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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Voto Latino Foundation, *et al*,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as
Arizona Secretary of State,

Defendant.

No: 2:19-cv-05685-DWL

**ARIZONA SECRETARY OF STATE'S
RESPONSE IN OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION AND RESPONSE TO
SUPPLEMENTAL MEMORANDUM
RELATED TO COVID-19**

I. INTRODUCTION

Plaintiffs ask this Court to enjoin Arizona's statute that requires ballots submitted by mail to be received by election officials by 7 p.m. on Election Day, A.R.S. § 16-548(A) ("Election Day Deadline"). The gist of Plaintiffs' argument is that the statute is unconstitutional on its face because it "arbitrarily disenfranchise[s]" voters in Arizona, a

1 state where county election officials count millions of ballots cast by mail every cycle.
2 (Doc. 22 at 6.) Not so. Arizona has generously extended mail voting to every eligible
3 voter in the state and offers voters a wide variety of convenient and flexible voting
4 opportunities that enable voters to exercise their right to vote. Against that backdrop,
5 Arizona’s existing Election Day Deadline—which works for more than 99% of all
6 Arizonans who choose to vote by mail—does not impose an unconstitutional burden on
7 the right to vote. Rather, the Election Day Deadline is simply a uniform, state-wide
8 deadline for all ballots to be in the hands of county elections officials for processing.

9 Plaintiffs’ request for a preliminary injunction comes during an election year and
10 in the midst of a global pandemic caused by an infectious disease (“COVID-19”).
11 Instead of the Election Day Deadline—which has existed for over two decades—
12 Plaintiffs want this Court to order the Secretary to create entirely new “instructions for
13 county election officials to accept and tabulate otherwise valid ballots that contain
14 indicia, such as a postmark, identifying them as sent on or before Election Day and
15 arrive at a county recorder’s office within, at a minimum, five business days of Election
16 Day.” (Doc. 22-15 [Proposed Order] at 2.) Because the relief that Plaintiffs seek is
17 extraordinary, Plaintiffs bear a heavy burden of demonstrating that the facts and law
18 clearly favor them.

19 Plaintiffs have failed to satisfy their burden. They attempt to meet their burden
20 through a supplemental memorandum, which is premised on the impact of COVID-19
21 on other states’ recent elections that were imminently approaching as the public health
22 emergency became increasingly more serious and necessitated modifications to election
23 procedures. (See Doc. 32 at 5 [discussing postponement of primary elections in Puerto
24 Rico and other states].) In contrast, the election that Plaintiffs care about in *this* lawsuit
25 is the November 2020 general election, which will be administered *six months* from
26 now. (See Doc. 22 at 6 [requesting the Court to enjoin the Election Day Deadline to
27 “protect the rights of Arizona voters in the upcoming November 2020 elections”]; Doc.
28 32 at 3 [same] & 12 [alleging voters “will be disenfranchised in the upcoming 2020

General Election”].) But “it is impossible to predict how the pandemic will play out in the coming weeks and months[.]” *Ariz. for Fair Elections, et al. v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020) (slip op.). Indeed, on April 29, 2020 (after Plaintiffs filed their supplemental memorandum here), Governor Ducey issued Executive Order No. 2020–33, which extended the Governor’s previous stay-at-home order until May 15, 2020, while noting that “Arizona is now more prepared to face the potential for an increase in patients needing treatment for COVID-19” but that government officials “are still learning the extent to which the disease has spread within our state.”¹ Moreover, the elections that Plaintiffs discuss were administered under vastly different circumstances than Arizona’s elections. Given the rapidly-evolving nature of the pandemic and the uncertainty surrounding it, a modification of Arizona’s Election Day Deadline for the November 2020 General Election would amount to an “overbroad injunction” that is not “narrowly tailor[ed]” to “specific threatened harms[.]” *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1142 (9th Cir. 2009) (reversing grant of preliminary injunction where the district court “fail[ed] to properly consider the balance of hardships and the public interest” and “enter[ed] an overbroad injunction”).

Simply put, the current pandemic neither entitles Plaintiffs to an injunction nor bolsters their claim here that Arizona’s Election Day Deadline is unconstitutional. To the contrary, an unwarranted and significant modification of Arizona’s longstanding statute that establishes a clear deadline by which voters must cast their ballot would undermine voter confidence, cause additional chaos and confusion, and could very well *increase* the number of disenfranchised voters in the upcoming November 2020 General Election. The balance of equities does not tip in Plaintiffs’ favor and an injunction would not serve the public interest.

Plaintiffs’ motion for preliminary injunction should therefore be denied.

¹ See Office of the Governor, Executive Orders, <https://azgovernor.gov/executive-orders> (last visited May 2, 2020).

II. BACKGROUND

A. Arizona's Statutory Scheme and Legislative History

Arizona is a national leader in making voting convenient and accessible for its voters. *See* Report of Dr. Lonna Atkeson, Ph.D. (“Atkeson Rprt.”), attached as Exhibit A to Declaration of Linley Wilson (“Wilson Decl.”), at ¶¶ 2, 3, 32, and Table 1 (comparing Arizona’s vote-by-mail regime to other states). As early as 1991, “[a]ny qualified elector” in Arizona was permitted to “vote by absentee ballot” in “[a]ny election called pursuant to [Arizona] law[]” without having to satisfy any particular criteria. *See* 1991 Ariz. Legis. Serv., 1st Reg. Sess. Ch. 51 (S.B. 1320) (eliminating the previous statutory requirements that had existed in A.R.S. § 16–541 to allow voters to “vote absentee”). In 1997, the Legislature re-labeled “absentee voting” as “early voting,” while retaining the same broad language in A.R.S. § 16–541 that had applied to absentee voting, therefore permitting *any* qualified voter to vote by early ballot in *any* election. Ariz. Laws 1997, 2nd Spec. Sess. Ch. 5 (S.B. 1003).²

In the same 1997 Senate Bill, the Legislature added the law that Plaintiffs challenge here—i.e., the requirement that ballots must be received by election officials by the time polls close (7:00 p.m.) on Election Day. *Id.* Arizona’s Election Day Deadline is nothing new. To the contrary, the deadline has remained exactly the same ever since the statute’s enactment 23 years ago. *Compare* Ariz. Laws 1997, 2nd Spec. Sess. Ch. 5 (S.B. 1003), *with* A.R.S. § 16–548(A).³ And the Election Day Deadline is

² The bill that prompted these changes, among others to Arizona’s election laws, was aimed at “chang[ing] and clarif[y]ing” many of the statutes concerning elections, including ... early voting by mail.” Ariz. Jud. Comm. Min., S.B. 1003 (Nov. 13, 1997). The bill passed with overwhelming support. *See* Senate Third Reading Vote, S.B. 1003, 43rd Leg., 2nd Spec. Sess. (Nov. 13, 1997) (29-0-1 Senate vote); House Third Reading Vote, S.B. 1003, 43rd Leg. 2nd Spec. Sess. (Nov. 14, 1997) (57-0-3 House vote).

³ Although this precise deadline was not enacted until 1997, absentee voters were permitted to vote “either by mail or in person” during “the time period for absentee voting”—well before 1991 when absentee voting was extended to any qualified elector. *See* Ariz. Att’y Gen. Op. I84–151, 1984 WL 61350 (citing A.R.S. § 16–548 (1984)). In 1984, the Attorney General noted in an opinion that “the practice of allowing absentee voters to present themselves in person at the County Recorder’s office and to cast ballots while there has been common in Arizona for years and has never been challenged.” *Id.*

not unique to Arizona; it is akin to the laws of at least seventeen other states. (See Doc. 30 [Secretary’s Motion to Dismiss] at 9–10.) In fact, approximately 75% of states “have an Election Day *or earlier* receipt deadline” for voters who vote by mail. Atkeson Rprt. at ¶ 14 (emphasis added); *see also id.*, Table 1.

