

Appeal No. 20-16932

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MI FAMILIA VOTA, *et al.*,

Plaintiffs and Appellees,

vs.

KATIE HOBBS,

Defendant and Appellee, and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

*Intervenor-Defendants and
Appellants.*

On Appeal from the United States District Court
for the District of Arizona
Hon. Steven P. Logan
Case No. 2:20-CV-01903-SPL

**EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR STAY PENDING APPEAL;
RELIEF NEEDED BY SATURDAY, OCTOBER 10, 2020**



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Circuit Rule 27-3 Certificate

Intervenor-Appellants Republican National Committee and National Republican Senatorial Committee (the “Republican Committees”), through undersigned counsel, hereby move this Court on an emergency basis for a stay pending appeal of the district court’s order entered on the evening of October 5, 2020. Fed. R. App. P. 8(a)(2); 9th Cir. R. 27-3. Relief is needed by Saturday, October 10, 2020.

The district court’s order enjoins enforcement of Arizona’s voter-registration deadline, which was set to expire just hours after the district court entered its order. *See generally* Ariz. Rev. Stat. § 16-120 (requiring voters to register at least 29 days before an election). This deadline has been in effect for 30 years, *see* H.B. 2074, ch. 32, § 2, 39th Leg., 2d Reg. Sess. (Ariz. 1990), and is deeply interconnected with other tightly compressed deadlines, including for example Arizona’s 27-day period for early voting, *see* Ariz. Rev. Stat. § 16-542(C), and is integral to the reliable administration of Arizona elections. As discussed below, a stay pending appeal is justified under the standard set forth in *Nken v. Holder*, 556 U.S. 418 (2009).

Undersigned counsel certifies the following information, as required by Ninth Circuit Rule 27-3(c).

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II. Facts Showing the Existence and Nature of the Emergency

Thirty years ago, the elected Legislature of the State of Arizona prescribed a reasonable and constitutionally sound rule: while individuals may register to vote at any time, those wishing to participate in the next ensuing election must submit their

registration no later than 29 days prior to Election Day. *See* Ariz. Rev. Stat. § 16-120(A). This deadline aligns with and reinforces Arizona’s inarguably constitutional 29-day durational residency requirement for new electors, *see id.* § 16-101(A)(3), and its relatively lengthy 27-day early voting period, *see id.* § 16-542(C). Pursuant to this long-settled law, voter registration for the November 3, 2020 general election would have closed after 11:59 p.m. on October 5, 2020.

Monday evening—just hours before the statutory cutoff—the District of Arizona supplanted the statutory deadline with an order extending the voter registration through October 23, 2020. This eleventh hour change contravenes repeated, and recently reiterated, admonitions by this Court and the United States Supreme Court against judicial tinkering with states’ election machinery on the eve of voting. And it is upending the careful preparations of political campaigns and elections officials throughout Arizona.

Each day that the district court order remains in effect, Arizona’s prerogative to regulate its election processes is wrongfully abrogated, the Appellants are forced to divert vital organizational resources to maintaining voter registration parity, the risk of voter confusion is compounded, and the burden on local elections officials is amplified. This Court’s intervention is necessary to restore legal certainty as voting commences, and to vindicate the uniform and consistent enforcement of Arizona’s reasonable, neutral, and facially constitutional voter registration deadline.

III. Why This Motion Could Not Have Been Filed Earlier

The Plaintiff-Appellees filed the Complaint in this case just eight days ago, on September 30, 2020. On Monday afternoon the District Court held a trial on the merits. Later that evening, the District Court issued its order in favor of the Plaintiff-Appellees, and enjoined enforcement of Arizona's voter registration deadline. On Tuesday the Intervenor-Appellants filed an Emergency Motion for Administrative Stay with this Court pending briefing and a decision on a full stay pending appeal. Yesterday this Court denied the administrative stay and set a briefing schedule for this Motion. This Motion is being filed at the earliest opportunity after entry of the District Court's order.

