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*Attorneys for Defendant Arizona Secretary
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Voto Latino, Inc., *et al*,
Plaintiffs,
v.
Katie Hobbs, in her official capacity as
Arizona Secretary of State,
Defendant..

Case No: 19-cv-05685-DWL

**ARIZONA SECRETARY OF STATE'S
EXPEDITED MOTION TO STAY
CONSIDERATION OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION OR IN THE
ALTERNATIVE AN EXTENSION OF
TIME**

1 Arizona Secretary of State Katie Hobbs (the “Secretary”) respectfully requests
 2 expedited review of the Secretary’s request to stay consideration of Plaintiffs’ Motion for
 3 Preliminary Injunction (“PI Motion”) until after the court issues a ruling on the
 4 Secretary’s Motion to Dismiss, which shall be refiled on or before March 20. As
 5 discussed below, a stay is warranted to preserve judicial and State resources.
 6 Additionally, undersigned counsel are preparing for a hearings in the U.S. District Court
 7 for the District of Arizona in another elections case on March 4–5, and yesterday a new
 8 hearing on March 10; the deadline to respond to the PI Motion is a mere three business
 9 days after the first hearing and due on the same day as the second hearing. Plaintiffs
 10 object to relief sought in this Motion. However, Plaintiffs filed their PI Motion three
 11 months after filing their initial complaint, and the PI Motion is accompanied by nearly
 12 400 pages of declarations and expert reports. The timing of Plaintiffs’ PI Motion belies
 13 any need for urgent relief. *See Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d
 14 1374, 1377 (9th Cir. 1985) (“Plaintiff’s long delay before seeking a preliminary
 injunction implies a lack of urgency and irreparable harm.”).

15 Given these circumstances, requiring a response in the traditional fourteen-day
 16 time frame would not give the Secretary adequate time to respond and would deprive this
 17 Court of the information necessary to make a determination on the merits of the
 18 preliminary injunction, should the Secretary’s Motion to Dismiss be denied.

19 BACKGROUND

20 Arizona has long allowed early and absentee voting in a variety of forms.
 21 Currently, early voting begins twenty-seven days before Election Day. A.R.S. § 16-
 22 542(C). Voters can choose to vote early in person or by mail, or on Election Day. Voters
 23 who are ill or disabled can request county elections officials come to them. A.R.S. § 16-
 24 549. Many voters in Arizona have signed up for the Permanent Early Voting List, which
 25 ensures they receive a ballot by mail for every election they are eligible to vote in. A.R.S.
 26 § 16-544(H). The parties agree that Arizona’s early voting program has been successful.
 27 Indeed, approximately 80% of Arizona’s voters elect to vote early. (Doc. No. 19, Second
 28 Amended Complaint ¶ 24.) Voters who receive a ballot by mail may return it by mail
 (postage pre-paid by the county) or at any designated drop-off location, give it to a family

1 member, caregiver, or someone who lives with them to return for them; or skip the line
 2 and drop it off at any polling place in their county. A.R.S. §§ 16-547(C), -551(C). The
 3 early ballot envelope includes the following notice: “In order to be valid and counted, the
 4 ballot and affidavit must be delivered to the office of the county recorder . . . or may be
 5 deposited at any polling place in the county no later than 7:00 p.m. on election day.”
 6 A.R.S. § 16-547(C). No matter how the ballot is cast, it must be in the hands of election
 7 officials before polls close by 7:00 pm on Election Day. A.R.S. §§ 16-547, -565.

8 Plaintiffs filed suit against the Secretary on November 26, 2019, alleging that
 9 Arizona’s law requiring mail-in ballots to be received by 7:00 p.m. on Election Day is
 10 unconstitutional. Counsel for the Secretary conferred with Plaintiffs’ counsel before
 11 filing a motion to dismiss. During this meet and confer, the Secretary’s counsel apprised
 12 Plaintiffs’ counsel about the substance of all the issues that would be raised in the
 13 anticipated Motion to Dismiss, including jurisdictional standing defects for the Plaintiffs—
 14 organizations without any members. Plaintiffs confirmed that they would not amend
 15 their First Amended Complaint to remedy the issues the Secretary raised, so the Secretary
 16 filed her Motion to Dismiss on February 3, 2020.

