ARIZONA SUPREME COURT

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

ARIZONA SECRETARY OF STATE ADRIAN FONTES' RESPONSE TO EMERGENCY PETITION FOR SPECIAL ACTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

This is a case about an unintentional error and whether, as a matter of law, that unintentional error should disenfranchise tens of thousands of Arizona voters for reasons having absolutely nothing to do with them and without any actual proof they are ineligible to vote a full ballot. "To err is human …." *In re Zussman*, 86 Ariz. 272, 275 (1959) (cleaned up). But to deprive voters of the franchise, when there is no actual proof they should be so deprived, is undemocratic, unconstitutional, and must be avoided at all costs.

Adrian Fontes, the Arizona Secretary of State (the "Secretary"), agrees with Stephen Richer, the Maricopa County Recorder (the "Recorder"), that this special action presents issues of statewide importance over which this Court should exercise jurisdiction. There are no material factual issues in dispute here. Indeed, the parties agree both to the operative facts and that the issues presented, in light of those facts, are purely legal and warrant this Court's review.

But the Secretary respectfully disagrees with the Recorder regarding the appropriate legal remedy. There are tens of thousands of voters (the "Affected Voters"), through no fault of their own, potentially affected by what amounts to an administrative coding error. The

Secretary believes the Affected Voters deserve to vote a full ballot in the 2024 General Election, and exercise their right to vote on all federal and state matters on the ballot. Indeed, the number of local races across Arizona, alone, are manifold. *See* Secretary's Appendix at No. 1 (APPX003-004).

The Recorder believes, in good faith and well-intentioned, that the law compels a different result. He asks this Court to allow him, and all other county recorders, to downgrade the Affected Voters to "federal-only" voters, and place the burden *on them* – in the midst of an election, after a primary election, and in some cases after early ballots will have been mailed – to provide satisfactory evidence of documentary proof of citizenship ("DPOC") *before* being permitted to vote a full ballot in the 2024 General Election. And the Recorder wants this Court to endorse this remedy, despite (1) the Affected Voters having been classified as DPOC-compliant voters until now (some for decades), and (2) there being *no proof* that each Affected Voter, in fact, is actually not a citizen entitled to vote a full ballot.

This Court should reject the Recorder's interpretation of the law, and order that the Affected Voters be permitted to vote a full ballot, for several reasons – any one of which, alone, will suffice.

First, the Recorder's proposed remedy, at this juncture and in the midst of the 2024 General Election, will cause chaos, uncertainty, and confusion. This must be avoided. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Second, the Recorder's interpretation of the law functionally violates the National Voter Registration Act's ("NVRA") prohibition against taking action to systematically remove the names of ineligible voters from the official lists of eligible voters within 90 days of a federal election. *See* 52 U.S.C. § 20507(c)(2)(A).

Third, the Recorder's proposed remedy has no statutory basis, and this Court is constrained from creating, through judicial fiat, a statutory remedy where one does not otherwise exist.

Fourth, fashioning a remedy in the midst of an election that places the burden on voters already technically deemed DPOC-compliant, *who have been permitted to vote a full ballot in prior elections*, that requires those voters to scramble to prove they actually have satisfactory evidence

of DPOC unconstitutionally interferes with their right to vote. *See, e.g.*, *In re Wood*, 551 P.3d 1163, 1171 ¶ 24 (App. 2024) (due process requires a petitioner to make a proper evidentiary showing before a court that a person lacks the capacity to vote "before terminating a person's fundamental right to vote."); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406 at *47 (Feb. 29, 2024) (explaining the legal framework for analyzing whether a person's right to vote was violated for a violation of procedural due process rights).

The Affected Voters, who have been treated as eligible to vote full ballots should be given the benefit of both the doubt and the status quo, and permitted to vote full ballots. This is especially appropriate given that nobody has checked the Affected Voters' registration record to determine whether satisfactory evidence of DPOC is in fact missing. Accordingly, for the following reasons, the Secretary asks this Court to accept jurisdiction and enter an order directing all counties in Arizona to allow the Affected Voters to cast full ballots, and count those ballots, in the 2024 General Election.

