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6 *Attorney for Coconino County*

7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 The Arizona Democratic Party; The Democratic
National Committee; DSCC

10 Plaintiffs,

11 v.

12 Katie Hobbs, in her official capacity as Secretary of
13 State for the State of Arizona; Edison Wauneka, in his
official capacity as Apache County Recorder; David
14 Stevens, in his official capacity as Cochise County
Recorder; Patty Hansen, in her official capacity as
15 Coconino County Recorder; Sadie Jo Bingham, in her
official capacity as Gila County Recorder; Wendy
16 John, in her official capacity as Graham County
Recorder; Sharie Miheiro, in her official capacity as
17 Greenlee County Recorder; Richard Garcia, in his
official capacity as La Paz County Recorder; Adrian
18 Fontes, in his official capacity as Maricopa County
Recorder; Kristi Blair, in her official capacity as
19 Mohave County Recorder; Michael Sample, in his
official capacity as Navajo County Recorder; F. Ann
20 Rodriguez, in her official capacity as Pima County
Recorder; Virginia Ross, in her official capacity as

No. CV-20-01143-PHX-DLR

**FIRST AMENDED
RESPONSE OF THE
COCONINO, NAVAJO, AND
APACHE COUNTY
RECORDS TO PLAINTIFFS'
MOTION FOR
PRELIMINARY AND
PERMANENT INJUNCTION**

*(Assigned to the Honorable
Douglas L. Rayes)*

1 Pinal County Recorder; Susanne Sainz, in her official
2 capacity as Santa Cruz County Recorder; Leslie
3 Hoffman, in her official capacity as Yavapai County
Recorder; and Robyn Pouquette, in her official
capacity as Yuma County Recorder,

4 Defendants.

5
6 **INTRODUCTION**

7 The Apache, Coconino, and Navajo County Recorders hereby file their brief to
8 inform the Court of their support of a cure period for unsigned early ballots consistent
9 with that requested by the Plaintiffs in this case. The reason for that support is that the
10 recorders of all three counties, along with the Arizona Secretary of State, previously
11 made commitments to the Navajo Nation to support such a cure period for unsigned early
12 ballots in settling previous litigation approved by this Court. To walk away from those
13 commitments would be disrespectful to our tribal partners.

14 **BACKGROUND OF NAVAJO NATION V. REAGAN**

15 Shortly after the general election in November of 2018, the Navajo Nation filed a
16 lawsuit in Arizona Federal District Court against the Arizona Secretary of State, and the
17 Recorders and Election Directors of Apache, Coconino, and Navajo Counties (Navajo
18 Nation v. Hobbs, CV-18-08329-PCT-DWL). The Complaint specifically included a
19 demand for preliminary and permanent injunctive relief to include allowing Tribal
20 Members whose mail-in ballots were rejected for a lack of signature the opportunity to
21 remedy that error. The “cure period” proposed by the Navajo Nation to correct those
22 deficient mail-in ballots was similar to the cure period allowed for remedying issues
23 regarding insufficient identification presented at the polls. See generally, *A.R.S. § 16-579(A)(2)*. The lawsuit also alleged in its Complaint that the counties’ and the State’s

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1 actions regarding voter registration, voter education, and early voting were insufficient as
2 they applied to residents of the Navajo Nation and hindered the ability of Navajo Tribal
3 Members to effectively participate in the political process. Because a significant portion
4 of Navajo Tribal Members speak only Navajo, the Navajo Nation attributed in its
5 Amended Complaint the failure of some tribal members to sign their early ballot
6 envelope to the fact that there is no Navajo language translation of the early ballot
7 instructions.

7 The State and each County defendant conducted settlement discussions with the
8 Nation through early 2019. At that time, the Elections Manual in effect was the 2014
9 Manual, which provided no direction at all as to how Elections officials might provide
10 voters who had failed to sign their early ballots an opportunity to cure their errors. Nor
11 did the 2014 Manual prohibit officials from providing that opportunity.

11 All Arizona counties had also faced litigation earlier during the 2018 election
12 regarding a “cure” period for early ballots submitted with signatures that did not appear
13 to match those on the voters’ registration records.¹ As the 2014 Elections Manual also did
14 not provide direction on that matter, the fifteen counties of the State varied in their
15 procedures. That litigation resulted in all parties agreeing to a uniform procedure in
16 which election officials would take efforts to contact voters with “mismatched”
17 signatures and allow them the opportunity to affirm their ballot consistent with the period
18 provided for voters who had failed to present necessary identification when voting at the
19 polling places. That Agreement was silent regarding unsigned early ballots.

19 The State and the County defendants each ultimately settled with the Nation
20 through separate and distinct settlement agreements, approved by, respectively, the
21 Secretary of State, the Attorney General’s Office, and the Apache, Coconino, and Navajo

21 ¹ Maricopa County Republican Party v. Reagan et. al., Maricopa County Superior Court, Case No. CV 2018-013963.

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1 County Boards of Supervisors, and County Attorneys Offices. Those settlement
2 agreements, attached as **Exhibit A to A-3**, are unique to each defendant. Generally, all
3 defendants agreed to support changes to the Elections Manual to allow for a cure process
4 for “unsigned earlies.” In the case of the county defendants, each agreed, even if the
5 Manual remained silent, to treat unsigned ballots just as they treat mismatched signature
6 ballots—by providing to the voter a notice of their ballot’s deficiency and allowing them
7 an opportunity to correct that deficiency. The Agreement signed by the Secretary of
8 State and approved by two representatives of the Attorney General’s Office, specifically
9 provided that:

The Secretary shall cause language to be included in the next Draft
Elections Procedures Manual, which will be sent to the Governor and
Attorney General for their approval as required by A.R.S. § 16-452, that
specifies that voters who fail to sign their early ballot affidavits (“missing
signatures”) shall be afforded the same opportunity to cure their signature
deficiency as that afforded to voters whose early ballot affidavit signatures
do not match their signature in the Voter Registration Database
 (“inconsistent signatures”).