IV. Notice of This Motion to the Court and Other Parties, and Positions of the Other Parties

The Intervenor-Appellants left a voicemail for the Court's Emergency Motions staff attorneys on Tuesday morning, and spoke to an Emergency Motions staff attorney at approximately 1:00 on Tuesday afternoon, to advise the Court of the upcoming filings. This Court then set a briefing schedule yesterday evening.

The Intervenor-Appellants further notified all parties by email on Tuesday at 1:23 in the afternoon, through their respective counsel, that they expected to file this Motion imminently and would request expedited briefing and consideration. Additionally, this Motion will be served by email and the appellate CM/ECF system.

Counsel for *amicus* Governor Doug Ducey has advised that he supports a stay. Counsel for the Plaintiff-Appellees has advised that they oppose this Motion. Counsel for the Defendant-Appellee Katie Hobbs, the Arizona Secretary of State, has advised that she takes no position on this Motion.

V. Why a Stay Was Not Requested in the District Court

The arguments to stay the District Court order pending appeal are also the arguments against granting the injunctive relief requested by the Plaintiff-Appellees. Each of these arguments was briefed in the District Court four business days ago, and reiterated during oral argument on Monday afternoon. The District Court rejected those arguments Monday evening. Moreover, the injury arising from the District Court's order—namely, the statewide disruption of early voting and Election Day preparations and the resulting diversion of the Appellants' organizational and financial resources—is real, ongoing (rather than merely imminent), and neither offset by a security bond nor redressable through monetary damages. In this context, moving the District Court for a stay pending appeal would only result in redundant proceedings in rapid succession, unnecessary delay, and additional disruption of Arizona elections—all without any practical likelihood of success. This is, therefore, the rare case in which it is impracticable to request a stay in the District Court. *See* Fed. R. Civ. App. P. 8(a)(2)(A)(i). *See generally Populist Party v. Herschler*, 746 F.3d 656, 657 n.1 (10th Cir. 1984) (“The [2020] election . . . is almost

upon us, and the order of the district court shows that seeking such relief there would not be practicable.”); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (allowing appellants to bypass district court in seeking stay in election-related dispute “because of the immediacy of the problem and the district court’s legal error concerning” a constitutional question); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (noting that “it would serve little purpose to require another application [for a stay] in the district court”); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406, 410–11 (5th Cir. 2013) (allowing appellant to bypass district court in seeking stay in part because of imminent effective date of challenged statute).

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 8, 2020

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EMERGENCY MOTION FOR STAY PENDING APPEAL

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Intervenor-Appellants Republican National Committee and Republican National Senatorial Committee (together, the “Republican Committees”) move for a stay of the District Court’s order extending Arizona’s voter registration deadline to October 23, 2020.

In evaluating a request for a stay pending appeal, “a court considers four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770 (1987)). As formulated in this Circuit, “a petitioner seeking a stay . . . must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner’s favor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). The Republican Committees are entitled to a stay under either facet of this rubric.

INTRODUCTION

The District Court erred in invalidating Arizona’s statutory deadline for voter registration because (1) the statutory deadline did not cause the Plaintiffs-Appellees’

injury, (2) the injunction does not redress the Plaintiffs-Appellees' injury, (3) the injury is not "severe," and (4) the statutory deadline is justified by the government's reasonable and non-discriminatory policy objectives. Moreover, the district court's last-minute injunction irreparably injures the Republican Committees and badly disrupts the orderly administration of the November 3, 2020 general election.

ARGUMENT

I. A Motion for a Stay in the District Court Is "Impracticable"

An appellant may request a stay directly from this Court if exhausting the same remedial avenue in the district court would be "impracticable." *See* Fed. R. Civ. P. 8(a)(2)(A)(i).