I. THE FACTS

The parties have submitted a joint statement of stipulated facts. Rather than recite them again here, for purposes of economy, we incorporate them herein by reference.

II. SPECIAL ACTION JURISDICTION

This Court has original and discretionary special action jurisdiction to consider legal issues of statewide importance and fashion any appropriate relief. *See* Ariz. Const. art. 6, § 5(1), (6); Ariz. R. P. Spec. Act. 1(a)–(b), 3(b)–(c), 4(a), *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 ¶ 10 (2006) (a party seeking relief under Ariz. Const. art. 6, § 5 "must proceed by way of a special action"); *City of Surprise v. Arizona Corp. Comm'n*, 246 Ariz. 206, 209 ¶¶ 6-7 (2019).

When deciding whether to accept special action jurisdiction, this Court considers several factors, including (1) whether the issues presented are of statewide significance; (2) whether the petition involves pure questions of law; (3) whether the case concerns responsibilities of state officials; and (4) whether the petitioner lacks an equally plain, speedy, and adequate remedy by appeal. *See Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 207 ¶ 2 (2013); *Haywood Secs., Inc. v. Ehrlich*, 214 Ariz. 114, 115 ¶ 6 (2007); *Ariz. Indep.*

Redistricting Comm'n v. Brewer, 229 Ariz. 347, 351 ¶ 14 (2012) ("We exercised our discretion to accept special action jurisdiction because the legal issues raised required prompt resolution and are of first impression and statewide importance.").

The Secretary respectfully disagrees with the Recorder's legal conclusions as they pertain to the correct outcome of this action and his belief that the Secretary's guidance to election officials is wrong. However, the Secretary agrees with the Recorder that this Court has, and should exercise, jurisdiction to resolve the purely legal issue of statewide importance that this special action presents.

Whether to disenfranchise innocent voters across Arizona because of an administrative glitch that ultimately may not accurately represent their citizenship status, amid a historic election, is an issue of statewide importance requiring prompt and final resolution. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 (2020) (when a case involves election and statutory issues of statewide importance, special action jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution is appropriate); *Ariz. Indep. Redistricting Comm'n*, 229 Ariz. at 351 ¶ 14 .

Moreover, the issue at bar is purely legal. The facts are undisputed. All the parties require is a ruling from this Court concerning the legal implication those facts have. *See* Pet. at 12, § 2 (citing cases). Meaning, the Secretary seeks a determination whether the law compels the disenfranchisement of voters across Arizona as a matter of law or permits the preservation of the status quo. The Secretary also agrees with the Recorder that the issue presented concerns the responsibility of elected officials and immediate resolution is paramount. *See* Pet. at 12-13, §§ 3-4. The parties, in good faith and well-intentioned, simply disagree about what remedy the law compels under the undisputed facts, and seek this Court's guidance because the Affected Voters' constitutional rights to vote are at stake.

For these reasons, this Court should exercise jurisdiction and enter an Order permitting the Affected Voters to cast a full ballot in the 2024 General Election.

III. THE PURCELL DOCTRINE PROHIBITS THE RELIEF THE RECORDER SEEKS

In election matters, "time is of the essence …." *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15 (1998). There are undeniably firm deadlines so that ballots can reach voters, and their votes can be cast and counted

timely and correctly. And "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Thus, Courts generally will not alter election rules or procedures on the eve of an election. *See Purcell*, 549 U.S. at 5; *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1027 (D. Ariz. 2022), aff'd sub nom., 83 F.4th 1199 (9th Cir. 2023), cert. denied, 144 S. Ct. 1395 (Apr. 22, 2024), No. 23-1021, 2024 WL 1706042. This is because "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. Indeed, the risk of voter confusion will only increase "[a]s an election draws closer." *Id.*

These principles are enshrined in what courts have come to call the *Purcell* Doctrine. The *Purcell* Doctrine "discourages courts from creating or altering election rules close to elections to avoid voter confusion." *Mi Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 985 (D. Ariz. 2020) (citing *Purcell,* 549 U.S. 1 at 4–5).

