No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, et al.,
Plaintiffs-Appellants,
v.
KATIE HOBBS, in her official capacity as Arizona Secretary of State;
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendants-Appellees,
and
ARIZONA REPUBLICAN PARTY, et al.,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 2:16-CV-01065 (Rayes, J.)

DEFENDANT-APPELLEE ARIZONA ATTORNEY GENERAL MARK BRNOVICH'S MOTION UNDER CIRCUIT RULE 41 FOR A STAY OF THE MANDATE

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Dated: January 31, 2020

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Pursuant to Federal Rule of Appellate Procedure 41(d) and Circuit Rule 41-1, Mark Brnovich, in his official capacity as Arizona Attorney General, hereby moves to stay the Court's mandate in the above-captioned matter pending the filing and final disposition of a petition for a writ of certiorari seeking review of the Court's January 27, 2020 en banc opinion in the Supreme Court. This case presents a substantial question, and there is good cause for a stay. Fed. R. App. P. 41(d)(1). The petition will not "be frivolous or filed merely for delay," 9th Cir. R. 41-1, and should accordingly be granted.

INTRODUCTION

The Court should stay its mandate given the substantial questions presented, the history of this case, the timing of the en banc opinion in relation to impending Arizona elections (in which the first ballots will have gone out by tomorrow), and the other considerations that underscore the good cause for a stay at this time.

It bears repeating that when this Court issued an injunction against A.R.S. § 16-1005(H) (the "Act"), before the 2016 election, *see Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 370 (9th Cir. Nov. 4, 2016), the Supreme Court stayed that injunction with remarkable speed: within 48 hours—over a weekend—without noted dissent. *Arizona Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (Nov. 5, 2016) (mem.).

Since that time, the record has gotten far stronger for the State of Arizona. The State not only prevailed in a bench trial, but the well-publicized, absentee-vote scandal in North Carolina during the last national election cycle has proven that the risks of fraud that the Arizona Legislature was concerned about are not imagined, but real. The Act is thus on far stronger footing than in 2016. But, contrary to the Supreme Court's unanimous, expeditious stay, and the findings of the district court to the contrary, this Court again holds that the Act violates the Voting Rights Act.

The Supreme Court could easily disagree with the en banc majority, again. The Attorney General's arguments are thus certainly not "frivolous or filed merely for delay." 9th Cir. R. 41-1.

Moreover, issuance of the mandate may cause confusion and electoral chaos from the outset. The first ballots for Arizona's 2020 Presidential Preference Election begin going out no later than *tomorrow* (with additional ballots going out no later than February 19), and could start being voted and harvested as soon as they are received. And Arizona is scheduled to hold additional elections on May 19, August 4, and November 3, 2020. A stay of the mandate will permit orderly presentment to the Supreme Court of the substantial, certiorari-worthy issues here and avoid imminent voter confusion in the midst of ongoing elections.

For these reasons, the Attorney General respectfully seeks a stay of the mandate pending the filing and final disposition of a petition for a writ certiorari.

LEGAL STANDARD

Under Rule 41, "[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court," wherein the moving party "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). A stay "will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1; *see also* Advisory Note to Rule 41-1.

The standard for obtaining a stay is not exacting. "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989); *see also United States v. Pete*, 525 F.3d 844, 850 & n.9 (9th Cir. 2008) (explaining that it is "often the case" that this Court will stay its mandate "while [a party] s[eeks] certiorari from the Supreme Court"); *Campbell v. Wood*, 20 F.3d 1050, 1052 (9th Cir. 1994) (Reinhardt, J., Browning, J., and Tang, J., dissenting) ("[U]nless a claim is frivolous or made merely for the purpose of delay, it is ordinarily our obligation to grant a stay.").

