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**THE SUPREME COURT FOR THE STATE OF ARIZONA**

AMERICAN CIVIL LIBERTIES  
UNION OF ARIZONA; LEAGUE OF  
UNITED LATIN AMERICAN  
CITIZENS-ARIZONA,

*Petitioners,*

v.

STEPHEN RICHER, in his official  
capacity as Maricopa County  
Recorder; MARICOPA COUNTY;  
LARRY NOBLE, in his official  
capacity as Apache County Recorder;  
APACHE COUNTY; DAVID W.  
STEVENS, in his official capacity as  
Cochise County Recorder; COCHISE  
COUNTY; PATTY HANSEN, in her  
official capacity as Coconino County  
Recorder; COCONINO COUNTY;  
SADIE JO BINGHAM, in her official  
capacity as Gila County Recorder;  
GILA COUNTY; POLLY  
MERRIMAN, in her official capacity  
as Graham County Recorder;  
GRAHAM COUNTY; SHARIE

Case No. CV-24-0263-SA

**PROPOSED INTERVENORS  
REPUBLICAN NATIONAL  
COMMITTEE AND  
REPUBLICAN PARTY OF  
ARIZONA'S RESPONSE TO  
EMERGENCY PETITION FOR  
SPECIAL ACTION**

MILHEIRO, in her official capacity as Greenlee County Recorder; GREENLEE COUNTY; RICHARD GARCIA, in his official capacity as La Paz County Recorder; LA PAZ COUNTY; LYDIA DURST, in her official capacity as Mohave County Recorder; MOHAVE COUNTY; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; NAVAJO COUNTY; GABRIELLA CAZARES-KELLY, in her official capacity as Pima County Recorder; PIMA COUNTY; DANA LEWIS, in her official capacity as Pinal County Recorder; PINAL COUNTY; ANITA MORENO, in her official capacity as Santa Cruz County Recorder; SANTA CRUZ COUNTY; MICHELLE BURCHILL, in her official capacity as Yavapai County Recorder; YAVAPAI COUNTY; RICHARD COLWELL, in his official capacity as Yuma County Recorder; and YUMA COUNTY.

*Respondents.*

and

REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF ARIZONA

*Respondent-Intervenors.*

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Proposed Intervenors the Republican National Committee and the Republican Party of Arizona request that this Court deny Petitioners American Civil Liberties Union of Arizona and League of United Latin American Citizens-Arizona's ("Petitioners") Emergency Petition for Special Action.

### **INTRODUCTION**

Plaintiffs have not offered sufficient justification for this Court to override the statutory deadline to cure ballots set by Arizona's Legislature earlier this year. As the Seventh Circuit explained, "[d]eadlines are essential to elections . . . . Counting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest." *Common Cause Indiana v. Lawson*, No. 20-2911, 2020 WL 6042121, at \*1 (7th Cir. Oct. 13, 2020). Petitioners would have this Court, by judicial fiat, arbitrarily extend the deadline to cure ballots with only a few hours remaining, and thus upset the careful balance of interests that the Legislature was uniquely empowered and competent to resolve.

Arizonans who vote by mail must satisfy various requirements. *See* A.R.S. §§ 16-542, 16-547. Where a voter fails to comply with the statutory requirements, their ballot may be rejected. However, the Arizona Legislature gives voters a second chance within a brief period of time to correct, if possible, errors the voters made that otherwise lawfully invalidated their votes. A bipartisan majority of the Legislature, acting within its unique legislative mandate and after careful deliberation, set the deadline to cure ballots at five calendar days after Election Day—5 p.m. today. This balanced the benefit of granting an opportunity for a fraction of the voting citizenry to have a second chance to vote against the interests of the citizenry as a whole in a timely and final certified election result, the practical needs of the state's election administrators, the state's deadline for conclusion of its administration of the election, and the overarching public policy favoring the timely certification of the election.