On September 17, 2024, during a telephone conference, the Secretary issued verbal guidance to Arizona's county recorders, directing them to allow the Affected Voters to cast a full ballot in the 2024 General

Election. After that telephone conference, the Secretary followed up with a written letter (the "Guidance"). *See* APP-0043-44. The Guidance, admittedly, is based in part on the *Purcell* Doctrine and the principle that we should avoid taking actions that could lead to "disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022).

The Recorder argues that it is inappropriate for the Secretary to rely on the *Purcell* Doctrine when providing his Guidance to Arizona counties, because "*Purcell* does not apply to *an election official's* determination of what rules to follow." Pet. at 18 (emphasis added). Mainly, the Recorder argues that *Purcell* is a "judicially-created doctrine that applies to courts evaluating a state's election laws and procedures" (*i.e.* only courts can rely on *Purcell*). Pet. at 18.

The Secretary is entitled to rely on legal precedent and the fundamental principles underlying that precedent when exercising his elected duty to protect Arizona voters and enable them to effectuate the franchise as fully as constitutionally possible. After all, this is why Arizonans overwhelming elected the Secretary in the first place.

Importantly, the Recorder cites no law prohibiting the Secretary from considering *Purcell* in the execution of his official duties, and this Court should not endorse a policy even remotely encouraging elected officials to deviate from sound legal principles that serve to protect our democracy.

But most critically, the Recorder does not actually argue that the *Purcell* Doctrine is not implicated here, or that it does not compel preserving the status quo and allowing the Affected Voters to vote a full ballot. Indeed, the Recorder admits throughout his Petition that this situation presents serious and consequential concerns amid the impending election. *See* Pet. at 3 ("Because Arizona's General Election begins this Saturday, September 21, 2024"); 8 ("early voting begins on October 9, 2024"); 13 ("the short time until the 2024 General Election begins"); 13 ("here, time is certainly of the essence");13 (the General Election "begins this weekend"); 13 ("… there is simply no time available …."); 14 (discussing how clarity is needed from the Court on the "unusually-compressed timeline presented"); and 15 ("the timely resolution of this dispute is critical, as the General Election will begin in just a few days with the issuance of UOCAVA ballots."). And the Recorder also acknowledges that the "*Purcell* doctrine usually permits states to

maintain the status quo and "not alter [ ] election rules on the eve of an election." Pet. at 18 (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020)). The Recorder (at 20) even concedes that "the Court could apply the *Purcell* doctrine and stay any changes to the voter roll (*i.e.*, allow the Affected Voters to vote full ballots this cycle despite failure to provide DPOC)."[1] This is precisely what this Court should do.

The parties actually *agree* that the *Purcell* Doctrine applies here. The disagreement, however, is *how* the *Purcell* Doctrine should apply. Forcing counties to change course and functionally reclassify the Affected Voters as federal only voters, when there is no evidence that each of them did not provide satisfactory evidence of DPOC or are non-citizens, is fundamentally unfair. Doing as the Recorder interprets the law will lead to "disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 880-81. Whereas maintaining the status quo in all respects and

[1] This assertion assumes no satisfactory evidence of DPOC has been provided for each and every Affected Voter. There is simply no proof of that in this case, a reality which alone compels maintenance of the status quo given that the General Election "begins this weekend." Pet. at 13.

allowing the Affected Voters to vote a full ballot will prevent that untenable outcome.

The *Purcell* Doctrine favors allowing the Affected Voters to vote a full ballot under our undisputed facts.

