circuit *Jacobson*, which remains under appellate review and failed to even address this basis of standing. 957 F.3d at 1207; *see Pavek v. Simon*, No. 19-CV-3000 (SRN/DTS), 2020 WL 3183249 (D. Minn. June 15, 2020), at *14 n.13 (observing *Jacobson* declined to address this form of injury).[3]

C. At the Hearing, Plaintiffs Will Meet Their Burden to Prove Standing.

Citing no relevant authority, the State incorrectly asserts (at 11–12) that Plaintiffs were required to prove their standing definitively when they *filed* their preliminary injunction motion, which was *before* the hearing on the motion was consolidated with the merits. This is flatly wrong. *See Lujan*, 504 U.S. at 560–61. Further, at the August 18, 2020 hearing, or otherwise, Plaintiffs will prove the required elements for organizational and associational standing by a preponderance of the evidence. *See Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986).

II. Plaintiffs Are Entitled to An Injunction

On the merits, Plaintiffs are entitled to an injunction under the factors detailed in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Contrary to the State's claim (at 34), Plaintiffs seek "a classic form of prohibitory injunction" because it would "prevent[] future constitutional violations." *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017). Even if the requested relief is characterized as a mandatory injunction, as the State asserts (at 34), it is still warranted because "'the facts and law clearly favor the

[3] Plaintiffs are not, as the State argues (at 11) choosing to "manufacture . . . injury by . . . choosing to spend money fixing a problem that otherwise would not affect" them. Why would they? Plaintiffs brought this lawsuit precisely because the lack of a post-election cure period deprives Democratic voters the chance to cure their ballots and, thus, deprives Plaintiffs from advancing their mission of electing Democrats by assisting more voters to cure ballot affidavits (instead of diverting from critical pre-election work to do the same).

moving party.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)). Moreover, absent an injunction, there is "a risk of extreme or very serious damage" to Plaintiffs' and countless Arizonans' right to vote. *Hernandez*, 872 F.3d at 999 (quotation omitted). "Mandatory injunctions are most likely to be appropriate," where, as here "the status quo . . . is exactly what will inflict the irreparable injury upon complainant." *Id.* (alteration in original) (citation omitted).

A. Plaintiffs Are Likely to Succeed on Their First and Fourteenth Amendment Undue Burden Claim. [4]

The Inadequate Cure Period unconstitutionally burdens the fundamental right to vote in violation of the First Amendment and Equal Protection Clause. *Wash. State Grange*, 552 U.S. at 451. The Supreme Court has laid out a "flexible standard" to resolve challenges to state election laws that burden voting rights in violation of the Fourteenth Amendment (the "*Anderson-Burdick* framework"). *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under that framework, a court (1) must "consider the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate; and (2) "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789.

Plaintiffs address the State's specific arguments below. But the reason why Plaintiffs

[4] Plaintiffs' claims are facial in nature, as the State correctly observes (at 30). But the State mischaracterizes Plaintiffs' claims as covering the *entire* statutory regime for curing unsigned mail ballots, when the Complaint repeatedly states that Plaintiffs challenge only the constitutionality of the post-election Inadequate Cure Period (*id.*; Compl. ¶¶ 62, 67), which has no "plainly legitimate sweep" and is unconstitutional on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). The State's examples of *pre*-election day cure opportunities are irrelevant, as is the State's unfounded suggestion (at 30) that Plaintiffs' facial challenges should be "disfavored" because they require "speculation" as to how the law would apply in practice. Not so. The "components of the burden" that the Inadequate Cure Period "imposes are defined by its facial terms, not by any anticipated exercise of discretion in its application." *Libertarian Party of N.H. v. Gardner*, 843 F.3d 20, 24–25 (1st Cir. 2016). Accordingly, this Court need not "speculate about 'hypothetical' or 'imaginary' cases," and "can readily ascertain" from Arizona law "as written," that the Inadequate Cure Period is unconstitutional. *Martin*, 341 F. Supp. 3d at 1337 (quoting *Wash. State Grange*, 552 U.S. at 450).

are likely to prevail on the merits is simple. The State already provides the same requested relief for signature mismatches and conditional provisional ballots. *See, e.g.*, A.R.S. § 16-550. The State's chief election officer—the Secretary—has submitted sworn testimony that the State can and should adopt that same requested cure period. The State offers no colorable reason why that same cure period should not be extended to missing signature ballots. There is none.[5] Multiple county recorders argue the same. *Anderson-Burdick* is a balancing test and here the weight is on Plaintiffs' side of the scales.

1. The Inadequate Cure Period Imposes a Significant Burden on the Right to Vote.

Defendants will reject a number of mail ballots for lack of signed ballot affidavits in the 2020 General Election without a five-day post-election cure period, as it does for other ballots. This presents a severe (and certainly a significant) burden on the right to vote.

At this first step of the *Anderson-Burdick* framework, the relevant inquiry is whether and to what extent a challenged law burdens the right to vote. *See Anderson*, 460 U.S. at 789; *see also Obama for Am. v. Husted* (*Husted II*), 697 F.3d 423, 428–29 (6th Cir. 2012) ("'The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights.'" (alterations in original) (quoting *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir.2004)).

