No. 20-16759

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

KATIE HOBBS *et al.*,
Defendants,

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

and

REPUBLICAN NATIONAL COMMITTEE, ARIZONA REPUBLICAN PARTY, and DONALD J. TRUMP FOR PRESIDENT, INC.,
Intervenor-Defendant-Appellants.

On Appeal from the United States District Court
for the District of Arizona

REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

The Arizona Secretary of State, the Democratic National Committee, and the Arizona Democratic Party oppose Movants' request for a stay. This reply addresses the weaknesses in their responses, particularly concerning points made by the Intervenor-Defendant-Appellants in their emergency motion. Both appellees completely mischaracterize the holding of *Purcell v. Gonzales*, 549 U.S. 1 (2006), which squarely prohibits courts from issuing the kind of election-eve injunction that the district court issued here. Appellees' arguments are entirely at odds with the legion of recent decisions applying *Purcell*—which may explain why they refuse to even acknowledge (let alone distinguish) them. Appellees' other arguments are equally misplaced. They ignore, for example, binding Circuit precedent requiring that the familiar *Anderson-Burdick* framework govern due-process claims. And Appellees' assertion that the Republican National Committee and Republican Party of Arizona cannot demonstrate irreparable harm is refuted by the Plaintiffs' own arguments that they—the mirror image of Intervenors—would be irreparably harmed if the injunction is stayed. For all these reasons, as well as the other merits arguments advanced by the State, the district court's injunction should be stayed pending resolution of this appeal.

ARGUMENT

I. The *Purcell* principle requires a stay.

Both the Plaintiffs and Secretary of State seek to avoid the plain application of *Purcell,* in which the Supreme Court warned that "[c]ourt orders affecting elections ...

can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. As Movants have explained, this case falls squarely within the category of cases to which *Purcell* applies and the injunction should be stayed on this basis alone. *See* Mot. for Stay 10-12; *see also* Arizona Mot. for Stay 18-19.

The Plaintiff-Appellees wave away the Supreme Court's clear instructions, principally relying on an Eleventh Circuit decision that declined to apply *Purcell* and refused to stay a district court granting relief in advance of an Alabama primary election earlier this year. Dem. Opp. 28 (citing *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 514 (11th Cir. 2020)). That reliance actually refutes Plaintiff-Appellees' position, because the *very decision* that they cite was effectively overruled days later by the Supreme Court. *See Merrill v. People First of Alabama*, 2020 WL 3604049, at *1 (U.S. July 2, 2020) (granting a stay of the district court's preliminary injunction pending disposition of the appeal in the Eleventh Circuit and the Supreme Court). The Supreme Court granted that stay in response to an application by the State of Alabama in which their principal argument was that *Purcell* and other "precedent prohibits federal courts from changing the rules of an ongoing or rapidly approaching election." *See* Emergency Appl. for Stay 2-3 (June 29, 2020), *available at* https://tinyurl.com/yy2ycrja.

Merrill is no outlier. All summer, the Supreme Court repeatedly made clear that the *Purcell* principle is alive and well, and consistently rejected efforts like those of

Plaintiff-Appellees and the district court to change the rules for imminent or ongoing elections. *See, e.g., Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020) (granting stay); *Thompson v. DeWine*, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (declining to vacate stay); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (June 26, 2020) (declining to vacate stay); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (July 30, 2020); *Clarno v. People Not Politicians Oregon*, 2020 WL 4589742, at *1 (U.S. August 11, 2020).[1]

These decisions underscore the mistaken premises of the Appellees' *Purcell* arguments. Contrary to Plaintiff-Appellees' contention (at 29-30), that this case resulted in a *permanent* injunction does not matter. *Purcell* and its progeny are concerned not with the procedural background of the case but whether the substance of the order—preliminary or permanent—will "alter the election rules on the eve of an election." *Republican National Committee*, 140 S.Ct. at 1207 (citing *Purcell,* 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); and *Veasey* v. *Perry*, 135 S. Ct. 9 (2014)). Indeed, in *Veasey* the Court

[1] The *only* case that Plaintiffs cite in which the Supreme Court denied a stay is *Common Cause v. Rhode Island*, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). *See* Dem. Opp. 28 n.21. But in that case the Court denied relief because "no state official has expressed opposition" to the federal court's suspension of a voting requirement. That is not true here. The Court also noted that, "[t]he status quo is one in which the challenged requirement has not been given effect," because the law in question had already been suspended "in Rhode Island's last election." *Id.* Again, that is not true here; the state's policy precluding any post-election cure of missing signatures was in effect until the district court's order, applying as recently as the statewide August 4 primary. Op. 3-4.

declined to vacate a stay of an election-eve order notwithstanding the dissent's complaint (echoed here by Plaintiffs) that the Court was ignoring "an extensive factual record developed in the course of a nine-day trial." *Id.* at 11; *see also Nelson v. Warner*, No. 20-1860 (4th Cir. Aug. 18, 2020) (granting stay of district court order issuing a permanent injunction following a four-day bench trial); *People First of Alabama,* 815 Fed. Appx. at 508 (noting the district court's "77-page order replete with factual findings") and *Merrill*, 2020 WL 3604049, at *1 (granting stay).

