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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

vs.

Katie Hobbs, et al.,

Defendants.

Case No: 2:21-cv-01423-DWL

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO STAY (DOC. 58)

INTRODUCTION

As the State previously explained, its requested 60-day partial stay would conserve the resources of the Court and the parties by delaying consideration of the *Anderson-Burdick* signature-curing claim until after the Ninth Circuit will have likely issued its decision in *Arizona Democratic Party v. Hobbs*, Nos. 20-16759, 20-16766 (*Hobbs I*), resolving essentially identical issues. *See* Doc. 58. Plaintiffs' lengthy opposition provides no sound reason for denying that request.

Plaintiffs make essentially three arguments against the requested partial stay. First, they argue that *Hobbs* will not resolve their *Anderson-Burdick* Signature Requirement Claims and that a stay would be inefficient. Second, they allege a stay will prejudice them. Third, they argue that, in the event the case is not stayed, *Arizona Democratic Party v. Hobbs ("Hobbs I")*, 976 F.3d 1081 (9th Cir. 2020) is not binding on this court. Each of these arguments fails. And Plaintiffs' willingness to advance such demonstrably weak contentions in opposition to a short stay, where the stakes are small, is inadvertently revealing as to the merits of their underlying claims.

This Court should grant the State's request for a partial stay.

ARGUMENT

I. *Hobbs I* is likely to be largely determinative of Plaintiffs' claims

Plaintiffs' opposition relies heavily on contending that *Hobbs I* will not be determinative here as precedent. That is highly doubtful, and the arguments that Plaintiffs offer in support are specious.

But, in any event, that is not the relevant inquiry here. Instead, the relevant question here is how best to adjudicate the claims presented efficiently. The State's proposed stay promotes efficiency and Plaintiffs' proposed approach is demonstrably wasteful.

A. Plaintiffs' Anderson-*Burdick* Signature Claim Is Functionally Indistinguishable From That In *Hobbs*

Plaintiffs' principal basis for opposing a stay is their contention (at 4) that *Hobbs I* will "not control the outcome of Plaintiffs' *Anderson-Burdick* Claims." That may or may

not be true; notably, under the Ninth Circuit's published stay opinion Plaintiffs' claim is functionally doomed unless the Ninth Circuit changes course. In any event, it takes little imagination to conceive of a broad final opinion that would render Plaintiffs' claim entirely untenable. And even if not completely controlling as a formal matter, the likelihood that the *Hobbs I* decision will functionally decide the claim at issue here is manifestly high.

Plaintiffs' attempt to distinguish their *Anderson-Burdick* non-signature curing claim from *Hobbs I* is unavailing for four reasons.

First, Plaintiffs' reliance (at 4-5) on "cumulative" burdens lacks merit. Plaintiffs nowhere explain how SB 1005's Signature Requirement is meaningfully "cumulative" with SB 1485's EVL Periodic Voting Requirement or how this allegation impacts the relevance of *Hobbs I*. The two challenged regulations are not even related to one another. One requires voters to sign their ballots or cure their failure to do so by close of election day; the other, requires voters to either vote or return a notice after four years of not voting in order to remain on the Early Voting List.

Plaintiffs' Complaint only makes conclusory assertions that these requirements "collectively" burden the right to vote, but they do not explain how that is. Mi Familia Complaint ¶132. This is not like a situation where a State requires registration to a particular party to participate in a primary and then makes voter registration changes unreasonably difficult. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 608 (2005) (discussing cumulative burden) (O'Connor, J., concurring). Instead, the two requirements have little in common that could make them "cumulative" in any meaningful sense.

But even if these regulations worked hand-in-glove for purposes of *Anderson-Burdick*, the Ninth Circuit's evaluation would still be largely decisive on these points with respect to the Signature Requirement. As the State has explained in its stay motion (at 7), the Ninth Circuit has held that the burden presented by the State's limitation on curing signatures up until when polls closed imposed "at most, a 'minimal' burden." *Hobbs I*, 976 F.3d at 1085. Similarly, as the State explained in its motion to dismiss (at 17-18), the Periodic Voting Requirement imposes a burden *less* than that presented in *Short v. Brown,*

which itself posed at most an "extremely small one." 893 F.3d 671, 677 (9th Cir. 2018).

Thus, even if Plaintiffs could rely on simple addition for two inapposite burdens, they would at most be adding an "at most … minimal" burden to an "extremely small one." That is distinctly unlikely to sum up to anything other than a minimal burden cumulatively, and certainly is unlikely to become a "severe" burden.