ARGUMENT

I. THE FORTHCOMING PETITION FOR CERTIORARI WILL PRESENT A SUBSTANTIAL QUESTION TO THE SUPREME COURT

A. This Case Presents Issues Of Enormous Importance

As this Court has recognized by repeatedly granting en banc review in this action, this case presents issues of substantial importance. The majority opinion properly begins, "[t]he right to vote is the foundation of our democracy." Slip op. at 7. The dissenting judges similarly recognize that "[t]he right to vote is the most fundamental of our political rights and the basis for our representative democracy." *Id.* at 141 (Bybee, J., dissenting). As the Supreme Court has recognized, however, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The importance of this case is underscored by the recent election in North Carolina's Ninth Congressional District in 2018. There is very strong evidence that the general election there was nearly—and quite literally—stolen. *See* Dkts. 102-1, 102-2, 103. The candidate receiving the most recorded votes, Mark Harris, appears to have employed fraud through ballot harvesting to put himself over the top; the North Carolina State Board of Elections specifically found that there was "overwhelming evidence that a coordinated, unlawful, and substantially resourced

absentee ballot scheme operated during the 2018 General Election." *See* Dkt. 102-2 at 10.

As a result of this absentee ballot scheme, the Board refused to certify the election results. *Id.* at 5. It instead ordered a new election, which did not take place until 10 months later on September 10, 2019. *See id.* at 46. In the meantime, over 700,000 North Carolina residents were left without any representation in the U.S. House of Representatives.

Fraudulent ballot harvesting thus can—and probably has—left hundreds of thousands of voters disenfranchised. Preventing such harms is of paramount importance to the State of Arizona (and all other states). But this Court's en banc opinion denies Arizona the power to protect its citizens from the harms that voters in North Carolina suffered.

The en banc majority discounted this evidence from North Carolina because would-be Representative-Elect Harris was a *Republican*: twice stating that "fraud [was] perpetrated by a *Republican* political operative in North Carolina," and the "actions of the North Carolina *Republican* operative." Slip op. at 112 (emphasis added). In contrast, the majority recognized ballot harvesting was primarily conducted by Democrats in Arizona, while "'the Republican Party has not significantly engaged in ballot collection.'" *Id.* at 83; *accord id.* at 21–22. The Supreme Court could easily disagree with the majority's apparent view that the

only potential risk of ballot harvesting fraud arises from Republicans and not Democrats.

The majority also discounted the North Carolina evidence by reasoning that "No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona." Slip op. at 89. But the Supreme Court addressed a similar issue in *Crawford v. Marion Count. Election Board*, 553 U.S. 181 (2008). In that case, which considered a challenge to an Indiana voter ID law, there was "no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194. But the Supreme Court found sufficient "flagrant examples of such fraud in other parts of the country[.]" *Id.* at 195. It therefore upheld the Indiana law against constitutional challenge. The North Carolina 2018 election is similarly a "flagrant example[]" that permits other states to address the harms that their sister states have personally felt. Arizona need not wait for such harms to occur in-state before enacting reasonable regulations to combat them.

In addition to discounting the North Carolina evidence, the Court gave no weight to the Carter-Baker Commission on Federal Election Reform's recommendations, which the Act "follows precisely." Slip op. at 161 (Bybee, J., dissenting). But despite adhering closely to these bipartisan best practices, the majority holds that Arizona somehow acted with both discriminatory intent and imposed disparate racial impacts. That holding is astonishing and unprecedented.

President Carter and Secretary Baker are no racists, and neither is the Arizona Legislature.

Nor was Arizona alone in adopting the bipartisan Commission's recommendation—this Court's ballot-harvesting holding could have broad effects elsewhere. As the dissent notes, ten other states—including Nevada in this Circuit—have "substantially similar" laws that could easily be invalidated. *See* slip op. at 158 (Bybee, J., dissenting). Moreover, nine other states impose other regulations on ballot harvesting, including California in this Circuit. *Id.* at 159–60.

The issues presented by this Court's out-of-precinct holding are similarly important: 25 other states have similar laws, including Hawai'i, Montana, and Nevada in this Circuit, as well as American Samoa and the Northern Mariana Islands. *Id.* at 181–82 (Appendix B).

