

No. 20-16932

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA; ARIZONA COALITION FOR CHANGE; ULISES
VENTURA,
Plaintiffs-Appellees.

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State,
Defendant-Appellee,

and

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN
SENATORIAL COMMITTEE

Intervenors-Defendants-Appellants,

and

STATE OF ARIZONA,
Proposed Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-01903-SPL

**STATE OF ARIZONA'S EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR A STAY PENDING APPEAL**

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Proposed Intervenor-Defendant-Appellant the State of Arizona (the “State”) respectfully submits this certificate in connection with its emergency motion for a stay pending appeal. The State also currently has an emergency motion to intervene pending, and thus is currently a proposed intervenor. By October 7, 2020 order, however, this Court provided that “prospective intervenor-appellant shall file any substantive motion for a stay pending appeal by 5:00 p.m. Pacific Time on October 8, 2020. For purposes of this scheduling order only, we assume without deciding that we will grant the State’s pending motion to intervene.” Doc. 24 at 2.

This case involves the State’s statutory voter registration deadline for voting in an upcoming election, which has been established under Arizona law since 1990. Specifically, to vote in an upcoming election, a person must register to vote “before midnight of the twenty-ninth day preceding the date of the election.” Ariz. Rev. Stat. (“A.R.S.”) 16-120(A). This year, the deadline that applies to the upcoming November 3, 2020, General Election (“General Election”) fell on Monday October 5, 2020 (the “Deadline”).

Plaintiffs waited until a mere *three business* days before the Deadline to bring suit in District Court, and they sought the extraordinary remedy of a mandatory injunction to alter the deadline. On October 5, 2020, the District Court granted, as modified, the Plaintiffs’ request for mandatory injunction, and further ordered that Defendant is

enjoined from enforcing the A.R.S. § 16-120 October 5, 2020, voter registration cutoff. The Court set a new deadline of October 23, 2020. The Court's order (the "Order") is a final judgment.

Intervenors-Defendants-Appellants Republican National Committee and National Republican Senatorial Committee ("Appellants") filed a notice of appeal to this Court the same day as the Order.

Defendant-Appellee Katie Hobbs in her official capacity as Arizona Secretary of State publicly announced that she "will not appeal" the Order. This means that no Arizona official is actively defending the constitutionality of the State's statutory deadline for voter registration, even though this deadline has been on the books for 30 years up until the *very day* it applied to the upcoming General Election.

To ensure that the State of Arizona ("State") is able to defend the constitutionality of its laws, the State previously filed an emergency motion to intervene, which remains pending. It now seeks a stay pending appeal.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature Of The Emergency

It is well-established that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). *Accord Maryland v. King*, 133 S. Ct.

1, 3 (2012) (Roberts, C.J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating [its] statutes ... it suffers a form of irreparable injury.”). Indeed, enjoining a “State from conducting [its] elections pursuant to a statute enacted by the Legislature... would seriously and irreparably harm” the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The State is thus suffering irreparable harm already as it cannot enforce the election laws enacted by its duly enacted representatives. The State therefore seeks expedited treatment of its emergency motion for a stay pending appeal.

The harms at issue are particularly significant because, as the Supreme Court has explained, “Court orders affecting elections, especially conflicting orders, 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 v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The district court’s injunction was issued on October 5—less than one month before the general election—making these risks substantial. Indeed, just today, this Court issued a published opinion in *Arizona Democratic Party et al. v. Hobbs and State of Arizona*, No. 20-16759 (9th Cir. Oct. 6, 2020), granting the State’s emergency motion for a stay pending appeal. This Court stated, “the Supreme Court ‘has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.’” Slip. Op. at 8 (collecting cases).

Here the harms are particularly acute because the potential for chaos is already manifest. As the State’s Election Director stated in her declaration filed in District

Court, “this last-minute change” could “lead to administration problems for election officials and may cause voter confusion.” Dul Declaration at ¶12. “Plaintiffs’ requested relief imagines that all county officials will be able to process voter registration forms that arrive *during* the early voting period, when counties must shift resources to operating early voting locations and ensuring voters who have requested a ballot-by-mail receive one. This may pose a significant burden on counties as they have limited staff (especially during this time).” *Id.* ¶13. Indeed, the early voting period began in earnest **yesterday, October 7, 2020.**¹ In addition, there is no time to update official correspondence and advertisements which all informed voters of the October 5 deadline. *See id.* ¶14.

Every day that these issues remain open is therefore one in which voters may be provided with either inaccurate or confusing information. The State therefore requests a decision on its motion for a stay pending appeal from this Court as soon as possible.

C. Notification Of Counsel For Other Parties and Proposed Schedule

The State notified the parties of its intent to intervene in this Court at 1:41 p.m this afternoon.

¹ County recorders have already been sending early ballots out to overseas military personnel.

