

**INDIAN LEGAL CLINIC**  
**ASU PUBLIC INTEREST LAW FIRM**  
SANDRA DAY O'CONNOR COLLEGE OF LAW  
Patty Ferguson-Bohnee (No. 020996)  
[Pafergus@asu.edu](mailto:Pafergus@asu.edu)  
111 E. Taylor St., Mail Code 8820  
Phoenix, AZ 85004

**NAVAJO NATION DEPARTMENT OF JUSTICE**  
Katherine Belzowski, Assistant Attorney General (No. 031473)  
Sage G. Metoxen, Acting Ass't Attorney General (No. 030707)  
Julianne Begay, Principal Attorney (No. 032649)  
[kbelzowski@nndoj.org](mailto:kbelzowski@nndoj.org)  
[smetoxen@nndoj.org](mailto:smetoxen@nndoj.org)  
[jbegay@nndoj.org](mailto:jbegay@nndoj.org)  
P.O. Box 2010  
Window Rock, AZ 86515(928) 871-2675

*Counsel for Plaintiff*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF APACHE**

NAVAJO NATION, on behalf of itself and  
all others similarly situated,

Plaintiff,

v.

LARRY NOBLE, in his official capacity  
as Apache County Recorder; RITA  
VAUGHAN, in her official capacity as  
Apache County Elections Director; and  
Apache County Board of Supervisors,  
Defendants.

**Case No. S0100CV202400242**

**REPLY TO DEFENDANTS' MOTION  
TO DISMISS AND OPPOSITION TO  
REQUEST FOR TEMPORARY  
RESTRAINING ORDER**

The Honorable Michael Latham

This Court should grant Plaintiff's request and deny the motion to dismiss for the reasons set forth herein. First, based on the undisputed facts, there are at least 172 voters who were not identified and therefore, not notified, about the need to cure their ballots until at least November 9, one day before the deadline to cure. Second, laches does not apply here. Third, this case is not precluded by *ACLU v. Richer*, CV-24-0263SA (Ariz. 2024). Finally, justice requires this Court to act.

### **OVERVIEW**

Plaintiff requests this Court to ensure that voters who have a right to cast an early ballot, also have a right to have that ballot counted. Arizona law provides that reasonable and meaningful attempts to contact a voter with a mismatched signature occurs as soon as practicable. A.R.S. § 16-550(A); EPM at 83. That did not happen in Apache County. As a result, Navajo voters in Apache County have been denied the right to vote, and their due process and equal protection rights under Arizona law have been violated. ARIZ. CONST., art. II, § 13; art. IV § 2; A.R.S. § 16-550.

### **FACTUAL BASIS**

The most important facts for this Court to consider in deciding whether to grant the request for emergency relief are (1) the Navajo Nation submitted and received a public records request for a list of voters who needed to cure their ballot defects; (2) at the end of the day on November 8, 2024, only 3 voters with curable defects were identified and shared by Apache County as needing to cure a ballot; Decl of Sjoberg; Apache County Early

Ballot Reject List dated 11.8.24 (“November 8 list”);<sup>1</sup> and (3) on November 10, the curing deadline, Apache County identified “175 total ballots that require ‘curing.’” Decl. of Craig Tsosie. These facts are undisputed. Thus, **there were at least 172 new ballots identified as needing curing between November 8 at 5 p.m. and November 10 at 5 p.m.**

Apache County never informed the Nation that the November 8 list was inaccurate and did not dispute the accuracy of the November 8 list in their declarations. Apache County also does not dispute that Craig Tsosie informed the Nation and other volunteers that the number of people who need to cure increased on November 9 to 182 voters.<sup>2</sup> Decl. of Craig Tsosie. Relying on the information provided by Craig Tsosie on November 9 and the experience of voters, the Navajo Nation made efforts to determine who needed to cure the ballots and why the list provided on November 8 was different. Decl. of Ethel Branch. The Navajo Nation submitted another Public Records Request to Apache County at around 9 a.m. on November 10, but this request was never filled. If it were filled, the Nation could have determined who still needed to cure, when the ballots were received by the County, and how the ballots were received. The declarations from the County are vague and do not assert when or how efforts were made to contact voters with curable defects. Notably, the County did not assert that it identified and notified all voters with

---

<sup>1</sup> The Navajo Nation filed a motion to file the November 8 list under seal. That list contained 3 voters with mismatched signatures and 18 voters with missing signatures.

<sup>2</sup> Apache County also does not dispute that it told the Navajo Nation and others that it had stopped processing ballots. Decl. of Craig Tsosie.

mismatched signatures by November 6, 7, or 8 or dispute that the number increased sometime over the holiday weekend.