Much of the State's briefing confuses rather than illuminates the inquiry. The State urges the Court (*e.g.*, at 23–26) to examine the burdens imposed by the requirement that mail ballots must be signed. But Plaintiffs do not challenge *that* requirement. When the State doubts a person's eligibility to vote at the polls, it lets them cast a conditional provisional ballot and prove their identity post-election.[6] When it doubts whether the same person signed their mail ballot affidavit and their voter registration form, it lets them prove their identity post-election. A.R.S. § 16-550. But when the State cannot verify the voter in

[5] *See* Declaration of Alexis Danneman in Supp. of Pls.' Reply in Supp. of Mot. for Prelim. Inj. and Perm, Injunction ("Danneman Decl.") Ex. 8 at Interrog. 1 (for the purposes of curing, "there is no meaningful difference between a ballot with a missing signature and a ballot with a mismatched signature").

[6] *Id.* Ex. 1 at Ch. 9 § IV.

question mailed a ballot lacking a signed ballot envelope, it does *not* allow the voter to prove they did post-election. *That* is what Plaintiffs challenge. Thus, the State's arguments about the minimal burdens imposed by the act of signing (at 23) and "read[ing] and heed[ing] instructions" (at 24) are irrelevant to *Anderson-Burdick*'s burden inquiry.

Instead, the relevant inquiry is what burden, or effect, the Inadequate Cure Period—the challenged law—has on the right to vote. And with that inquiry cast into focus, the State's attempt to divert the judicial eye makes sense: The undeniable effect of the Inadequate Cure Period is that for each election thousands of ballots go uncounted because they were cast without signatures on the ballot envelopes. For example, in the general election in 2016, Maricopa County alone rejected 2,209 ballots for having a missing signature. [Danneman Decl. Ex. 2 at Interrog. 1] The same pattern holds for other elections. [*See, e.g.*, *id.* ("2014 General Election: 3,749; 2012 General Election: 4,610; 2010 General Election: 3,352; 2008 General Election: 2,644")] Other counties reject a large number of ballots. For example, Pima County rejected 120 in the 2016 general election. [Danneman Decl. Ex. 3 at PLFS001491] The State cannot seriously dispute that—if not provided a post-election cure period—a significant number of voters will be disenfranchised in the upcoming election as a result of the Inadequate Cure Period.[7]

In similar cases, courts have held that this type of disenfranchisement severely burdens the right to vote. *See Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."). At a minimum, courts routinely hold that disenfranchisement, or its risk, constitutes "at least a serious" or "substantial" burden on the right to vote. *Democratic Exec.*

[7] This can happen for a variety of reasons. For example, cure is sometimes conducted by mail. [*See, e.g.*, *id.* Ex. 4 at Interrog. 1; *id.* Ex. 5 at Interrog. 5] But ballots with missing signatures inevitably arrive on or close to election day. [*See, e.g.*, *id.* Ex. 6 at Interrog. 2] Given the lag time of physical mail, these voters, for example, certainly would be afforded no opportunity to cure. [*See, e.g.*, *id.* Ex. 7 at Interrog. 2]

Comm. of Fla. v. Lee, 915 F.3d 1312, 1321 (11th Cir. 2019); *see also Ne. Ohio Coal. for Homeless v. Husted* (*Husted I*), 696 F.3d 580, 593 (6th Cir. 2012) (disqualifying provisional ballots is a "substantial" burden on voters);[8] *Husted II*, 697 F.3d at 433 (rejecting claim that law eliminating early voting opportunities imposed only a "slight" burden).

This burden is not "minimal," as the State claims (at 23), and its reliance on *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008) is misplaced. In *Lemons*, the court evaluated an inapposite issue—a challenge to the lack of opportunity to cure *referendum* signatures, which was afforded to signers of *mail* ballots. There are immediate and important differences between a voter signing a referendum petition—in which the voter is one of many who must sign in order to show that the matter has sufficient broad public support to access the ballot—and a voter signing an absentee ballot envelope, which contains the ballot effecting the voter's exercise of their right to vote. The law at issue here involves the latter, and its consequence is *total disenfranchisement*, whereas invalidating a voter's signature on a referendum petition does not stop the voter from voting for that referendum if it qualifies for the ballot. And even in the referendum signature-matching context, the *Lemons* court emphasized (and explicitly relied upon) the existence of important procedural safeguards that limited the risk of erroneous rejection of a signature, which "protect[ed] the rights of petition signers and treat[ed] voters in different counties equally." *Id.* at 1104.[9] As a result, "the verification process [was] weighted in favor of *accepting* questionable signatures," putting the thumb on the scale of the voter. In contrast, the Inadequate Cure Period flatly

[8] The State takes issue (at 25) with Plaintiffs' reliance on *Husted I*. There, the court considered multiple constitutional challenges to voting laws. In considering a law that resulted in disenfranchisement, or votes not being counted, the court plainly held that the burden was "substantial" (a fact the State ignores). 696 F.3d at 593. To be sure, in considering a ballot affirmation requirement, the court found the burden "minimal," and "unspecified." *Id.* at 600. But Plaintiffs do not challenge the ballot signature requirement. So, *Husted I*'s discussion of the burden of ballot affirmation requirements is not relevant.

