No. 20-15719

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONANS FOR FAIR ELECTIONS, et al.
Plaintiff-Appellants.
v.
KATIE HOBBS in her official capacity as Arizona Secretary of State,
Defendant-Appellee
and
STATE OF ARIZONA,
Intervenor-Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:20-cv-658

STATE OF ARIZONA'S CORRECTED COMBINED RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND RESPONSE TO AMICI

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Dated: April 29, 2020

CIRCUIT RULE 27-3 COUNTER STATEMENT

Pursuant to Circuit Rule 27-3, Intervenor-Defendant-Appellee State of Arizona (the "State") provides the following information in response to Plaintiffs' Circuit Rule 27-3 Statement:

A. The Nature Of The Alleged Emergency

Plaintiffs assert (at vii), without citation, that "Absent immediate injunctive relief pending the appeal, Plaintiffs will suffer irreparable harm." But the district court has already expressly found that Plaintiffs were not likely to suffer irreparable harm absent issuance of injunctive relief. ADD-25-27. And Plaintiffs do not argue anywhere in their motion that these factual findings were clearly erroneous.

More generally, the timeline of initiative circulation and this litigation both severely undermine Plaintiffs' instant claim of an emergency.

Initiative Timeline

The time to begin collecting signatures to qualify for the Arizona 2020 ballot began on November 3, 2018. A.R.S. § 19-121(D). Notably, one committee (not a plaintiff here) applied to begin circulating two initiatives a mere ten days later on November 13, 2018.[1] Plaintiffs, however, were amongst the last to begin circulating. Plaintiff Arizonans for Fair Elections only applied to begin circulating the operative

[1] *See 2020 General Election Initiative, Referendum and Recall Applications*, Katie Hobbs Sec'y of State, https://apps.arizona.vote/info/IRR/2020-general-election/18/0 (last updated Feb. 26, 2020).

petition/initiative on January 29, 2020. *Id.* Plaintiff Arizonans Fed Up with Failing Healthcare (Healthcare Rising AZ) started modestly earlier, with their operative application being filed on October 4, 2019. *Id.*

As the district court explained: "It is notable that Plaintiffs' declarations fail to provide any explanation (let alone justification) for why they waited so long to begin organizing and gathering signatures." ADD-20. "The State has presented evidence that at least one Arizona initiative committee began that process in November 2018, yet the two [Plaintiff] committees … waited until the second half of 2019, thereby missing out on essentially a year's worth of time to [qualify for the ballot]." *Id.*

That court further explained that "a reasonably diligent campaign wouldn't have needed to put all of its eggs in the March/April basket." ADD-21 n.13.

This Litigation

Plaintiffs' declarations use the Arizona Governor's March 11 emergency declaration as the relevant starting date of consideration/impact by coronavirus. ADD-149-50 (¶¶21, 29); 155-56 (¶¶15, 17, 22). Plaintiffs, however, did not initiate this litigation until three weeks later on April 2. ADD-1.

B. The Relief Requested

As the district court properly observed, "there is a heightened burden where a plaintiff seeks a mandatory preliminary injunction, which should not be granted 'unless the facts and law clearly favor the plaintiff.'" ADD-12 (quoting *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1441 (9th Cir. 1986)).

Here the relief sought by Plaintiffs is mandatory in nature: Plaintiffs seek affirmative creation of new technical capabilities in Arizona to permit electronic signatures to be gathered for initiative petitions. That capability does not presently exist, and no prohibitory injunction could bring it into existence.

Moreover, Plaintiffs do not merely seek, as they contend (at vii), "for the Secretary and County Recorders to be enjoined from striking electronic signatures." They further seek affirmative placement on the ballot of initiatives that qualify by electronic signatures, notwithstanding the violation of Arizona statutory law (which even Plaintiffs agree is the case, and why they challenge it) and Arizona constitutional law (which they dispute).

Plaintiffs' motion does not acknowledge the mandatory nature of the injunctive relief that they seek (or dispute its proper characterization as involving mandatory relief). Plaintiffs also do not attempt to satisfy the heightened burden applicable to mandatory injunctive relief. *See infra* at 23.

C. Effects Of Denying Requested Relief

Although the cover of Plaintiffs' brief indicates that "Relief is needed by: May 7, 2020," no citation is provided in support. It appears that Plaintiffs' are relying on two conclusory assertions in newly-submitted declarations for that date. *See* Maldonado Decl. ¶31; Grennan Decl. ¶20.

Based on the district court's unchallenged factual findings that Plaintiffs are not likely to suffer irreparable harm, the State disagrees that Plaintiffs will suffer

irreparable harm absent a decision by this Court by May 7 (or any other date).

D. Whether Relief Was Sought In The District Court

Plaintiffs concede (at ix) that they never sought an injunction pending appeal in the district court. They argue that the exhaustion requirement of Rule 8(a) should be excused because "Plaintiffs must quickly avail themselves to relief" and "seeking [such an] injunction below would be futile."

As explained below, *infra* at 6-7, Plaintiffs patent violation of Rule 8(a) alone justifies denying an injunction pending appeal here.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge. Executed in Phoenix, Arizona.

DATED: April 29, 2020.

Respectfully submitted,

By: */s/Drew C. Ensign*
Drew C. Ensign
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INTRODUCTION

Plaintiffs' request for an injunction pending appeal fails on every level. As an initial matter, Plaintiffs have flouted Rule 8(a) by not seeking such relief in the district court first and failed to provide any persuasive basis for waiving that requirement. This failure is particularly inexcusable as the district court acted with exceptional speed below: litigating the entire action, including Plaintiffs' request for a temporary restraining order ("TRO") and preliminary injunction, in a total of 15 days.