17 Plaintiffs then filed a Second Amended Complaint on February 24, with no
 18 objection from the Secretary. As part of the stipulation to file a Second Amended
 19 Complaint, the parties agreed that the Secretary would withdraw the Motion to Dismiss,
 20 and could re-file a “responsive pleading” on or before March 20 to respond to the
 21 amendments the Plaintiffs made. The next day, on February 25—after the Stipulated
 22 Motion to File a Second Amended Complaint was filed—Plaintiffs filed the PI Motion,
 23 which includes 32 exhibits, including two expert reports that rely upon analysis of a
 24 significant amount of underlying data, which the Secretary received on February 27. This
 25 Court then denied the Secretary’s Motion to Dismiss as moot and set a deadline of March
 26 20, to file a responsive pleading to Plaintiffs’ Second Amended Complaint. The Secretary
 27 intends to file a Motion to Dismiss by the March 20 deadline.

28 ANALYSIS

As an initial matter, Plaintiffs’ claims are tenuous and likely to be dismissed
 because requiring voters to return all ballots before the polls close on Election Day does

1 not violate the Constitution. *See Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D.
2 Fla. 2004) (holding that the requirement that ballots be received by 7:00 p.m. on Election
3 Day presents only a “light imposition on Plaintiffs’ right to vote” and is justified by the
4 State’s interest to ensure a fair and honest election and to count votes within a reasonable
5 time). Plaintiffs’ claims are based on their dissatisfaction with Arizona’s robust early
6 voting system, which is one of the most generous in the nation, contending that the
7 system does not go far enough to accommodate early voters. Plaintiffs argue that county
8 election officials should be required to count ballots that were sent on or before Election
9 Day but reach the county recorder five days *after* the polls close. This arbitrary deadline
10 expansion is simply not required by the Constitution. It is also unclear how exactly the
11 county elections officials—who are not parties to this lawsuit—would determine when
12 ballots were mailed, given that postage pre-paid mail is more often than not
13 unaccompanied by a postmark. In addition to questioning the merits of the Plaintiffs’
14 claims, the Secretary raised in her first Motion to Dismiss (and will raise again in her
15 forthcoming Motion to Dismiss) meritorious arguments regarding Plaintiffs’ standing and
16 that Plaintiffs’ requested relief is barred under the Eleventh Amendment.

17 If this case is dismissed, preliminary injunction briefing and a hearing would be
18 unnecessary. It would therefore preserve judicial and State resources to first determine
19 whether Plaintiffs have stated a claim for which relief can be granted prior to engaging in
20 the more complex (and more costly) inquiry into whether a preliminary injunction is
21 appropriate. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th
22 Cir. 1979) (holding that district courts can issue stays to promote efficient use of judicial
23 resources). Additionally, a preliminary injunction may only issue if Plaintiffs make a
24 “clear showing” that they are entitled to such an “extraordinary remedy.” *Winter v. Nat.*
25 *Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “Generally ‘the entry or continuation of
26 an injunction requires a hearing. Only when the facts are not in dispute, or when the
27 adverse party has waived its right to a hearing, can that significant procedural step be
28 eliminated.’” *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). The
Plaintiffs cannot demonstrate that they are entitled to this extraordinary remedy.

1 If the Secretary's renewed Motion to Dismiss is denied, the Secretary will likely
2 respond with her own expert report(s) to defend against the two lengthy expert reports
3 Plaintiffs submitted with the PI Motion. To prepare an adequate defense to the PI Motion
4 and the associated reports, the Secretary needs an opportunity to procure her own
5 expert(s), provide them with sufficient time to scrutinize the data, and reach their own
6 conclusions about the facts. The Secretary cannot accomplish this herculean task in the
7 traditional 14-day response time. As noted above, counsel for the Secretary is currently
8 preparing for a preliminary injunction hearing in another case. This hearing is scheduled
9 for March 4–5 and March 10, involves complex factual and legal issues, including expert
10 testimony. Accordingly, the Secretary requests that the Court adjust its docket in the
11 interest of fairness to the parties. *See Leyva*, 593 F.2d at 863.