Additionally, as Plaintiffs note, Arizona voters may “choose to automatically receive a mail ballot for every election.” (Doc. 21 at ¶ 24 [citing A.R.S. § 16-544(A)].) Early voters are guaranteed to be mailed a ballot at least twenty-four to twenty-seven days before Election Day. A.R.S. §§ 16-541, –542(A), (C). Leading up to Election Day, voters may fill out the ballot in the comfort of their home and deliver it themselves, or through the mail, to the county recorder, a designated ballot drop-box or drop-off location, or any polling place in the county where the voter resides. A.R.S. § 16–548(A). It costs nothing for a voter to return the ballot by mail; that cost is borne by the counties. A.R.S. § 16–542(C) (“The county recorder or other officer in charge of elections shall mail the early ballot and the envelope for its return postage prepaid to the address provided by the requesting elector...”).⁴

The Election Day Deadline is communicated to all early voters in advance of every election. Indeed, Arizona law requires the printed instructions that accompany all early ballots to include the following unambiguous instruction: “In order to be valid and counted, the ballot and affidavit must be delivered to the office of the county recorder or other officer in charge of elections or may be deposited at any polling place in the county no later than 7:00 p.m. on election day.” A.R.S. § 16–547(C). And the ballot is not the only place this information is provided to voters; it is broadly publicized in voter education materials prepared by the Secretary and the Citizens Clean Elections Commission. *See* Atkeson Rprt. at ¶ 7; Wilson Decl., Exhibit (“Ex.”) C at ¶¶ 4-5. That the Election Day Deadline is communicated to voters in all of these forms refutes Plaintiffs’ allegation that Arizona has “fail[ed] to provide clear guidance” to voters (Doc. 22 at 6) about how to comply with the deadline.

⁴ Only Arizona and fifteen other states pay for postage. Atkeson Rprt. Table 1.

Plaintiffs’ own arguments confirm the success of early voting in Arizona. (*See* Doc. 22 at 7 [“Of the millions of Arizonans who receive mail ballots, approximately 90% return them through the mail instead of delivering them in person.”].) Significantly, “very few ballots actually come in late.” Atkeson Rprt. at ¶¶ 8, 65. In 2018, for example, rejected ballots represented less than 1%—just .13%—of all counted ballots. *Id.* In 2016, even fewer—only .09%—of all counted ballots were rejected as late. *Id.*⁵ Given that over 99% of voters cast timely ballots, Arizona’s thorough and proactive efforts to communicate the deadline have been successful, making voters well aware of the Election Day Deadline, contrary to Plaintiffs’ allegations. *See id.*

B. Plaintiffs’ Request For A Mandatory Injunction

Notably, Plaintiffs’ proposal to extend the ballot receipt deadline *and* require early ballots to be “postmarked” by Election Day may even *increase* the number of late rejected ballots because this change would likely affect voter behavior. *Id.* at ¶¶ 11–12, 58, Section X (explaining that, based on an analysis of late ballot rejection rates in California, “which has a very similar election ecosystem to Arizona ... [c]hanging the process may have the effect of shifting more voters to return their ballot either on or much closer to Election Day, which may actually increase disenfranchisement levels[.]”). Also, whether a ballot is postmarked by the United States Postal Service (“USPS”) is not within the control of a voter, county officials, or the Secretary, and any “inconsistent use of post-marking could result in the disparate treatment of voters[.]” Wilson Decl., Ex. B at ¶ 5; *see also* Atkeson Rprt. at ¶ 92 (observing that under Plaintiffs’ proposed change, voters would “have to rely on the post office to correctly postmark their ballot” and “[w]henver the USPS is unreliable, so is the Election Day postmark”).

The uncertainty surrounding COVID-19—including the impact of COVID-19 on USPS procedures (*see* Doc. 32 at 8–9)—further weighs in favor of *denying* Plaintiffs’

⁵ As Dr. Atkeson explains, these percentages “include[] all late rejected ballots arriving after the deadline—even those with missing or unreadable postmarks and those that arrive after a 5 business-day post-election window.” Atkeson Rprt. at ¶ 8.

1 motion, not granting it. Moreover, Plaintiffs’ proposal to require elections officials to
2 accept ballots for up to five business days *after* Election Day would also be burdensome
3 and problematic to county boards of supervisors, who must comply with statutory
4 deadlines that are triggered after every primary and general election for canvassing
5 election results. *See* A.R.S. §§ 16–642(A), –645; *see also* Wilson Decl., Ex. B at ¶ 10;
6 Atkeson Rprt. at ¶ 103 (opining that if the deadline were extended to five business days
7 after Election Day, “[i]t is likely that the [S]tate would have to reconfigure and redesign
8 their current canvassing deadlines”).

9 Extending the ballot receipt deadline past Election Day would also collide with
10 the signature curing process available to voters under Arizona law, which allows voters
11 up to five business days after a primary, general, or special election to verify a
12 mismatched signature. *See* A.R.S. § 16–550(A); Atkeson Rprt. at ¶ 105. (*See also* Doc.
13 23–2 [Dr. McCool’s report discussing the signature curing process].) This means, as a
14 practical matter, that any voters who wait to send their ballot on Election Day and have a
15 signature mismatch likely would not qualify for the curing process, which is occurring
16 during the same time frame. “Thus, a process that is meant to enfranchise more voters
17 on one hand, may actually lead to greater disenfranchisement because more voters wait
18 until very late in the process jeopardizing their opportunity to resolve any problems with
19 their ballot.” Atkeson Rprt. at ¶ 105; *see also* Wilson Decl. Ex. B. at ¶ 7 (Yuma County
20 Recorder expressing concern that the proposed postmark rule “would appear to limit, if
21 not entirely preclude, voters from using this cure period, even though it has been widely
22 publicized as a right all early voters have”).

23 As further discussed below, Plaintiffs are not entitled to the extraordinary relief
24 they seek.

25 ...

26 ...

27 ...

28 ...

III. ARGUMENT

Plaintiffs seeking a preliminary injunction have the burden to show: 1) that they are likely to succeed on the merits; 2) that they are likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in their favor; and 4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The balance of the equities and public interest factors merge when the State is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Preliminary injunctions are typically tools to maintain the status quo between the parties until determination of the action on the merits. When a plaintiff seeks to change the status quo, as in this case, the plaintiff's request is for a mandatory injunction and the plaintiff's burden is much heavier. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). A mandatory injunction “‘goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.’” *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980) (citation omitted). A mandatory injunction is not issued in doubtful cases, *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879, and should not be granted “unless the facts and law clearly favor the plaintiff.” *Comm. of Cent. Am. Refugees v. I.N.S.*, 795 F.2d 1434, 1441 (9th Cir. 1986).

A. Plaintiffs Are Not Likely To Succeed On The Merits

Because Plaintiffs advance “a preelection, facial attack” on the constitutionality of the Election Day Deadline, “seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.” *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality opinion). Plaintiffs are not likely to satisfy this burden to succeed on the merits of their claims alleged in the Second Amended Complaint. The Election Day Deadline is not an undue burden on the right to vote (Count 1) and does not deprive voters of procedural due process (Count 2).