Plaintiffs are also extremely unlikely to prevail on appeal. Notably, Plaintiffs' motion utterly fails to recognize the deferential nature of this Court's review. Notably, the district court made *three* determinations subject to deferential review that are *each independently dispositive here*: (1) that Plaintiffs were unlikely to suffer irreparable harm, ADD-25-27, (2) that the balance of equities disfavored the relief sought by Plaintiffs, ADD-27, and (3) so did the public interest, ADD-27-29. The first is reviewable only for clear error and the latter two only for abuse of discretion.

But Plaintiffs do not even *acknowledge* the governing standards of review, let alone attempt to satisfy them. Instead, Plaintiffs appear to regard their appeal in this Court as a pure mulligan, advancing new legal arguments, citing new cases, and relying on new declarations to obtain an injunction that was expressly denied below, which is not even alleged to constitute an abuse of discretion. But that is not how appellate review operates, and the district court's explicit factual findings and exercise of its equitable discretion cannot simply be ignored as inconvenient.

Even as to the issues on which this Court's review is *de novo* or has *de novo* components—*i.e.*, whether Plaintiffs have Article III standing and whether they are likely to prevail on their *Anderson-Burdick* claim—the district court's decision is plainly correct. Plaintiffs' briefs below literally did not even acknowledge a key provision of the Arizona Constitution (Article IV, pt. 1, § 1(9)), hereinafter "Article IV Presence Mandate"), which for 108 years has expressly mandated in-person signing of initiative petitions—and thus specifically bars the relief sought here. And Plaintiffs neither challenged it nor explained how their injury could be redressable given their failure to do so. (Indeed, their filings in this Court represent their *first* attempt to do so in writing.) Because the Article IV Presence Mandate affirmatively precludes Plaintiffs' requested relief and is unchallenged, Plaintiffs have failed to show that it is "*likely* that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis added). And even if that were a debatable issue (and not waived), this Court should certify that pure question of *Arizona law* to the Arizona Supreme Court, which is presently considering an identical issue.

The district court also correctly held that Plaintiffs were unlikely to prevail on their *Anderson-Burdick* claim. Plaintiffs do not even attempt to satisfy the "reasonably diligent" circulator standard that this Court has set forth in ballot access cases. Instead, they contend (at 12) that the district court applied "the wrong framework" because it followed binding precedents of this Court explicitly addressing ballot access (including specifically for initiatives) instead of out-of-circuit, non-precedential district

court decisions largely addressing the right to vote. But the district court did not err by faithfully applying this Court's directly-on-point precedents.

Plaintiffs' motion should accordingly be denied.

BACKGROUND

A. Arizona's Framework to Qualify Initiatives for the Ballot

Arizona has allowed initiative legislation since statehood in 1912. This right is enshrined in the Arizona Constitution, in the same article that limits the legislature's power. Ariz. Const. art. IV. That power is subject to limitations. For example, to qualify for the ballot an initiative measure must obtain signatures from 10% or 15% of all qualified electors in Arizona for statutory or constitutional amendments, respectively. *Id.* pt. 1 §1(2). For 2020, 10% is 237,645 valid signatures. ADD-17. Initiative petitions must be filed with the Secretary at least four months before the election, and will only go into effect if approved by a majority of voters. *Id.* §1(3)-(4).

Article IV provides explicit requirements for how signatures may be collected. In particular, the Article IV Presence Mandate provides:

> [E]very sheet of every such [initiative] petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed *in the presence of the affiant* and that in the belief of the affiant each signer was a qualified elector….

Ariz. Const. art. IV, pt. 1, §1(9) (emphasis added). Plaintiffs do not challenge the constitutionality of this provision under the U.S. Constitution. ADD-30 n.18.

The Arizona Constitution expressly contemplates the legislature's enactment of

legislation regarding initiatives. Ariz. Const. art. IV, pt. 1, § 1(11), art. VII, §12 (providing the legislature with authority to enact "registration and other laws to secure the purity of elections and guard against abuses of the elective franchise"); *see also Arrett v. Bower*, 237 Ariz. 74, 78 ¶10 (App. 2015). Legislation regulating the initiative process was adopted immediately upon statehood. A.R.S. tit. XXII, *et seq.* (1913).

Arizona statutory law mirrors the Article IV Presence Mandate and provides "[e]very qualified elector signing a petition shall do so in the presence of the person who is circulating the petition and who is to execute the affidavit of verification." A.R.S. § 19-112(A). In addition, an Arizona statute requires strict compliance with applicable requirements for qualifying initiatives for the ballot. A.R.S. § 19-102.01. Plaintiffs do challenge these provisions as unconstitutional.

B. This Litigation

Although Plaintiffs allege that the coronavirus epidemic effectively shutdown their signature collection efforts on March 11, they did not file this suit until three weeks later on April 2. ADD-113-114. Plaintiffs filed a motion for a TRO and preliminary injunction the same day. Neither Plaintiffs' Complaint nor their motion mentioned the Article IV Presence Mandate. ADD-107-145. The district court set a deadline for responses of April 10 and held a hearing on April 14. Doc. 9.

After the Secretary announced that she would not oppose the Plaintiffs' requested relief, the State moved to intervene over Plaintiffs' opposition. The district court granted that request. ADD-40. The State filed an opposition brief on April 10.

Plaintiffs declined to file a reply brief.

C. District Court's Decision

Following the April 14 hearing, the district court issued a comprehensive decision on April 17. The district court first concluded that Plaintiffs had failed to establish Article III redressability because it was "entirely speculative" that Arizona courts would conclude that the Article IV Presence Mandate (which Plaintiffs did not challenge) would permit use of electronic signatures through E-Qual. ADD-7-11.