This Court has already set a briefing schedule for the State's anticipated motion for a stay pending appeal. (Doc. 24). The State has notified the emergency clerk by email this afternoon as well.

- **Appendix A: Contact Information Of Attorneys**

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INTRODUCTION

Proposed Intervenor-Defendant-Appellant the State of Arizona (the “State”) hereby joins the request of Intervenor-Defendant-Appellants’ Emergency Motion Under Circuit Rule 27-3 For A Stay Pending Appeal (Doc. 31), as well as in the arguments advanced therein. In addition to joining these arguments, the State offers a few additional points.

ARGUMENT

I. THE STATE HAS STANDING TO SEEK RELIEF FROM THE DISTRICT COURT’S INJUNCTION AND WILL SUFFER IRREPARABLE HARM FROM THE SAME ABSENT A STAY

As the State as explained previously, there should be no question that the State has Article III standing to seek relief from the district court’s injunction and that it suffers irreparable harm from the same since it prevents the State from enforcing its duly-enacted election laws. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (enjoining a “State from conducting [its] elections pursuant to a statute enacted by the Legislature... would seriously and irreparably harm” the State).

Indeed, it is well-established that “a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.” *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). *Accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating [its] statutes ... it suffers a form of irreparable injury.”).

The irreparable harm that the State is suffering, and will suffer, from the

injunction below plainly supplies Article III standing to challenge that injunction. And because the State has standing to seek a stay, that should resolve any standing issues in this appeal. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 498 (2007) (“Only one petitioner needs to have standing to authorize review.”).

II. THE DISTRICT COURT’S INJUNCTION SQUARELY VIOLATES *PURCELL*

It is well established that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion” with the risk increasing “[a]s an election draws closer.” *Purcell v Gonzalez*, 549 U.S. 1, 4-5 (2006). That risk is manifest here due to Plaintiffs’ dilatory conduct—not filing this suit until September 30, 2020.

To evade *Purcell*, the district court relied heavily on *Arizona Democratic Party v. Hobbs*, which it characterized by stating that “This Court has previously held that the *Purcell* doctrine does not apply to the extension of election deadlines because the requested remedy is ‘asking [election] officials to continue applying the same procedures they have in place now, but for a little longer.’” Order at 4-5 (quoting *Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *13 (D. Ariz. Sept. 10, 2020)).

This Court, however, subsequently made plain that this reasoning was erroneous when it granted a stay pending appeal in a published opinion the next day. *See Arizona Democratic Party v. Hobbs*, ___ F.3d ___, No. 20-16759, 2020 WL 5903488

(9th Cir. Oct. 6, 2020). This Court explained that *Purcell* did apply there—as here: “[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 a new procedure ... at the eleventh hour. Indeed, the Supreme Court ‘has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.’” *Id.* at *2 (quoting *RNC v. DNC*, 140 S. Ct. 1205, 1207 (per curiam)) (collecting cases including, *inter alia*, *Purcell v. Gonzalez*, 549 U.S. 1 (per curiam)).

Notably, the *Purcell* violation is considerably *worse* here. While the *Arizona Democratic Party* injunction was issued on September 10—almost 60 days out from the election—the instant injunction was issued on October 5, or less than month away from election day. Indeed, by remarkable coincidence, the injunction at issue in *Purcell* also issued on October 5—which earned the swift and unanimous reversal of the Supreme Court. *Purcell*, 549 U.S. at 3-6. The same result should obtain for this injunction issued fourteen years *to the day* later.

More generally, alteration of the status quo by injunctions close to an election is the essence of *Purcell* doctrine. 549 U.S. at 4-5. And this Court similarly attempted to sidestep *Purcell* in 2016, holding that *Purcell* doctrine did not apply because the injunction issued “preserve[d] the status quo prior to the recent [challenged statute].” *Feldman v. Arizona Sec’y of State’s Office*, 843 F.3d 366, 369 (9th Cir. Nov. 4, 2016) (en banc). But the Supreme Court disagreed: issuing a stay the next day (a Saturday)

without any noted dissent. 137 S. Ct. 446 (Nov. 5, 2016). Thus, *Purcell* cannot be disregarded by simply characterizing the injunction at issue as a preservation or minor modification of the status quo.

III. A STAY SHOULD ONLY APPLY PROSPECTIVELY

The State only seeks a stay prospectively. Specifically, those voters who have completed registration under the terms of the district court's injunction—*i.e.*, those have been told that they will be permitted to vote by the terms of the injunction—should be excluded from the stay pending appeal. Instead, the State agrees that any stay pending appeal should only operate for those voters that register *after* a stay comes into force.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant a stay pending appeal. Such a stay should be limited to those voters that register after the effective date of the stay.

Respectfully submitted this 8th day of October, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 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/ Drew C. Ensign _____
Drew C. Ensign