[9] For example, the signature-match review process was multi-tiered; "higher county elections authorities review[ed] all signatures that [we]re initially rejected." *Id.*; *see also id.* at 1105.

disenfranchises voters, particularly those who are not notified that their ballot is missing a signature until election day. Indeed, it is the very *lack of procedural safeguards* that gives rise to this claim; and the State can point to none (unlike in *Lemons*) that mitigate the clear constitutional injury that follows as a result.[10]

The State likewise misreads *Rosario v. Rockefeller*, 410 U.S. 752 (1973). There, plaintiffs failed to timely comply with a pre-election registration deadline. *Id.* at 757–58. The Court held that the deadline was constitutional because voters had ample opportunity to register and failed to do so. *Id.* at 758. That is not the case here. The Inadequate Cure Period results in ballots cast *before* the relevant deadline going uncounted. The relevant comparison is to the State's inconsistent cure periods for signature mismatch mail ballots and conditional provisional ballots. Regardless, *Rosario* held only that the failure to register by the deadline was not a *severe* burden; not that *all* deadlines related to voting impose only a "minimal" burden on voting. Nor could it. Courts have often recognized that deadlines related to voting impose significant and impermissible burdens. *See Anderson*, 460 U.S. at 806 (deadline for filing nomination petitions imposed a substantial and unconstitutional burden); *Nader v. Brewer*, 531 F.3d 1028, 1039 (9th Cir. 2008) (deadline burdensome).

The State's remaining arguments (at 24–25) are unsupported by authority, contrary to controlling law, or unpersuasive on their face. The State argues, for example that the statute only affects a small number of voters, and because other states have potentially similar or even less generous laws. The Supreme Court, however, has emphasized that when assessing the severity of the burden, courts must consider the effects of the restriction on those voters who are impacted by the law. *See, e.g.*, *Crawford*, 553 U.S. at 198, 201 (controlling op.) ("[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]," not the burdens on all

[10] In addition, *Lemons* explicitly recognized the unique nature of referendum petitions that warranted fewer safeguards—including that it is comparatively more difficult to verify signatures on referendum petitions as compared to ballots. *Id*. at 1104.

voters). That some voters need not avail themselves of a cure period, or that other states similarly deny the opportunity to cure, is therefore of no importance to the determination that this Court must make here—*i.e.*, what is the burden on Arizona voters who *are* disenfranchised by the Inadequate Cure Period? And courts have been clear, as well, that states' election laws are not fungible. For example, state voter ID laws are not universally constitutional or unconstitutional—individual assessment of each state's law and the burdens it imposes is required. *See, e.g.*, *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 547 n.7 (6th Cir. 2014), ("[W]e do not find that other states' electoral laws and practices are relevant to our assessment of the constitutionality or legality" of Ohio law.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Anderson*, 460 U.S. at 789 (explaining challenges "cannot be resolved by any 'litmus-paper' test that will separate valid from invalid restrictions").[11]

Relatedly, the State argues (at 24) that the burden here is minimal because "Arizona is a clear leader in removing burdens to voting." (Emphasis omitted). But the fact that some state voting laws are constitutional hardly means *all* are. And evaluation of the burden must be done from the perspective of the impacted voters, not the electorate as a whole. *Crawford*, 553 U.S. at 198, 201; *see also O'Brien v. Skinner*, 414 U.S. 524, 29–30 (1974). Here, the affected voters are those voters who cannot cure their unsigned ballots due to the Inadequate Cure Period. Some voters, for example, have no other "available opportunities to vote," *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020), given the Inadequate Cure Period. These include voters who submit unsigned ballots on or close to election day.[12] *See*

[11] The State also argues (at 24 & n.10) that the burdens imposed by the Inadequate Cure Period are "minimal" because it is "'generally applicable, even-handed, [and] politically neutral.'" *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (quoting *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002)). But *Dudum* simply noted that the Ninth Circuit has held, in other circumstances, that laws that meet that description do not impose "severe" burdens. It nowhere held, or suggested, that such laws categorically impose "minimal" burdens. They do not in this case, for the reasons discussed above.

[12] For similar reasons, that there is a pre-election day cure period for missing signature ballots does not mean that the Inadequate Cure Period is a "minimal" burden, as the State argues citing no authority (at 24). It is of no use to some affected voters.

supra note 7 (some unsigned ballots submitted too close to election day to afford cure opportunity). This burden does not extend to voters with mismatched signatures, as the State allows these voters to cure their ballots after election day. A.R.S. § 16-550.

Finally, the State argues (at 24–25) that the burden of the Inadequate Cure Period is "minimal" because some people might not take advantage of a post-election cure period, if it were provided. This counterintuitive argument is (a) utterly inconsistent with the State's provision of a post-election cure period for signature mismatch and conditional provisional ballots and (b) premised on what amounts to speculation about how some people may act if they had time to cure a signature deficiency.[13] More fundamentally, this reflects yet another attempt by the State to avoid the relevant "burden" inquiry under *Anderson-Burdick*. Neither the State (nor its expert) denies that some voters will be disenfranchised by the Inadequate Cure Period. This is the definition of a "severe" (and certainly a significant) burden on the affected voters. *See Lee*, 915 F.3d at 1321.

