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21
22 **UNITED STATES DISTRICT COURT**
23 **DISTRICT OF ARIZONA**

24 Darlene Yazzie, Caroline Begay, Leslie Begay,
25 Irene Roy, Donna Williams and Alfred McRoye,

26 Plaintiffs,

27 v.

28 Katie Hobbs, in her official capacity as the
Arizona Secretary of State,

Defendant.

No. 3:20-cv-08222-GMS

[PROPOSED] COMPLAINT-IN-INTERVENTION

Arizona Advocacy Network (“AzAN”) files this Complaint-in-Intervention for declaratory and injunctive relief against Defendant KATIE HOBBS, in her official capacity as the Arizona Secretary of State (the “State”) and alleges as follows:

NATURE OF THE ACTION

1. This case concerns Arizona’s requirement that election officials automatically reject all mail ballots that arrive after 7 p.m. on Election Day, even if they were postmarked on or before Election Day, and even if the delivery delay was beyond the control of the

1 voter. The “Election Day Receipt Deadline” has resulted in the disenfranchisement of
2 thousands of lawful, eligible Arizona voters through no fault of their own: the ballots of
3 more than 17,000 voters have been rejected in Arizona elections held since 2008. In 2008,
4 at least 1,611 ballots were rejected, even though many of them were mailed days before
5 Election Day. In 2012, more than double that number—4,107 ballots—were rejected. And
6 in the 2018 midterm election, a lower turnout general election than either 2008 or 2012,
7 more than 3,000 ballots were rejected. Many of these ballots would have been counted if
8 Arizona had accepted ballots postmarked on or before Election Day.

9 2. Particularly in light of the global COVID-19 pandemic and the recent well-
10 publicized cut-backs in service by the U.S. Postal Service (“USPS”), this Court must protect
11 the rights of Arizona voters in the upcoming November 2020 election by preliminarily
12 enjoining the Election Day Receipt Deadline and ensuring that all eligible Arizona voters
13 who cast their ballot before or on Election Day, and whose ballots are received within a
14 reasonable time after Election Day, have their votes counted.

15 **PARTIES**

16 3. AzAN incorporates by reference and re-alleges Paragraphs 1-8 of the
17 Complaint filed by Plaintiffs in this action (Doc. 1).

18 4. Plaintiff AzAN is a non-profit, non-partisan organization devoted to
19 defending and deepening Arizona’s commitment to democracy, primarily by advocating for
20 meaningful voting rights and access to the ballot, political decisions driven by voters instead
21 of money, and a fair and independent judiciary. Since its inception in 2002, AzAN has been
22 involved in get-out-the-vote (“GOTV”) efforts in Arizona. As part of its GOTV efforts,
23 AzAN educates voters, among other things, on how and when to cast their mail ballots. As
24 part of its continued efforts to turn out the vote across Arizona, AzAN expects to expend
25 significant organizational resources educating voters about the Election Day Receipt
26 Deadline, which directly harms AzAN by burdening and disenfranchising voters, thus
27 frustrating its mission of enfranchising and turning out voters in Arizona. As a result, AzAN
28 has had to—and will continue to—expend and divert additional funds and resources that it

1 would otherwise spend on other mission-critical voter education and engagement efforts to
2 ensure that voters are not disenfranchised by Arizona’s Election Day Receipt Deadline.

3 5. Defendant Katie Hobbs is sued in her official capacity as Secretary of State for
4 the State of Arizona. The Secretary is a person within the meaning of 42 U.S.C. § 1983 and
5 acts under color of state law. She is the Chief Elections Officer for Arizona, A.R.S. § 16-
6 142(A)(1), and has broad authority to oversee the voting process in Arizona. The Secretary
7 also issues the Arizona Election Procedures Manual (“Manual”), which establishes election
8 procedures and administration across Arizona’s fifteen counties. A.R.S. § 16-452. The
9 Manual is approved by the Governor and the Arizona Attorney General and carries the force
10 of law. A.R.S. § 16-452(B). Arizona law also requires the Secretary, after consulting with
11 county officials, to “prescribe rules to achieve and maintain the maximum degree of
12 correctness, impartiality, uniformity and efficiency on the procedures for early voting and
13 voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.”
14 A.R.S. § 16-452(A). Thus, the Secretary directs county officials, who are responsible for
15 physically counting ballots, regarding when to count or reject ballots.