### **I. Laches Does Not Apply**

Laches bars preliminary relief when there is an unreasonable delay in bringing an action and there is prejudice to the opposing party sufficient to justify denying the relief sought. *Sotomayor v. Burns*, 199 Ariz. 81, 83, 13 P.3d 1198, 1200 ¶ 8 (2000); *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922 ¶ 10 (D. Ariz. 2016); *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81, 84 ¶ 14 (Ariz. 1993). Neither apply here. In adjudicating laches claims, courts must focus on “fundamental fairness” and “consider all factors.” *Ariz. Republican Party v. Richer*, 257 Ariz. 210, 547 P.3d 356, 365–366 ¶¶ 30–31 (citing *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 560, 201 P.3d 517 ¶ 13 (2009)). Laches does not apply in this case because the Nation did not unreasonably delay in bringing this action and Apache County will not be prejudiced if it allows voters who were not identified on the November 8 list an opportunity to cure. Further, fundamental fairness prevents this Court from dismissing this action based on a laches defense.

The Navajo Nation did not delay in filing this action. This action was filed on the evening of the first business day after learning that there were at least 179 voters who were not identified by 5 p.m. on November 8, and therefore not notified before that time that their ballots had to be cured by 5 p.m. on November 10. “To determine whether delay was unreasonable, a court considers the justification for the delay, the extent of the plaintiff’s

advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence in preparing and advancing his case.” *Reagan*, 189 F. Supp. 3d at 923, ¶ 10 (D. Ariz. 2016); *Harris*, 973 P.2d at 1169–70, ¶¶ 16-18. The Nation did not find out that the list of voters who needed to cure had grown from 3 to 182 until approximately 5 p.m. on Saturday afternoon, November 9. The Nation did not have knowledge of any names from the Democratic party until November 9 at almost 9 p.m. Decl. of Ethel Branch 2. However, the Nation was reasonable in wanting to verify that this was a good list, so it submitted a public records request to Apache County on November 10 at 9 a.m. Even though curing is time sensitive, to date, the Nation has not received this list. The Nation only learned the exact number of ballots left to be cured when Apache County responded to the *ACLU v. Richer* case in the Arizona Supreme Court at approximately 4:30 p.m. on Sunday, November 10. Once it learned of this discrepancy, the Nation began preparing this action. The Nation hoped to review the outstanding cure list before filing this litigation, but to date, the Nation has not received the list. The Nation filed this lawsuit as soon as possible after it gathered the facts needed to prepare and draft the litigation, which was filed in the evening of the first business day after it learned of the increased number of mismatched signatures that were not disclosed on November 8.

This case is distinguishable from *Mathieu v. Mahoney* cited by Defendants. In *Mahoney*, the Arizona Supreme Court held that the Plaintiff’s constitutional challenge against a ballot proposition was barred under the doctrine of laches because the Plaintiff

had constructive knowledge for more than a year about Defendant's efforts to propose the proposition. *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81, 84 ¶ 17 (1993). The court reasoned that the Plaintiffs' should have filed their complaint after the Secretary certified that the ballot proposition would be placed on the general election ballot. *Id.* The court found that because the Plaintiff had constructive knowledge about the ballot proposition for over a year, and had prior knowledge that the ballot would include the proposition for over two months prior to filing a complaint, the Plaintiff's suit was barred by laches. *Id.* Here, the Nation learned about the uncured ballots just hours before the curing deadline. Unlike the Plaintiff's constructive knowledge about the ballot proposition in *Mathieu*, the Nation filed this suit soon after learning about the uncured ballots and learning that a statewide solution would not be adopted.

Even if this Court finds a slight delay, delay alone in asserting an election law violation does not serve as a basis to apply the laches defense. *Harris v. Purcell*, 193 Ariz. 409, 412, 973 P.2d 1166, 1169 ¶ 16 (1998) (citing *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81, 85 (1993)). The Arizona Supreme Court examines the justification for delay, "including the extent of plaintiff's advance knowledge of the basis for challenge." *Id.* The court must also determine whether the delay by the challenging party was unreasonable and the delay would result in actual prejudice against the adverse party. *Id.*