The exigencies precipitated by the district court's order make further proceedings in that forum infeasible. The district court just days ago considered comprehensive briefs and extensive oral arguments on the same issues now confronting this Court. There is no reason to believe that a redundant round of submissions before the same judge, while injury is ongoing (as distinct from merely imminent), would yield new insights.

Moreover, "[t]his is not a run-of-the-mill case; instead, it is a voting case decided on the eve of the election. The judgment below substantially disturbs the election process . . . days before early voting begins." *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). The district court's directive is exacting a substantial

adverse impact not only on the Republican Committees but also local elections officials across the state, and presages logistical complications and ensuing confusion for potentially thousands of late registrants.

When district courts transgress constitutional boundaries and intermeddle at the eleventh hour in states’ reasonable and non-discriminatory electoral mechanisms, appellate tribunals properly intervene to maintain the status quo. *See generally Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *Andino v. Middleton*, -- S. Ct. --, 2020 WL 5887393 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring) (“[F]or many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election.”); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Feldman v. Ariz. Sec’y of State’s Office*, 147 S. Ct. 446 (2016); *Arizona Democratic Party v. Hobbs*, 20-16759, 2020 WL 5903488, at *2 (9th Cir. Oct. 6, 2020) (“[A]s we rapidly approach the election, the public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling to implement and to administer” district court’s order); *Democratic National Committee v. Bostelmann*, 20-2835 and 20-2844, slip op. at 4 (7th Cir. Oct. 8, 2020) (“A last-minute event may require a last-minute reaction. But it is not possible to describe COVID-19 as a last-minute event.”).

In short, “[t]he [2020] election . . . is almost upon us, and the order of the

district court shows that seeking such relief there would not be practicable.” *Populist Party*, 746 F.3d at 657 n.1; *see also Homans*, 264 F.3d at 1243; *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Planned Parenthood of Greater Texas Surgical Health Services*, 734 F.3d at 410–1.

II. The Republican Committees Are Highly Likely to Prevail on the Merits

A. Plaintiffs-Appellees’ Injury Is Neither Traceable to State Action Nor Remediated by a Prospective Injunction

The judicial power cannot be enlisted to vindicate a litigant’s policy preferences. Rather, it exists only resolve discrete “cases” and “controversies.” *See* U.S. CONST. art. III. To this end, a plaintiff must establish not only the existence of an articulable “injury” but—just as importantly—that the harm is “fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

The crux of Plaintiffs-Appellees’ theory of standing is that they “have diverted significant resources to try to register as many voters as possible ahead of the Voter Registration Cutoff notwithstanding the pandemic restrictions.” Dkt. 1 (Compl.) ¶ 8. In principle, the Republican Committees agree that a diversion of resources impelled by a governmental action or practice is a cognizable injury that can sustain organizational standing—but the Plaintiffs-Appellees’ injury is neither traceable to any state action nor remediable through a prospective injunction.

1. Plaintiffs-Appellees' Injury is Not Traceable to State Action

There is no plausible nexus between the Plaintiffs-Appellees' claimed injury (*i.e.*, their previous expenditures of organizational resources) and Arizona's statutory deadline for voter registration. Four considerations fortify this conclusion.

First, voter registration efforts were never prohibited or restricted by law in Arizona. The so-called "stay at home" order issued by Governor Ducey on March 30, 2020 did not prohibit or restrict voter registration efforts; to the contrary, it affirmatively exempted "Essential Activities," a term defined to explicitly include "[e]ngaging in constitutionally protected activities such as speech and religion, and any legal or court process provided that such is conducted in a manner that provides appropriate physical distancing to the extent feasible." Executive Order 2020-18, ¶ 4(f), available at <https://azgovernor.gov/file/34365/download?token=6YdWos-F>; see also *Thompson v. DeWine*, 959 F.3d 804, 809 (6th Cir. 2020) (Ohio plaintiffs unlikely to succeed on merits of claims that petition filing deadline and signature thresholds burdened their constitutional rights, in part because the state "specifically exempted conduct protected by the First Amendment from its stay-at-home orders").