Moreover, “voting absentee[] is a privilege and a convenience for those unable to vote in person,” not a right. *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D. Ala. 1972), *aff’d* 410 U.S. 919 (1973). To support their extraordinary request at this late hour to disrupt the state’s ability to meet its election deadlines, the Petitioners cite just one case, *Raetzl v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990). But that case merely held that rejecting mail ballots without any notice to the individual and an opportunity to cure violates due process. Arizona does provide notice to an individual that their mail ballot was rejected, along with an opportunity to cure. There is no right to cure an otherwise invalid ballot indefinitely, and no legal or equitable authority extends the time for curing ballots beyond the period authorized by the Legislature. Petitioners’ supply no precedent for their specific request, that the Court legislate a forty-eight or ninety-six hour additional period for voters to cure their ballots, which would usurp the Legislature’s unique power and responsibility to set the law while balancing the numerous and complex interests at issue.

Furthermore, the Petition relies entirely on speculative or disputed factual contentions that preclude proceeding through an emergency special action. In particular, the Petition incorrectly contends that thousands of ballots have not yet been identified as needing curing, depriving voters of their opportunity to cure. Petitioners appear to have been misled by an inaccurate table published by the Secretary of State but which has since been updated as of yesterday evening. A footnote in that table previously indicated that signature verification had not been performed on many thousands of ballots, but it no longer can be read to establish that is the case. In fact, Maricopa County has now confirmed that it has completed signature verification, further undermining the entire factual premise of the Petition. Petitioners’ fundamental misapprehension of the facts not only vitiates the sole argument of the Petition, but also injects a disputed point of fact that a special action

cannot resolve.

A special action of the nature Petitioners invoke can only be used to compel an official to take a nondiscretionary action required by law. It is inappropriate here because Petitioners do not seek to compel the County Recorders to comply with a non-discretionary duty. Instead, Petitioners have identified an alleged problem—a delay in notifying voters as to the need to verify their signatures—and demanded that the Court fix this problem by implementing only one potential solution among many: extend the curing deadline provided by statute. But there is no nondiscretionary legal duty to extend the ballot curing deadline. If the counties were facing a potential constitutional violation in the near future, changing the law would be just one of several options available to avoid the violation, thus presenting a discretionary policy choice that this Court cannot make for the counties through a special action.

Lastly, the Petitioners have had abundant notice of the potential need for relief from the statutory five calendar day deadline. They could have considered the time it has taken the counties to verify signatures in past elections and the anticipated and observed issues with this election's lengthy ballot that have been discussed extensively. Petitioners nevertheless sat on their rights until *four days* after the election, to the day before the end of the five-day cure period, to file an emergency action on the Saturday of a holiday weekend. The doctrine of laches therefore bars the Petition, as does the principle that election laws should not be changed in proximity to an election.

Accordingly, the Court should deny the Petition, and Arizona's general election should proceed in accordance with the processes and deadlines set by the Arizona Legislature upon which the public and election officials have relied.

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## ARGUMENT

### **I. THE FIVE-DAY CURE DEADLINE REPRESENTS THE LEGISLATURE'S CONSIDERED AND COMPLEX POLICY DETERMINATION THAT BALANCES MULTIPLE INTERESTS THAT THIS COURT SHOULD NOT RE-LEGISLATE.**

Governor Hobbs signed HB 2785 into law on February 9, 2024. It was a bipartisan emergency measure enacting significant changes to Arizona's election laws and procedures. Among them was setting the deadline for voters to "cure" their ballot at 5 calendar days after Election Day, which would be November 10, 2024 (today) at 5 p.m. Laws 2024, Ch. 1 § 22 (H.B. 2785); *see also* 2024 Ariz. Legis. Serv. Ch. 2 (S.B. 1285). This period was carefully chosen based on the immutable schedule for concluding the election in accordance with federal law and the U.S. Constitution.

Indeed, Petitioners' counsel, Campaign Legal Center, lauded the Legislature's amendment of the ballot cure deadline after the measure was signed into law:

[HB 2785] helps ensure Arizona's election deadlines comply with the federal Electoral Count Reform Act of 2022 – a move that helps secure Arizona's elections and enables Arizona's presidential election results to be properly transmitted to Congress, reflecting the will of Arizona's voters." "Campaign Legal Center commends Arizona lawmakers for their bipartisan effort to update the state's election laws. . . . The bill signed today by Governor Hobbs is a robust bipartisan compromise that aligns Arizona's post-election timelines with new federal deadlines – a necessary improvement ahead of the 2024 presidential election. This is a step forward for democracy, for Arizona's voters, and for trust in Arizona's elections.