To determine whether the delay has prejudiced a defendant, a court considers only prejudice that stems from the plaintiff's delay in bringing suit, not difficulties caused by

the fact of having been sued. *Shouse v. Pierce Cty.*, 559 F.2d 1142, 1147 (9th Cir. 1977); *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923. Arizona cases have noted, “[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance.” *Sotomayor*, 13 P.3d at 1200, ¶ 9; *see also Mathieu*, 851 P.2d at 85 ¶ 6. The Arizona Supreme Court has declined to apply laches, even when a party has delayed ten months in bringing an action. In *McLaughlin v. Bennett*, the Arizona Supreme Court determined that, despite delaying 10 months in bringing their suit, the plaintiffs could proceed with their claim because the secretary of state’s office still had sixteen weeks to print a publicity pamphlet and had requested the trial court issue an extended briefing schedule. *McLaughlin v. Bennett*, 238 P.3d 619, 621 ¶¶ 4-5 (2010). In another case seeking to prevent a county recorder from including overvote instructions with mail-in ballots, the court declined to apply laches. The court ruled that, despite delaying five months in bringing their challenge, the plaintiffs could proceed with their claim since the county was able to meet deadlines for mailing early ballots and so suffered no prejudice. *Arizona Pub. Integrity All. v. Fontes*, 475 P.3d 303, 310 ¶ 16 (2020).

Here, there is no actual prejudice to Apache County. The County will not be prejudiced if the Court grants relief. The County would not be significantly burdened by contacting and allowing less than 200 voters whose right to vote has been denied have an opportunity to cure their ballots. And, as noted by the Defendants, there is still a week before the canvas must be complete, and Apache County has tabulated 90% of its

ballots. Def. Response at 5; Arizona Secretary of State, Ballot Progress, *available at* <https://apps.arizona.vote/electioninfo/BPS/47/0> (last checked 11.14.24 at 12:30 p.m.).

This Court should focus its analysis on “fundamental fairness” and “consider all factors.” *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 560, 201 P.3d 517, 521 ¶ 13 (2009). This Court should consider more than the single fact of when the lawsuit was filed, including the Nation’s efforts outside litigation, to resolve the conflict. Laches does not require, as the very first course of action, that the plaintiff file a lawsuit. *McComb v. Superior Ct. In & For Cty. of Maricopa*, 189 Ariz. 518, 525–26, 943 P.2d 878, 886 ¶¶ 27–28 (App. 1997), *as amended* (July 25, 1997). The Navajo Nation timely requested a list of ballots to be cured on November 8. However, the Nation learned on the evening of November 9, that the list had grown. The Nation then submitted a public records request on November 10 to obtain a copy of the list of voters who needed to cure from Apache County. The Nation was interested in the list (1) so it could reach out to voters to assist in curing, and (2) to determine if additional action needed to be taken to enforce the rights of voters. If additional people were on the list, the Nation would know that these individuals were newly identified and had not been contacted in the prior three days. If the Nation had received the list, the Nation could have further determined when the ballots had been returned and if there had been a delay in reaching out to the voters. However, the County failed to respond to the request. The Nation assumed that the County would at least respond to the PRR by November 12, 2024, which was a normal business day. However,



the County has never responded. The lack of response from the County inhibited the Navajo Nation from engaging in a reasonable ballot curing campaign. The Nation could only attempt to contact voters on the deadline, but lacked a full list of all of the Navajo voters who needed to cure.

Furthermore, there is enough time left in the election cycle to provide these voters with a reasonable opportunity to cure. The canvassing deadline for counties is November 21. Arizona Secretary of State Election Calendar 2023-2024, *available at* [https://apps.azsos.gov/election/2024/2024\\_Election\\_Calendar.pdf](https://apps.azsos.gov/election/2024/2024_Election_Calendar.pdf). Therefore, the County still has seven days until the deadline to canvass ballots and provide them to the Secretary of State. It would be fundamentally unfair to prevent qualified voters who cast a ballot with mismatched signatures from having a meaningful and reasonable opportunity to cure because the County delayed in identifying and contacting those individuals as soon as practicable. Failure to do so will violate their equal protection and due process rights.

## **II. *ACLU v. Richer* Does Not Preclude This Suit**

*ACLU v. Richer*, CV-24-0263SA (Ariz. 2024), does not preclude this suit. The Arizona Supreme Court rejected the Petitioner's request for a statewide extension of the curing deadline. The Supreme Court found that the case lacked evidence of voter disenfranchisement because there was no evidence that "reasonable efforts" were not made. If the Supreme Court would have ruled differently, it would have resolved this issue, but Special Actions do not preclude the initiation of a case in a lower court so long as there are new arguments or evidence to present. The presentation of evidence to the Arizona

Supreme Court was not particularized. The evidence primarily focused on the ballot progress tracker on the Arizona Supreme Court website. Emergency Petition for Special Action, Br. of Petitioner 2, *ACLU v. Richer*. In contrast, this case clearly identifies that there were a set of voters not identified by Apache County by the close of business on November 8, 2024, the third day of ballot curing. There is evidence to indicate that these voters did not receive constitutionally adequate notice for curing because they were not yet even identified as needing to cure their ballots. The November 8 list provided by the County to the Navajo Nation failed to identify at least 172 voters who still needed to cure their ballots. Indeed, the County failed to identify voters with mismatched signatures. The County deprived voters of a reasonable and meaningful opportunity to cure their ballot because they were not even contacted by November 8, if at all.