Second, no interested and qualified individual was denied registration before the statutory deadline. The Plaintiffs-Appellees do not allege otherwise, nor could they, because voter registration entails no physical contact or even direct interaction with any third party; an individual may register online or simply drop a completed

paper form in the mailbox at her convenience.

Third, record evidence demonstrates that productive campaign field operations in Arizona have been possible since at least May. More than 130,000 ballot measure signatures were gathered in Arizona in May and June alone. *See* Dkt. 19-1 (Decl. of Zack Alcyone, ¶ 4(a)). An experienced manager of campaign field operations further attested that, while the pandemic has presented practical obstacles, well-organized field efforts have attained impressive signature collection and voter contact benchmarks. *See* Dkt. 19-2 (Decl. of Nathan Sproul, ¶¶ 6-8).

Finally, the statutory deadline simply does not prevent the Plaintiffs-Appellees from continuing to register voters. To be sure, those who register after October 5 may not participate in the immediately ensuing election—but they are still lawfully registered and may cast ballots in every election thereafter.¹ Thus, to the extent the Plaintiffs-Appellees’ organizational mission is voter registration, the October 5 deadline does nothing to abrogate their ability to continue on pace.

In sum, the Plaintiffs-Appellees conspicuously elide a pivotal distinction between the effects of the pandemic and the effects of the statutory registration deadline. They aver that they “had to divert resources in order to ramp up our in-

¹ Even if late registrants’ inability to vote in the November 3, 2020 general election is an “injury,” it is not a harm inflicted on these organizational Plaintiffs-Appellees—and Plaintiffs-Appellees notably do not even purport to assert standing on behalf of third parties.

person registration work to get people registered ahead of the deadline. That meant we had to purchase PPE equipment, buy cleaning supplies, develop new health and safety protocols, train staff to follow those protocols, and hire safety control staff to make sure those protocols were being followed,” as well as bolster staffing on their voter registration program. Dkt. 2 (Bravo Decl. ¶¶ 26, 29-30). But there is no evidence that these expenditures were attributable to the statutory October 5 deadline. Thus, even accepting Plaintiffs-Appellees’ claims at face value, the injury posited by the Plaintiffs is traceable to the global pandemic, not to any identifiable state action. *See Tully v. Okeson*, -- F.3d. --, 2020 WL 5905325, at *3 (7th Cir. Oct. 6, 2020) (“[T]he *statute* does not ‘impact [Plaintiffs’] ability to exercise the fundamental right to vote’ or ‘absolutely prohibit[Plaintiffs] from voting’; only the pandemic is potentially guilty of those charges”).

2. A Prospective Injunction Cannot Remediate the Injury

Even if the statutory deadline caused the Plaintiffs-Appellees’ injuries, those injuries cannot be redressed through injunctive remedies. “[A] plaintiff who seeks prospective injunctive relief cannot establish standing based on past harm alone. Even if a plaintiff has suffered past harm from the kind of conduct the suit seeks to enjoin, the plaintiff must ‘establish a real and immediate threat’ that the harm-producing conduct will recur.” *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1280 (D.C. Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105

(1983)). In this vein, Plaintiffs-Appellees’ recitation of their financial and logistical exertions over the preceding weeks and months are irrelevant; the operative question—which Plaintiffs-Appellees are at a loss to answer—is how the *absence* of an injunction will compel them to divert organizational resources *in the future*.

