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16 **UNITED STATES DISTRICT COURT**
17 **DISTRICT OF ARIZONA**

18 Mi Familia Vota, et al.,

19 Plaintiffs,

20 vs.

21 Katie Hobbs, et al.,

22 Defendants.

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

**NOTICE OF NINTH CIRCUIT
DECISION**

NOTICE

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2 The State respectfully provides notice of the Ninth Circuit’s recent decision in
3 *Arizona Democratic Party v. Hobbs*, No. 20-16759, 2021 WL 5822090, --- F.4th --- (9th
4 Cir. Dec. 8, 2021) (“*Hobbs*”). *Hobbs* involved several of the same parties and centered on
5 a challenge to the precise practice—now codified in SB 1005—that Plaintiffs challenge in
6 this case. As the State contended in its Motion to Dismiss (Doc. 72 at 10-11), the outcome
7 of *Hobbs* essentially controls the resolution of the Plaintiffs’ Poll-Close Deadline
8 *Anderson-Burdick* Claims. As the Ninth Circuit has now ruled in Defendants’ favor on
9 nearly every issue raised on these Claims, this Court should dismiss the virtually identical
10 *Anderson-Burdick* claim here for the reasons explained by *Hobbs*, as well as the State’s
11 prior briefing that this Court incorporated by reference. Doc. 75 at 4-5; *see also* Docs. 58-
12 2, 58-5 (State’s *Hobbs* briefing).

13 In *Hobbs*, the Court addressed the exact same practice codified by the challenged
14 provision SB 1005—a requirement that voters must either sign their ballots when they
15 return them or cure their failure to do so by an election day deadline. 2021 WL 5822090
16 at *4. Plaintiffs made the same claim they are making here: that the measure “severely
17 burden[s] Arizona voters” and that “[n]o state interest justifies” the measure. *See* Mi
18 Familia Complaint at ¶¶ 132-133. *See also* DSCC Complaint at ¶¶ 128-129. The Ninth
19 Circuit’s holdings on these issues in *Hobbs* makes plain that this claim is no longer tenable
20 in this Circuit.

21 On the question of the burden, as the Ninth Circuit explained, a requirement to sign
22 the ballot by election day is a “reasonable, nondiscriminatory regulation[.]” that imposes
23 “only a minimal burden on voting rights.” *Hobbs*, 2021 WL 5822090 at *9. The court
24 observed that “most forms of voter negligence have no remedy” but Arizona provides a
25 “measure of grace” by “scrupulously examin[ing] each ballot” and notifying voters of a
26 failure to sign, giving them until election day to correct this error. *Id.* at *8. The Plaintiffs’
27 complaints here assert that the burden is severe because the failure to cure results in
28 “disenfranchisement.” This characterization of the burden was squarely rejected by the

1 Ninth Circuit, which explained that “[t]o the extent that the election-day deadline results
2 in voters’ not casting a vote in an election, that result ‘was not caused by the election-day
3 deadline, but by their own failure to take timely steps to effect their vote.’” *Id.* at *9
4 (cleaned up) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)).

5 Plaintiffs’ assertions here on the supposed lack of any state interest in SB 1005 are
6 similarly foreclosed by *Hobbs* as controlling precedent. The Ninth Circuit only found it
7 necessary to consider one interest to justify the minimal burden imposed: the State’s
8 interest in reducing administrative burden on poll workers. *Id.* *Hobbs* held that “Plaintiffs’
9 proposed relief would require officials to expend extra effort and, in at least one populous
10 county, to implement a new, cumbersome process during that frantic [post-election]
11 period.” *Id.* at *11. The Ninth Circuit also considered the Plaintiffs’ comparison between
12 the differing cure periods for missing signatures and signature mismatches. *Id.* at *12. The
13 court observed that the administrative burden for correction of missing signatures was
14 different than the administrative burden in the other situations, and held that the distinction
15 drawn by the State between these categories was rational, and it did not change the calculus
16 on the State’s interest. *Id.* at *12-13.

17 Plaintiffs have suggested in passing that their claim is somehow distinct because it
18 alleges a “cumulative” burden. That contention fails for the reasons that the State has
19 previously explained. *See* Doc. 74 at 2-4.

