IN THE SUPREME COURT

STATE OF ARIZONA

MARICOPA COUNTY RECORDER STEPHEN RICHER, in his official capacity, Petitioner, v. ARIZONA SECRETARY OF STATE ADRIAN FONTES, in his official capacity, Respondent.	No. CV-24-0221-SA

RESPONSE OF PROPOSED INTERVENORS ARIZONA STATE SENATE PRESIDENT WARREN PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA TO THE EMERGENCY PETITION FOR SPECIAL ACTION

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Warren Petersen, in his official capacity as the President of the Arizona State Senate, and Ben Toma, in his official capacity as the Speaker of the Arizona House of Representatives, respectfully submit this brief in opposition to the Maricopa County Recorder's petition for special action relief and in support of the Secretary of State.

INTRODUCTION

Arizona's constitutional government is constructed on the premise that only "citizen[s] of the United States" may participate in its elections. Ariz. Const. art. VII, § 2(A). Two decades ago, the people of Arizona became the first in the nation to require documentary proof of citizenship ("DPOC") as a condition of registering to vote. *See* A.R.S. § 16-166(F). In recent years, the Legislature has fortified that mandate and supplemented it with rigorous list maintenance protocols tailored to identifying and, if appropriate, removing from the rolls individuals who are not U.S. citizens or Arizona residents. *See* 2022 Ariz. Laws ch. 99, 370. Persons who decline to provide DPOC may register to vote only in federal elections by using the federal form promulgated by the Election Assistance Commission, *see Arizona Inter Tribal Council of Arizona*, 570 U.S. 1 (2013). But DPOC is a mandatory field on the Arizona-specific state voter registration form, *see* A.R.S. § 16-121.01(C), and **every** individual who has registered to vote after January 24, 2005 must provide it if they wish to cast ballots in state and local races.

The Speaker and President accordingly agree unreservedly that the approximately 97,688 individuals who were erroneously registered as full-ballot voters despite not having provided DPOC must cure the deficiency to avoid redesignation as "federal-only" voters. The question confronting the Court, however, is—having been affirmatively induced by government officials to believe they were qualified, full-ballot voters—***when*** they must do so.

Candidly, Arizona statutes supply no clear answer. In the realm of voter registration, as in many other contexts, "[o]fficial acts of public officers are presumed to be correct and legal," *Swartz v. Superior Court*, 105 Ariz. 404, 406 (1970), and the Legislature has not preemptively devised specific statutory mechanisms for correcting their mistakes. The Speaker and President submit, however, that a holistic assessment of the relevant statutes, leavened by considerations of equity and due process, counsel the following remedy: the affected voters should be provided written notice of the omission in their registration record, instructions for resolving it, and a postage prepaid preaddressed return envelope for submitting DPOC. If they do not provide a sufficient response within 35 days, they should be redesignated as federal-only voters, but may thereafter reinstate their full ballot status at any time by providing DPOC. The Court should, however, defer implementation of this remedy until after the November 5, 2024 general election; in

the interim, the affected voters should be issued full (*i.e.*, not federal-only) ballots, if they choose to vote.

JURISDICTION

The Speaker and President concur with the named parties that the Court should exercise jurisdiction over Recorder Richer's special action petition. The Arizona Constitution confers on this Court "original jurisdiction of . . . mandamus, injunction, and other extraordinary writs to state officers." Ariz. Const. art. VI, § 5(1). Although the Court understandably has exercised this jurisdiction only sparingly, it nevertheless has employed it to address legal issues that "require[] prompt resolution and are of first impression and statewide importance." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351, ¶ 14 (2012); *see also Cronin v. Sheldon*, 195 Ariz. 531, 533, ¶ 3 (1999) (accepting original special action jurisdiction where "the cases at bar raise an issue of first impression . . . and the question of constitutionality now demands consistent, statewide application"); *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 288 (1992) (accepting special action jurisdiction "to serve the public interest," even though plaintiff could have initiated the proceedings in the superior court).

The necessity of legal certainty carries particular salience in the context of election administration. *See Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 587 (1994) (emphasizing that "procedures 'leading up to

an election cannot be questioned' after the vote but 'must be challenged before the election is held.'"). Recognizing that an *ex ante* resolution of significant election law disputes is critical to instilling public confidence in electoral integrity, this Court has invoked its jurisdiction to settle such questions expeditiously. *See Arizonans for Second Chances, Rehabilitation & Public Safety v. Hobbs*, 249 Ariz. 396, 404–05, ¶ 20 (2020) (exercising original special action jurisdiction to address "a legal issue of constitutional, statewide importance" concerning the Secretary's legal duties, where "there was a need for immediate, final relief"); *see also Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61, ¶ 2 (2020) (granting expedited pre-election review and relief in challenge to county recorder's illegal issuance of ballot instructions). The Court accordingly should accept jurisdiction.