The two cases invoked by the district court on this point only illuminate the flaw in its reasoning. In *Fair Maps Nevada v. Cegavaske*, 2020 WL 2798018 (D. Nev. May 29, 2020), the plaintiff ballot measure committee sought an extension of the deadline for filing its initiative petition, which clearly would operate prospectively to at least potentially alleviate their alleged injury (*i.e.*, an unconstitutional burden on ballot access). Nothing in *Fair Maps* elucidates how an extension of the voter registration deadline could conceivably remedy the Plaintiffs-Appellees’ *past* diversions of organizational resources. Similarly, the court in *Arizona Democratic Party v. Reagan*, 2016 WL 6523427 (D. Ariz. Nov. 3, 2016) (Logan, J.), perfunctorily held that ordering the Secretary of State to extend the voter registration deadline could redress the plaintiffs’ alleged injury—but conspicuously never identified what that ostensible “injury” was, let alone explained how the requested order would have mitigated it.

In other words, even assuming that Plaintiffs-Appellees’ “expenditures ‘perceptibly impaired’ these organizations’ activities, they at best demonstrate *past* injury. Such injury might admit standing to sue for compensatory

damages. But it is not an injury that can be redressed through the prospective declaratory and injunctive relief sought in this action.” *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015) (internal citation omitted); *see also Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) (organization plaintiffs’ past expenditures to “address voting inequities and irregularities” could not sustain standing because the complaint “pleads only backward-looking costs, not the imminent future injury needed to establish standing for declaratory and injunctive relief claims like this one”).

The Plaintiffs-Appellees’ inability to delineate a concrete organizational injury that is both (1) traceable to the October 5 registration deadline and (2) remediable by a prospective injunction, is fatal to the viability of their claims.

B. The Voter Registration Deadline Does Not Severely Burden Rights and Is Necessary to Advance Important Government Interests

Because the statutory voter registration deadline does not “severely” burden any person’s constitutional rights, the Republican Committees are highly likely to succeed on the merits of their appeal.

1. Overview of Standards of Review for Voting Rights Claims

Before parsing the Plaintiffs-Appellees’ allegations of a “burden,” it is useful to recount the doctrinal structure in which voting rights claims are evaluated. Broadly speaking, the United States Supreme Court has recognized three variants of constitutional injuries in the voting rights context.

First, a state or locality's denial of the franchise to any citizen residing in the electoral jurisdiction can be sustained only if it the least restrictive means of furthering a compelling governmental interest. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (invalidating statute that limited right to vote in school board elections to property owners and parents of schoolchildren in the district); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating requirement that individuals must reside in the state for a year and in the county for three months in order to be eligible to vote); *Evans v. Cornman*, 398 U.S. 419 (1970) (striking down Maryland statute that prohibited residents of a federal enclave within the state from voting in state elections); *Carrington v. Rash*, 380 U.S. 89 (1965) (statute denying the vote to military personnel deemed unconstitutional).

A second type of voting rights claim that likewise triggers strict scrutiny arises out of “regulations that contravene the principle of ‘one person, one vote,’ by diluting the voting power of some qualified voters within the electoral unit.” *Green v. City of Tucson*, 340 F.3d 891, 900 (9th Cir. 2003); *see also Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (“Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment”).

Occupying a third, and considerably more deferential, tier of constitutional review are neutral, generally applicable laws that regulate the manner and method of voting—to include Arizona's voter registration deadline. Governed by the

standard first articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992), such “reasonable, nondiscriminatory restrictions” are sustained by “the State’s important regulatory interests,” even if they modestly burden voting rights. *Burdick*, 504 U.S. at 434; *see also Pub. Integrity Alliance v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (“We have repeatedly upheld as ‘not severe’ restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process” (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011))).² This so-called *Anderson-Burdick* rubric applies irrespective of whether the voting procedure in dispute is cast as a violation of the plaintiff’s equal protection rights, or instead as an infringement on the voter’s First Amendment right to associate for political ends. *See Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (explaining that *Anderson-Burdick* “creat[ed] a single standard for evaluating challenges to voting restrictions”).