THE FIGHT OVER THE ELECTIONS PROCEDURES MANUAL

14 When Secretary Hobbs included language consistent with the settlement
15 agreements in the Navajo Nation case, it was blocked by the same Arizona Attorney
16 General’s Office that had approved the settlement in the Navajo Nation case, despite no
17 change in leadership in that office. The reasons set forth by the Attorney General’s
18 office, in a tracking spreadsheet that circulated between the AG’s Office and the
19 Secretary, asserted that the provision allowing a cure period for unsigned earlies would
20 violate *A.R.S. §§ 16-548(A) ARS 16-552(B)* as well as the statutory intent and legislative
21 history of *A.R.S. § 16-550(A)* that tracking spreadsheet is attached as **Exhibit B**. The
22 Attorney General’s Office further commented that the voter:
23

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1 “[S]hall make and sign the affidavit. Ballot affidavit signature must be
2 sufficient for the vote to be allowed. Curing the ballot contained within an
3 unsigned envelope is not possible, as the voter cannot affirm the ballot contained
4 therein is THEIR actual ballot. New ballot must be issued and received before the
close of elections. New early ballot may be mailed, time permitting, or
on Election Day a provisional ballot may be cast.

5 In response, the Secretary replied as follows:

6 We disagree with AGO's statutory interpretation, based on legal advice from the
7 AGO attorneys who represented our office in the NN lawsuit. Under no
8 circumstance would an early ballot be “allowed” or counted if it does not have a
9 signature. All the EPM does is specify the deadline for curing a ballot with a
10 missing signature - i.e. for the voter to provide the missing signature. This
11 deadline does not conflict with any statutory provision as statute is silent on this
12 issue. Filling in this gap is within the authority of the SOS under 16-452(A),
13 which specifically requires [sic] that the EPM shall provide uniform procedures for
14 early voting and for the counting and tabulation of ballots. Further, AGO is wrong
15 in the factual statement that curing the ballot contained in an unsigned envelope is
16 not possible. It is possible - counties are able to determine the voter's identity
17 based on the affidavit envelope even if it's not signed - that's how they're able to
18 contact the voter to notify them of the issue.

19 In the end, the following language received the approval of the Secretary, the Governor,
20 and the Attorney General regarding “unsigned earlyies”:

21 If the early ballot affidavit is not signed, the County Recorder shall not count the
22 ballot. The County Recorder shall then make a reasonable and meaningful
23 attempt to contact the voter via mail, phone, text message, and/or email, to notify
the voter the affidavit was not signed and explain to the voter how they may cure
the missing signature or cast a replacement ballot before 7:00pm on Election Day.

See 2019 Elections Procedure Manual, page 69. Interestingly, the Attorney General’s
Office and Governor approved the curing of unsigned early ballots in the manual, despite
there being a lack of specific statutory authority allowing it other than the Secretary’s
statutory authority to implement uniform rules in the Manual for tabulating ballots under

1 A.R.S. § 16-452(A). If Attorney General’s Office believes sufficient authority exists for
2 curing unsigned early ballots at all, there is no logical reason to believe that the cure
3 period cannot extend to a period similar for that of mismatched signatures on early
4 ballots.

5
6 **CONCLUSION**

7 Due to the requirements of brevity, the Recorders of the three counties have not
8 outlined the long history of federal and state governments failing to live up to the terms
9 of the agreements and treaties they have made with Native Americans in the past. Such
10 an endeavor would more appropriately take book form. However, it suffices to say that
11 the Navajo Nation reasonably believed that, having received commitments from the
12 Secretary and her representatives from the Attorney General’s Office, as well as the three
13 County Recorders, that provision would be made for a five day cure period for unsigned
14 early ballots in the 2019 Elections Procedures Manual. That clearly failed to happen due
15 to resistance from the Attorney General’s Office.

16 For their part, the County Recorders of Apache, Coconino, and Navajo County
17 intend to honor their agreement with the Navajo Nation. As such, they oppose the State’s
18 effort to block the relief requested by the Plaintiffs in this matter.
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DATED this 05 day of August, 2020.

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Coconino County Attorney

/s/ Rose Winkeler

Rose Winkeler
Deputy County Attorney

BRAD CARLYON
Navajo County Attorney

/s/ Jason S. Moore (With permission)

Jason S. Moore
Deputy County Attorney

MICHAEL B. WHITING
Apache County Attorney

/s/ Joseph D. Young (With permission)

Joseph D. Young
Deputy County Attorney

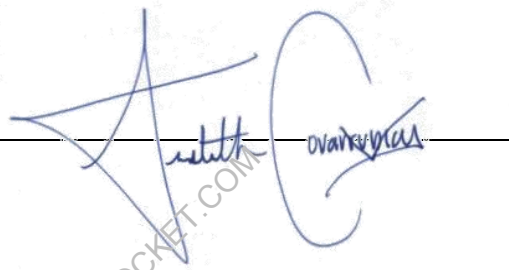
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CERTIFICATE OF SERVICE

I hereby certify that on the 05 day of August, 2020, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

By: 

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