ARGUMENT

I. The County Recorders Have No Statutory Authority to Summarily Relegate Existing Full Ballot Voters to Federal-Only Status

Recorder Richer's preferred course of action—to wit, summarily move the affected voters to federal-only status "unless and until the voters provide DPOC," Pet. at 21—is unviable because no Arizona statute empowers him to take such action in these circumstances. "The Recorder's authority is limited to those powers expressly or impliedly delegated to him by the state constitution or statutes." *Ariz. Pub. Integrity All.*, 250 Ariz. at 62, at ¶ 14. The petition musters no constitutional or statutory predicate for the notion that the Recorder may, by fiat on the eve of an

election, reassign to federal-only status a voter who previously submitted a facially complete registration that the Recorder had duly accepted and processed as a full ballot registration. Accordingly, even if the Court declines to definitively or comprehensively adjudicate the merits of the petition, it should, at the very least, confirm that the county recorders may not unilaterally fashion their own, extra-statutory bespoke remedies.

II. The Affected Voters Must Be Provided Adequate Notice and an Opportunity to Provide DPOC Before Their Registration Status Is Changed

More broadly, it is concededly true that no statute supplies an express answer to the question at hand—namely, what to do when a voter did not provide DPOC but her registration nevertheless was long ago processed and accepted as a full ballot registration? The dilemma lies at the crossroads of several statutes, although it narrowly eludes any single one of them. First, A.R.S. § 16-134(B) provides that if a voter submits an incomplete registration form, he will not be registered but may cure the deficiency at any time before 7:00 p.m., on Election Day. But—crucially—in that scenario, the county recorder "shall notify the applicant [of the defect] within ten business days of receipt of the registration form." *Id.* Here, the county recorders undisputedly did not convey the requisite notice; indeed, most, if not all, the affected voters submitted their registrations years ago and have voted full ballots in numerous elections. Second, A.R.S. § 16-165 requires the county recorders to conduct various

list maintenance programs—by, for example, collecting data from juror questionnaires, the Arizona Department of Administration, and other reliable databases—to identify and contact currently registered voters who appear not to be U.S. citizens or Arizona residents. Here, however, there is no affirmative indication that any of the affected voters actually are non-citizens. Finally, A.R.S. §§ 16-542 and 16-544 allow any qualified elector to receive and cast an early ballot at any time during the 27 days preceding an election. Implicit in these statutes is a promise that a registered, full ballot voter may obtain and cast a full ballot during this period and that, if the ballot is properly completed and timely submitted, it will be tabulated in its entirety.

When, as here, an interpretive query rests at the confluence of multiple related statutes, they should be "construed together . . . as though they constituted one law," *State ex rel. DES v. Pandola*, 243 Ariz. 418, 419, ¶ 6 (2018), and the Court must, to the extent possible, "give effect to all of the provisions involved." *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017). In that vein, the Speaker and President believe that A.R.S. § 16-165 offers a template for effectuating Arizona's DPOC requirement while respecting the imperative of fair notice and the affected voters' justifiable expectation—created by government actors' own mistakes—that they may vote full ballots in this election.

A.R.S. § 16-165 generally provides that if a county recorder receives information that casts doubt on a registered voter's citizenship status, the recorder must alert the voter in writing, with an easy means of replying (*e.g.*, a preaddressed, stamped envelope), and afford her 35 days in which to respond. *See* A.R.S. § 16-165(A)(9)(b), (A)(10). If she fails to do so, the registration ordinarily would be canceled, although, in the current circumstances, all parties presumably agree that redesignation to federal-only status would be the appropriate recourse. And the voter could, at any time thereafter, reattain full ballot status by providing sufficient DPOC. The Speaker and President believe that this procedure provides a statutorily sound and substantively fair method of allowing the affected voters to secure compliance with Arizona's DPOC requirement.

III. The Court Should Defer the Implementation of Any Remedy Until After the 2024 General Election

Even if the question of remedy is resolved, the problem of timing remains. Any reasonable notice and cure period inevitably would overlap with the statutory early voting window, hence engendering the logistically formidable problem of determining which affected voters can obtain which ballot style and when.

Here again, no particular statute furnishes an obvious solution. But embedded in the Court's equitable powers is considerable discretion. *See generally Brewer v. Burns*, 222 Ariz. 234, 242, ¶ 41 (2009) (noting that, even in the mandamus context, courts "retain discretion to determine what relief, if any, should be granted");

Armory Park Neighborhood Ass'n. v. Episcopal Cmty. Servs. in Ariz., 148 Ariz. 1, 8 (1985) ("The equitable power of the judiciary exists independent of statute."). At least two compelling considerations underscore the necessity of deferring any remedial actions until after the November 5, 2024 general election.