2. The Statutory Deadline Does Not Impose a “Severe” Burden

The district court’s finding that Arizona’s statutory registration deadline

² If the alleged burden on the franchise is “severe”—*i.e.*, it operates as a deprivation or dilution of the right to vote—then the strict scrutiny standard controls. *See Burdick*, 504 U.S. at 434; *Green*, 340 F.3d at 893 (noting that “the Supreme Court has applied strict scrutiny only to voting regulations that prohibit some residents in a given electoral unit from voting, or that dilute the voting powers of some residents in a given electoral unit”).

exacts a “severe” burden on First and Fourteenth Amendment rights is unsustainable as a matter of law. *See generally Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (district court’s characterization of burden is “not a factual finding, but a legal determination subject to de novo review.”).

It has never been easier to register to vote in the State of Arizona. Individuals wishing to engage in this foundational function of citizenship may do so by completing a simple, one-page form, which may be submitted either on paper or online, 24 hours a day, seven days a week. To further facilitate easy and expeditious registrations, the Secretary of State has long maintained a toll-free telephone hotline for those encountering questions or potential impediments in the registration process. Importantly, physical contact is not a prerequisite; any individual possessing a computer, smartphone, or a postage stamp may register to vote in a matter of minutes without risking exposure to COVID. There is simply no record evidence to sustain the supposition that the pandemic—rather than confounding variables such as decreased emigration rates, lower voter enthusiasm, inevitable depletion of the pool of qualified-but-unregistered individuals, etc.—is the causal engine behind any drop-off in the pace of voter registration. The truism that a later deadline may result in more individuals registering does not imbue the October 5 deadline with an unconstitutional complexion. *See Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (noting that “every electoral law and regulation necessarily

has *some* impact on the right to vote, yet to strike down every electoral regulation that has a minor impact on the right to vote would prevent states from performing the important regulatory task of ensuring that elections are fair and orderly”).

The district court held that “[r]egistering to vote has never been easier for *some*, though others are not so fortunate,” citing lack of Internet access in remote areas. *See* Dkt. 35 at 7-8. This reasoning, however, indulges an analytical fallacy that the Supreme Court has rejected. Finding that Indiana’s voter identification law did not severely burden voting rights, the Court acknowledged that “a somewhat heavier burden may be placed on a limited number of persons.” *Crawford v. Marion County*, 553 U.S. 181, 199 (2008) (plurality opinion). But it declined to “perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weigh their burdens against the State’s broad interests in protecting election integrity.” *Id.* at 200; *see also Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) (plaintiffs “have not presented evidence that the residential street address requirement [for voter IDs] imposes a substantial burden on most North Dakota voters. Even assuming that some communities do not have residential street addresses, that fact does not justify a statewide injunction”).

Thus, even if the district court’s conjecture that some geographic or demographic subsets of the Arizona population may be more likely to encounter

logistical obstacles in registering to vote, “on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.” *Id.* In short, the October 5 registration deadline is not a severe burden on voting rights generally, and Plaintiffs-Appellees have supplied no evidence to support a finding of a severe burden on any identifiable subset of potential registrants.

B. Governmental Interests Outweigh Any Burden in This Case

Even assuming the existence of some imposition on the Plaintiffs-Appellees’ rights, the State’s important regulatory interests in “correctly register[ing] voters,” *Ariz. Libertarian Party v. Reagan*, 798 F.3d 733 (9th Cir. 2015), and ensuring the organized and efficient administration of the November election, *see Nader v. Brewer*, 531 F.3d 1028, 1040 (9th Cir. 2008) (deeming “orderly election administration” a “compelling” state interest), easily offset it. *See Dudum v. Arntz*, 640 F.3d 1019, 1114 (9th Cir. 2011) (“[W]e emphasize that the City is *not* required to show that its system is narrowly tailored” under the *Anderson-Burdick* test). The voter registration deadline fortifies and advances these interests in at least five distinct respects.

First, the statutory voter registration deadline effectively functions as a mechanism for enforcing Arizona’s 29-day durational residency prerequisite to qualified elector status. *See* Ariz. Rev. Stat. § 16-101(A)(3). Because registrants

are not required to aver on the registration form that they have satisfied the 29-day residency rule, an extension of the registration deadline would leave election officials without any consistent metric to verify that such late registrants are *bona fide* residents as of the residency deadline. This, in turn, may generate avoidable challenges to voters' qualifications and post-election litigation.