Campaign Legal Center, "Bipartisan Arizona Election Bill Aligns State Election Deadlines with Federal Law," Feb. 9, 2024, <https://campaignlegal.org/press-releases/bipartisan-arizona-election-bill-aligns-state-election-deadlines-federal-law>.

The separation of powers between the Arizona Legislature and the Judiciary militates toward this Court deferring to the legislative policy judgment that a five-

day ballot cure period is the most the state could allow for its election process and still be able to satisfy its other legal mandates, as Petitioner Campaign Legal Center acknowledged earlier this year.

## II. **SPECIAL ACTIONS CANNOT DEPEND ON DISPUTED AND UNCLEAR FACTS LIKE THOSE UPON WHICH THE PETITION RELIES**

The Petition erroneously contends that “due to significant delays in processing early ballots in many Arizona counties and the fast-approaching deadline of 5 p.m. on Sunday for voters to correct perceived signature mismatches on their early ballots, tens of thousands of Arizonans stand to be disenfranchised without any notice, let alone an opportunity to take action to ensure their ballots are counted.” Pet. at 1. Further, Petitioner claims that “[b]ecause these ballots have not even been processed, Respondents have not identified which ballots are defective and have not notified voters of the need to cure those defects.” *Id.* Petitioner’s basis for this mistaken belief is a misleading chart the Secretary of State previously published on its website, which Petitioner’s interpreted to mean that “over **250,000** early mail ballots had not yet been *processed*, meaning they have not yet been checked for signatures or otherwise verified.” *Id.* at 2.

Since Petitioners filed this action, the Secretary of State’s website has changed. A comparison of the language used in a footnote on the Secretary of State’s website to explain its use of the phrase “[e]stimated number of early ballots left to process” before and after the Petition was filed confirms that the genesis of the Petition was semantic confusion, not a real risk of disenfranchisement. Below is a comparison of the two statements, which referred to the figures in a chart that form the basis of Petitioners’ argument:

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## Pre-Petition Language

<sup>2</sup> This number is an estimate of how many early ballots have not been signature or otherwise verified and are therefore not ready for tabulation. It is important to note that not all ballots will pass this review. Those that do not, will not be tabulated.

## Post-Petition Language

<sup>2</sup> The number of ballots that have been received and are in ballot processing, not yet signature verified, or waiting for a signature to be cured.

Arizona Secretary of State, “Ballot Progress,” <https://apps.arizona.vote/electioninfo/BPS/47/0> (comparison of content on November 9, 2024 with November 10, 2024). Rather than indicating that certain voters have yet to have their ballots undergo signature verification, it now states only that a certain number of ballots “have been received and are in ballot processing, not yet signature verified, or waiting for a signature to be cured.”

Moreover, the Petition identified Maricopa County as the source of the vast majority of the supposedly un-processed ballots, noting that Maricopa County had 235,000 early ballots left to process as of Friday. Pet. at 2–3. Yet, yesterday, the Maricopa County Recorder’s Office confirmed that this is false:



With the exception of ballots still waiting to be cured by the legal deadline, the Maricopa County Recorder's Office has signature verified and finished processing all ballots cast in the 2024 General Election.

This milestone comes several days earlier than it did in the 2020 and 2022 elections — despite having a two page ballot.

We are grateful for all the election workers who took part in this important process.

9:53 PM · Nov 9, 2024 · 23.6K Views

Maricopa County Recorder’s Office (@RecordersOffice), X, <https://x.com/RecordersOffice/status/1855488962997203243> (Nov. 9, 2024 7:53 P.M. MST).

As Petitioners concede, a special action requires a purely legal question, rather than a disputed question of fact. *See* Pet. at 7 (collecting cases). At most, Petitioners rushed to court based on ambiguous language on the Secretary of State’s website without establishing that the purported problem—voters lacking notice that their

ballots requiring curing—even exists. To even entertain Petitioners’ extraordinary request that cure deadline be extended, a court would first need to find that signature verification is indeed incomplete. This inherently factual inquiry is inappropriate in a special action. In light of the Maricopa County Recorder’s Office statement, however, it is far more likely that signature verification is complete. If it is not complete in some places, or for a different number of people than the Petition claims, the Court is not in a position to declare that the entire state must suffer the turmoil and delay of extending the deadline.