A. Last-Minute Changes to Election Administration Risk Causing Mistakes and Uncertainty

Abrupt, eleventh-hour changes to the electoral infrastructure breed errors and pullulate confusion. This dynamic is sometimes coined the "*Purcell* principle," a reference to the reasoning expounded in *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("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."). Preliminarily, *Purcell* does not directly govern here. It encapsulates a maxim of federalism: federal courts should refrain from dictating state election procedures in temporal proximity to an election. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (federal courts should not "swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent"); *see also Republican Nat'l. Comm. v. Mi Familia Vota*, -- S. Ct. --, 2024 WL 3893996 (Aug. 22, 2024) (staying recent district court injunction of Arizona voter registration law enacted in 2022). Further, this case presents not a

change to an election "rule," but instead the (highly unusual) question of how to remedy government actors' failure to timely enforce a longstanding rule.

That said, *Purcell* offers instructive insights that complement this Court's repeated admonition—often expressed in terms of laches—that "last-minute election challenges . . . prejudice not only defendants but the entire system." *Mathieu v. Mahoney*, 174 Ariz. 456, 461 (1993); *see also Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15 (1998). While this case lies somewhere in the interstices of laches and *Purcell*, it squarely implicates the rationales of both. The exigent nature of this dispute may not be attributable to conscious delay on the part of any party now before the Court. But it certainly was precipitated by the failure of some government officials somewhere to timely identify and remediate the database flaw that caused the affected voters to be misclassified.

And the prejudice to those voters posed by any pre-election change to their eligibility is obvious and palpable. It bears emphasis that these individuals are not relying in merely some generalized way on the continued existence of various statutory processes or procedures. Rather, they were affirmatively induced by elections officials to believe that they had properly and fully registered to vote, and in many cases have routinely obtained and cast full ballots without incident year after year, in election after election. "Fundamental fairness is the *sine qua non* of the laches doctrine." *Harris*, 193 Ariz. at 414, ¶ 24. Ambushing these voters with

the revelation—just weeks before the election and possibly after some of them had already requested an early ballot—that they are not, in fact, eligible to vote in Arizona elections after all is dissonant with any recognizable conception of that term.

The disruptive potentialities of any pre-election change in these voters' registration status require little imagination. As noted above, any cure period during which the affected voters could provide DPOC would coincide with early voting, which begins on October 9. This, in turn, would spawn multiple possible permutations of curing timelines and balloting options. For example, an affected voter might provide DPOC after having been issued a federal-only early ballot, at which point he could either cast it and forfeit his right to vote a full ballot or instead surrender it unvoted in exchange for a full ballot. This complex decision tree would be even more opaque to a voter whose DPOC submission crosses in the mail with an issued federal-only ballot. These convoluted and variable scenarios portend exactly "the risk of voter confusion and the unfairness of unexpected administrative burdens," *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 897 (6th Cir. 2024), that inform both the *Purcell* principle and this Court's laches doctrine. *See also Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 925 (D. Ariz. 2016) (laches is implicated when a "delay has prejudiced the administration of justice").

B. A Pre-Election Remedy Would Implicate Significant Procedural Due Process Concerns

For the county recorders to abruptly reassign the affected voters to a federal-only status would jeopardize—if not violate—these individuals' procedural due process rights. *See* U.S. Const. art. XIV, § 1; Ariz. Const. art. II, § 4. As a threshold matter, the franchise is a liberty interest that the federal and Arizona constitutions protect. *See In re Matter of Wood*, 551 P.3d 1163, 1169, ¶ 15 (Ariz. App. 2024) (adjudicating procedural due process challenge to voting restriction); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) ("Because voting is a fundamental right, the right to vote is a 'liberty' interest which may not be confiscated without due process."); *McClung v. Bennett*, 225 Ariz. 154, 156, ¶ 8 (2010) (citing candidates' due process interests in eligibility for the ballot).

It is worth pausing here to recognize that procedural due process occupies a narrow plane in voting rights litigation. Most courts have (correctly) held that due process challenges to an election statute or regulation are subsumed into the so-called *Anderson-Burdick* standard, an Equal Protection Clause doctrine that weighs the relative burdens and state interests at stake. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021); *Wood*, 551 P.3d at 1169, ¶ 16.