B. There Are Substantial Grounds For Disagreement And The Purpose Of This Motion Is Not Delay, As There Is At Least A Reasonable Probability Of Supreme Court Review Here

As discussed above, there are substantial grounds for disagreement with the majority's decision. Moreover, the Attorney General's position is supported by (1) the findings of the district court that conducted the bench trial, (2) the initial panel majority that sided with the State, (3) the four en banc judges in dissent, (4) Judge Watford's unwillingness to join the majority's holding that racial discrimination was a motivating factor leading to the enactment of H.B. 2023, and

(5) the Supreme Court's lightning-fast and unanimous stay of this Court's injunction in 2016.

This motion is motivated by profound disagreement with the en banc majority on the *merits*, not delay. The Attorney General is committed to seeking Supreme Court review of the en banc decision and will file a petition for a writ of certiorari in due course. And that forthcoming petition has at least a reasonable probability of being granted in light of the importance of the issues here, the nature of the Court's errors, and the following additional considerations: (1) the Supreme Court has never decided a VRA Section 2 results test case in the vote denial context, (2) VRA Section 2 vote denial claims are a growing part of the election litigation landscape, and (3) this is an election year for President of the United States in which substantial election-related litigation is already underway, including in cases with similarities to the present one.

II. THERE IS GOOD CAUSE FOR A STAY

Absent a stay of the mandate, there is substantial potential for voter confusion. Due to the yearlong delay between grant of en banc review and issuance of the Court's January 27, 2020 en banc decision, elections in Arizona are now ongoing and imminent and the potential for disruption, confusion, and electoral chaos if the mandate issues is substantial. Arizona's 2020 Presidential

Preference Election is scheduled for March 17, 2020.[1] Like the primaries in other early primary states, numerous Democratic Party candidates are competing in the 2020 Presidential Preference Election in Arizona. The first 2020 Presidential Preference Election ballots will be sent out to voters by *tomorrow*, February 1, with more ballots to follow in the coming weeks.[2]

Once ballots are received, voters can begin voting, and the extant ballots are subject to being harvested according to the en banc majority opinion. Issuance of the mandate here leaves nothing else for the district court to do as to ballot harvesting except enter an injunction or final judgment. Issuance of the mandate creates the possibility of an injunction or judgment in the middle of the 2020 Presidential Preference Election, or in close proximity to other elections scheduled for May 19, August 4, and November 3, 2020.[3]

As the Supreme Court has repeatedly recognized, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5. This Court's issuance of an injunction near the November 2016 general election has already resulted in a

[1] *March 17th, 2020 PPE Election*, Citizens Clean Elections Commission, https://www.azcleanelections.gov/arizona-elections/March-17-election (last visited Jan. 31, 2020).
[2] *Id.*
[3] *Id.*

Purcell-based stay in this very case. Moreover, *Purcell* itself was a unanimous, summary reversal of this Court enjoining another provision of Arizona law.

The Supreme Court's prior stay and summary reversal under/in *Purcell* underscore that a stay of the mandate is warranted here. Absent such a stay, the potential for an injunction or judgment to issue "just weeks before"—or indeed *during*—an election is unacceptably high. *Purcell*, 549 U.S. at 4.

* * *

The risk of electoral fraud through ballot harvesting is real, as the voters of North Carolina know all too well. As recently as the last federal election cycle, an election for the U.S. House of Representatives was very nearly stolen by the very practice that the Act prohibits. That theft was only prevented by the North Carolina State Board of Elections vacating the election, leaving over 700,000 North Carolinians without representation in the U.S. House of Representatives for over eight months. Combatting such risks is not discriminatory in effect, nor was the Act enacted with discriminatory intent—as the district court properly held after a full-blown trial.

Given the circumstances of this case and the timing of the Court's en banc opinion, the Court should heed the Supreme Court's prior directives in connection with election cases both in Arizona and elsewhere, stay the mandate, and let the

Attorney General press forward with a petition for certiorari in the Supreme Court on the important, certiorari-worthy issues presented here.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court stay its mandate.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to participants in the case who are registered CM/ECF users.

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