### **III. PETITIONERS’ REQUESTED RELIEF IS INCOMPATIBLE WITH A SPECIAL ACTION**

A special action is inappropriate here because Petitioners are not seeking to compel the County Recorders named as Respondents to comply with a non-discretionary duty. Far from seeking compliance with existing law, Petitioners ask this Court to order counties to ignore a law setting the deadline for voters to cure deficient ballots. A petition for a deviation in the application of the law is fundamentally at odds with special action jurisdiction, which requires a public official’s failure to perform clear mandatory duties or a public official acting in excess of his or her statutory authority. Here, the Petitioners urge the Court to order a discretionary policy decision to take one potential course of action among several, which is not what a special action allows.

“[S]pecial action relief is the modern equivalent of [a] common law writ[ ] such as mandamus . . . .” *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 584 n.1 (1994). “An action is in the nature of mandamus if it seeks to compel a public official to perform a non-discretionary duty imposed by law.” *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 (2013). Rule 3(a) “sets forth the traditional functions of the writ of mandamus” by permitting petitioners to compel a state officer to perform a duty required by law. Ariz. R.P.

Spec. Act. 3(a), State Bar Committee Note (a).

The alleged “duty required by law” that the Petition seeks to enforce is to extend the time allowed to cure ballots. However, that is only one of several options that the counties have to satisfy their constitutional duty to provide adequate notice of a defect and an opportunity to respond. The counties could, for example, devote more resources to verifying signatures to get it done faster. The Petition does not ask for this. The counties could devote more resources to notifying voters in order to speed the curing of ballots. The Petition does not ask for this. The Petition only seeks an extension of the deadline to cure. Whether and to what extent counties may allocate resources to verify signatures faster, more aggressively contact voters, or extend the curing period is inherently a policy decision within the discretion of the counties. Extending the cure deadline is thus not, by itself, a mandatory duty subject to compulsion through a special action, but rather one possible discretionary policy decision the counties could pursue to fulfill their duties. And far from satisfying a statutory obligation, any extension of the deadline would violate it.

#### **IV. PETITIONERS’ RELIEF IS BARRED BY THE DOCTRINE OF LACHES**

Petitioner’s request for special action relief is barred by the equitable doctrine of laches because they waited until four days after Election Day, and just one day before the 5-day curing period ends, to seek emergency relief. “In the context of election matters, the laches doctrine . . . will bar a claim if the party’s unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). At this late hour, the counties’ obligations under state law to complete their canvass of the election by November 21, 2024 (followed in quick succession by deadlines for recounts, the statewide canvass, election contests, certification, and the meeting of the Electoral College), cannot tolerate leaving open the cure period for an additional period of time. Petitioners’

delay greatly prejudiced Intervenors' ability to develop a full record showing why Plaintiffs are not entitled to the remedy they are seeking.

Petitioners' delay is even more consequential in the election context. Courts abhor eleventh-hour changes to election procedures. *See Democratic Nat'l Comm'y . Wisc. State Legislature*, 141 S. Ct. 28, (2020) ("Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." (discussing *Purcell v. Gonzalez*, 541 U.S. 1 (2006)) (Kavanaugh, J., concurring in denial of stay); *see also Richer v. Fontes*, No. CV-24-0221-SA, 2024 WL 4299099, at \*3 (Ariz. Sept. 20, 2024) (citing *Purcell*). If the Court issues the relief Petitioners seek, a critical deadline will be reopened hours before it is set to expire, which will upset the Legislature's careful orchestration of the sequence of deadlines that must occur for Arizona's election to proceed in accordance with overlapping state and federal requirements.

### **CONCLUSION**

For these reasons, Intervenors respectfully ask this Court to deny Plaintiffs' improper and late attempt to thwart the will of the Arizona Legislature and, based on uncertain facts, have this Court order counties to follow what would otherwise be a discretionary decision as to how to best allocate resources to fulfill their legal duties.

DATED this 10th day of November, 2024      Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing electronically with AZTurboCourt, which electronically delivered copies of the same to all parties who have appeared in this action.

*/s/ David Rothschild*  
\_\_\_\_\_  
David Rothschild