1 **1. The Election Day Deadline Does Not Burden the Right to Vote And Is**
 2 **Easily Justified By The State’s Interests**

3 **a. The *Anderson/Burdick* Framework**

4 Casting a ballot by the Election Day deadline is not burdensome, and the deadline
 5 is easily justified by the State’s interests. The federal Constitution authorizes State
 6 legislatures to prescribe the “Times, Places and Manner of holding Elections . . .” U.S.
 7 Const. art. I, § 4, cl. 1. States “retain broad authority to structure and regulate
 8 elections.” *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018). But because election
 9 regulations “inevitably affect” the right to vote, constitutional challenges are judged
 10 under the two-part *Anderson/Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S.
 11 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this framework,
 12 courts “must first consider the character and magnitude of the asserted injury to the
 13 rights . . . that the plaintiff seeks to vindicate.” *Short*, 893 F.3d at 676 (*quoting*
 14 *Anderson*, 460 U.S. at 789); *see also Pub. Integrity All. v. City of Tucson*, 836 F.3d
 15 1019, 1025 (9th Cir. 2016) (*en banc*) (noting circuit case law “has not always accurately
 16 described the *Burdick* test” and emphasizing that “*Burdick* calls for neither rational basis
 17 review nor burden shifting”). If the asserted injury evidences no burden, there is “no
 18 reason to call on the State to justify its practice.” *Ariz. Libertarian Party v. Reagan*, 798
 19 F.3d 723, 732 n.12 (9th Cir. 2015). Minimal burdens from generally applicable and
 20 even-handed regulations are justified by a State’s important regulatory interests.
 21 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

22 Far short of an “extensive restriction,” a reasonable, generally-applicable election
 23 deadline—the quintessential time regulation—does not impose a meaningful burden on
 24 the right to vote. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (upholding
 25 constitutionality of deadline to register with a political party to participate in primary
 26 election); *Barilla v. Ervin*, 886 F.2d 1514, 1524 (9th Cir. 1989) (upholding pre-election
 27 deadline to reregister after moving within a county), *overruled on other grounds by*
 28 *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1989); *Isabel v. Reagan*,

394 F. Supp. 3d 966, 982 (D. Ariz. 2019) (“[The Plaintiff] had ample opportunity to register to vote and therefore wasn’t disenfranchised. *Rosario* and *Barilla* are controlling.”). Specifically, deadlines requiring absentee or early ballots to be received by a certain time on Election Day present, at most, only a “light imposition” on the right to vote. *See Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (relying on *Rosario* and *Burdick* to deny preliminary injunction against statute requiring ballots to be received by elections officials by 7 p.m. on Election Day).

b. Plaintiffs Have Not Established A Burden On The Right To Vote, Let Alone A Severe Burden

Here, the generally-applicable Election Day Deadline does not impose an unconstitutional burden on the right to vote. As a preliminary matter, the alleged burden on the right to vote must be considered in the broader context in which the challenged law operates in Arizona. *See McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 810-11 (1969) (reasoning that “appellants’ challenge to the allegedly unconstitutional incompleteness of Illinois’ absentee voting provisions cannot be sustained” while emphasizing Illinois’ “willingness to go further than many States”). Plaintiffs’ Second Amended Complaint presents an incorrect and “bleak picture of Arizona election administration,” which “has emphasized voter convenience” and has expanded multiple voting opportunities for its citizens over time. Atkeson Rprt. at ¶ 32.

When a voter requests an early ballot, Arizona law mandates that county elections mail the ballot to the voter at least twenty-four to twenty-seven days *before* an election. A.R.S. § 16-542(C). By comparison, other states on average only allow early voting during a 22-day period. Atkeson Rprt. at ¶ 44. And as noted above, Arizona law requires that early ballots mailed to voters be accompanied by an envelope with “return postage prepaid”, A.R.S. § 16–542(C), which eliminates any hassle or responsibility on the voter’s part to ensure that the voter’s local post office correctly processes the voter’s ballot. Arizona was an early adopter of vote centers, is only one of 10 states to offer ballot drop boxes, and allows any voter the option of being placed on a Permanent Early

1 Voting List (“PEVL”). Atkeson Rprt., Section V (summarizing “Election
2 Administration in Arizona”). Thus, Arizona is a “state leader in their [vote by mail]
3 programs” and a “full-service state” that generally provides *more* voting opportunities
4 than most other states. *Id.* at ¶¶ 32, 50 & Table 1. The simple Election Day Deadline at
5 issue here has existed in Arizona for over 23 years while Arizona has increasingly
6 expanded voters’ options, making voting easier and more convenient over time.

7 Plaintiffs contend that the Election Day Deadline has a “disproportionate effect”
8 on Hispanic, Latino, and Native American Voters, and voters in rural areas. (Doc. 22 at
9 11–14.) It is well-established, however, that generally-applicable election regulations do
10 not violate the Constitution simply because they may incidentally impact some voters
11 more than others. *See Crawford*, 553 U.S. at 198-200 (upholding identification
12 requirement to vote even though some voters would have a more difficult time
13 managing “life’s vagaries” to obtain the required identification or go through a special
14 process to cast a provisional ballot); *McDonald*, 394 U.S. at 810-11 (“Constitutional
15 safeguards are not . . . offended simply because some [voters] . . . find voting more
16 convenient than appellants.”). The right to vote is not at stake here, in light of Arizona’s
17 statutory scheme as a whole and the numerous early and in-person voting opportunities
18 that have been extended to voters. *See McDonald*, 394 U.S. at 807–10 (reasoning
19 Illinois’ Election Code does not “operate as a whole” to deny appellants the exercise of
20 the franchise, and emphasizing, “we cannot lightly assume, with nothing in the record to
21 support such an assumption, that Illinois has in fact precluded appellants from voting”).

22 Indeed, there is no constitutional right to early voting, *see id.*, and the challenged
23 law here “merely imposes a deadline”—nothing more. *See Friedman*, 345 F. Supp.2d at
24 1376 (reasoning that Florida’s ballot-receipt-deadline statute “does not deny the right to
25 vote to a class of persons” and “merely imposes a deadline by which Plaintiffs must
26 return their absentee ballots”); *see also Mays v. LaRose*, 951 F.3d 775, 791-92 (6th Cir.
27 2020) (“Ohio’s generally applicable deadline for requesting absentee ballots is
28 constitutional because it imposes only a minimal burden on Plaintiffs’ right to vote” and

1 the state's interests "justify that burden") (citing *McDonald*, 394 U.S. at 807–09).
2 Accordingly, Arizona's Election Day Deadline for receiving ballots is constitutional,
3 even assuming some voters may prefer more time to send them back to elections
4 officials. *See Friedman*, 345 F. Supp. 2d at 1377 ("Like the election laws in *Burdick* and
5 *Rosario*, Florida's 7 p.m. deadline of returning ballots on election day does not
6 disenfranchise a class of voters."); *see also Walgren v. Bd. of Selectmen of Town of*
7 *Amherst, Mass.*, 373 F. Supp. 624, 634 (D. Mass. 1974), *aff'd sub nom. Walgren v. Bd.*
8 *of Selectmen of Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975) (rejecting challenge by
9 college students to town policy establishing a January date of election while college
10 students were largely on vacation and requiring absentee ballots to be received by the
11 closing of polls on election day).