The district court then addressed the merits of Plaintiffs' request for a TRO "to provide a complete record in the event of appellate review." ADD-11. (Although the district court formally addressed only a TRO, the same standards apply to requests for preliminary injunctions. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir.2001)). In doing so, it concluded that Plaintiffs' request for relief failed on multiple independent grounds, including that (1) "Plaintiffs have not … demonstrated a likelihood of success or even serious questions going to the merits of their First and Fourteenth Amendment-based claims," ADD-4, 12-25; (2) Plaintiffs had failed to establish likely irreparable harm, and instead their request was "based on speculation," ADD-25-27, (3) "the balance-of-equities factor weigh[ed] against" Plaintiffs' request, ADD-27; and (4) so did the public interest. ADD-27-29.

LEGAL STANDARD

An injunction pending appeal is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian Ry. Co. v. United States*, 272 U.S.

658, 672 (1926). Instead, an injunction pending appeal only issues if the applicant satisfies the following factors: 1) whether the applicant has "made a strong showing that he is likely to succeed on the merits;" 2) whether the applicant will suffer irreparable injury absent the requested relief; 3) whether the injunction will substantially injure other parties in the proceedings; and 4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the most critical, and the "mere possibility" of success on either factor (or both) is insufficient grounds for the issuance of an injunction pending appeal. *Id.* Appellate courts review the district court's determination for whether an injunction should issue for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc); *accord eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

ARGUMENT

I. PLAINTIFFS' VIOLATION OF RULE 8(A) ALONE JUSTIFIES DENYING THEIR MOTION

As an initial matter, Plaintiffs' motion should be denied purely on the basis that Plaintiffs have flouted Rule 8(a). "The cardinal principle with respect to … [any] applications under Rule 8 is that the relief ordinarily must first be sought in the lower court." Charles Alan Wright et al, 16A Fed. Prac. & Proc. Juris. §3954 (5th ed.). Thus, "Before filing an emergency motion, the movant should exhaust all alternatives in the lower court or agency." Christopher A. Goelz & Meredith J. Watts, Calif. Practice Guide: Fed. 9th Cir. Civ. App. Practice, §6:652 (2011). Failure to comply with Rule

8(a)'s exhaustion requirement justifies denying relief. *See Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 931 (6th Cir. 2002).

Plaintiffs proffer two cursory excuses for their failure to exhaust (at ix): (1) potential delay and (2) exhausting "would be futile." Both fail. The district court here operated with extraordinary speed: adjudicating the entire action in 15 days. There is no reason to believe that, having already gotten up to speed with the case, the district court could not have adjudicated a request for an injunction pending appeal quickly. The possibility of delay is always inherent in Rule 8(a)'s exhaustion requirement, but this Court nonetheless insists upon it; and the concern is particularly weak here given how quickly the district court acted below. Indeed, Plaintiffs took longer from decision below to their motion (5 days) than the district court took from oral argument to decision (3 days).

Nor was it futile to seek such relief below: "[i]t does not follow from the refusal to grant a preliminary injunction ... in the court below that the district court would refuse injunctive relief pending an appeal." *Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970). Indeed, *every* litigant seeking an injunction pending appeal has lost in the district court, but Rule 8(a) nonetheless demands exhaustion below. Exhaustion is no more "futile" here than in any other typical appeal.

Because Plaintiffs have violated the "cardinal principle" of Rule 8(a) and offered no defensible excuse, this Court should deny Plaintiffs' motion without prejudice and direct them to exhaust in the district court.

II. THE DISTRICT COURT'S FACTUAL FINDINGS AND EQUITABLE BALANCING ARE UNCHALLENGED HERE

Plaintiffs expressly acknowledge (at ix) that district court "issued a thirty-page opinion fully explaining the Court's position on the merits and rejecting the arguments in support of the TRO below." But although Plaintiffs acknowledge those holdings, they advance no actual arguments regarding *most* of the district court's holdings, ignoring them completely.

The district court notably made *three* findings/holdings that independently bar any injunction pending appeal here *even if* Plaintiffs had standing and were likely to prevail on their *Anderson-Burdick* claim (*but see infra* Sections III-IV). Specifically, the district court held:

- "Plaintiffs have not demonstrated that it is likely, as opposed to merely possible" that they would suffer irreparable harm. ADD-25-27.
- "[T]he balance-of-equities factor weighs against" Plaintiffs' srelief. ADD-27
- "The public interest weighs against" Plaintiffs' relief as well. ADD-27-29.

Each of these holdings is reviewed deferentially: the first only for clear error and the latter two only for abuses of discretion. *See supra* at 1. Thus, to prevail on appeal, Plaintiffs would have to show clear error in the factual *and* that the latter *two* exercises of the district court's equitable authority were *both* abuses of discretion. But Plaintiffs' motion does not even try. In any event, Plaintiffs are unlikely to prevail on *any* of these issues under the governing standards of review, let alone all of them.

A. The District Court's Express Findings That Plaintiffs Were Unlikely To Suffer Irreparable Harm Is Unchallenged And, In Any Event, Not Clearly Erroneous

To obtain any injunction, Plaintiffs must show that they are "*likely* to suffer irreparable harm." *Winter v. NRDC*, 555 U.S. 7, 20 (2008) (emphasis added). This is a hard floor: a "'possibility' standard" was expressly rejected as "too lenient." *Id.* at 22.

The district court expressly found Plaintiffs had failed to establish irreparable harm, explaining that one Plaintiff failed to "demonstrate[] that it is likely, as opposed to merely possible, that but-for the COVID-19 pandemic, … [it would have] qualified for the November 2020 ballot" and the other's alleged harm was "based on speculation." ADD-25-27. The district court further explained that Plaintiffs' declarations were "conclusory and lack[ed] foundation." ADD-26.

These factual findings can be set aside only if they were shown to be clearly erroneous. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2014); Fed. R. Civ. P. 52(a)(6). But Plaintiffs do not even try: not even acknowledging these factual findings, let alone attempting to show that they are clearly erroneous. This forfeiture alone means that Plaintiffs have no prospect of success on appeal.