Unlike *Richer*, here there are at least 172 voters who were not identified, and were therefore not contacted before at least November 9 — during a holiday weekend. Further, during the early voting period, on election day, and after election day, there were times when Apache County did not answer the phone or the voice mailbox was full. Decl. of Frances Sjoberg. In addition, since Apache County failed to update the SOS ballot tracker timely or provide the mandatory link on their website to allow voters to check their ballots, voters could not check the status of their ballots timely. This cannot be interpreted as “reasonable” or “meaningful” or “as soon as possible.” Rather, this is significant delay which has the result of impeding the rights of voters guaranteed under the law.

### **III. This Claim Should Not Be Dismissed**

Arizona law disfavors motions to dismiss for failure to state a claim upon which relief can be granted. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). Moreover, such motions are not to be used as a vehicle to resolve disputes about the facts or merits of the case. *Coleman v. City of Mesa*, 230 Ariz. 352, 363 ¶ 46 (2012). Instead, the narrow question presented by the Motion to Dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., is whether the facts alleged by Plaintiff are sufficient “to warrant allowing [it] to attempt to prove [its] case.” *See id.* In addition, Arizona is a notice pleading jurisdiction, and so perfection in pleading is not required. *See Rosenberg v. Rosenberg*, 123 Ariz. 589, 592–93 (1979). The Nation includes sufficient facts, which if true, establishes that the Defendants violated various aspects of Arizona law.

### **IV. Signature Curing Must Be Reasonable and Meaningful**

Arizona law requires ballot curing to be reasonable and meaningful and be conducted as soon as practicable.

If not satisfied that the signatures were made by the same person the County shall make reasonable and meaningful attempts to: (1) contact the voter via mail, phone, text message, and/or email; (2) notify the voter of the inconsistent signature; and (3) allow the voter to correct or confirm the signature. The County Recorder shall attempt to contact the voter as soon as practicable using any contact information available in the voter’s record and any other source reasonably available to the County Recorder.

EPM at 83. The early voting period of 27 days. A.R.S. § 16-542(C). Waiting to identify and contact a voter the night before or the day of the curing deadline is not “as soon as practicable.” Nor does it provide reasonable and meaningful opportunities to cure.

## CONCLUSION

For the reasons set forth herein, this Court should deny the Motion to Dismiss and grant the relief requested by Plaintiff.

RESPECTFULLY SUBMITTED this 14th day of November, 2024

By:  \_\_\_\_\_

Patty Ferguson-Bohnee  
INDIAN LEGAL CLINIC  
ASU PUBLIC INTEREST LAW FIRM  
SANDEA DAY O'CONNOR COLLEGE OF LAW  
111 E. Taylor St., Mail Code 8820  
Phoenix, AZ 85004

Katherine Belzowski  
Sage G. Metoxen  
Julianne Begay  
NAVAJO NATION  
DEPARTMENT OF JUSTICE  
P.O. Box 2010  
Window Rock, AZ 86515

*Counsel for Plaintiff*

## CERTIFICATE OF SERVICE


The undersigned hereby certifies that on this 14th day of November, 2024, she filed the Navajo Nation's Reply to Defendants' Motion To Dismiss and Opposition to Request for Temporary Restraining Order in the AZTurboCourt e-filing system for filing and transmittal of documents to the Courts, and that a copy of the filing was served on the same day via email to the parties as follows:

Emily M. Craiger  
[emily@theburgesslawgroup.com](mailto:emily@theburgesslawgroup.com)  
The Burgess Law Group  
3131 E. Camelback Rd., Suite 224  
Phoenix, Arizona 85016  
602-806-2100

*Attorney for Defendants*

Nicholas Klingerman  
[nicholas.klingerman@azag.gov](mailto:nicholas.klingerman@azag.gov)  
*Arizona Attorney General's Office*

RESPECTFULLY SUBMITTED this 14th day of November, 2024

By: 

Patty Ferguson-Bohnee  
INDIAN LEGAL CLINIC  
ASU PUBLIC INTEREST LAW FIRM  
SANDRA DAY O'CONNOR COLLEGE OF LAW  
111 E. Taylor St., Mail Code 8820  
Phoenix, AZ 85004

Katherine Belzowski  
Sage G. Metoxen  
Julianne Begay  
NAVAJO NATION  
DEPARTMENT OF JUSTICE  
P.O. Box 2010  
Window Rock, AZ 86515

*Counsel for Plaintiff*

RETRIEVED FROM DEMOCRACYDOCKET.COM