12 The logic of *Rosario* and *Barilla* controls here. *See Friedman*, 345 F. Supp. 2d at
13 1377 (relying on *Rosario* to deny preliminary injunction against statute requiring ballots
14 to be received by elections officials by 7 p.m. on election day). In *Rosario*, the Supreme
15 Court upheld a New York statute imposing a deadline to register to vote a full *eight*
16 *months* prior to a presidential primary and *eleven months* prior to a nonpresidential
17 primary. *Rosario*, 410 U.S. at 760. The petitioners in *Rosario* could have registered
18 before the deadline but failed to do so. *Id.* at 755. As a result, they were not eligible to
19 vote in the subsequent primary election. *Id.* Nonetheless, the Court upheld the statute
20 because it "merely imposed a time deadline" on the petitioners' ability to participate in
21 the election. *Id.* at 752. The Court concluded: "if [petitioners'] plight can be
22 characterized as disenfranchisement at all, it was not caused by [the law], but by their
23 own failure to take timely steps to effect their own enrollment." *Id.* at 758.

24 Similarly, in *Barilla*, the Ninth Circuit upheld a state's deadline for voter
25 registration set at twenty days before Election Day. 886 F.2d at 1516. Plaintiffs had
26 been denied the ability to vote because their mailed-in registrations were received after,
27 but mailed before, the deadline. *Id.* at 1517. The Ninth Circuit rejected the argument
28 that strict scrutiny should apply and instead followed the Supreme Court's lead in

1 *Rosario* that the *Anderson/Burdick* balancing test is the appropriate standard for review
2 of election deadlines. *See id.* at 1523-25. “What is at issue here is not a ‘ban’ on
3 plaintiffs’ right to vote, [as would be required for strict scrutiny to apply] but rather, a
4 ‘time limitation’ on when plaintiffs had to act in order to be able to vote.” *Id.* at 1525.
5 The deadline “easily” satisfied that test. *Id.*

6 Although not about a deadline, the Supreme Court’s analysis of Hawaii’s bar on
7 write-in voting is also informative. *Burdick*, 504 U.S. at 441. The Court relied heavily
8 on the issue of timing, often couching the petitioner’s case as one for an elimination of
9 deadlines to make the ballot. *Id.* at 437 (characterizing—after citing to *Rosario*—
10 petitioner’s “limited” interest as the equivalent of wanting “instantaneous access to the
11 ballot” (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974))). The Court also wrote that
12 reasonable election regulations require voters “to act in a timely fashion if they wish to
13 express their views in the voting booth.” *Id.* at 438. Finally, the Court concluded, “the
14 State’s interests outweigh petitioner’s limited interest in waiting until the eleventh hour
15 to choose his preferred candidate.” *Id.* at 439. It is also noteworthy that the burdens
16 faced by the petitioner in *Burdick* were greater than the burdens at issue here. *Id.* at 443
17 (noting that meeting the deadline to gather signatures 150 days before the primary
18 election “requires considerable organization at an early stage in the election, a condition
19 difficult for many small parties to meet”) (Kennedy, J., dissenting). The Court also
20 found unavailing the argument that voters who discovered new information late in the
21 process, causing them to change their support to another candidate, would be unable to
22 change their minds because of the early deadline. *See id.* at 445 (Kennedy, J.,
23 dissenting).

24 Plaintiffs emphasize that ballots postmarked by Election Day should be counted
25 because this comports with common experience in other contexts and voters’ reasonable
26 expectations. (Doc. 22 at 4.) The Constitution does not demand states to measure such
27 expectations (by unknown standards) and try to accommodate such expectations. In any
28 event, the mere fact that postmark procedures are available in other contexts does not

mean that voters *expect* that rules unrelated to voting regulate voting procedures. Indeed, Plaintiffs’ conjecture is at odds with the facts; over 99% of Arizona voters who vote by mail use one of the many available methods to return their ballot by election officials by 7:00 p.m. on Election Day. Atkeson Rprt. at ¶ 8. As Dr. Atkeson further observes, “[p]eople are used to deadlines and successfully conform to them all of the time.” *Id.* at ¶ 57 (collecting examples in other contexts, such as payment due dates for mortgages and credit card bills, where postmark rules do not govern).

Plaintiffs cannot succeed in their facial attack of Arizona’s generally-applicable time regulation, the kind explicitly authorized by the Constitution, which requires early ballots to be received by 7 p.m. on Election Day. If this imposes a burden on Plaintiffs’ right to vote at all, it is no heavier than the burdens imposed by the deadlines or other regulations at issue in the cases cited above. The identification requirement in *Crawford*; the complete denial of absentee voting in *McDonald*; the ballot access requirement in *Burdick*; and, the registration deadlines in *Rosario* and *Barilla*, presented much heavier, or at least equal, burdens as Arizona’s Election Day Deadline. And Plaintiffs’ facial challenge most certainly fails when taking into account the plethora of options available to voters, the fact that early voting begins a full 27 days before an election, and Arizona’s other laws and procedures that make voting easy and convenient for voters (such as prepaid postage and ballot drop boxes). See Atkeson Rprt., Sections V & VI.

c. Plaintiffs’ Particular Burden Theories Fail

As noted, Plaintiffs claim that the Election Day Deadline places a particular burden on rural, Hispanic, and Native American voters and that this is material to measuring the burden under *Anderson/Burdick*. (Doc. 22 at 12.) But the Supreme Court in *Crawford* and *McDonald* rejected the argument that there is a special hardship exemption to generally-applicable election regulations in a facial challenge. In *McDonald*, if absentee voting was not constitutionally required to accommodate, for example, the special burdens of a single working mother who cannot afford child care,

1 394 U.S. at 810 n. 8, then the Election Day Deadline is surely constitutional, even if
2 some rural voters have slower mail service (particularly when other options to deliver
3 ballots are still available). *Cf. Mays*, 951 F.3d at 792 (reasoning that “electors who fail
4 to vote early cannot blame Ohio law for their inability to vote; they must blame ‘their
5 own failure to take timely steps to effect their enrollment’”) (citing *Rosario*, 410 U.S. at
6 758). Similarly, the *Crawford* Court did not find a significant burden in requiring
7 identification to vote—which required an in-person trip to obtain—or having to cast a
8 provisional ballot in person, even when particularly more burdensome for some groups,
9 such as seniors. 553 U.S. at 200. Any alleged extra burden on rural voters is also not
10 constitutionally significant, given that “voters have many avenues available to them to
11 vote.” Atkeson Rprt. at ¶ 50. Any difficulties associated with rural living or post office
12 procedures are part of “life’s vagaries” and do not constitute a meaningful burden on the
13 right to vote. *Crawford*, 553 U.S. at 197. (See also Doc. 23-2 at 23–24 [Dr. McCool
14 stating that mail timelines present “the vagaries of a ‘live deadline’” when attempting to
15 identify a precise date of mailing to ensure that the mail reaches the recipient in time].)

16 If the deadlines in *Rosario*, cutting off the ability to vote a full eleven months
17 before Election Day for failure to register, required only minimal review, then the
18 Election Day deadline here cannot possibly warrant anything more than the same
19 minimal review. This is so even if the deadline means voters must mail their ballots
20 before Election Day—if they choose to vote by mail. If a voter misses the Election Day
21 Deadline, it is because of the voter’s “own failure to take timely steps” to ensure their
22 vote is counted. *Rosario*, 410 U.S. at 758.

23 The hardships faced by the plaintiff in *Burdick* were arguably even greater, yet
24 that Court described the burden as “slight,” *Burdick*, 504 U.S. at 439, or “limited.” *Id.*
25 If a requirement for voters to organize 150 days before the election for their candidate to
26 make the ballot satisfies constitutional requirements, surely an Election Day Deadline in
27 a system where voters have multiple options regarding how and when to cast their vote
28 is also constitutional. Ballots are mailed to voters twenty-seven days before the election,

1 leaving voters plenty of time to cast their vote. If Plaintiffs wish to wait until the final
2 week before Election Day to learn more information, a “limited interest,” *id.*, they are
3 free to vote in person or deliver their ballot in-person up until 7 p.m. on Election Day—
4 options unavailable to the plaintiff in *Burdick*.