IV. THE NVRA BARS CONDUCTING A SYSTEMATIC VOTER REGISTRATION REMOVAL PROGRAM WITHIN 90 DAYS OF A FEDERAL ELECTION

The NVRA mandates that "[a] State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2)(A). That 90-day restriction shall not be construed to preclude removal (1) at request of the registrant, (2) due to criminal conviction, mental incapacity, or death, or a change in residence, or (3) for "correction of registration records pursuant to" the NVRA. 52 U.S.C. § 20507(a)(3)(A)-(B), (4)(A)-(B); § 20507(c)(2)(B)(ii).

The United States District Court, in the District of Arizona, recently considered challenges to certain provisions of Arizona law related to the cancellation of voter registrations, and concluded that NVRA's 90-day restriction applies to those provisions. *See Mi Familia*

Vota v. Fontes, 691 F. Supp. 3d 1077, 1093 (D. Ariz. 2023) ("*MFV I*"); *see also Mi Familia Vota,* No. CV-22-00509-PHX-SRB, 2024 WL 862406 ("*MFV II*").

A.R.S. § 16-165(A)(10) requires county recorders who receive information that a registered voter may not be a citizen to initiate a process that may lead to cancellation of that voter's registration. A.R.S. §§ 16-165(G)-(K) require the Secretary and county recorders to compare voter registration rolls to data regarding citizenship in various federal databases. The *MFV I* court concluded that NVRA's 90-day restriction applies to A.R.S. §16-165(A)(10):

> The 90-day Provision *prohibits systematic cancellation of registrations within 90 days of an election*. First, Section 8 plainly forbids "any program" to routinely remove registrants, subject to enumerated exceptions, and "the phrase 'any program' suggests that the 90 Day Provision has a broad meaning . . . . [R]ead naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *Arcia* [*v. Fla. Secretary of State*], 772 F.3d [1335,] 1344 [(11th Cir. 2014)] (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Id.* at 1345 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

MFV I, 691 F. Supp. 3d at 1093 (emphasis added).

Logically, any similar list maintenance activity that will change the voter registration status of the Affected Voters – and de facto "cancel" them, even if temporarily, from casting a full ballot – necessarily must pause during the 90 day period before the 2024 General Election. The forced transition of the Affected Voters from a full-ballot to a federal-only ballot voter, which prevents them from voting on any state-related matters, is related to the administration of voter registration list maintenance. And doing so at this juncture, as the Recorder suggests the law requires, is certainly part of "any program" that will systematically remove the names of ineligible voters from the official lists of eligible voters for purposes of voting a full ballot (even if temporarily).

Indeed, in the days "leading up to an election cycle … systematic cancellation programs can cause inaccurate removal and [e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *MFV I*, 691 F. Supp. 3d at 1093 (cleaned up). *That is precisely the worry here*. The Affected Voters have been treated as full ballot eligible, and right now, there is no actual proof that each one of them is not. There is only a mere *concern* that the Affected Voters *may* not be eligible to vote because of an administrative

coding error. And even then, the parties agree that the concern is likely inapplicable to the majority of the Affected Voters. Thus, there is a significant risk that denying them the right to vote a full ballot will be the wrong decision, and that decision may not be corrected in time to assure the impacted votes are cast and counted. This risk cannot be taken at the expense of our democracy.

The Recorder argues that his proposed remedy does not violate the NVRA's 90 day proviso because NVRA does not preclude "'the removal of names from official lists of voters' to 'correct[] registration records pursuant to this chapter.'" Pet. at 17 (citing U.S.C. § 20507(c)(2)(B)). The Secretary respectfully disagrees. Ultimately, the Recorder seeks to put the burden on the Affected Voters to provide their satisfactory evidence of DPOC without bothering to even confirm whether DPOC is actually absent from the Affected Voter's registration record, and if the Affected Voter does not provide DPOC before the date of the 2024 General Election, then they must be subjected to a federal-only ballot. Pet. at 17. The Recorder's remedy is not the sort of record correction NVRA allows for several reasons.