16 **JURISDICTION AND VENUE**

17 6. AzAN incorporates by reference and re-alleges Paragraphs 10-12 of the
18 Complaint filed by Plaintiffs.

19 **BACKGROUND**

20 7. AzAN incorporates by reference and re-alleges Paragraphs 13-50 of the
21 Complaint filed by Plaintiffs.

22 8. Arizonans have a right to vote by mail. A.R.S. § 16-541(A). Mail voting is
23 exceedingly popular in Arizona; in recent years, around 80% of Arizona’s voters received
24 their ballots by mail before voting in elections.

25 9. The increase in early voting by mail has been further accelerated this election
26 cycle by the spread of a highly infectious novel coronavirus, which causes the dangerous
27 and sometimes deadly disease COVID-19.

28

1 10. In Arizona, COVID-19 has already infected more than 200,000 people, and
2 more than 5,200 Arizonans have died as a result. Infections are expected to increase this
3 fall.

4 11. The pandemic makes in-person voting—during which voters must come into
5 close contact with poll workers and other voters, and must make contact with surfaces
6 touched by many others throughout the day—a dangerous activity. This is particularly the
7 case among racial and ethnic minorities, including Native Americans, who have
8 experienced disproportionately high infection rates, and disproportionately worse health
9 outcomes due to infection.

10 12. For this reason, the Secretary and other election officials have encouraged
11 increased voting by mail for the 2020 elections. Based on both past data and current events,
12 the number of mail ballots cast in the 2020 general election promises to be significant.

13 13. While Arizona voters have non-mail alternative options for returning their
14 ballots to election offices, they overwhelmingly prefer to return their ballots by mail. In the
15 2016 general election, approximately 90% of Arizona voters who voted with a mail ballot
16 returned their ballot via mail. Other options, such as hand-delivery, require transportation
17 and travel time and are thus more burdensome.

18 14. Since 2008, more than 17,000 Arizona voters have had their ballots rejected
19 because they arrived after 7:00 p.m. on Election Day. Every election year, multiple races
20 are decided by margins of mere hundreds or even a few dozen ballots, and at least some
21 election outcomes would otherwise be different if not for the Election Day Receipt
22 Deadline.

23 15. The Election Day Receipt Deadline is contrary to the reasonable expectations
24 of Arizona voters. Nearly all other mail-related deadlines in modern life—including state-
25 mandated deadlines like tax documents, insurance premium payments, and vehicle
26 registrations—are evaluated by whether mail is postmarked by the deadline, not when it is
27 received. Even Arizona itself implements a “postmark” rule for other election-related
28 deadlines; for instance, voter registration applications are considered timely as long as they

1 are postmarked by the registration deadline and received by election officials within five
2 days of the deadline. See A.R.S. § 16-134(C)(2).¹

3 16. The Election Day Receipt Deadline also deprives Arizona voters of key
4 election information. The final days before an election are a critical time for campaigning,
5 and late-breaking developments can often influence voter decisions. Because of the Election
6 Day Receipt Deadline, voters across Arizona—who both desire to and think they can wait
7 until Election Day to evaluate their preferred candidates—are disenfranchised.

8 17. Outside of a few large urban areas like Phoenix and Tucson, much of Arizona
9 is rural, and voters in those areas are particularly harmed by the Election Day Receipt
10 Deadline due to slow and unreliable mail service. Even voters in metropolitan areas like
11 Phoenix and Tucson, where mail delivery is often speedier, routinely have their ballots
12 rejected under the Election Day Receipt Deadline, despite sending them many days before
13 Election Day.

14 18. Those delays are compounded given recent slowdowns in service by the USPS.
15 The slowdowns are a result of shifts in internal practices at the USPS (the cutback of
16 overtime hours for postal workers, prohibiting mail carriers from making extra trips to
17 deliver mail, hiring freezes and the removal of mail sorting machines at some postal
18 facilities) and an abnormally high number of personnel absences due to the COVID-19
19 pandemic.