5 Further underscoring the insignificance of the alleged burden here, the data
6 reflects that “[c]ounties offer a variety of methods for voting that are consistent with
7 their demographic and geographic constraints” and “[a]ll counties provide expanded
8 opportunities to vote consistent with their population needs.” Atkeson Rprt. at ¶ 51 &
9 Table 2. Plaintiffs’ expert, Dr. Ansolabehere, opines that “the rate of late rejected
10 absentee [sic] ballots is much lower in Maricopa County than in the rest of Arizona,”
11 and concludes that “the rate of late rejected absentees [sic] is much higher for Hispanic
12 and Native American populations than for Whites.” Ansolabehere Rprt. at ¶¶ 8, 11. But
13 there are two flaws in his analysis. First, as Dr. Atkeson explains, “[g]iven the small
14 sample size, there is not enough statistical power to apply conventional statistics and
15 models” to the data. Atkeson Rprt. at ¶ 76. Second, Dr. Ansolabehere’s Maricopa
16 County data is incomplete, as he did not include 162 of 748 total precincts in Maricopa
17 County in his data set, i.e., “over one in every five precincts (or 21.7%)” that existed in
18 Maricopa County in 2018. Atkeson Rprt. at ¶ 86. This renders Dr. Ansolabehere’s
19 analysis unreliable and invalid. *Id.* at ¶ 88.

20 In any event—putting aside the small sample size and incomplete data—Dr.
21 Atkeson concluded that the data from 12 of Arizona’s 15 counties suggested that
22 “smaller turnout counties have, on average, slightly higher rejection rates than bigger
23 turnout counties (.29% compared to .15%).” Atkeson Rprt. at ¶¶ 76–78. Similarly, rural
24 counties “averaged three tenths of” less than 1% of late rejected ballots (.30%), “while
25 urban counties average .12%,” for a difference of .18%. Atkeson Rprt. at ¶ 79. These
26 are incredibly small numbers. The data does not support Plaintiffs’ claim that rural
27 voters are particularly burdened by the Election Day Deadline. And although Plaintiffs
28 assert that Hispanics and Native Americans encounter more difficulties getting ballots in

on time because of Arizona’s “long history of discrimination” (Doc. 22 at 12), county resources “for both voters and election administrators” and the reliability of mail service are more likely factors that contribute to the slight urban v. rural differences in the small data set.⁶ Atkeson Rprt. at ¶ 79. Thus, the rate of rejection for late ballots is not based on race; instead, “turnout and urbanicity, which are highly related, are the biggest factors in understanding rejection rates.” *Id.* at ¶ 85.

Whatever the explanation for county-specific rejection rates, the statewide data confirms that the Election Day Deadline is not too high a bar for over 99% of voters to return their ballots in on time. Atkeson Rprt. at ¶ 8. Nearly all Arizonans are capable of meeting the Election Day Deadline and thus, just as in *Barilla*, the Election Day Deadline is not a severe burden on the right to vote. Rather, it is a constitutionally valid time regulation establishing when people must act in order to vote. *See Barilla*, 886 F.2d at 1525. Given the generous twenty-seven day early voting period, “no excuse” early voting, and voters’ ability to be included on the PEVL, *see* A.R.S. § 16–544, and the many options regarding how to cast a vote, the burden on voters because of the Election Day Deadline is very minimal.

d. Plaintiffs’ Proposal Does Not Eliminate The Alleged Burden

Moreover, under Plaintiffs proposal (to count ballots that have a postmark and are received within 5 business days), *some*, and perhaps even *more*, ballots would still arrive too late to be counted. *See* Atkeson Rprt. at ¶ 58 (explaining that Dr. Ansolabehere’s

⁶ Plaintiffs repeatedly cite the Ninth Circuit’s divided opinion in *Democratic Nat’l Comm. et al. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (“*DNC v. Hobbs*”), to support their allegations of discrimination and other alleged facts in their motion for preliminary injunction. (*See* Doc. 22, at 2–8.) As Plaintiffs note (*id.* at 8), the mandate is currently stayed pending the Arizona Attorney General’s petition for writ of certiorari filed in the U.S. Supreme Court on April 27, 2020. Moreover, *DNC v. Hobbs* analyzed claims regarding Arizona’s out-of-precinct policies and a statute that criminalizes the collection and delivery of another person’s ballot under Section 2 of the Voting Rights Act. 948 F.3d at 998. The *DNC v. Hobbs* court did not address the constitutionality of the Election Day Deadline at issue here, or any other statutory deadline in Arizona’s election code. In fact, *DNC v. Hobbs* court did not even reach the plaintiffs’ First and Fourteenth Amendment claims in light of the court’s holdings under the VRA. *See DNC v. Hobbs*, 948 F.3d at 999 (“We do not reach DNC’s First and Fourteenth Amendment claims.”). Plaintiffs’ heavy reliance on *DNC v. Hobbs* in this litigation is therefore misplaced.

report “does not show that changing the deadline will actually increase the number of voters who get their ballots in on time” and that “changes in voter behavior due to changes in the law could actually *increase* the number of voters disenfranchised because of the policy change”); *see also id.*, Section X (discussing analysis of California rejection rates and how Plaintiffs’ proposed changes might influence voters). Inevitably, there will “always be some [vote by mail] ballots that go uncounted because they are late.” *Id.* at ¶ 90. Plaintiffs have yet to articulate a principled reason why their proposed deadline would not violate the Constitution as to those ballots that will continue to arrive late.

Additionally, some ballots that are rejected as late are cast *after* Election Day, which would not be counted under the existing deadline or under Plaintiffs’ proposal. But it is impossible to disentangle those rejected ballots from the ballots that Plaintiffs argue *should* be counted under their proposed deadline. Atkeson Rprt. at ¶ 99 (cautioning that the data “do[es] not consider whether or not the ballot was actually voted by Election Day”). In other words, it would be a mistake to assume that all of the ballots received by county elections officials within 5 business days of an election were legally voted on Election Day in the first place. *See id.*⁷

e. Any Incidental Burden Is Justified By The State’s Interests

The State’s interests easily satisfy the balancing test required by the *Anderson/Burdick* framework. Those interests include finality, promoting voter confidence, orderly election administration, and “protecting the integrity, fairness, and efficiency of [] ballots and election processes.” *Timmons*, 520 U.S. at 364–65; *see also*

⁷ Further undermining the validity of Dr. Ansolabehere’s analysis, the data regarding late rejected ballots reflects information from only six counties—Graham, Greenlee, Cochise, Coconino, Pima, and Santa Cruz Counties—which represents “only 22% of Arizona voters” and the time range of the data was not consistent. *See* Atkeson Rprt. at ¶ 97. Dr. Atkeson therefore re-created the data using only 2018 information provided by these six counties. *Id.* at ¶¶ 97–99 & Figures 4 & 5. Dr. Atkeson’s analysis “indicate[s] that the average ballot arrives within 5.2 days,” but the spike in the data around the third day “is largely due to” Pima County, where 58% of the late rejected ballots arrived within 3 days. *Id.* at ¶ 99. Ultimately, “the data are incomplete and may not reflect state averages.” *Id.*

1 *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral
2 processes is essential to the function of our participatory democracy.”); *Crawford*, 553
3 U.S. at 192-97 (recognizing state’s interest in promoting voter confidence and
4 improving and modernizing election administration). See Wilson Decl., Ex. B. at ¶ 12
5 (Yuma County Recorder stating, “I am genuinely concerned about the suspicions that
6 could arise, and what impact that would have on elections in my county, should a post-
7 mark rule be introduced”). Indeed, a deadline for receiving ballots “is important
8 because at some point, the election has to end so a winner can be determined.” Atkeson
9 Rprt. at ¶ 93. Having that deadline fall on Election Day is imminently reasonable, and
10 also necessary to avoid a cascade of other problems.