First, and importantly, the Recorder's legal interpretation puts the proverbial cart before the horse. As of now, the county recorders and the Secretary do not know if each of the Affected Voters failed to provide DPOC, are non-citizens, or are otherwise ineligible to vote. The Recorder wants to put the onus on the Affected Voters to prove their DPOC prior to the upcoming 2024 General Election, and cites to A.R.S. § 16-166(F) as the controlling authority for doing so. But, as discussed below, the law and fundamental principles of fairness abhor placing the burden on the Affected Voters, on the eve of an election, to prove something that, until now, was not in dispute. *See* § VI, *infra*. Instead, if there is any burden to be had, it should fall on the government to confirm ineligibility in the first instance. This is especially so when, as also discussed below, the remedy the Recorder asks this Court to deploy lacks any statutory basis. *See* § V, *infra*.

Moreover, the Recorder does not seek to correct a record that actually requires correcting. Again, there is no existing proof any Affected Voter's registration record requires correction. Thus, there is nothing to "correct." Asking the Affected Voters to prove otherwise, out of the blue and on the eve of a historic election, is indefensible.

Finally, the term "correction" is used elsewhere in NVRA, and that usage does not support the Recorder's broad interpretation. In those other instances, the term "correction" relates only to a change of *residence* within the 90-day period, and not a generalized ability to "correct" for any reason whatsoever. *See* 52 U.S.C. § 20507(c)(1)(B)(i), (d)(1)(B)(ii), (d)(3), (e)(2)(A), (f). The "correction" contemplated by the Recorder, however, is a grave one. His "correction" seeks to automatically relegate the Affected Voters to a federal only ballot, unable to vote in their local elections, despite the likelihood that the majority of them may be eligible to vote a full ballot – and, as far as anyone knows, are actually eligible to do so.

The NVRA precludes the relief the Recorder believes the law compels.

V. THE RECORDER'S INTERPRETATION OF THE LAW REQUIRES THIS COURT TO LEGISLATE THROUGH JUDICIAL FIAT AND CRAFT A REMEDY THAT DOES NOT EXIST

"The words of a statute are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *McLaughlin v. Jones*, 243 Ariz. 29, 32, ¶ 10 (2017) (cleaned up). "It is not, however, [this Court's] role to rewrite [a] statute." *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313, ¶ 22 (2017). Nor

will this Court read into a statute something that is not there. *See Grounds v. Lawe*, 67 Ariz. 176, 187 (1948) ("But such is not the specific reading of the statute, and we are not permitted to read into it what is not there, as much as we personally might feel that an election contest should be determined on its merits rather than on pleadings and a want of statutory authorization.").

Instead, this Court will "interpret … statutory provisions as they are written, and [is] constrained from rewriting the law under the guise of interpreting it even if [this Court can] divine a more desirable intended outcome than the text allows." *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 489, ¶ 38 (2022). Simply stated: this Court is not the Legislature and it will not exercise legislative power no matter how desirable it may be to do so.

The Recorder asks this Court to interpret the law to allow county recorders to downgrade the Affected Voters to "federal-only" voters and place the burden on them to prove otherwise – *in the midst of an election where early voting begins for some as soon as this weekend*. *See* Pet. at 13 ("That election begins this weekend."). And the Recorder asks this Court to endorse this remedy, despite the Affected Voters having been classified

as DPOC-compliant voters until now, and with there being *no proof* that each of the Affected Voters, in fact, has failed to provide DPOC or are truly ineligible to vote a full ballot.

To do this, however, this Court must manufacture a statutory remedy where none otherwise exists. This Court cannot do so. If the Legislature wants to pass a law permitting the remedy the Recorder seeks, then the Legislature can and will. It has not yet done so, and this proceeding is not the forum wherein legislation can be enacted.