20 19. These delays are already happening across the country. In California’s recent
21 primary election, over 70,000 ballots were rejected for arriving after the state’s receipt
22 deadline—even though California accepted ballots up to three days after Election Day. In
23 Wisconsin’s Spring Election, a massive increase in requests for absentee ballots placed a
24 significant strain on elections officials, who were unable to send ballots to thousands of
25 voters who timely requested them in time for those ballots to be returned by Election Day.

26
27 ¹ The term “postmark” is not limited to the traditional postmark stamp, but can also
28 include any other official indicia that a ballot entered the postal system, such as a bar code
or tracking information.

1 But for a decision of the U.S. Supreme Court in litigation brought in anticipation of this
2 very problem, which allowed absentee ballots to count so long as they were postmarked by
3 Election Day, over 79,000 voters would have been disenfranchised. *See Democratic Nat'l*
4 *Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1638374, at *38-39 (W.D. Wis. Apr.
5 2, 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208
6 (2020).

7 20. In light of these and similar occurrences in primary elections around the
8 country and the USPS's widely publicized delays with delivering mail, the General Counsel
9 of the USPS recently sent a letter to the Secretary alerting her that Arizona's current election
10 deadlines "are incongruous" with the Postal Service's current capabilities. The letter warned
11 that in order to ensure that election officials receive mail ballots by the Election Day Receipt
12 Deadline, voters need to request them at least 15 days before the November 3, 2020 general
13 election. State law allows registered voters to request early ballots up to 11 days before an
14 election, but under that time frame, they would likely not receive their ballot in time for
15 them to fill it out and return it by the Receipt Deadline.

16 21. The State has no legitimate reason to reject otherwise valid ballots that are
17 postmarked on or before Election Day but arrive after the Election Day Receipt Deadline.
18 Election officials have a full 20 days after Election Day to complete the count and certify
19 results. A.R.S. § 16-642(A). Further, Arizona law already recognizes that the total number
20 of valid ballots will be in flux for some days after the election; voters have up to five
21 business days to cure certain ballot defects, and provisional ballots are processed up to ten
22 days after the election. A.R.S. § 16-135(D); *id.* § 16-550. Requiring Arizona to accept
23 ballots that are postmarked on or before Election Day and which arrive within ten days of
24 Election Day would put a minimal administrative burden on the state, if any. And as the
25 Supreme Court has explained, "administrative convenience" cannot justify the deprivation
26 of a constitutional right. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

27 22. The Election Day Receipt Deadline also decreases Arizona voters' confidence
28 in the fair administration of the election. The Deadline is widely misunderstood, and for

1 good reason—because it defies voters’ reasonable expectations about the way mail
2 deadlines work. It also infuses the voting process with uncertainty, as neither voters nor
3 election officials have any real way to predict when a ballot must be mailed to arrive in
4 time. Lastly, the Election Day Receipt Deadline functionally requires some voters to mail
5 their ballots back earlier than others, which leads to the perception of unfairness and unequal
6 treatment.

7 **Voting in Arizona**

8 23. AzAN incorporates by reference and re-alleges Paragraphs 51-53 of the
9 Complaint filed by Plaintiffs.

10 **Navajo Nation Tribal Members Bear the Effects of Discrimination in Education, 11 Employment and Health which Hinder their Ability to Participate Effectively in the Political Process**

12 24. AzAN incorporates by reference and re-alleges Paragraphs 54-79 of the
13 Complaint filed by Plaintiffs.

14 **A History of Discrimination by Arizona Officials Restricting the Rights of Navajo 15 Nation Tribal Members to Register to Vote, Vote and Otherwise Participate in the Democratic Process**

16 25. AzAN incorporates by reference and re-alleges Paragraphs 80-100 of the
17 Complaint filed by Plaintiffs.

18 **Relevant Statutes**

19 26. AzAN incorporates by reference and re-alleges Paragraphs 101-105 of the
20 Complaint filed by Plaintiffs.