11 Moreover, given the current uncertainty and instability surrounding COVID-19,
12 the State has an even stronger interest during these extraordinary times in adhering to the
13 Election Day Deadline to preserve public confidence and the stability and integrity of its
14 upcoming elections. See *Crawford*, 553 U.S. at 197 (“[P]ublic confidence in the
15 integrity of the electoral process has independent significance, because it encourages
16 citizen participation in the democratic process.”); cf. Michael Morley, *Election*
17 *Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory
18 L.J. 545, 593 (2018) (states have “important interests in adhering to voter registration
19 deadlines in the wake of election emergencies to allow them to focus their resources on
20 recovering from the emergency, ensuring the accuracy of voter registrations they have
21 received, relocating polling places as needed, ensuring adequate staffing for the voting
22 period, and otherwise minimizing the likelihood of errors or delays in voting.”).

23 The State has important regulatory reasons to require all ballots be received by
24 Election Day so that counting can begin on time, with a known universe of voters, to
25 dedicate resources to curing ballots, see A.R.S. § 16–550(A), and ensuring that election
26 results will be reported in a timely manner. Arizona’s twenty-day window to certify
27 elections does not alter this analysis, because there is not extra leisure time built into the
28 process. Elections officials across the state work nearly around the clock to ensure that

1 every ballot or voter is properly verified, every vote tabulated, every spoiled ballot
2 duplicated, and that all the other myriad of processes that take place prior to canvass are
3 completed within specific statutory time frames. See A.R.S. § 16–135(D) (requiring
4 provisional ballots to be counted “[w]ithin ten calendar days after a general election”);
5 § 16–642(A) (20-day canvass deadline), –645(B) (10-day canvass deadline after primary
6 election); Atkeson Rprt. at ¶¶ 101–03 (discussing the Early Ballot Board and Provisional
7 Ballot Board processes); Wilson Decl., Ex. B at ¶ 8 (same). Requiring county election
8 officials to accept ballots up to five business days after an election—i.e., a full *seven*
9 days after the November 3, 2020 general election—would place a significant burden on
10 elections officials because they will have to verify and count greater numbers of ballots
11 while working to help voters cure their ballots. See Wilson Decl., Ex. B at ¶ 7. It is
12 unknown whether those processes could be conducted in parallel at this time. See *id.*
13 This would add additional (as of yet undetermined) steps in a delicate framework that
14 has been refined to accurately process millions of votes in a safe, secure, efficient
15 manner. The State’s interests in enforcing the Election Day Deadline easily justify the
16 limited burden imposed on voters.

17 In short, Plaintiffs cannot show that the Election Day Deadline is
18 unconstitutional. Enacting a generally-applicable deadline by which county officials
19 must receive ballots simply “proscribes the mechanics of voting” for early voters in
20 Arizona. See *Friedman*, 345 F. Supp. 2d at 1376. “As the United States Supreme Court
21 noted in *Burdick*, a state has a substantial interest in regulating their elections in order to
22 make the elections ‘fair and honest’ and to ensure that ‘some sort of order, rather than
23 chaos, is to accompany the democratic processes.’” *Id.* (citing *Burdick*, 504 U.S. at
24 433). The Election Day Deadline has existed for 23 years while Arizona has steadily
25 and consistently increased voting options for Arizonans. At the same time, elections
26 officials on the ground, who actually accept ballots, see A.R.S. § 16–548(A), are tasked
27 with ensuring that elections are safely and properly conducted. Voters have multiple
28 options for how and when to cast their votes, as long as all voted ballots are received by

election officials by the times polls close on Election Day. Very few Arizona voters miss the Election Day deadline. Neither the facts nor the law “clearly favor” Plaintiffs on Count 1. *See Comm. of Cent. Am. Refugees*, 795 F.2d at 1441; *see also Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176, 1182–83 (9th Cir. 1988) (while courts have a duty to ensure that elections “conform to constitutional standards,” courts must “undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process”).

2. The Election Day Deadline Does Not Implicate Procedural Due Process

For similar reasons, Plaintiffs also cannot succeed on the merits of their procedural due process claim. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104–05 (9th Cir. 2008) (rejecting procedural due process challenge to procedures for verifying referendum petition signatures, reasoning the State’s regulatory interests “are sufficient to justify the state’s ‘reasonable, nondiscriminatory restrictions’”) (quoting *Burdick*, 504 U.S. at 434).

Under traditional procedural due process principles, there must be an initial showing that a plaintiff has been deprived of a liberty interest. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (“The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’”). Courts then consider 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional safeguards; and 3) the government’s interest, including the burden of additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first *Mathews* factor is essentially the same as the first *Anderson/Burdick* inquiry. As already described, the burden on Plaintiffs’ right to vote (or “liberty interest”) is minimal.

The second factor, risk of erroneous deprivation of the interest through the procedures used, makes little sense because, conceding that voters whose ballots are received late are deprived of the ability to vote, this does not equate to an erroneous

deprivation because voters do not have an unlimited right to cast a vote at any time they wish or to otherwise ignore generally applicable election time regulations. *Burdick*, 504 U.S. at 433. In any event, as noted above, Arizona law mandates that every early ballot issued include printed instructions notifying voters that ballots must be delivered to the officer in charge of elections by 7:00 p.m. on Election Day. A.R.S. § 16-547(C). This pre-election notice mitigates any feigned risk of an “erroneous deprivation.” Furthermore, as discussed in the Secretary’s reply in support of the motion to dismiss (Doc. 41), voters in Arizona have an opportunity to track the status of their early or provisional ballots via the Secretary’s online voter information portal.⁸ Therefore, a voter has “pre-deprivation notice” of the deadline *and* “post-deprivation” notice of whether his/her ballot was counted.

Finally, the third factor is also essentially the same as the second part of the *Anderson/Burdick* framework. Plaintiffs are not actually asking for *additional* procedural safeguards but simply for a different procedure altogether—one that would continue to, as Plaintiffs put it, “disenfranchise”: early voters whose ballots arrive after the 5 business-day deadline; early voters who mail their ballot on or around Election Day but then lose any opportunity to cure a mismatched signature; and voters who have the misfortune of receiving no postmark or an unreadable postmark on their ballot. *See supra*, Sections II(B), III(A)(1)(d). The value of Plaintiffs’ substitute procedure is nonexistent, and “the burden on plaintiffs’ interests from the state’s failure to adopt their proposed procedures is slight at most.” *See Lemons*, 538 F.3d at 1105. Thus, Plaintiffs’ procedural due process claim is meritless.

Accordingly, the facts and the law do not “clearly favor” Plaintiffs on Count 2. *See Comm. of Cent. Am. Refugees*, 795 F.2d at 1441.

B. Plaintiffs Have Not Demonstrated Irreparable Harm

Because Plaintiffs’ likelihood of success on the merits is extremely low, their threshold requirement for showing irreparable harm is heightened. *Save Our Sonoran*,

⁸ See <https://my.arizona.vote/PortalList.aspx> (last visited Apr. 26, 2020).