The Legislature's choice not to expressly allow this remedy is important and cautions against allowing a remedy not otherwise expressly permitted by statute. The Legislature has declared how county recorders go about cancelling a voter's registration (A.R.S. § 16-165(G)-(K)), or designating a voter as active and inactive (A.R.S. § 16-166). The Legislature has even told county recorders when, and why, they must reject an *application* for registration *in the first instance*. *See* A.R.S. § 16-166(F). But the Legislature has yet to permit county recorders, or anyone, to downgrade an otherwise registered voter to "federal-only" when voters who have been classified as DPOC-compliant voters are now suspected of *possibly* having failed to provide satisfactory evidence of

DPOC without concrete proof and without having actually checked their registration record.

To the extent the Recorder invokes A.R.S. § 16-166(F) as the statutory basis for his remedy, he is mistaken. Ours is not a situation contemplated by A.R.S. § 16-166(F), because it prescribes when an election official must reject a voter registration *application* for lack of DPOC *in the first instance and at the time of application*. Here, the circumstances are different. There is no proof each of the Affected Voters ever failed to prove DPOC, and none of them are being flagged as having failed to do so *at the time they registered to vote*. Instead, we have a preemptive presumption that a mistake occurred, without any proof, and based on an administrative coding error discovered not during the voter registration process but years after the Affected Voters even registered to vote. Section § 16-166(F) does not prescribe the remedy that the Recorder mistakenly believes the law allows.

VI. THE RECORDER'S INTERPRETATION OF THE LAW WILL UNCONSTITUTIONALLY BURDEN THE AFFECTED VOTERS' RIGHT TO VOTE

"Due process is flexible and calls for such procedural protections as the particular situation demands, and the fundamental requirement of

due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211, ¶ 20 (2017) (cleaned up). Thus, the process due cannot be shallow or meaningless.

State laws that burden the right to vote violate the state and federal constitutional rights to due process unless relevant and legitimate state interests of sufficient weight justify the burden. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *AZ Petition Partners LLC v. Thompson*, 530 P.3d 1144, 1148, ¶ 16 (Ariz. 2023). The "test" to determine whether the burden justifies constitutional infringement is known as the "*Anderson / Burdick*" test.

Under that test, courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021) (cleaned up).

The more severely a law burdens the right to vote, the more strictly the law must be scrutinized. *Burdick*, 504 U.S. at 434; *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 729-30 (9th Cir. 2015). Even slight burdens must be justified by valid state interests – and where a law's burden on the right to vote is "severe," the law "is subject to strict scrutiny," meaning the law can be upheld only if it is "narrowly tailored to advance a compelling state interest." *Burdick*, 504 U.S. at 433-434, 441; *see also In re Wood*, 551 P.3d 1163, 1169 (App. 2024) (analyzing *Anderson* / *Burdick* framework in the guardianship context).

In the context of voting, due process compels one seeking to infringe upon the right to vote to make a proper evidentiary showing that a person lacks the capacity to vote "before terminating a person's fundamental right to vote." *In re Wood*, 551 P.3d at 1171 ¶ 24; *see also MFV II*, No. CV-22-00509-PHX-SRB, 2024 WL 862406 at *47.

There is no proof that each of the Affected Voters failed to provide satisfactory evidence of DPOC, and they may have done so. In fact, until now, the Affected Voters were presumed eligible to vote a full ballot. Even so, amid an election, when early voting is about to commence and some mail-in ballots are about to be mailed, the Recorder asks this Court

to condone a "prove me wrong after-the-fact and despite any evidence to the contrary" process for determining whether the Affected Voters should enjoy the benefit of the status quo, or suffer, through no fault of their own, the indignity of a *presumption* that they are ineligible to cast a full ballot in the 2024 General Election. Worse, the Recorder wants that all-new process to occur divorced from the voter registration process. To summarize the relief the Recorder believes the law requires, albeit with undoubtedly good and noble intentions, highlights its unconstitutionality under the *Anderson* / *Burdick* test.