21 **Why This Action is Necessary**

22 27. AzAN incorporates by reference and re-alleges Paragraphs 106-111 of the
23 Complaint filed by Plaintiffs.

24 28. While the allegations in Plaintiffs’ Complaint in this suit focus on the serious
25 impact the Election Day Receipt Deadline will have on Navajo voters in particular, the
26 Election Day Receipt Deadline will disenfranchise voters *throughout* Arizona. Voter
27 confusion, COVID-19, and mail delays affect voters across the state. As a result, a statewide
28 injunction against the Election Day Receipt Deadline is necessary to ensure than all

1 Arizonans are not denied their fundamental right to vote through no fault of their own.

2 **CLAIMS FOR RELIEF**

3 **COUNT I**

4 **First and Fourteenth Amendments**

5 **U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983, 28 U.S.C. § 2201, 28 U.S.C. § 2202**
6 ***Undue Burden on the Right to Vote***

7 29. AzAN re-alleges all other Paragraphs in this Proposed Complaint.

8 30. AzAN incorporates by reference and re-alleges Paragraphs 112-116 of the
9 Complaint filed by Plaintiffs.

10 31. To evaluate whether a state election law unduly burdens the right to vote in
11 violation of the First and Fourteenth Amendment rights, federal courts weigh the burden to
12 voting rights against the justifications put forward by the State for the burdens imposed by
13 the rule. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460
14 U.S. 780, 789 (1983). This balancing test uses a flexible sliding scale, where the
15 rigorousness of scrutiny depends upon the extent to which the challenged law burdens
16 voting rights. *See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir.
17 2016). Even the most relaxed standard of review still requires a court to assess the means-
18 fit of the challenged provision.

19 32. Arizona's Election Day Receipt Deadline imposes a severe burden on all
20 Arizona voters. It requires voters to mail their ballots well in advance of an election—how
21 much in advance, no one can precisely predict—or drop off the ballot in person, which
22 requires time and transportation and carries a risk of contracting or spreading COVID-19.
23 The Election Day Receipt Deadline does not align with voters' reasonable expectations
24 about when a ballot can be returned, thus disenfranchises understandably confused voters,
25 who believe they have up to and including Election Day to send their ballot.

26 33. Although Arizona has a legitimate interest in finalizing election results and
27 requiring that ballots be returned at a certain time, the Election Day Receipt Deadline is
28 neither a reasonable nor remotely tailored method to achieve those goals. Arizona could

1 equally serve its interests in a manner that does not predictably disenfranchise voters by the
2 thousands every election. With no compromise to its policy goals and little administrative
3 burden, Arizona could accept ballots that are postmarked by Election Day and arrive by the
4 end of the provisional ballot processing period (i.e. ten days). This would serve its interests
5 in finalized and timely election results without burdening voting rights.

6 **COUNT II**

7 **Article 2, Section 21 of the Constitution of the State of Arizona**

8 34. AzAN re-alleges all other Paragraphs in this Proposed Complaint.

9 35. AzAN incorporates by reference and re-alleges Paragraphs 102 and
10 Paragraphs 117-118 of the Complaint filed by Plaintiffs.

11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, AzAN respectfully requests that this Court enter judgment:

- 13 A. Declaring that Arizona’s Election Day Receipt Deadline violates
- 14 the First and Fourteenth Amendments to the United States
- 15 Constitution, and the Elections Clause of the Arizona Constitution;
- 16 B. Preliminarily and permanently enjoining the Secretary, her
- 17 respective agents, officers, employees, and successors, and all
- 18 persons acting in concert with each or any of them, from rejecting
- 19 ballots that are postmarked by Election Day and arrive at a county
- 20 recorder’s office within ten business days of Election Day;
- 21 C. Awarding AzAN its costs, expenses, and reasonable attorneys’ fees
- 22 pursuant to 42 U.S.C. § 1988 and other applicable laws; and
- 23 D. Granting such other and further relief as the Court deems just and
- 24 proper.
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- 28

1 Dated: September 11, 2020

/s Sarah R. Gonski

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

/s Daniel R. Graziano