1 *Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). “Speculative injury cannot be the
2 basis for a finding of irreparable harm.” *In re Excel Innovations, Inc.*, 502 F.3d 1086,
3 1098 (9th Cir. 2007). Plaintiffs cannot satisfy this heightened threshold for several
4 reasons, even considering their supplemental memorandum premised on COVID-19.

5 First, Plaintiffs’ claim of irreparable injury allegedly caused by the Election Day
6 Deadline is not only speculative; it is completely within their control to avoid.
7 Preliminary relief from this Court is not necessary to protect the sole voter who is a
8 Plaintiff in this lawsuit. Plaintiff has voluntarily elected to vote by mail; and Plaintiff’s
9 own efforts are all that are required to ensure that election officials receive her ballot by
10 the Election Day Deadline. More than 99% of Arizona voters who choose to cast early
11 ballots manage to comply with the Election Day Deadline. Plaintiff should be able to do
12 so too without relief from this Court. *See Morley, Election Emergencies*, 67 Emory L.J.
13 at 592 (observing that “[w]hen voters have an extended period of time to engage in an
14 activity, such as registering to vote or engaging in early voting, the Constitution
15 generally does not entitle them to deadline extensions due to election emergencies”).

16 Second, the Organizational Plaintiffs’ claims of irreparable harm also fall flat.
17 For starters, economic injury is generally insufficient to sustain preliminary relief
18 (assuming, *arguendo*, that they are spending money differently due to the challenged
19 law). *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Greater Birmingham Ministries*
20 *v. State*, 161 F. Supp. 3d 1104, 1117 (N.D. Ala. 2016) (“[A] loss of money and time . . .
21 is generally not irreparable harm in the preliminary injunction context.”). More
22 importantly, there are numerous election regulations with which voters must comply in
23 order to have their vote counted. If an organization wishes for certain voters’ ballots to
24 be counted, the organization must educate those voters on how to comply with election
25 regulations. No irreparable injury could be claimed for resources diverted to educating
26 voters on any *constitutional* election regulation. Therefore, once again, Plaintiffs’
27 failure to show any likelihood of success on the merits dooms their claim of irreparable
28 injury.

1 Third, although COVID-19 is relevant to the irreparable harm factor as a general
2 matter, Plaintiffs' claim here that the Election Day Deadline is unconstitutional is not
3 related to any increased hardship associated with the pandemic. While the pandemic is a
4 serious problem and creates significant challenges in an election year, it does not justify
5 rewriting Arizona's 23-year-old statute that requires that election officials receive all
6 ballots by the time the polls close on Election Day. *Cf. Ariz. for Fair Elections, et al. v.*
7 *Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020) (slip
8 op.) ("Although Plaintiffs are correct that the COVID-19 pandemic constitutes an
9 'extraordinary circumstance[]' that has resulted in 'profound' dislocations [], it is also a
10 profound thing for a federal court to rewrite state election laws that have been in place
11 since the 1910s.").

12 Plaintiffs rely on recent election events in Wisconsin that were affected by
13 COVID-19 to show irreparable harm here. (See Doc. 32 at 13.) But Plaintiffs' reliance
14 is misplaced. There, COVID-19 caused an explosion in the number of requests for
15 absentee ballots—as of the date the district court enjoined Wisconsin's Election Day
16 ballot return law, 1,119,439 absentee ballots had been requested. This was around five
17 times more than in *any* prior spring election in Wisconsin. *Democratic Nat'l Committee*
18 *v. Bostelmann*, — F. Supp.3d—, 2020 WL 1638374, at *4 (W.D. Wis. Apr. 2, 2020).
19 Wisconsin election administrators were unable to keep up with this increased demand
20 for absentee voting. See *id.* ("In light of these unprecedented numbers, at least some
21 clerks are having trouble processing the applications for absentee ballots."). Elections
22 officials represented in court that there was "no practical way" that some voters who
23 timely requested an absentee ballot would have time "to receive, vote and return their
24 ballot by Election Day." *Id.* By the time the district court ruled, the statewide elections
25 commissioners informed the court that they did not oppose temporarily transforming the
26 Election Day receipt deadline into a postmark deadline. *Id.* at *16. The court found in
27 light of the unprecedented use of absentee ballots, "even the most diligent voter may be
28 unable to return his or her ballot in time to be counted." *Id.* at *17.

1 But Arizona is not Wisconsin. A five-fold increase in the use of mail ballots is
 2 literally impossible here, where “nearly 80% of Arizonans [] vote by mail.” (Doc. 21 at
 3 ¶ 1.) “Arizona is almost effectively a full VBM state” and “has the experience and
 4 preparedness to shift their election from (mostly) VBM to nearly all VBM, and to
 5 account for an increase in VBM ballots.” Atkeson Rprt. at ¶ 115. Arizona elections
 6 officials will thus not be caught off guard by a sudden and unexpected surge in the use
 7 of early voting caused by COVID-19. To the contrary, “Arizona is one of only a few
 8 states that is in a strong position to ensure both the safety of its voters, and a fair VBM
 9 system in the November 2020 election.” *Id.* at ¶ 124. Arizona “has good voter
 10 registration list maintenance,” offers voters “many ways to cast a mail ballot other than
 11 mailing it in,” provides a sophisticated online ballot tracking system, has “the
 12 organization of staff necessary to qualify and count VBM [ballots] quickly,” and has
 13 granted counties with statutory authority to establish emergency voting centers, *see*
 14 A.R.S. § 16–411(B)(5). *See* Atkeson Rprt. Section XIV; *see also* Danielle Root,
 15 *Wisconsin Primary Shows Why States Must Prepare Their Elections for the Coronavirus*
 16 (Apr. 27, 2020) (stating that “Wisconsin’s experience should be a warning to states
 17 across the country” and recognizing that Arizona, Montana, and Oregon are “relatively
 18 well-situated for conducting elections during the pandemic, as they have most of the
 19 necessary policies and infrastructure to support mass reliance on vote by mail”).⁹

20 Pointedly, Arizona has already conducted a presidential preference election
 21 during the COVID-19 pandemic, and Plaintiffs do not present any evidence that the
 22 problems in Wisconsin arose here. (*See* Doc. 32 at 7 n.2 (noting that Arizona “reported
 23 an increase in voting by mail during its March 2020 PPE, with 90 percent of all ballots
 24 being cast by mail”).¹⁰ And Arizona does not hold another statewide election for

25 ⁹ Available at:

26 <https://www.americanprogress.org/issues/democracy/news/2020/04/27/484013/wisconsin-primary-shows-states-must-prepare-elections-coronavirus/> (last visited May 4, 2020).

27 ¹⁰ *See also* MacKinley Lutes-Adlhoch & Jonmaesha Beltran, *Despite COVID-19, poll*
 28 *officials report steady turnout, smooth voting* (Mar. 17, 2020), available at
<https://cronkitenews.azpbs.org/2020/03/17/despite-covid-19-poll-officials-report-steady->

months, giving voters and officials plenty of time to prepare for any increase in the use of mail voting. *See also* Atkeson Rprt. at ¶¶ 128–34 (explaining why the PPE cannot be used to make any inferences about what might happen in the November 2020 general election). In short, the very real reasons it made sense to temporarily suspend Wisconsin law to account for COVID-19 have no applicability to Arizona and do not support enjoining the Election Day Deadline. *See Morley, Election Emergencies*, 67 Emory L.J. at 597 (“A court’s willingness to modify ... an election based on an election emergency should [] depend on the geographic scope of both the election and the emergency”).