20 Because large portions of Plaintiffs’ claims are indistinguishable from the claims
21 rejected by the Ninth Circuit in *Hobbs*, those claims should be dismissed. *See also* Doc.
22 76 at 10 (incorporating *Hobbs* arguments in motion to dismiss). In addition, Intervenor-
23 Plaintiffs’ claims should be dismissed on collateral estoppel and *res judicata* grounds as
24 well, since their *Hobbs* involved an equivalent claim to an identical practice. *See, e.g.,*
25 *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (“The doctrine of issue
26 preclusion prevents relitigation of all issues of fact or law that were actually litigated and
27 necessarily decided in a prior proceeding.”) (cleaned up).

28 The Ninth Circuit’s decision also supports the State’s arguments that Plaintiffs’

1 *Anderson-Burdick* challenge to the Periodic Voting Requirement should also be dismissed
2 for three reasons. *First*, *Hobbs* stresses that “the election-day deadline for submitting a
3 completed ballot imposes, at most, a minimal burden.” 2021 WL 5822090, at *7. But rather
4 than requiring a signed ballot be returned to election officials by election day (with the
5 possibility of cure) as a condition of voting by mail in *every* election, the Periodic Voting
6 Requirement only requires that voters return a signed mail-in ballot *every four years or*
7 *return a notice*. It therefore imposed an *even smaller* burden than in *Hobbs*, which was
8 outright “minimal” (a characterization the majority repeated a double-digit number of
9 times).

10 *Second*, the Ninth Circuit’s acceptance of “the State’s interest in reducing
11 administrative burdens” as sufficient to sustain the Poll-Close Deadline supports the
12 State’s equivalent arguments for the Periodic Voting Requirement. *Id.* at *9-13. The
13 administrative burdens at issue to the State for the latter are substantially larger: while
14 curing a non-signature impose only “some additional administrative burden,” *id.* at *10,
15 printing and sending ballots costs approximately \$2-3 per ballot (and millions of dollars in
16 aggregate). Doc. 76 at 19-20. Indeed, ballot printing/mailing is Maricopa County’s *single*
17 *biggest* election expense. *Id.*

18 Moreover, the remedy for non-compliance with the Periodic Voting Requirement
19 is even less drastic: rather than disqualifying any particular vote outright, a voter simply is
20 no longer sent ballots automatically—but does not preclude voting by other means or
21 simply re-registering for the EVL. The Periodic Voting Requirement will thus save far
22 more resources than the Poll-Close Deadline for non-signature curing while imposing even
23 lesser burdens on voters. That balancing in *Hobbs* requires judgment in favor of the State
24 *a fortiori* here for the Periodic Voting Requirement.

25 *Third*, *Hobbs* reiterates that “[t]he Constitution permits, and even encourages,
26 States to experiment by making it easier for some to vote.” *Id.* at *14 (citing *inter alia*
27 *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018)). Arizona has already done so by
28 creating an EVL—a step *far more generous* than the *vast majority* of States. Doc. 76 at 1,

1 APP-3. Having now run that experiment for 14 years, the Constitution permits Arizona to
2 learn from its experiences, including by reducing modestly the cost of that generosity vis-
3 a-vis voters for whom the State’s EVL expenditures on automatically printing/sending
4 ballots are consistently wasteful.

5 As *Hobbs* reiterates, “the Constitution merely sets a floor.” 2021 WL 5822090, at
6 *14. Contrary to Plaintiffs’ implicit premises, the Constitution demands neither that States
7 adopt EVLs nor a one-size-fits-all EVL if they choose to implement them. It certainly does
8 not demand that States adopt an EVL of the sort that Plaintiffs insist upon—*i.e.*, one with
9 lifetime membership that is completely irrevocable no matter consistently voters decline
10 to avail themselves of the costly expenditures of the State.¹

11 **CONCLUSION**

12 *Hobbs* requires dismissal of Plaintiffs’ *Anderson-Burdick* challenge to the State’s
13 Poll-Close Deadline and strongly supports the State’s motion to dismiss their *Anderson-*
14 *Burdick* challenge to the Periodic Voting Requirement.

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24 Respectfully submitted this 12th Day of December, 2021.

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26 ¹ *Hobbs* notably does not resolve some issues presented both in that case and here. In
27 particular, it found unnecessary to resolve (1) the State’s arguments that Plaintiffs’ had
28 failed to satisfy the *Salerno* standard for their facial claims, (2) the State’s other interests
supporting the Poll-Close Deadline, 2021 WL 5822090 at *9, and whether Arizona law
affirmatively precludes post-election curing at *4 n.2. Those unreached issues continue to
provide additional bases for dismissal here.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th Day of December, 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.

s/ Drew C. Ensign
Drew C. Ensign
*Counsel for Mark Brnovich, Arizona Attorney
General*

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