The risk that the Recorder's proposed remedy will interfere with the Affected Voters' ability to exercise their right to vote is manifest when, like here, there is no proof the Affected Voters are truly ineligible to vote a full ballot and their registration records have not even been reviewed to ascertain the truth one way or the other. Due process requires more than what the Recorder proposes. Due process requires allowing the Affected Voters to cast a full ballot.

VII. THE SECRETARY'S GUIDANCE DOES NOT VIOLATE ANY EQUAL PROTECTION RIGHTS, WHEREAS THE RECORDER'S INTERPRETATION OF THE LAW DOES JUST THAT

The Recorder argues that the Secretary's Guidance treats the Affected Voters differently than all other registrants for the 2024 General Election in violation of the Equal Protection Clause of the United States Constitution and Equal Privileges and Immunities Clause of the Arizona Constitution. Pet. at 18-19. According to him, "when Arizona's requirement to provide DPOC to vot[e] a Full Ballot is not applied consistently, it potentially constitutes an equal protection violation". Pet. at 19.

While the Secretary appreciates the Recorder's equal protection concerns, and while equal protection concerns do exist here, his are misplaced. The Secretary's Guidance does not present equal protection concerns. Rather, it is the Recorder's interpretation of the law that runs afoul of equal protection.

Currently, there is no proof that each of the Affected Voters *never* provided satisfactory evidence of DPOC, or are non-citizens, or should not cast a full ballot. Indeed, until now they have been treated as full ballot eligible. All we have here is, at most, a worry. But a worry, unsubstantiated, is no basis upon which to deprive voters of the franchise. Even so, the Recorder's interpretation of the law would treat

the Affected Voters differently than every other voter who, like the Affected Voters, is believed to have at some point provided DPOC. The only difference here is that the Affected Voters are subject to a clerical coding error that may or may not matter (and based on the evidence thus far does not matter). Like their counterparts, there is no proof yet that each of the Affected Voters are ineligible to cast a full ballot[2]. Ignoring this reality and treating them differently than all other registered voters because of a mere clerical glitch would deprive the Affected Votes of equal protection.

Conversely, the Secretary's Guidance protects the Affected Voters, and indeed all voters, by affording them the equal application of the law and allowing them to remain full ballot voters unless and until there is evidence they are ineligible to do so. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one

[2] The Secretary's statements pertain to the Affected Voters as whole. The Secretary is aware of the individual registrant identified in the Recorder's Petition which originally alerted him to this coding error. The Recorder acknowledged that he had checked this particular registrant's voter registration file and confirmed that the registrant was not a United States citizen but also had not voted since registering. *See* Pet. at 4.

person's vote over that of another."); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). After all, Proposition 200 clearly states that a state license or identification with an issuance date *after* October 1, 1996 is sufficient DPOC to register to vote. Every one of the Affected Voters obtained a license or identification card with an issuance date facially demonstrating DPOC. The Affected Voters, and election officials, are entitled to rely on that information. Declining to do so will only cause administrative gridlock and chaos in the form of voter confusion and literally tens of thousands of election contests at every jurisdictional level. Arizona cannot allow that to happen. For now, only this Court has the power to do just that.

VIII. CONCLUSION

The Secretary respects the Recorder and applauds his continued concern for both protecting voters and preserving the rule of law. He has served Maricopa County well and with dignity. But the Secretary respectfully disagrees with the Recorder's interpretation of the law under the undisputed facts at bar.

The Affected Voters deserve to vote a full ballot unless and until there is unequivocal proof to the contrary. An unintentional coding error

is simply no basis for potentially disenfranchising voters. If this were a close call, the tie would always go to protecting the People's constitutional rights. But this is not a close call. The Affected Voters, as of now, have not been proved unqualified to cast a full ballot. The inquiry must end there.

Accordingly, the Secretary asks this Court to accept jurisdiction and enter an order directing all counties in Arizona to allow the affected voters to cast full ballots, and count those ballots, in the 2024 General Election.

RESPECTFULLY SUBMITTED this 18th day of September, 2024.

SHERMAN & HOWARD, L.L.C.

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