The Secretary is similarly off-base in claiming that "issuing a stay at this stage may produce the harms that *Purcell* seeks to prevent" because some voters or election officials may have relied on the district court's decision. Sec'y. Opp. 6-7. The Supreme Court has rejected this reasoning. "[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error." *Republican National Committee*, 140 S.Ct. at 1207.

If anything, the Secretary's arguments highlight the potential for voter confusion that the district court's order had introduced into Arizona's ongoing election. For the past year, the state's published Election Procedures Manual has made clear that ballots missing a necessary voter signature "shall not count." Op. 4. Those were the rules in effect for the August statewide primary election. Now, in the wake of a decision issued just days before absentee voting opened for overseas and military votes, the Secretary concedes that voters are likely being "instructed" differently "pursuant to the lower

court's ruling." Sec'y Br. 7. This underscores the need for a stay now, to ensure continued uniformity in the administration of the election and sow confidence, not confusion, in the electorate. Indeed, Arizona's "primary and general election system"—like that of other States—is "facing a wide variety of challenges in the face of the pandemic." *Reclaim Idaho*, 140 S.Ct. at 2617. The district court's order adds to those burdens and subtracts from voter confidence and clarity in precisely the way *Purcell* prohibits.

II. Plaintiffs' procedural due process claims are governed by the *Anderson-Burdick* framework.

Movants' opening brief explained that this Court and other circuits have recognized that the *Anderson-Burdick* framework applies to *all* claims brought under the First and Fourteenth Amendments, including procedural due process claims. *See Lemons v. Bradbury*, 538 F.3d 1098, 1103 (9th Cir. 2008) (noting that a "more flexible standard applies for analyzing election laws that burden the right to vote" under *Anderson-Burdick* and affirming denial of procedural due process claim); *see also* Mot. for Stay 7-10 (collecting cases).

Plaintiff-Appellees, like the district court, largely ignore *Lemons* and its binding resolution of this question. *See* Dem. Opp. 21-24. In a footnote, they contend that the Court in *Lemons* was really applying the separate *Matthews* analysis, inferring this from the Court's passing citation to a Seventh Circuit decision. *Id.* 22-23 n.17. This argument does not survive even a cursory review of the *Lemons* decision.

In *Lemons*, the Court began its analysis by laying out the *Anderson-Burdick* case law, specifically quoting *Burdick* for the proposition that "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Lemons*, 538 F.3d at 1103. This Court then proceeded to analyze all of the claims under that framework. It first rejected an equal protection challenge, finding that Oregon's requirements for initiative petitions were backed by "important interests" that "justify the minimal burden imposed on plaintiffs' rights in this case." *Id.* at 1104. It then "reject[ed] plaintiffs' procedural due process argument *for the same reasons*." *Id.* (emphasis added). It again engaged in the familiar balancing test, finding that "Oregon's interests in detecting fraud and in the orderly administration of elections are weighty and undeniable" when compared to the "slight at most" "burden on plaintiffs' interests." *Id.* at 1104-05. And were there any doubt, the Court closed its analysis by reiterating that "Oregon's 'important regulatory interests' are sufficient to justify the state's 'reasonable, nondiscriminatory restrictions.'" *Id.* at 1105 (citing *Burdick*, 504 U.S. at 434).

In other words, the relevant section of *Lemons* begins and ends with the *Anderson-Burdick* framework, disposing of a procedural-due process claim along the way. The Court never even cites *Mathews v. Eldridge* or invokes its test, and thus—despite Plaintiffs' insistence—cannot possibly be read to be "assess[ing] the *Mathews* factors."

Dem. Opp. 22-23 n.17. This Court has no basis to assume that the *Lemons* court was doing anything other than what it said: applying the *Anderson-Burdick* analysis to reject plaintiffs' due-process claim. And of course *Lemons* is completely consistent with other decisions of this Court holding that "First Amendment, Due Process, [and] Equal Protection claims" challenging state voting laws are "addressed under [the] single analytic framework" outlined in *Anderson* and *Burdick*. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). *See also Soltysik v. Padilla*, 910 F.3d 438, 449 n.7 (9th Cir. 2018) (noting that election-related First and Fourteenth Amendment claims are all "folded into the *Anderson/Burdick* inquiry"). Because this Court is "bound by [its] circuit precedent," *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 972 (9th Cir. 2020) (Christen, J., concurring in part and dissenting in part), Plaintiffs' procedural due process claims must be measured—and are likely to fail—under a proper application of the *Anderson-Burdick* framework.