C. The Balance of Equities And The Public Interest Favor The State

Enjoining Arizona’s Election Day Deadline is not in the public interest, and the balance of equities favors the State. “[D]istrict courts must give serious consideration to the balance of equities.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (citation omitted). In doing so, courts must consider “all of the competing interests at stake.” *Id.* “[T]he less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.” *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). This burden is even higher when, as here, Plaintiffs seek a mandatory injunction that would require this Court to rewrite state law for the coming election. *See Comm. of Cent. Am. Refugees*, 795 F.2d at 1441; *S.W. Voter*, 344 F.3d at 919 (injunction that impacts an impending election is “extraordinary”); *Morley, Election Emergencies*, 67 Emory L.J. at 594 (modifying election rules “raises separation of powers and sometimes federalism concerns”).

Of course, Plaintiffs and the Secretary alike benefit from ensuring public health and safety. *See Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”). But the

[turnout-smooth-voting/](#) (“Concerns about COVID-19 prompted Ohio officials to cancel their primary just hours before polls were set to open Tuesday, but elections in Arizona, Florida, and Illinois proceeded as scheduled. Despite some minor problems Tuesday, Arizona poll workers and voters both reported mostly smooth sailing.”).

1 constitutionality of the Election Day deadline has been established, and the public
 2 interest is not served by enjoining the statute, even in light of COVID-19. Any potential
 3 burden related to the COVID-19 pandemic on voting in the November 2020 general
 4 election is not a result of the Election Day Deadline. As discussed above, Arizona is
 5 “one of only a few states that is in a strong position to ensure both the safety of its
 6 voters, and a fair VBM system in the November 2020 election.” Atkeson Rprt. at ¶ 124.

7 Plaintiffs’ requested relief only increases potential burdens by asking the Court to
 8 order the Secretary to implement a new postmark rule for this year’s general election.
 9 They want to impose this new rule even though they acknowledge that the USPS “is
 10 facing a budgetary crisis due to COVID-19” and that as summer approaches, USPS “will
 11 need to make cuts,” and that USPS “struggled to deliver mail ballots to voters in
 12 Wisconsin[.]” (Doc. 32 at 8–9.) It is perplexing that Plaintiffs apparently are not
 13 concerned about *adding* an additional burden on USPS in this time of crisis. Whether a
 14 ballot would even be postmarked for the November 2020 general election is dependent
 15 on the idiosyncratic practices of the local post office where voters would drop off their
 16 ballot. See Wilson Decl., Ex. B at ¶ 5 (noting that “[a]s pre-paid mail, [early ballots] are
 17 not required to be post-marked, and many of the ballots are not” postmarked, and even
 18 putting this aside, “sometimes, to expedite processing of election mail, some non-
 19 essential processes (such as post-marking) are skipped to expedite the process”).¹¹ Of
 20 course, the Secretary has no control over USPS policies or procedures. Whether USPS
 21 could even be required to start postmarking ballots in Arizona when they are not a party
 22 to this lawsuit is a dubious proposition. And even putting aside this problem (i.e., that
 23 no party here could enforce a requirement that all ballots be postmarked), Plaintiffs’ rule
 24

25 ¹¹ See USPS, Handbook PO-408 – Area Mail Processing Guidelines, § 1-1.3 Postmarks,
 26 https://about.usps.com/handbooks/po408/ch1_003.htm (noting that although post offices
 27 are “required to make a local postmark available” because USPS “is sensitive to the
 28 importance some customers place upon these postmarks,” postmarks “are not required
 for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces
 with an indicia applied by various postage evidencing systems”) (last visited May 4,
 2020).

1 would only add to the burdens on USPS and could potentially cause more delay,
2 resulting in more ballots arriving too late to count.

3 A postmark requirement could very well lead to a false sense of security and
4 voter confusion, incorrectly suggesting to voters that as long as they drop off their ballot
5 at the post office by Election Day, it would be postmarked and counted, even though
6 voters “still have a delivery deadline that may still be hard to meet.” Atkeson Rprt. at
7 ¶ 92. And a postmark requirement would directly conflict with Arizona law that
8 requires “[t]he county recorder or other officer in charge of elections” to “supply printed
9 instructions to early voters” that include the following statement: “In order to be valid
10 and counted, the ballot and affidavit must be delivered to the office of the county
11 recorder or other officer in charge of elections or may be deposited at any polling place
12 in the county no later than 7:00 p.m. on election day.” See A.R.S. § 16–547(C).
13 Plaintiffs do not acknowledge the clear tension between their proposed rule and the
14 mandate of A.R.S. § 16–547(C). They have not joined the counties in this lawsuit and
15 do not seek a modification of A.R.S. § 16–547(C)—perhaps recognizing that it would
16 not be feasible to implement a postmark rule *and* require all county officials to re-print
17 instructions notifying voters of the new postmark rule, contrary to Arizona law.
18 Plaintiffs’ proposal would also necessitate substantive modifications to the Secretary’s
19 Publicity Pamphlet and the Citizens Clean Elections Commission’s Voter Guide, which
20 are sent to every household that has a registered voter. See Atkeson Rprt. at ¶¶ 62–63 &
21 Figures 1 & 2; Wilson Decl., Exhibit C. All of this is certain to lead to massive
22 confusion and *additional* communication problems—during a state of emergency when
23 communication is already difficult.

24 It is also unlikely that an entirely new postmark requirement—where none has
25 existed in Arizona’s history and when voters currently receive ballots with postage
26 prepaid—would be feasible for elections officials to be properly trained on and
27 implement in the next six months when deciding which ballots should be counted. See,
28 *e.g.*, *Coviello v. Knapp*, 91 A.D.3d 868, 869 (N.Y. App. 2012) (invalidating ballot

1 because “the date of the postmark cannot be ascertained”); *see also* Atkeson Rprt. at
2 ¶ 92 (“Data from Pima County showed that a large number of VBM ballots are returned
3 without or with an unreadable postmark”) Adding a postmark rule and changing the
4 established Election Day Deadline in an election year, and in the middle of a pandemic,
5 would cause chaos and confusion for the reasons discussed above, and would reduce
6 voter confidence that Arizona’s elections are fair. *See* Wilson Decl., Ex. B at ¶ 12.

7 In addition, Plaintiffs overlook important public interest implications of
8 enjoining the statute. Enjoining any state law, particularly a well-established and
9 generally applicable election law, has significant consequences. The State’s legislative
10 process is entitled to respect, and a state “suffers an irreparable injury whenever an
11 enactment of its people or their representatives is enjoined.” *Coal. v. Econ. Equity v.*
12 *Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also* *Virginian Ry. Co. v. Sys. Fed’n No.*
13 *40*, 300 U.S. 515, 602 (1937) (legislation “is in itself a declaration of the public
14 interest”).

15 All voters are eligible, without excuse, to receive an early vote that permits
16 voters to, in the comfort of their home, research the issues, review the information in the
17 pamphlets provided by the Arizona Citizen’s Clean Elections Commission and the
18 Secretary of State, and consult with any other people or groups they wish, then complete
19 their ballot, and return their ballots by Election Day so their votes can be counted. The
20 generally-applicable Election Day Deadline does not violate the Constitution. Plaintiffs
21 have not established that the balance of equities and public interest favor a preliminary
22 injunction, and COVID-19 does not alter this outcome.

23 IV. CONCLUSION

24 Plaintiffs have not demonstrated that the law or the facts clearly favor them to
25 warrant a mandatory injunction. Accordingly, the Court should deny Plaintiffs’ motion
26 for a preliminary injunction.

27 ...

28 ...

1 RESPECTFULLY SUBMITTED this 4th day of May, 2020.

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