Moreover, Plaintiffs' irreparable harm arguments in this Court (at 13) are wholly conclusory in nature, and notably cites no precedent at all. Plaintiffs do not even attempt to demonstrate that the challenged statutes are *likely* to make the difference between them qualifying for the ballot or not. And to the extent that Plaintiffs are relying (at 13) on "health risks to circulators and initiative supporters, up

to and including death," the district court properly found "that's the fault of the COVID-19 pandemic, not the Title 19 requirements." ADD-16.

Because Plaintiffs have not even attempted to satisfy their burden of demonstrating that the district court's factual findings are clearly erroneous, Plaintiffs have not demonstrated *any* chance of success on appeal.

B. There Was No Abuse Of Discretion In Balancing The Equities

Winter further requires that Plaintiffs demonstrate "that the balance of equities tips in [their] favor." 555 U.S. at 20. The district court, exercising its equitable discretion, concluded that "the balance-of-equities factor weighs against" Plaintiffs' relief. ADD-27. That conclusion was based both upon the irreparable harm to the State, and that "Plaintiffs are seeking to enjoin the State's election rules midway through the election cycle," which the "Supreme Court has repeatedly instructed courts" against. *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

Plaintiffs again do not even acknowledge the district court's equitable balancing, let alone attempt to demonstrate an abuse of discretion in performing it. That forfeiture similarly precludes Plaintiffs from demonstrating any likelihood of success on appeal, since the district court's balancing of the harms is another fully sufficient ground for denying injunctive relief. *Winter*, 555 U.S. at 20.

C. The District Court Did Not Abuse Its Discretion In Concluding That The Public Interest Disfavored Plaintiffs' Requested Relief

To obtain injunctive relief, Plaintiffs also must show that "an injunction is in

the public interest." *Winter*, 555 U.S. at 20. The district court, however, concluded that "[t]he public interest weighs against issuing" injunctive relief. ADD-27-29.

Plaintiffs once again do not even acknowledge this holding, let alone attempt to demonstrate that it was an abuse of discretion. Instead, Plaintiffs advance only a single conclusory paragraph (at 14), that does not cite a single precedent, nor identify any fault with the district court's actual reasoning. That perfunctory argument fails to demonstrate even the slightest chance that Plaintiffs will prevail in showing that the district court's public-interest determination was an abuse of discretion.

The district court's public-interest holding rests on several important considerations: *i.e.*, that (1) the Article IV Presence Mandate has "been a part of Arizona's constitutional and electoral landscape for over a century … [and] reflect a considered judgment, which has stood the test of time, about how best to prevent electoral fraud and promote civic engagement," (2) it is "extremely difficult to amend a law that was enacted via the initiative process," and (3) "Plaintiffs' request raises significant federalism and separation-of-powers concerns." ADD-28-29. The district court's thoughtful weighing of the public interest was not an abuse of discretion.

* * * * *

Ultimately, Plaintiffs' motion constitutes a near-complete abdication of satisfying their applicable burdens on appeal. To establish any chance of success, Plaintiffs would have to show (1) that the district court *clearly erred* in its factual findings *and* that the lower court abused its discretion in (2) balancing the harms and

(3) weighing the public interest. The deference this Court accords to factual and equitable determinations of the district court is a bedrock principle of appellate litigation—which Plaintiffs' instant arguments utterly flout.

Plaintiffs' failure even to attempt to satisfy their burdens under deferential review necessarily means that Plaintiffs have failed to demonstrate any chance of prevailing on appeal. As such, no injunction pending appeal may issue.

III. PLAINTIFFS LACK ARTICLE III STANDING

It is well-established that Plaintiffs must demonstrate that it is "*likely* that a favorable judicial decision will prevent or redress the injury." *Summers*, 555 U.S. at 493 (2009) (emphasis added). The district court's conclusion that Plaintiffs failed to do so is plainly correct, and Plaintiffs accordingly are not likely to succeed in challenging it.

Plaintiffs' redressability problem is that the Arizona Constitution *expressly mandates* the presence of the circulator during signing of initiative petitions: "every sheet of every such [initiative] petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet *was signed in the presence of the affiant*." Ariz. Const. art. IV, pt. 1, § 1(9) (emphasis added). By its plain and unambiguous terms, the Article IV Presence Mandate precludes use of the E-Qual system for initiative petitions.

A. Plaintiffs Failed To Develop Any Redressability Argument Below

Although Plaintiffs claim to have been aware of this mandate previously, their Complaint is utterly silent as to it. ADD-61:25-62:19; ADD-1-30. So too is their

motion for a preliminary injunction/TRO. ADD-31-40. And when the State expressly raised that argument, ADD-167, Plaintiffs declined to file a reply brief.

The one and only time that Plaintiffs attempted to satisfy *their* burden of demonstrating Article III redressability below came at oral argument, only for a few short minutes. ADD-51:2-17; 63:2-68:1; 89:18-22. And Plaintiffs failed to cite *even a single case* in support of their redressability argument, even when specifically directed to do so. ADD-65:10-21 ("[Q:] [W]hat is your best case … that absent Title 19 strict compliance goes out the window and substantial compliance is all that's required…. [A:] I don't have th[at]…. I don't have a good citation for that right in front of me.").

The district court's redressability holding is thus fully justified on waiver grounds alone. Plaintiffs only belatedly, at oral argument, suggested they could overcome the Article IV Presence Mandate through "substantial compliance," but did not provide a single citation in support. The district court's resulting conclusion Plaintiffs had failed to "establish a likelihood of redressability" is unassailable. ADD-4. That is particularly true as the relevant inquiry is whether Plaintiffs' *Complaint* establishes standing. *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). And Plaintiffs' Complaint is utterly silent on this critical issue.