Second, Plaintiffs' suggestion (at 4) that this case is fundamentally different because "Plaintiffs' claims will be based on a record that reflects what actually happened in the 2020 election" adds nothing. Plaintiffs offer neither evidence nor allegations why data from the 2020 election is likely to change anything. They do not, for example, even *allege* that the rate of disqualification went up (or down). Moreover, Intervenor-Plaintiffs would have had powerful incentives to submit any such post-2020 evidence to the Ninth Circuit if it would have helped their claims. They tellingly have not.

Indeed, the sole fact that Plaintiffs do note about the 2020 election—*i.e.*, that it was an "an election with historic voter turnout," Opp. at 4—does Plaintiffs no good. That Arizona had historically *high* rates of turnout in 2020—notwithstanding having the challenged Poll-Close Deadline for non-signature curing in place—certainly does not support Plaintiffs' allegations that the State has somehow imposes unconstitutionally excessive burdens on voting. Instead, it supports the State's contention that "Arizona operates one of the most open and generous voting systems in the United States." MTD at 1. That Plaintiffs believe that *high* turnout somehow proves that Arizona has made it uniquely *burdensome* to vote is inadvertently revealing about the logical soundness of Plaintiffs' claims.

Third, Plaintiffs' reliance (at 4) on "what actually motivated the Arizona legislature in 2021 to enact SB 1003," is irrelevant to the State's instant stay request. To be sure, that is the central merits inquiry for Plaintiffs' *intentional discrimination* claim (assuming Plaintiffs have standing, *but see* MTD at 7-9). But the State has *not* moved to stay those claims. And the *Anderson-Burdick* burden framework is focused on *objective* burdens and justifications. The Legislature's actual motivations are irrelevant, as States can rely on

"post hoc rationalizations," can "come up with [their] justifications at any time," and have no "limit[s]" on the type of "record [they] can build in order to justify a burden placed on the right to vote." *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). Plaintiffs' attempt to distinguish *Hobbs I* on putative subjective intent thus fails.

Fourth, Plaintiffs' apparent premise—*i.e.*, that binding precedent resolving a challenge involving the *same* challenged law and *same* asserted legal violations can never resolve subsequent claims—defies common sense. True, there is no issue preclusion, as "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). But binding precedent frequently forecloses future challenges as a practical matter.

Under Plaintiffs' premise, for example, they could assert an *Anderson-Burdick* challenge to Indiana's voter-ID law, notwithstanding the Supreme Court's decision in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), and claim that *Crawford* does "not resolve Plaintiffs' *Anderson/Burdick* Claims as a matter of law." Opp.5. They could further offer identical evidence (and nothing more) as in *Crawford*, since (in their view), they "are entitled to make their case." Opp.9.

But if Plaintiffs were to do so, they likely would be facing potential Rule 11 issues, rather than the completely blank slate that Plaintiffs now envision. The Supreme Court's resolution of the *Anderson-Burdick* voter-ID challenge is, as a practical matter, likely to be definitive for everyone going forward absent significant new legal or factual developments. Plaintiffs' arguments ignore reality and practicalities by contending that the Ninth Circuit's *Hobbs I* decision could not possibly be similarly controlling as a practical matter, even if it does not formally "resolve [Plaintiffs'] Claims as a matter of law."

B. Even If *Hobbs I* Were Only Persuasive Authority, A Stay Is Still Warranted

In any event, even if Plaintiffs were correct *Hobbs I* did not decide their case, a stay is still warranted. What matters here is whether a stay is "efficient" and the extent to which

the "independent proceedings which bear upon the case." *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (obtaining a stay "does not require that the issues in such [other] proceedings are necessarily controlling") (citing *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)).

For all of the reasons explained previously and above, *Hobbs I* is likely to be highly relevant to the claim at issue here. It is therefore efficient to stay that claim (but not the others) for a short time.

Indeed, courts routinely stay decisions pending forthcoming decisions that are likely to be influential on the subsequent case. *See*, *e.g.*, *Ctr. for Biological Diversity v. EPA*, No. CV-20-555, 2021 WL 3410974, at *3 (D. Ariz. July 9, 2021) (granting stay pending parallel proceeding in D.C. Circuit, observing that "this approach [of limiting stay] while expeditious would ultimately have been a waste of this Court's resources"); *Winters v. Loan Depot, LLC*, No. CV-20-01290, 2021 WL 2714747, at *1 (D. Ariz. July 1, 2021) (granting stay pending resolution of Ninth Circuit case which could affect court's jurisdiction); *A.B.C. Sand & Rock Co., Inc. v. Maricopa Cty.*, No. 2:17-CV-1094, 2017 WL 2609524, at *2 (D. Ariz. June 16, 2017) (staying case pending result in administrative proceedings); *CoBiz Bank v. IMH Special Asset NT 161 LLC*, No. CV-15-02321, 2016 WL 11728608, at *3 (D. Ariz. June 10, 2016) (staying case pending result in related litigation); *Evolutionary Intel., LLC v. Facebook, Inc*, No. C 13-4202 SI, 2014 WL 261837, at *2 (N.D. Cal. Jan. 23, 2014) (staying case even though one defendant was not bound by parallel proceeding because "simplification of the issues could still occur" because the result of the parallel proceeding would be "strong evidence" in the pending case).