Even if *Lemons*, *Dudum*, and *Soltysik* did not dictate that result, logic would. Plaintiffs' position, accepted by the district court, is a minority view, as Movants noted. *See* Mot. for Stay 7-8. Plaintiffs do not dispute this in their response, or explain why this Court should deviate from the decisions of the other courts of appeal to reach this question. Just last week, a district court in Wisconsin rejected the same argument by one of the same Plaintiffs here, noting that only a scattered few district courts had applied a separate procedural due process analysis in the elections context. *Democratic*

National Committee v. Bostelmann, 2020 WL 5627186, at *28 (W.D. Wis. Sept. 21, 2020).[2] And "even these cases fail to address the overlap between the *Mathews* and *Anderson-Burdick* standards, much less the exclusive role played by the latter test in the U.S. Supreme Court's overall election law jurisprudence." *Id.* "Accordingly, plaintiffs have not convinced this court that in the claims before it, an independent analysis under the *Mathews* test is necessary, much less appropriate." *Id.* The same is true here.

III. Movants' injuries are the mirror image of Plaintiffs.'

Plaintiff-Appellees contend that Movants cannot demonstrate irreparable injury in this case. Dem. Opp. 6. This is an astounding assertion, in light of the Democratic organizations' own arguments about their interests that are at stake here. Indeed, Plaintiff-Appellees contend in their brief that the Arizona policy struck down by the district court "'frustrates the ADP's organizational mission' of electing Democrats in Arizona." Dem. Opp. 13-14. They also argue that the law requires them to divert resources, *id.* at 14-15, noting the District Court's finding that the ADP "currently channels additional educational resources … to ensure that voters in those areas understand the signature rules for VBM ballots." Op. 10. The Democratic Plaintiffs further rely on the potential harm that Arizona's law might present to their "election

[2] Although the district court in Wisconsin granted other limited relief to the DNC and other plaintiffs, that order has since been stayed in full by the Seventh Circuit. *See* Order in *DNC, et al. v. Bostelmann, et al.* (Nos. 20-2835 & 20-2844) (7th Cir. Sept. 27, 2020).

prospects." Dem. Opp. 14 n.7 (citing *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981)). *See also id.* at 26 (arguing that a stay would harm the Arizona Democratic Party because some votes of its members "inevitably will be rejected due to missing signatures").

Movants include the Republican National Committee and the Arizona Republican Party—who are the "mirror image" of the Democratic Plaintiffs. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (quoting *Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996)). Indeed, in their successful motion to intervene, the Movants noted that "[a]ny relief awarded to Plaintiffs will change the structure of the competitive environment and fundamentally alter the environment in which Movants defend their concrete interests (e.g. their interest in winning election or reelection)." D. Ct. Doc. 36 at 6 (citing *Shays v. Federal Election Comm.*, 414 F.3d 76, 85-86 (D.C. Cir. 2005)) (cleaned up). Appellants also noted *Purcell's* observation that last-minute changes to election laws "threaten to confuse voters and undermine confidence in the electoral process. *Id.* (citing *Purcell*, 549 U.S. at 4-5). And Movants, echoing the Democratic organizations here, observed that the litigation could force them "to spend substantial resources informing Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation in the wake of the 'consequent incentive to remain away from the polls." *Id.* at 6-7.

Movants reiterated this point in their motion to this court, noting that "given the need to allocate resources and inform voters of the process for correctly voting, the decision irreparably increases the risk of voter confusion" and thus harms the Movants. Mot. for Stay 1.[3] And indeed, other courts—including the Supreme Court—have granted relief to the RNC in other appeals where they were the *only* appellants who had been "permitted to intervene below." *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499, at *1-2 (7th Cir. Apr. 3, 2020). *See also Republican National Committee*, 140 S. Ct. at 1206 (granting further stay in RNC appeal). There is simply no merits to the Democratic organizations' assertion that the RNC cannot show any harm from the district court's order.

Of course, if Plaintiff-Appellees are correct that these harms are insufficient, the district court's order must still be vacated. Plaintiffs rely on identical theories of injury for their own standing here. *See* Dem. Opp. 13-14. If those injuries are non-cognizable, then the plaintiffs lacked the necessary Article III injury to maintain this case. *See* Ariz. Mot. for Stay 6-9.

[3] Contrary to Plaintiff-Appellees suggestion (at 6), there was nothing unusual about Movants deferring to the State of Arizona's arguments in support of a stay in the interest of time and avoiding duplicative briefing.

CONCLUSION

For the foregoing reasons, the Court should stay the district court's injunction pending appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

/s/ Patrick Strawbridge
Counsel for Intervenor-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 27-1(d) because it is less than 20 pages, excluding the portions exempted by Fed. R. App. P. 27(a)(2)(B) and Fed. R. App. P. 32(f). The motion's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Patrick Strawbridge
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