B. Plaintiffs' Substantial Compliance Argument—Which Was Not Developed Below—Is Unpersuasive

But even if Plaintiffs had actually developed their "substantial compliance" argument robustly in their brief below, it would still fail for four reasons. *First*, as the

district court noted, it is far from clear that the Arizona Supreme Court continues to apply a "substantial compliance" standard generally: "no case applying that [substantial compliance] standard expressly rooted it in the Arizona Constitution," and "whether substantial compliance survives as the applicable standard may be called into question by the Arizona Legislature's enactment in 2017 of A.R.S. § 19-102.01, which requires strict compliance with statutory and constitutional requirements." ADD-9. Indeed, the Arizona Supreme Court avoided that question in 2018 and 2019, leaving it expressly open. *Id.* (citing *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018); *Morales v. Archibald,* 439 P.3d 1179, 1181 (Ariz. 2019).

Second, it is doubtful that the Arizona Supreme Court would ever apply a "substantial compliance" standard to the Article IV Presence Mandate, which has a specific and unequivocal mandate. That court, for example, has never permitted initiatives to qualify if they are signed by only 9% of electors from the last gubernatorial election, rather than the constitutionally mandated 10%—even though that might be considered "substantial compliance." For express mandates like the 10% amount, or the presence mandate, compliance is binary—not multiple choice. And, because petitioners have disavowed any relief in this action against the Arizona Constitution, the Secretary's theoretical enabling of E-Qual would be subject to collateral attack due to violating the Arizona Constitution. That uncontested redressability problem remains even now, one brief into the *appeal*.

Third, the Arizona Supreme Court has previously stressed the critical nature of

the Article IV Presence Mandate, explaining that if it becomes "too inconvenient for present-day operation, the remedy is to amend it—not to ignore it." *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 432 (1991). And it has further explained that "the integrity of the signature collection process is *singularly dependent* on the probity of circulators." *Stanwitz*, 245 Ariz. at 349 (emphasis added). In light of those clear holdings, it is unlikely that the Arizona Supreme Court would conclude that use of E-Qual substantially complies with Article IV.

Fourth, one cannot "substantially comply" with a constitutional mandate by obliterating it out of existence—which is what Plaintiffs here effectively propose. Article IV expressly mandates *in-person* execution of petition initiatives between signers and a natural-person petition circulator who has the legal capacity to sign an affidavit. Permitting remote execution between a person and an inanimate object incapable of signing an affidavit is 100% *non*-compliance, not substantial compliance. *See Morales*, 439 P.3d at 1183 ¶22 (committee did not substantially comply with legal requirements where it "completely failed to comply" by failing to attach a copy of the application to petition sheets where statute required signature collection with a "facsimile of the time-and-date-marked copy").

Petitioners' arguments are akin to arguing that the State could "substantially comply" or "further the purpose" of the jury trial right of the Sixth Amendment by providing a bench trial in front of a judge. Notably, that would furnish a decision-maker that is detached, neutral, and not beholden to the state (with tenure dependent

only on the voters, not elected officials)—thus "substantially complying" with the purposes of that clause. And, in many cases, a bench trial might actually be *more* favorable for defendants than a jury trial (such as where there are prior admissible convictions or the alleged crimes are particularly heinous).

But such an outcome would be constitutionally ludicrous. The jury trial right is just that: a right to an actual *jury*, not a factfinder that purportedly serves the underlying purposes of the Jury Trial Clause. Indeed, the Supreme Court recently rejected a prior purposivist interpretation of the Sixth Amendment that had permitted non-unanimous verdicts, even though the Court had previously held that such verdicts sufficiently accomplished the purposes underlying the Sixth Amendment. *Ramos v. Louisiana*, __ U.S. __, 2020 WL 1906545, at *9 (U.S. Apr. 20, 2020) ("The deeper problem is that the [1972] plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place.").

Similarly, the purposes of the Confrontation Clauses of the Sixth Amendment Arizona Constitution could likely be served by permitting criminal defendants to serve mandatory interrogatories on adverse witnesses, which would also eliminate infection risk. But that would flout the Confrontation Clauses, which not only have a purpose but a *specific method* of vindicating that purpose (there, in-person confrontation).[2]

[2] *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed

So too with the Article IV Presence Mandate: it not only has specific purposes (*i.e.*, deterring fraud and promoting meaningful expressive exchanges about proposed initiatives). It also mandates a *specific procedure* for effectuating them: in-person exchanges and execution, supported by affidavits executed by natural persons capable of being cross-examined and subject to perjury charges. Even if E-Qual substantially complied with the substantive purposes of the Article IV Presence Mandate (and it does not), that is irrelevant because the subsection further mandates a specific *procedure* for vindicating those purposes. Just as the Confrontation Clause would never permit alternative out-of-court procedures that supposedly further its purpose, so too does the Article IV Presence Mandate dictate a specific procedure for accomplishing its purposes—to the exclusion of all others.

C. Plaintiffs Have Waived Alternative Redressability Requirements

Plaintiffs appear to argue (at 20) that their "pleas for relief" were sufficiently broad to establish redressability. But, in light of Plaintiffs' express disavowal that they were challenging the constitutionality of the Article IV Presence Mandate, ADD-30 n.18, those arguments fail. If the Article IV Presence Mandate bars use of E-Qual, Plaintiffs' injury is manifestly not redressable in light of their concession that they do not challenge its constitutionality.

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in a particular manner: by testing in the crucible of cross-examination."); *id.* ("The Clause thus reflects a judgment, not only about the desirability of reliable evidence … but about how reliability can best be determined.").

D. The Arizona Supreme Court Could Easily Moot This Case Soon

Plaintiffs are unlikely to establish Article III redressability on appeal—and thus unlikely to prevail—for another independent reason: the Arizona Supreme Court is considering the precise issue of Arizona law *now* and is likely to rule against Plaintiffs. The State has specifically raised all of these issues, and the Arizona Supreme Court has agreed to resolve expeditiously.