Plaintiffs' contrary contention that a stay would be "simply wasteful" lacks merit even in Plaintiffs' own telling. True, this Court *could* duplicate all of the briefing that has already occurred in *Hobbs I* and then decide the issue itself, subject to potential "supplemental briefing" or "reconsideration … when there is new relevant case law," as Plaintiffs suggest (at 5). But even in Plaintiffs' own description, it is apparent that their

approach would involve *more* briefs, not less. And Plaintiffs do not contend those more-numerous briefs would be shorter. (They wouldn't.)

At bottom, Plaintiffs' suggestion that it is *more* efficient to duplicate past efforts rather than leverage them in a manner permitting less marginal effort the second time around is simply specious.

II. Plaintiffs' Claims of Prejudice Lack Merit

Plaintiffs complain (at 6-7) that a sixty-day stay will prejudice them by forcing the parties to delay a portion of their briefing then possibly pick that briefing up again when *Hobbs* is decided or when the sixty-days has ended. They also observe that sixty days will push this Court incrementally closer to the 2022 election.

This first claim of prejudice is not prejudice at all, but efficiency, and fails for the reasons set forth above. And their second claim rings hollow too.

Plaintiffs notably have not requested a preliminary injunction, and it is distinctly implausible to expect that this case could be adjudicated to final judgment substantially in advance of the 2022 general election. The median time in this District from filing of a civil suit to trial, for example, is currently 35.7 months.[1] Plaintiffs' expectation that their suit—filed in August 2021 without a preliminary injunction motion—would be fully adjudicated in time for the 2022 primary and general elections, including in sufficient time in advance of voting to avoid issues under *Purcell* doctrine, was always fanciful. And the non-realization of Plaintiffs' unrealistic expectation is not cognizable prejudice.

Moreover, Plaintiffs' own conduct further belies their claim of prejudice. Plaintiffs could, for example, have intervened in *Hobbs I* or filed a parallel action back in June 2020 when *Hobbs I* was filed if they were concerned about obtaining expeditious adjudication of the claim at issue here. Furthermore, if Plaintiffs' overwhelmingly duplicative *Anderson-Burdick* claim cannot possibly wait for even 60 days, why did Plaintiffs take all 14 days allotted to them to file a response to the stay motion?

[1] *See* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf.

III. *Hobbs I* is Binding On This Court

Finally, Plaintiffs argue (at 8) that *Hobbs I* is not binding on this Court because "[i]t had neither the benefit of full briefing or argument nor the luxury of time to methodically *consider* the record or relevant authority." These are arguments as to why *Hobbs I* may be discounted by another court which is not formally bound by it, and might also be relevant in the Ninth Circuit itself. But nothing in those contentions could absolve this Court of its duty to follow the Ninth Circuit's published opinions as binding precedent. That would not have been the case if the Ninth Circuit had not published *Hobbs I*. *See* Ninth Circuit Rule 36-3. But it did, and Intervenor-Plaintiffs did not seek rehearing *en banc*.

"A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided." *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001). *See also McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) ("A circuit court's decision binds the district courts sitting within its jurisdiction while a decision by the Supreme Court binds all circuit and district courts.") (citing 18–134 *Moore's Federal Practice—Civil* § 134.02 (2003)). A district court lacks authority to second guess adequacy of briefing, argument, and consideration of the decisions of the court of appeals of their circuit; if this were the rule, it is difficult to see how the system could function as district courts could discard inconvenient precedent at will. Plaintiffs' suggestion otherwise is contrary to hundreds of years of practice in United States courts.

Plaintiffs also argue that the *Anderson-Burdick* inquiry is necessarily fact-specific, so *Hobbs I* is not decisive. That might be theoretically true, but Plaintiffs have not pointed to any meaningful factual differences that might help them distinguish *Hobbs I*. Indeed, the sole new fact they raise with any potential relevance—the historically *high* turnout in 2020—actually supports the State. *Supra* at 3. Because Plaintiffs have not offered any colorable basis for distinguishing their *Anderson-Burdick* claim from that at issue in the Ninth Circuit's published stay decision, the *Hobbs I* stay decision is binding here.

CONCLUSION

This Court should grant the State's Motion for Partial Stay.

Respectfully submitted this 22nd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

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