Second, because precinct registers must be prepared no later than 10 days prior to the election, *see id.* § 16-168(A), the district court has tasked the County Recorders with the impossible feat of finalizing voter rolls while concomitantly processing late registrations and adding those registrants to the precinct registers. *See Arizona Green Party v. Reagan*, 838 F.3d 983, 991 (9th Cir. 2016) (noting that interdependent “nested deadlines” “reflect an effort by the state to achieve the important goal of orderly elections”).

Third, in contrast to the vast majority of states, Arizona conditions eligibility to vote in state and local elections on the registrant's production of documentary proof of U.S. citizenship. *See Ariz. Rev. Stat.* § 16-166(F). Although elections officials will attempt, by drawing on motor vehicle division and Social Security Administration records, to independently verify new registrants' citizenship status, *see Ariz. Elections Procedures Manual* (rev. 2019) at p. 22, this process necessitates a temporal buffer before Election Day.

Fourth, late registrants who are issued an early ballot but who—either out of

confusion or because they did not timely receive a ballot—appear at the polling place on Election Day will be forced to vote a provisional ballot, which sows voter confusion and distrust and requires further post-election processing. *See id.* §§ 16-579(B), -584; *see also Pest Comm. v. Miller*, 626 F.3d 1097, 1103 (9th Cir. 2010) (recognizing “preventing voter confusion” as an “important state interest”).

Fifth, requiring early voting to proceed in tandem with an extended voter registration period also engenders potential risks to election integrity. Because it appears that Arizona’s statewide voter registration database is not equipped to monitor requests for, and submissions of, ballots across different counties, a currently registered voter who casts an early ballot in one county but then re-registers in another county could conceivably submit two ballots in the November 3, 2020 general election. The existence of this possibility—even if it not actualized—can amplify public perceptions of a vulnerable and disorderly election. *See Crawford*, 553 U.S. at 197 (recognizing that “public confidence in the integrity of the electoral process has independent significance” distinct from the state’s interest in preventing actual fraud).

The district court’s observation that “31 other states have later voter deadlines than Arizona,” Dkt. 35 at 8, is a *non-sequitur*. The Arizona Legislature acted well within its constitutional purview in designating a registration deadline 29 days before the next succeeding election—which accommodates Arizona’s

comparatively long 27-day early voting period, *see* Ariz. Rev. Stat. § 16-542(C)—and “absent a truly serious burden on voting rights, ‘it is the job of democratically-elected representatives to weigh the pros and cons of various [election] systems.’” *Dudum*, 640 F.3d at 1115 (internal citation omitted); *see also Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1028 (9th Cir. 2016) (observing in election context that democratic federalism “permits states to ‘serve as laboratories for experimentation to devise various solutions where the best solution is far from clear’”). “[T]he balance between discouraging fraud and other abuses,” on the one hand, and ‘encouraging turnout’ and voter safety, on the other, ‘is quintessentially a legislative judgment.’” *Tully*, 2020 WL 5905325, at *6. The district court was “ill equipped to second guess, let alone override, the rational policy judgments of [Arizona]’s elected officials ‘on the eve of an election.’” *Id.*

In sum, the Republican Committees are highly likely to succeed on the merits of the appeal because (1) the Plaintiffs-Appellees’ injury is neither traceable to state action nor redressable by an injunction and (2) the district court erred in concluding that the registration deadline “severely” burdens voting rights and is not justified by important governmental interests.