If the Arizona Supreme Court rules that the Article IV Presence Mandate precludes use of E-Qual, this case is moot. Plaintiffs have not asserted that this mandate violates the U.S. Constitution. It then is purely a question of Arizona law whether the Arizona Constitution precludes use of E-Qual for initiative petitions. And if it does, Plaintiffs' alleged injury is necessarily not redressable. While this Court obviously has authority to disagree with the Arizona Supreme Court as to what *federal* law provides, that court's resolution of *Arizona law* is binding and conclusive here.

The possibility—indeed, likelihood—that the Arizona Supreme Court will hold as much further supports the State's position on appeal.

IV. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS OF THEIR *ANDERSON-BURDICK* CLAIM

This Court has repeatedly held that *all* constitutional challenges to election regulations are governed by "a single analytic framework"—*i.e.*, the *Anderson-Burdick* framework. *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011). The *Anderson-Burdick* framework recognizes that "States may, and inevitably must, enact reasonable

regulations of parties, elections, and ballots to reduce election—and campaign-related disorder." *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006).

Under the *Anderson-Burdick* framework, "an election regulation that imposes a severe burden is subject to strict scrutiny." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008). In contrast, "*Lesser burdens* trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012) (quoting *Prete*, 438 F.3d at 961) (cleaned up).

A. The District Court's Conclusion That Plaintiffs' Failed This Court's "Reasonable Diligence" Standard Is Plainly Correct

Plaintiffs are also unlikely to prevail on the merits of their *Anderson-Burdick* claim, particularly given the district court's unchallenged factual findings.

This Court has already addressed conclusively how the *Anderson-Burdick* framework applies to ballot access. Specifically, this Court explained that the applicable test is equivalent to whether "'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Angle*, 673 F.3d at 1133 (quoting *Nader*, 531 F.3d at 1035).

Plaintiffs make *zero* effort to show that they can satisfy this Court's "reasonably diligent" standard. In any event, the district court made express factual findings that "a 'reasonably diligent' committee could have placed its initiative on the November 2020 ballot despite the Title 19 requirements and the COVID-19 outbreak" if they

had "simply started gathering signatures earlier." ADD-20. Indeed, one committee that *did* start earlier, "had already gathered around 300,000 signatures by the time of the pandemic outbreak." ADD-19.

Plaintiffs do not even attempt to argue that this factual finding was clearly erroneous. Plaintiffs' claim thus fails under *Angle* and *Nader*. (Plaintiffs make no attempt to argue that they can prevail under *Anderson-Burdick* if the challenged acts do not impose a "severe burden.")

B. Plaintiffs' Attempt To Replace This Court's "Reasonable Diligence Standard" With Out-Of-Circuit Non-Precedents Fails

Rather than attempting to satisfy the standard that this Court set forth in *Angle*, Plaintiffs instead place all their eggs (at 11-13) in the basket that the district court applied "the wrong framework for analyzing due diligence in light of a catastrophe."

But Plaintiffs are unlikely to prevail on their argument that the district court erred by applying the very standard that this Court mandated. The *Angle* court set forth a standard that does not admit of the exception that Plaintiffs seek to smuggle into it, and a panel of this Court lacks authority to overrule *Angle* as precedent. *United States v. Jefferson*, 791 F.3d 1013, 1016 n.2 (9th Cir. 2015).

Against this Court's actual *binding precedents*, Plaintiffs instead rely overwhelmingly upon out-of-circuit *non-precedential* opinions issued under such time-pressured circumstances as to create substantial risk of error. For example, *Florida Democratic Party v. Scott* was an October 10, 2016 order imposing a *single-day* extension

of the voter registration deadline, from October 11 to October 12, 2016 due to a hurricane. 215 F. Supp. 3d 1250 (N.D. Fla. 2016). While citizens have a fundamental right to vote on the officials that represent them, there is no requirement that the States make lawmaking-by-initiative available *at all* or ensure that there are measures on every general election ballot. *Angle*, 673 F.3d at 1127. Indeed, while state government can easily survive an election cycle with few or no initiatives on the ballot, it will rapidly crumble if no officials are elected and elected offices are vacant.

Moreover, the *Scott* reasoning is also so expansive as to be implausible on its face. The *Scott* court remarkably held that Florida's interests were insufficient under *rational basis* review. 215 F. Supp. 3d at 1257. But adhering to pre-existing deadlines set by statute is at least a *rational* way to proceed, even if district courts or policy-makers might decide a different approach is *better*. The *Scott* court's holding that adhering to settled expectations set by statute was "wholly irrational" demonstrates its constitutional unseriousness. *Id.*

DNC v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 1320819 (W.D. Wis. Mar. 20, 2020) was a temporary restraining order issued two days after filing of the relevant complaint, and two days prior to the intervention of the defending party that later successfully obtained a stay from the U.S. Supreme Court of a preliminary injunction issued in that case. *See RNC v. DNC*, __ U.S. __, 2020 WL 1672702 (U.S. Apr. 6, 2020). It too involved the right to vote on candidates, rather than qualify initiatives for a ballot, thus threatening some individuals with a total deprivation of the right to

vote, rather than partial reduction in the time available to collect signatures.

Omari Faulkner et al. v. Virginia Dep't of Elections, CL-2000-1456-00, *3 (Va. Cir. Ct. March 25, 2020) was effectively a default judgment, where the Commonwealth of Virginia declined to oppose the plaintiff, and the court consequently found it had no state interests "to weigh against 'the character and magnitude of the asserted injury to the rights protected'" by the Constitution. *Id.*

Plaintiffs' reliance on *Ferrigno Warren v. Griswold*, 2020-CV-31011 (Colo. D. Ct. Apr. 21, 2020) (order available at http://shorturl.at/crEQ1) is similarly misplaced. That case solely involved Colorado law, and thus is not relevant here. Moreover, it appears to have erred as a matter of state law, by directly violating *Kuhn v. Williams*, 418 P.3d 478 (Colo. 2018). Unsurprisingly, the Colorado Supreme Court granted review a mere week later. *See* http://shorturl.at/jHSU4. In any event, the relief provided in *Warren* was a reduction in the number of signatures needed—relief that Plaintiffs specifically disavowed below. ADD-74:7-ADD-76:13; ADD-180.