12 In addition to sparing the resources of this Court, it is notable that the Secretary
13 does not have an unlimited litigation budget and should not be forced to hire an expert
14 witness when such expert testimony is very likely to ultimately be unnecessary to defend
15 Arizona law. The Secretary believes that this suit should easily be disposed of at the
16 motion to dismiss phase. If this case can be decided on a motion to dismiss without the
17 need for experts or further proceedings, then Arizona's taxpayers should not be required
18 to incur tens of thousands of dollars for expert analysis if the PI Motion is mooted by
19 dismissal.

20 Staying consideration of the motion for preliminary injunction would not prejudice
21 any alleged rights that Plaintiffs themselves have been in no hurry to vindicate until now.
22 *See Oakland Tribune, Inc.*, 762 F.2d at 1377 ('[T]he district court was not required to
23 issue a preliminary injunction against a practice which has continued unchallenged for
24 several years.'). The fourteen-day response time presumes a state of urgency to prevent
25 irreparable harm. There is no imminent irreparable harm about to befall Plaintiffs because
26 Arizona law requires all ballots, whether cast in person or by mail, to be received by
27 election officials before polls close on Election Day. Plaintiffs' delays in bringing this
28 suit, amending their complaint, and filing the PI Motion, confirm this fact.

Finally, Plaintiffs do not seek a continuance of the status quo, but ask this Court to
issue a mandatory injunction and order the Secretary to ensure that any ballot sent by

1 Election Day and received by county election officials up to five days after polls close is
 2 counted. In other words, not only do Plaintiffs ask this Court for extraordinary relief in a
 3 doubtful case, they seek this relief without considering the serious damage that may result
 4 to the election as a whole if their request is granted. “A State indisputably has a
 5 compelling interest in preserving the integrity of its election process.” *Eu v. San*
 6 *Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989). A dramatic and
 7 last-minute shift in elections procedures could result in delayed results, questions of
 8 election integrity and fairness, and would require the Secretary or counties to develop an
 9 ad hoc process to determine when ballots were mailed (to the extent that is possible) and
 10 add those to the ballots that are already in process. Injunctions that alter the status quo are
 11 “not granted unless extreme or very serious damage will result and are not issued in
 12 doubtful cases.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d
 13 873, 879 (9th Cir. 2009) (internal quotations and citations omitted). Because Plaintiffs’ PI
 14 Motion seeks a mandatory injunction—a very high bar—their PI Motion should be stayed
 pending the resolution of the Secretary’s forthcoming motion to dismiss.

15 **ALTERNATIVE RELIEF**

16 In the event this Court denies the Secretary’s request to stay consideration of
 17 Plaintiffs’ PI Motion until the Secretary’s forthcoming Motion to Dismiss is resolved, the
 18 Secretary requests that this Court extend the deadline to file a response to the PI Motion
 for forty-five days after the Motion to Dismiss is due, i.e., May 4, 2020.

19 **CONCLUSION**

20 For the reasons outlined in this Motion, the Court should stay the response
 21 deadline for Plaintiffs PI Motion until after the Motion to Dismiss is decided.
 22 Alternatively, the Court should grant the Secretary an extension to the response to
 23 Plaintiffs’ PI Motion until May 4, 2020.

24
 25 RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

26 Mark Brnovich
 27 Attorney General

28 /s/ Kara M. Karlson
 Kara M. Karlson

Assistant Attorney General
Attorney for Defendant
Secretary of State Katie Hobbs

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CERTIFICATE OF SERVICE

The foregoing was e-filed with the Clerk of the Federal Court for the District of Arizona using the CM/ECF System on March 3, 2020.

Copy emailed this same day to:

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