III. Without a Stay, the Republican Committees Are Irreparably Injured

As set forth at length in the Republican Committees’ Response to the Plaintiffs-Appellees’ Motion to Dismiss, the district court’s injunction inflicts an

ongoing, irreparable and non-compensable injury to the Republican Committees. By changing key election rules and deadlines weeks before Election Day, the injunction forces the Republican Committees “to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame.” *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006). Specifically, the eighteen-day extension of the voter-registration deadline obliges the Republican Committees to spend additional time on voter-registration efforts, using resources that would otherwise have been spent differently on other campaign activities, *see* Dkt. 15 (Motion to Intervene), p. 17, ¶ 8 (Decl. of Brian Seitchik), or risk falling behind in the competition to register voters throughout Arizona. This dilemma—diversion of scarce resources for voter registration or impairment of organizational purpose—constitutes an injury. *See Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040–41 (9th Cir. 2015).

Importantly, this is precisely the same alleged injury that undergirds Plaintiffs-Appellees’ theory of their own standing (although the Republican Committees’ injury—unlike that alleged by the Plaintiffs-Appellees—can be redressed by prospective relief from this Court). *See generally Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (“The intervenors have shown that, absent a stay, they would be irreparably injured. The stay and the injunction mirror each other — if the lack of an injunction injures the plaintiffs, the

lack of a stay injures the intervenors”). The upshot is that if the Republican Committees’ compelled reallocation of scarce resources is not an irreparable injury, then Plaintiffs-Appellees likewise have sustained no injury and thus the District Court lacked jurisdiction over their claims.

IV. The Issuance of a Stay Will Not Injure the Plaintiffs-Appellees

As discussed at length above, the purported injury of the Plaintiffs-Appellees—*i.e.*, diverting resources to cope with putative voter registration difficulties arising out of the pandemic—is impervious to the issuance or dissolution of any injunction because it is not caused by any state action. If the district court’s order is stayed, Plaintiffs-Appellees are free to continue their voter registration efforts unimpeded and unrestricted. The only consequence of a stay is that the late registrants will be unable to vote in *this particular election*. Even assuming that this neutral and generally applicable limitation constitutes a cognizable detriment to those unidentified third parties, however, it neither necessitates nor warrants a denial of a stay. *See Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014) (“The individual voter plaintiffs may be harmed by the issuance of this stay. But we find that this harm does not outweigh the other three factors.”).

V. The Public Interest Is Best Served by a Stay

“[G]iven that the election machinery is already in motion, the public interest weighs strongly in favor of issuing the stay.” *Veasey*, 769 F.3d at 896. The neutral

and non-discriminatory voter registration deadline codified in Section 16-120(A) embodies a considered policy judgment of the elected legislature, and “it is in the public interest to uphold the will of the people, as expressed by acts of the state legislature, when such acts appear harmonious with the Constitution.” *Pavek*, 967 F.3d at 909 (granting stay pending appeal). Further, upending an integral and deeply entrenched component of Arizona’s elections infrastructure just as the County Recorders commence the herculean project of disseminating, processing and tabulating millions of early ballots portends voter confusion, logistical complications and potential vulnerabilities to electoral integrity. *See Texas All. for Retired Americans v. Hughs*, 20-40643, 2020 WL 5816887, at *4 (5th Cir. Sept. 30, 2020) (granting stay of order enjoining abolition of straight-ticket voting, reasoning that “state election machinery is already well in motion. A stay here, while the court can consider argument on the merits, will minimize confusion among both voters and trained election officials”); *New Georgia Project v. Raffensperger*, 20-13360-D, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020) (finding that “a stay preserves the status quo and promotes confidence in our electoral system”).

CONCLUSION

For the foregoing reasons, the Court should during the pendency of this appeal stay the injunction issued by the district court.

Dated: October 8, 2020

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CERTIFICATE OF COMPLIANCE

This Response complies with the type-volume limitation of Rule 27(d)(2) because it contains 4,722 words, excluding the parts that can be excluded. This response further complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word in 14-point Times New Roman font.

Dated: October 8, 2020 /s/ Thomas Basile

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 8, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 8, 2020 /s/ Thomas Basile