V. THE REMAINING INJUNCTION-PENDING-APPEAL FACTORS SUPPORT DENIAL OF PLAINTIFFS' MOTION

As explained above, the district court has already considered and resolved the final three injunction-pending-appeal/*Winter* factors, and Plaintiffs do not even attempt to demonstrate reversible error in those determinations. *Supra* at 8-12. Instead, Plaintiffs offer (at 14-15) a *single* conclusory paragraph on each, citing in total only a single supporting case for the underwhelming proposition that this "Court is

not prohibited from granting the relief sought." Plaintiffs' perfunctory paragraphs fail to satisfy their burden on *any* of the latter three factors here.

Moreover, this Court has long been clear that mandatory injunctions—such as what Plaintiffs seek here—"'go[] well beyond simply maintaining the status quo *pendente lite* [and] [are] particularly disfavored.'" *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citation omitted). Plaintiffs seeking this "disfavored" remedy must meet a heightened burden; indeed, district courts must "*deny such relief*, 'unless the facts and law *clearly favor* the moving party.'" *Id.* (emphasis added) (citation omitted)).

The district court properly concluded that Plaintiffs sought mandatory injunctive relief—*i.e.*, affirmative expansion of E-Qual to permit electronic signatures for initiative petitions and affirmative placement on the Arizona ballot notwithstanding the violation of Arizona law. ADD-12. Plaintiffs do not challenge this determination, but *never* acknowledge this heightened burden—let alone argue that they satisfy it here. And the district court already concluded they had failed to "had failed "to clearly demonstrate that the requested relief is necessary." ADD-4.

Plaintiffs' failure even to attempt to meet the burden for mandatory injunctive relief further militates against an injunction pending appeal here.

VI. IF THIS COURT CONCLUDES THAT PLAINTIFFS' REDRESSABILITY IS EVEN DEBATABLE, IT SHOULD CERTIFY THE ISSUE TO THE ARIZONA SUPREME COURT

Because Plaintiffs do not challenge the constitutionality of the Article IV Presence Mandate, the issue of whether it bars use of E-Qual for initiative petitions is

a potentially insurmountable barrier to Plaintiffs obtaining relief. If the Arizona Supreme Court holds that it is a bar, Plaintiffs' request for relief here necessarily fails.

Given this uncertainty, if this Court believes that it is even debatable whether the Arizona Constitution precludes Plaintiffs from establishing redressability—particularly given their patent waiver below, which literally extends to failing to expend even a single written word in support of redressability—this Court should certify the controlling questions of Arizona law to the Arizona Supreme Court.

Notably, that Court is presently considering these very arguments in *Arizonans For Second Chances v. Hobbs*, No. CV-20-0098-SA, which is now fully briefed. The State's briefs in that case are attached as ADD-273-406. Given that posture, this Court could reasonably anticipate an answer to any certified question expeditiously.

Ultimately, Plaintiffs have chosen not to challenge the constitutionality of the Article IV Presence Mandate. As such, if it governs as written, Plaintiffs lose. And that pure question of state law should be decided by the Arizona Supreme Court. Indeed, if the Arizona Supreme Court decides that issue against Plaintiffs, this action is completely moot even if not certified, since this Court cannot overrule the Arizona Supreme Court as to what *Arizona law* provides.

VII. RESPONSE TO AMICI

The State hereby responds as follows to Plaintiffs' Amici that filed by 5pm on the day of the State's deadline. Given time limitations, it does not respond herein to briefs filed later than that (*i.e.*, less than 7 hours before the State's midnight deadline).

1. January Contreras (Doc. 8-1)

Ms. Contreras twice states suggests that issue of potential fraud need to be reviewed before E-Qual is expanded to initiative petitions. Specifically, she contends (at 4) "[t]hese issues deserve a review to validate the integrity of the online process" and (at 9) that she "agrees that a review of the security and integrity of the E-Qual online petition system is appropriate" (although it is "effective[]" in her judgment).

But Ms. Contreras never indicates when such a review could occur. The district court never reached that issue due to the multitude of other failings in Plaintiffs' request for injunctive relief (which she does not address). Nor does she contemplate that this Court would review those factbound issues before issuing relief here. Thus, even though she *twice* states that a review should occur *before* E-Qual is expanded, she fails to state how such a review could occur in these proceedings. Even if Ms. Contreras were correct, her arguments *at most* support a remand so that the district court could consider these factually intense issues.

Ms. Contreras also hyperbolically contends (at 2, 9) that Arizona voters are being "effectively being deprived of their constitutional right to direct democracy" entirely and that "Arizona is depriving Arizonans of their constitutional right to direct democracy." But the district court expressly found that "a 'reasonably diligent' committee could have placed its initiative on the November 2020 ballot despite the Title 19 requirements and the COVID-19 outbreak," and the evidence "strongly suggests that, had Plaintiffs simply started gathering signatures earlier, they could have

… qualify[ied]" ADD-20. Ms. Contreras simply ignores these findings.

Ms. Contreras further ignores that at least one committee that was more diligent and started earlier, Smart and Safe Arizona, had already gathered approximately 300,000 signatures and looks highly likely to qualify for the 2020 ballot—refuting Ms. Contreras's grandiose claims that the State has effectively eliminated direct democracy in 2020. ADD-19; ADD-187. As in all prior elections, reasonably diligent initiative campaigns can still qualify for the Arizona ballot.