But two highly unique attributes of this dispute produce a classic procedural due process problem. First, the potential deprivation of the affected voters' liberty interest derives not from the application of any statute—all parties seemingly agree

that the DPOC requirement itself is valid and enforceable—but rather from public officials' ***failure*** to timely and consistently implement it. Second, the affected voters' incorrect registration status is attributable entirely to the actions or omissions of the government—not the voters. *See Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020) (contrasting the "failure to sign one's ballot," which "is entirely within the voter's control" with "the prospect that a polling official might subjectively find a ballot signature not to match a registration signature"); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) ("To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair" for due process purposes); *Democratic Executive Comm. of Fla. v. Lee*, 915 F.3d 1312, 1324–25 (11th Cir. 2019) ("It is one thing to fault a voter if she fails to follow instructions . . . But it is quite another to blame a voter when she may have done nothing wrong and instead may have simply had the bad luck to have had her ballot reviewed by a particularly strict (and not formally trained) judge of signatures, and then to not have been notified of the problem until it was too late to do anything about it." (citations omitted)).

This constellation of circumstances accordingly renders the traditional procedural due process framework an appropriate reference point. Under that rubric, courts evaluate "(1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if

any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211, ¶ 20 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Recorder Richer's proposal is lacking along all three metrics.

First, the "interest" at stake is paramount; "voting rights . . . are generally considered fundamental rights." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595, ¶ 20 n.7 (2009); Ariz. Const. art. II, § 21 (recognizing the "free exercise of the right of suffrage").

Second, the summary and last-minute transfer of these voters to the federal-only list—even if coupled with a truncated pre-election cure period—presents substantial risks of wrongful disenfranchisement born of confusion or paperwork errors. As noted above, temporally overlaying a cure window on the early voting period multiplies the possible permutations of voter classifications and ballot options. Worse yet, the affected voters' status may mutate during the voting period; some may, by casting a federal-only early ballot, lose their ability to vote in state and local races, even if they provide DPOC before Election Day. *See Krieger v. City of Peoria*, 2014 WL 4187500, at *5 (D. Ariz. Aug. 22, 2014) (issuance of new ballot, after some voters had already received and cast prior, incomplete versions of the same ballot, produced "fundamental unfairness"); *Martin v. Kemp*, 341 F. Supp. 3d

1326, 1339 (N.D. Ga. 2018) (finding procedural due process problem where "the existing [ballot] cure option is illusory"); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 229 (M.D.N.C. 2020) (finding valid due process claim even though "the risk of an erroneous deprivation is by no means enormous"). And, with due respect to Maricopa County, it has not proven itself a paragon of highly competent election administration in recent years.

Third, the State's unquestionably important interest in verifying the affected voters' citizenship status can be advanced by implementing notice and cure processes promptly after the November election. Indeed, post-election remedies would ***avoid*** the administrative burdens that otherwise would result from hurriedly crafting and enforcing a registration curing protocol concomitantly with active voting. *See Martin*, 341 F. Supp. 3d at 1339 (finding that alternative proposed procedures would "impose a minimal burden on Defendants").

The Court need not conclusively find that Recorder Richer's proposal would, in fact, result in the denial of any affected voter's procedural due process rights. Rather, the significant risk that it could do so reinforces that the Court should use its discretion to defer the implementation of any remedy until after November 5. *Cf. State v. Gomez*, 212 Ariz. 55, 60, ¶ 28 (2006) (courts "construe statutes, when possible, to avoid constitutional difficulties").

IV. Maricopa County's Proposal Would Exacerbate—Not Solve—Equal Protection Concerns

Finally, Recorder Richer advances the curious reasoning that abruptly redesignating the affected voters to federal-only status is somehow necessary to obviate a violation of the federal Equal Protection Clause or the Arizona Constitution's Equal Privileges and Immunities Clause. *See* Pet. at 19. This fundamentally inverts the analysis. Similarly situated persons—*i.e.*, individuals who have submitted registrations after January 24, 2005 without compliant DPOC—were entitled to (and presumably did) receive prompt notification from the county recorder of the deficiency within ten business days, thereby affording them ample time to remediate the omission before an election. *See* A.R.S. § 16-134(B). A subset of that class—namely, the 97,688 voters affected by the misclassification of ADOT data—undisputedly were denied this timely notice. *See Waltz Healing Ctr. v. Ariz. Dept. of Health Servs.*, 245 Ariz. 610, 616, ¶ 24 (App. 2018) ("To establish an equal protection violation, a party must establish [as a threshold matter] that it was treated differently than those who are similarly situated."). To the extent this case implicates equal protection concerns, summarily casting this subclass of voters off the state and local registration rolls on the eve of a national election will assuredly aggravate—not ameliorate—them.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction but deny the relief sought. A notice and cure procedure that requires the affected voters to provide DPOC as a condition of maintaining full ballot status must and should be implemented immediately after the November 5, 2024 general election. But any remedy that alters the registration status of these individuals prior to the election is neither mandated by Arizona statutes nor comports with precepts of fairness, consistency, and due process.

RESPECTFULLY SUBMITTED this 18th day of September, 2024.

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