2. Defendants' Interests Cannot Justify the Burdens Imposed on the Right to Vote.

However characterized, the Defendants' and State's interests do not justify the Inadequate Cure Period. The *Anderson-Burdick* framework "is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be, such that 'a state may justify election regulations imposing a lesser burden by demonstrating the state

[13] To be admissible, an expert opinion must, among other things, be "based on sufficient facts or data" and "the product of reliable principles and methods." Fed. R. Evid. 702. That is not the case with the opinion of Professor Atkeson, whose opinion constitutes speculation based on no described methodology and is not purported to be reached to any degree of certainty. At most, the report says (Doc. 85-3 ¶ 59) that longer cure deadlines "may" lead to fewer voters curing their ballots and (*id.* ¶ 60) that "it is not clear theoretically that longer curing times will lead to more votes being counted." In offering these opinions, the expert relies on ballot-rejection (not cure) data from just six states, providing no assessment of their statistical significance. It also does not consider details of the other states' cure periods, methods, geographies, or other variables that may influence cure rates. Given this thin and incomplete analysis, it is unsurprising that there's no apparent relationship between the cure periods in the data. Why are relatively fewer no-signature ballots not counted in Washington, with a 21-day cure period, as compared to Colorado, with an 8-day cure period? Even to a lay reader, it is apparent that these "opinions" lack foundation and are guesswork at best.

has important regulatory interests.'" *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016) (quoting *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 729–30 (9th Cir. 2015)). Under this "means-end fit framework," "severe" restrictions are "subject to strict scrutiny." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). Less severe burdens remain subject to balancing, and "[h]owever slight" the burden on the right to vote "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (plurality) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

Even assuming the burden is less than severe, none of the justifications put forward by the state are "'sufficiently weighty to justify the limitation'" of the Inadequate Cure Period. *Id*. The State argues (at 27–28) that four "interests" justify the Inadequate Cure Period. None do. *See Anderson*, 460 U.S. at 789 (examining "precise interests" offered).

First, the State argues that the Inadequate Cure Period is justified by concerns about preventing fraud. But the State's only argument on this point (at 27) is that the ballot *signature* requirement prevents fraud. It makes no argument, and presents no evidence, that the lack of a post-election cure period prevents election fraud. Nor could it.[14]

Second, the State argues (at 27) that the Inadequate Cure Period is justified by the State's "interest in reducing the administrative burden on poll workers." But the State puts forth little evidence that a post-election cure period would be administratively burdensome. The only evidence the State proffers (at 27) is the use of staff time. [*See* Doc. 85-3 ¶ 75; Doc. 85-4 ¶ 19] Regardless, administrative burdens do not justify disenfranchisement. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *United States v. Berks County, Pennsylvania.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) ("Although these reforms may result in some administrative expenses . . . , such expenses are likely to be minimal and are far outweighed by the fundamental right at issue.").

[14] *See Detzner*, 2016 WL 6090943, at *7 ("[L]etting mismatched-signature voters cure their vote by proving their identity *further* prevents voter fraud[.]").

The State also speculates (at 27) that if the post-election cure period is implemented "election results will . . . take *even longer* to process" and could prevent ballots from being counted under the statutory deadlines.[15] But it fails to explain why this would be. Counties already have a five-day post-election cure period and process in place for signature mismatches and conditional provisional ballots. A.R.S. §§ 16-550, 16-579; Danneman Decl. Ex. 1 at Ch. 9 § IV. The State does not even attempt to explain why curing these ballots, but not the others, would delay final tabulation.

The Court need not take Plaintiffs' word for it. The State's made-for-litigation arguments are flatly contradicted by the State's own Chief Election Officer—the Secretary—and multiple county recorders. The Secretary herself has stated that an identical cure period for missing signature ballots as for signature mismatch ballots "would not impose a significant burden on county election officials."[16] Specifically, "because the counties already were required to handle the 'cure' process for early ballots with mismatched signatures and conditional provisional ballots, the Secretary anticipated that the Additional Cure Period would not cause any significant increase in costs or resources."[17] Indeed, "[t]he Secretary believed that county officials could feasibly implement the Additional Cure Period with existing resources." [18]

Further, Apache County, Navajo County, and Coconino County officials all advocate for the additional cure period. [Doc. 90] The Coconino County Recorder states that she does "not think that the requested post-election cure period for unsigned ballots would be a burden."[19] Rather, the process would be straightforward. Her office would first "attempt to

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[15] The State gets its expert (Doc. 85-3 ¶ 74) to repeat the same claim, again citing nothing and relying on nothing in support.

[16] Danneman Decl. Ex. 8 at Interrog. 1.

[17] *Id.* at Interrog. 3.

[18] *Id.* at Interrog. 4. Although Professor Atkeson asserts in passing (Doc. 85-3 ¶ 76) that extending the cure period would "cost the state additional funding," she provides no citation for this proposition. And, in its brief before this Court, the State does not argue an additional cure period would be so financially burdensome as to justify disenfranchisement.

[19] Danneman Decl. Ex. 12, ¶ 20.

reach the voter via phone," which would take at most 2-3 minutes per voter.[20] She would then set up a process that "would either track the procedure for verifying provisional conditional ballots in-person, or could potentially be administered online."[21] Her expectation is that "the time from when a voter comes into the Verification Site to the time they sign the form cure affidavit to take no more than 2 minutes per voter."[22] Given this, and because Coconino County already has "staff on hand to call voters and notify them of signature mismatch issues for five days after an election" and "Post-Election ID Verification Sites set up and staffed for five business days after an election, [Coconino County] would not need to hire additional staff to administer" the post-election cure period Plaintiffs seek.[23] Instead, the proposed cure period "could be administered in tandem with and would use the same processes as the five business day signature match and provisional conditional ballot processes."[24] Thus, the post-election cure period would have no significant impact on her office or to impact the timing of certification of election results.[25]

Third, the State argues (at 27) that the Inadequate Cure Period is justified by the State's interest in the "orderly administration" of elections. Specifically, the State argues (at 28) that having the same deadline (election day) for curing non-signature ballots, voting in person, and returning mail ballots is desirable because it (1) reduces the number of dates to know; (2) provides finality; and (3) sets a clear deadline for poll workers. But one of these things (curing non-signature ballots) is not like the others. What *would* be "orderly" and consistent is if the cure date for missing ballot signatures was set for five days after the election, *the same* as the cure dates for mismatched signature ballots and conditional provisional ballots. In fact, the Secretary wanted these three deadlines to be the same

[20] *Id.* ¶ 15.
[21] *Id.* ¶ 16.
[22] *Id.*
[23] *Id.* ¶ 19.
[24] *Id.*
[25] *Id.* ¶¶ 19, 23.

precisely "to ensure uniformity, efficiency, and impartiality" and "reduc[e] voter confusion and by ensuring that eligible voters are not excluded from the democratic process."[26] It strains credulity to believe that the deadline sought by the State's chief elections officer, and county recorders, would undermine election administration.[27] Indeed, the only reason why those three deadlines are not the same is that the Attorney General objected.[28]

Finally, the State argues (at 28) that the Inadequate Cure Period is justified by an interest in promoting voter participation. (The State ironically proposes to "promot[e]" voter participation by *rejecting* voters' ballots and giving them *less time* to cure.) Again, the Professor Atkeson does not actually conclude that fewer voters will cure their ballots if Plaintiffs' relief is granted. Instead, she concludes (Doc. 85-3 ¶¶ 59–60) that "it is not clear theoretically that longer curing times will lead to more votes being counted" and it "may" be that fewer votes are cured. This equivocal opinion is unsurprising given that the expert's opinion is untethered from data. *See supra* 13. In any event, Plaintiffs bring this lawsuit precisely because they seek the opportunity to assist more voters in taking the steps required to cure a ballot rejected because the voter neglected to sign the ballot they cast.

The Inadequate Cure Period cannot survive any level of scrutiny under *Anderson-Burdick*. *See Detzner*, 2016 WL 6090943, at *7 (finding it is "illogical, irrational and patently bizarre for the State . . . to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters").

3. Plaintiffs Are Likely to Succeed on the Merits of Their Fourteenth Amendment Procedural Due Process Claim.

Plaintiffs are also likely to succeed on the merits of their procedural due process

[26] Danneman Decl. Ex. 8 at Interrog. 1. Likewise, in the Coconino County Recorder's view, "the requested post-election period for unsigned ballots would promote the orderly administration of elections." *Id.* Ex. 12 ¶ 21.

[27] The State cites (at 28–29) *United States v. Locke*, 471 U.S. 84, 101 (1985) to argue all Plaintiffs' arguments "fly in the face of the concept of deadlines." In *Locke*, the court refused to hold that a party substantially complied with a missed deadline. *Id.* In this case, though, Plaintiffs are not asking this Court to excuse compliance with a deadline but to address the irrational burden on the right to vote imposed by the deadline in question.

[28] Danneman Decl. Ex. 9 at Req. for Admissions 1, 2.

claim. [*See* Doc. 2 at 9–14]

a. *Mathews*—not *Anderson-Burdick*—Governs this Claim.

Courts analyze procedural due process claims under a three-step process. *See Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1192–93 (9th Cir. 2015) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 341, 343, 347 (1976)). The State wrongly argues (at 12–13) that procedural due process claims are reviewed under the *Anderson-Burdick* framework. They aren't. *See, e.g.*, *Schmitt v. LaRose*, 933 F.3d 628, 642 (6th Cir. 2019), *cert. denied*, No. 19-974, 2020 WL 2621728 (U.S. May 26, 2020); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214–17 (D.N.H. 2018). In this regard, the State relies on *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). But *Dudum* involved an appeal from a substantive due process claim—not a procedural due process claim. *See Dudum v. City & County of San Francisco*, No. C 10-00504, 2010 WL 3619709, at *6, *15 (N.D. Cal. Sept. 9, 2010). The two claims are distinct: A procedural due process claim challenges the deprivation of a life, liberty, or property interest "*without due process of law*[,]" whereas a substantive due process claim challenges actions the government cannot take—no matter what process is in place.[29] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *see also Oceanside Golf Inst., Inc. v. City of Oceanside*, Nos. 88-5647, 88-6056, 1989 WL 61771, at *4 (9th Cir. June 1, 1989) (noting that the procedural and substantive due process analyses differ). The State's reliance (at 13) on *Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th 2018) is also misplaced; that case concerned a First Amendment violation. *See id.* at 443, 449 n.7.

b. Plaintiffs Have Alleged a Constitutionally Protected Liberty Interest That Arises Under State Law.

The State argues (at 14) there cannot be a liberty interest so long as state law prohibits

[29] The State also erroneously argues (at 13–14) that Plaintiffs' due process claim is substantive. But Plaintiffs only request seek implementation of additional process to afford an otherwise eligible Arizona voter 5 additional days to cure the ballot. [*See* Doc. 2 at 13] Plaintiffs seek no new substantive right. Indeed, the right for Arizona voters to have their mail ballots counted is well-established and undisputed. *See, e.g., Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990).

a post-election day cure for unsigned mail ballot affidavits. But this conflates the liberty interest at issue—access to mail voting—with the procedures Plaintiffs seek to protect such interest—a post-election day cure period for unsigned mail ballots. Plaintiffs' constituents have a constitutional right to vote that is "entitled to substantial weight[.]" *Martin*, 341 F. Supp. 3d at 1338. Once the State extended mail voting to Plaintiffs' constituents, *see* A.R.S. § 16-541, it cannot deprive them of having their ballots counted without adequate due process. *See, e.g.*, *Saucedo*, 335 F. Supp. 3d at 215 ("[A] voter has a sufficient liberty interest once 'the State permits voters to vote absentee.'") (citing *Zessar v. Helander*, No. 05C1917, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13, 2006)); *Raetzel*, 762 F. Supp. at 1357; *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 (1996).

c. The Inadequate Cure Period Denies Plaintiffs' Rights Without Adequate Process.

(i) The Interest Here Deserves Significant Weight.

Rejecting an otherwise valid mail ballot due to a technicality that can easily be cured after election day—as is the case for mail ballots with signature mismatches—is equivalent to denying an eligible Arizona citizen the right to vote, which the State concedes (at 15) is a "profound" private interest. *See Martin*, 341 F. Supp. 3d at 1338 (because "the private interest at issue implicates the individual's fundamental right to vote[, it] is therefore entitled to substantial weight"). And, the degree of potential deprivation that may be created by disenfranchising many voters is high. *Mathews*, 424 U.S. at 341; *see* Doc. 2 at 4, 7, 12 (Maricopa County alone has rejected thousands of unsigned mail ballots in recent years). Indeed, courts in this district have held that mail voting is "such a privilege . . . deserving of due process[,]" *Raetzel*, 762 F. Supp. at 1358, [h]aving induced voters to vote by mail ballot, "the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo*, 335 F. Supp. 3d at 217.[30]

[30] The State misunderstands *Saucedo* (at 16 n.5). The eligibility of a voter is not defined by whether a voter signs a mail ballot but rather as an initial matter whether the voter is even qualified to cast a ballot. *See* 335 F. Supp. 3d at 217.

(ii) The Risk of Erroneous Deprivation is Substantial.

The risk of erroneous deprivation is great. [*See* Doc. 2 at 11–13] The State argues (at 16) that the risk is minimal because the overall rate of rejection of mail ballots due to missing signatures was below 1% in the 2018 general election. But each discarded ballot represents a voter denied his or her constitutional right to vote. *See Saucedo*, 335 F. Supp. 3d at 217 ("[E]ven rates of rejection well under one percent translate to the disenfranchisement of dozens, if not hundreds, of otherwise qualified voters, election after election."); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[E]ven one disenfranchised voter . . . is too many[.]").

The State also takes a crabbed view of erroneous deprivation (at 17, 20), arguing it can deprive citizens of a right deserving of significant protection based on error. That is incorrect. *See, e.g.*, *Zessar*, 2006 WL 642646, at *9 (finding "fact that . . . absentee voters may have been deprived of their vote through a good-faith error, rather than outright fraud, does not eliminate their due process interest in preserving their right to vote"). There is no reason to deny thousands of eligible voters their right to adequate procedures to have their vote counted. The State acknowledges the risk of deprivation—it provides a cure period for missing signature ballots. It does so precisely because it acknowledges that some voters—who after all went to the time and energy to obtain a mail ballot in the first instance—will neglect to sign and be deprived of their right to vote otherwise.

That the Inadequate Cure Period creates a risk of erroneous deprivation is clear. Plaintiffs' constituents may not have their completed mail ballots delivered to county recorders well in advance of election day in order for county recorders to "make a *reasonable and meaningful* attempt to contact the voter via mail, phone, text message, and/or email[ ] to notify the voter the affidavit was not signed," and for the voter to cure the missing signature before 7:00 p.m. on election day.[31] For example, in Santa Cruz County in

[31] Danneman Decl. Ex. 1 at 68-69.

2018, some of these mail ballots missing signatures arrived on November 5, the day before election day.[32] The same year, in Mohave County, 13 mail ballots received without a signature were delivered within two days of the election, and the only means by which to contact the voters was by mail.[33] But, Mohave County "does not send letters by mail to the voter after the Friday before the election," and therefore, these voters had no way to cure their ballots under the current regime.[34] Other counties, including La Paz, Yuma, and Yavapai also contact voters by mail, which extends the period of time by which voters are first informed of their missing signature. It also reduces the window for voters to either visit their local elections office to provide their signature, vote in person on election day, or, if they are even informed in time, receive and return a replacement ballot by mail.[35]

These are the facts at the best of times. These are not the best of times. The United States Postal Service's ("USPS") mail delivery delays and operational difficulties are well-documented. USPS has struggled to keep up with the dramatic increase in mail voting in elections that have occurred during the COVID-19 pandemic, resulting in thousands of ballots not being delivered to election officials in time for a pre-election day cure period to even apply.[36] Indeed, a recent report by the Inspector General for the USPS confirmed that the USPS "cannot guarantee a specific delivery date or alter standards to comport with individual state election laws."[37] USPS has announced "major operational changes" "that

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[32] *See id.* Ex. 6 at Interrog. 2.
[33] *See id.* Ex. 7 at Interrog. 2.
[34] *Id.*
[35] *See, e.g., id.* Ex. 4 at Interrog. 1; *id.* Ex. 5 at Interrog. 5; *id.* Ex. 10 at Interrog. 1.
[36] *See, e.g., Senators Johnson, Baldwin call for investigation of Wisconsin absentee ballots*, WBAY.com (Apr. 9, 2020, 6:49 PM), https://www.wbay.com/content/news/Senators-Johnson-Baldwin-call-for-investigation-of-Wisconsin-absentee-ballots-569521331.html; Letter from Frank LaRose, Ohio Sec'y of State, to Ohio Congressional Delegation (Apr. 23, 2020), https://www.dispatch.com/assets/pdf/OH35713424.pdf; Harri Leigh, *A record number of mail-in ballot applications, but will they arrive in time?*, FOX43 (May 26, 2020), https://www.fox43.com/article/news/politics/elections/a-record-number-of-mail-in-ballot-applications-but-will-they-arrive-in-time/521-de6f5ff0-38eb-47a5-a935-313e6a6a1ee3.
[37] Press Release, USPS, Re: Election Mail (May 29, 2020), https://about.usps.com/newsroom/national-releases/2020/2020-05-29-marshall-to-

could slow down mail delivery" even more.[38] And, carriers are being directed to leave mail behind at distribution centers if it would delay them instead of "making multiple delivery trips to ensure timely distribution," as they have historically done.[39] Since then, some Americans have gone "upwards of three weeks without packages and letters."[40]

Accordingly, the risk is substantial, especially during the COVID-19 pandemic, that through no fault of their own, Plaintiffs' constituents will be disenfranchised without "some form of post-deprivation notice . . . so that any defect in eligibility can be cured and the individual is not . . . denied so fundamental a right" should their mail ballots arrive at county recorders' offices too close to, or on, election day. *Raetzel*, 762 F. Supp. at 1358.

Were the same cure period available for ballots with signature mismatches afforded to unsigned their ballots, the risk of erroneous deprivation would greatly decline. The county recorders agree that voters will, if given the chance, cure their ballots.[41] Thus, additional procedures are necessary to ensure that voters are advised of the missing signature on their ballot affidavit and have the ability to cure a simple oversight. *See Martin*, 341 F. Supp. 3d at 1339, 1343 (granting injunction allowing for post-election day cure period for ballots with signature mismatches because existing cure period, which was only effective through election day, was inadequate in preventing disenfranchisement).

(iii) Additional Process Furthers the State's Interest in Election Integrity and Imposes Minimal Burden.

Finally, Plaintiffs have also shown that the limited and narrow relief that they are

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election-officials-re-election-mail.pdf.

[38] Jacob Bogage, *Postal Service memos detail 'difficult' changes, including slower mail delivery*, Wash. Post (July 14, 2020), https://www.washingtonpost.com/business/2020/07/14/postal-service-trump-dejoy-delay-mail/.

[39] *Id.*

[40] Ellie Rushing, *Mail delays are frustrating Philly residents, and a short-staffed Postal Service is struggling to keep up*, Phila. Inquirer (Aug. 2, 2020), https://www.inquirer.com/news/philadelphia/usps-tracking-in-transit-late-mail-delivery-philadelphia-packages-postal-service-20200802.html.

[41] *See* Danneman Decl. Ex. 6 at Interrog. 4 (noting that four voters remedied their ballots in 2018); *id.* Ex. 7 at Interrog. 4 (40 voters remedied their ballots in 2018); *id.* Ex. 11 at PLFS001428 (noting that 33 voters remedied their ballots in 2018).

seeking would impose a negligible, if any, administrative burden on Defendants and would further the State's interest in election integrity. [*See* Doc. 2 at 13; *see also supra* 13–17]

First, as explained above (*supra* 13–17), applying the same cure period for ballots with signature mismatches, *see* A.R.S. § 16-550(A), and conditional provisional ballots, Danneman Decl. Ex. 1 at Ch. 9 § IV, to ballots with no signatures would create no meaningful burden on the State.

Second, making the State's post-election cure periods consistent would not increase "fraud." Counties already verify the identities of voters who submit conditional provisional ballots and "mismatched" signature mail ballots post-election. Plaintiffs ask only that the State do the same for voters who submit an unsigned mail ballot. This would "*further* the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised." *Saucedo*, 335 F. Supp. 3d at 220 (emphasis added); *Martin*, 341 F. Supp. 3d at 1340 (the "additional procedures would involve minimal administrative burdens" while furthering State's interests in election integrity).

B. Plaintiffs Will Suffer Irreparable Harm Absent Relief.

The State's asserts (at 31) that because Plaintiffs did not join any voters, they cannot claim any direct disenfranchisement, and thus no irreparable harm. This ignores Plaintiffs' associational and organizational standing. The harms Plaintiffs face are, respectively, their members' disenfranchisement (*see supra* Section I.A) and, among other ills,[42] harm to their election prospects (*see supra* Section I.B). Harm to Plaintiffs' election prospects necessarily derives from their members' disenfranchisement, and the State (at 31) implicitly concedes that disenfranchisement is irreparable injury. [*See* Doc. 2 at 14–15]

Likewise, the State's argument (at 31) that Plaintiffs would only suffer harm if their requested relief would swing the results of an election in favor of Democrats cannot

[42] As discussed, *supra* Section I.B, Plaintiffs are also irreparably harmed because they must divert resources that would otherwise be used as part of other campaign efforts—and which cannot be retroactively applied to those efforts once the election is over.

withstand scrutiny. They cite *Winter*, 555 U.S. at 20, for that proposition, but *Winter* concerns whether the Navy's use of sonar harms marine mammals. In the election context, it is beyond cavil that organizational plaintiffs can suffer irreparable harm when their voters are disenfranchised, without needing to show that "more" of their voters are harmed by the law at issue than the other side. *See, e.g.*, *Crawford*, 553 U.S. at 188.

C. The Balance of Equities Favors Relief.

Finally, the balance of the equities tips in Plaintiffs' favor. First, the State's suggestion (at 31–32) that the harm caused by disenfranchisement of "a tiny percentage of voters" is "non-cognizable" is contrary to case law (and common sense). *See, e.g.*, *Husted I*, 696 F.3d at 593. Second, the State argues (at 32) that it has required absentee voters to sign envelopes for 102 years and so Plaintiffs should have filed this lawsuit before any of their representatives or counsel were born. But the genesis of this lawsuit was not 102 years ago; it was December 2019, when the Attorney General rejected the Secretary's Draft Manual adding a post-election cure period. [*See* Doc. 2 at 3, 9; Doc. 91 at 4–5]

In contrast to Plaintiffs' substantial harms, the State faces little, if any, potential harm from the requested relief. There is no reason to think that "the integrity of [Arizona's] election process" will be threatened by the requested relief (at 32) because it would verify *more* voters' identities, not fewer. Plaintiffs are *not* asking that unsigned ballots be counted. Rather, Plaintiffs simply seek a cure period to allow election administrators to verify the identity of voters who did not sign their otherwise lawfully cast ballot, during the same time period for cure as already provided for other ballots. As a result, there is no need to "learn . . . an entirely new system." *Little v. Reclaim Idaho*, __ U.S. __, 2020 WL 4360897, at *2 (U.S. July 30, 2020) (Roberts, C.J., concurring)).

At the end of the day, the State tries to have it both ways. The State simultaneously argues (at 31) that Plaintiffs' harms are "minimal" because only "a tiny percentage" of votes are at issue and at the same time (at 32–33) that it would suffer great administrative burden to facilitate a cure period for missing signatures. Neither point is true. This is a case in which

Plaintiffs seek only what one defendant (the Secretary) herself proposed, and which other defendants Apache County, Navajo County, and Coconino County all support, Doc. 90, and confirm they are fully capable of implementing within the existing five-day cure period.

D. The Public Interest Favors Relief, Which *Purcell* Does Not Preclude.

"[P]revent[ing] the violation of a party's constitutional rights," as Plaintiffs seek to do, is decidedly in "[t]he public interest." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). Instead of addressing this, the State pivots (at 33-34) to *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006), to suggest that relief should be precluded here based on the proximity of the election. Not so. With the hearing on the merits scheduled for next week—months in advance of the general election—this is not a case in which there is "inadequate time to resolve the factual disputes," which is what the Court cautioned against in *Purcell*. *Id.* at 5-6. Nor did *Purcell* establish a per se rule against enjoining voting laws in an election year. Rather, *Purcell* urged courts to consider whether a last-minute change is likely to sow widespread voter confusion, undermine confidence in the election, or create insurmountable administrative burdens on election officials. *Id.*

There is no evidence of any of that here. The requested injunction would not change the process for submitting a mail ballot or confuse voters to their detriment. The State would implement the requested relief administratively on the back end of the voting process. "*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists." *People First of Ala. v. Sec'y of State for Ala.*, No. 20-12184, 2020 WL 3478093, at *8 (11th Cir. June 25, 2020). Because the Inadequate Cure Period is unconstitutional, enjoining it would "almost by definition" be in the public interest. *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012).

Conclusion

For these reasons, Plaintiffs respectfully request that this Court issue a permanent injunction as set forth in the proposed order.

Dated: August 10, 2020

By: */s/ Kevin Hamilton*

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to all parties.

s/ Indy Fitzgerald

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