2. Professor Bender (Doc. 11-3)

Professor Bender's primary claim appears to be (at 12) that "[a]llowing Plaintiffs to temporarily gather signatures … through E-Qual would also further, rather than conflict with, the purpose of article IV, part 1, section 1(9) of the Arizona Constitution." But Professor Bender ignores that the Article IV Presence Mandate does not merely set forth a purpose, but also provides a *specific procedure* to accomplish that purpose—which Plaintiffs' relief directly conflicts with. *Supra* at 17. And Professor Bender's disavowal of constitutional text in favor of purpose is *not* how the Arizona Supreme Court approaches constitutional analysis. Indeed, just last week that court reiterated that "[a]s a general rule of constitutional interpretation, 'clear and unambiguous language is given its plain meaning unless absurd or impossible consequences will result.'" *Morrissey v. Garner*, __ Ariz. __, 2020 WL 1918688, at *2 (Ariz. Apr. 21, 2020). And the Article IV Presence Mandate precludes E-Qual for initiative petitions in "clear and unambiguous language."

More generally, Professor Bender's purposivist argument is precisely the sort of reasoning that would allow bench trials and out-of-court interrogatories to satisfy the Sixth Amendment's Jury Trial and Confrontation Clauses. *See supra* at 15-17. Indeed, while the State expressly made this argument in response to Professor Bender in the Arizona Supreme Court, ADD-392-395, Professor Bender has made no effort to supplement his analysis here to provide a response.

In any event, Professor Bender's purposivist arguments fail even on their own terms. While he contends (at 13) that "Electronic signature gathering through E-Qual is therefore far better at preventing fraud than in-person, face-to-face, signature gathering," that claim is unsupported by the record. Notably, one of the amici below observed that *all* of the credentials needed to access the E-Qual system are *public records* obtainable by literally anyone, ADD-193, which Plaintiffs never disputed (nor did Petitioners or their amici in the Arizona Supreme Court dispute that). The verification that Professor Bender extols as "far better" thus may be *easy* to overcome by anyone intent on impersonating Arizona voters.

3. League of Women Voters of Arizona ("League") (Doc. 12)

The League's brief is entirely policy based, and does not appear to raise any arguments that the district court erred. The Arizona Supreme Court has already made plain that policy arguments cannot be used to trump the Article IV Presence Mandate. *See Western Devcor*, 168 Ariz. at 432; *supra* at 14-15. The League also ignores that one of the initiative campaigns that is a petitioner in the Arizona Supreme Court has

begun to circulate via mail. *See* Makar Decl. Ex. A. Those same procedures could be effective to circulate amongst the populations that the League's brief addresses.

4. Grand Canyon Institute (Doc. 15-2)

Most of the Institute's arguments appear directed at contending that the Plaintiffs satisfy this Court's "reasonable diligence" standard. *See Angle*, 673 F.3d at 1133. Plaintiffs, however, have not made any argument on appeal that they satisfy that standard, thereby waiving any such contention. The Institute's brief cannot not undo Plaintiffs' forfeiture. Moreover, the Institute's analysis is based upon examining "citizen initiatives that submitted signatures proposing constitutional amendments from 2012 to 2018." Br. at 9. But *none* of that evidence is in the record. As the district court properly observed, "Plaintiffs haven't proffered any evidence of those reasons and norms in their declarations." ADD-20. Amici cannot reach outside the record to show that a district court's factual findings were clearly erroneous based on evidence never submitted to it. Nor does the Institute even contend that the district court clearly erred, ignoring (like Plaintiffs) the standard of review here.

In any event, the Institute's analysis is inapposite. The relevant question is not when the least diligent campaigns that successfully qualified for the ballot began circulating (qualifying perhaps *in spite* of their level of diligence rather than because of it). Instead, this Court examines whether "'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Angle*, 673 F.3d at 1133 (citation omitted). The reference to "normally" alone suggests

that exceptional events are off the table. In any event, the Smart and Safe campaign has provided powerful evidence that even now it is not the case that it is "rare" that an initiative will qualify for the ballot. Even in this pandemic, that initiative appears quite likely to qualify, s*upra* at 26, which the Institute ignores entirely. It further ignores statutory initiatives completely for reasons that are not explained.

The Institute impugns the district court's order as "requir[ing] that petition circulators seek signatures via door-to-door canvassing, rather than through E-Qual." Br. at 14-16 (parading the horribles of "canvassing" at this time). This is a classic false choice as the district court required no such thing, and Plaintiffs' refusal to consider alternatives undermines their arguments. *See*, *e.g.*, ADD-298 ("Petitioners also do not explain why they could not be using this time to communicate with voters … and then arrange for actual execution after the pandemic has receded").

The Institute also suggests (at 17-18) that there is only "minimal risk of fraud[]," citing federal law. But at least one amici argued below that all of the necessary pedigree information were public records, ADD-193—which was not disputed below. A remand would thus be required to resolve this disputed issue of fact if should it become relevant.

5. Legislative Democrats (Doc. 16-2)

Legislative Democrats assert a false equivalence (at 9-10) that principles of "avoiding fraud are just as strong for candidates as they are for ballot measures"—so why not use the E-Qual for initiative petitions? But there is an enormous gulf

between nominating a candidate who will likely face at least one opponent for a fixed term of office, and initiating legislation that is nigh-permanent as "it is extremely difficult to amend a law that was enacted via the initiative process." ADD-28.

Moreover, Legislative Democrats offer precious little in terms of actual legal argument (such as addressing the actual text of Article IV or addressing *Western Devcor*). Their brief makes almost no effort show any error by the district court—indeed, not citing its opinion at all.

CONCLUSION

For the foregoing reasons, Plaintiffs' request for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Drew C. Ensign, 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 April 29, 2020, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign