No. 24-6301

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STRONG COMMUNITIES FOUNDATION OF ARIZONA, INC.; et al.,
Plaintiffs-Appellants,

v.

STEPHEN RICHER, in his official capacity as Maricopa County Recorder; et al.,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Arizona

OPENING BRIEF OF PLAINTIFFS-APPELLANTS STRONG COMMUNITIES FOUNDATION OF ARIZONA, INC. AND YVONNE CAHILL

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure (FRAP), Appellant Strong Communities Foundation of Arizona, Inc. (d/b/a "EZAZ.org") states that it is a non-profit 501(c)(3) organization. Appellant has no corporate parent and is not owned in whole or in part by any publicly held corporation.

Appellant Yvonne Cahill is an individual.

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Jurisdictional Statement

Appellants Strong Communities Foundation of Arizona, Inc. (d/b/a "EZAZ.org") and Yvonne Cahill (collectively, the "Plaintiffs" or "Appellants") respectfully submit this opening brief.

The district court had federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction over the Plaintiffs' State law claims under 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the appeal is from an order denying a motion for temporary restraining order and preliminary injunction.

The notice of appeal was timely because it was filed on October 14, 2024, 4-ER-409-10, three days after the district court's order of October 11. 1-ER-2-23; FRAP 4(a)(1)(A). This brief is filed within the deadline specified by the Clerk's Preliminary Injunction Time Schedule Notice, dated October 16, 2024.

Issues Presented

1. Did the District Court err when it determined that the Appellants did not have standing to move for a temporary restraining order and preliminary injunction?

2. Did the District Court err when it denied the Appellants' motion for a temporary restraining order and preliminary injunction based on the *Purcell Doctrine*?

Statement of the Case and Facts

I. Arizona's Federal-Only Voters

Arizona law requires that persons registering to vote provide documentary proof of citizenship (DPOC). A.R.S. § 16-166(F). However, the U.S. Supreme Court has held the State may not impose these voter registration requirements on registrants who use the federal voter registration form. *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*Inter Tribal Council*"), 570 U.S. 1 (2013). Because the National Voter Registration Act (NVRA) requires States to "accept and use," 52 U.S.C. § 20505(a)(1), the federal form issued by the Election Assistance Commission (EAC),[1] and because that form does not require DPOC, the Supreme Court held in *Inter Tribal Council* that "the NVRA forbids States to demand that an applicant submit additional information beyond that required by the

[1] The NVRA originally delegated this authority to the Federal Election Commission. NATIONAL VOTER REGISTRATION ACT OF 1993, PL 103–31, May 20, 1993, 107 Stat 77 § 6(a)(1). The Help America Vote Act transferred this authority to the EAC.

Federal Form." *Inter Tribal Council*, 570 U.S. at 15. However, because Arizona may establish its own requirements for state and local elections, and because State law requires DPOC, registering to vote in state and local elections still requires registrants to provide DPOC. Therefore, Arizona has a unique bifurcated system of voter registration whereby voters who have registered without providing DPOC (Federal-Only Voters) may only vote in federal races.

According to the Arizona Secretary of State's Office (AZSOS), as of April 1, 2024, 35,273 registered voters in Arizona had failed to provide proof of citizenship and were, therefore, registered only to vote in federal races.[2] As of July 1, 2024, the number of Federal-Only Voters was 42,301.[3] This means that the number of Federal-Only Voters increased by 7,028—nearly 20% in just three months.

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[2] ARIZONA SECRETARY OF STATE'S OFFICE, *Federal Only Registrants as of April 1st, 2024*, (Apr. 1, 2024), https://perma.cc/N5HW-MAL3; *see also Anderson v. Holder*, 673 F.3d 1089, 1094 (9th Cir. 2012) (stating that courts "may take judicial notice of records and reports of administrative bodies" (cleaned up)).

[3] ARIZONA SECRETARY OF STATE'S OFFICE, *Federal Only Registrants as of July 1st, 2024*, (Apr. 1, 2024), https://perma.cc/L2CD-RWPB.

II. Voter List Maintenance Requirements

The U.S. Supreme Court also held in *Inter Tribal Council* that the NVRA "does not preclude States from denying registration based on information in their possession establishing the applicant's ineligibility." *Inter Tribal Council*, 570 U.S. at 15 (cleaned up). Further, the Court noted that the NVRA only requires states to register eligible persons. *Id.* Nor does the Court's decision in *Inter Tribal Council* prohibit States from engaging in the voter list maintenance procedures required by the Help America Vote Act (HAVA), 52 U.S.C. § 21083(a)(2)(A), (a)(2)(B)(ii), (a)(4)(A), such as inquiring about the citizenship or immigration status of potentially ineligible voters on voter rolls.

Further, despite its prohibition on requiring evidence of citizenship status beyond the four corners of the EAC's federal voter registration form, the U.S. Supreme Court acknowledged that States nevertheless could access information via other means to help them resolve questions about a voter registration applicant's citizenship status. In 2022, the Arizona Legislature enacted, and then-Governor Ducey signed, H.B. 2492

and H.B. 2243,[4] which, among other things, amended Arizona's election statutes to impose stricter voter list maintenance requirements for Federal-Only Voters. Those requirements mandate that Arizona County Recorders perform monthly list maintenance to confirm the citizenship of all Federal-Only Voters. A.R.S. § 16-165. Those requirements also require County Recorders to perform list maintenance within ten days for all newly registered Federal-Only Voters to verify citizenship. A.R.S. § 16-143(D). The Defendants have failed to perform this required list maintenance.

One obstacle to performing such list maintenance is that Arizona Secretary of State Adrian Fontes has neglected to obtain access for list maintenance to the three databases that the statutes specifically require be consulted to verify citizenship: the U.S. Department of Homeland Security's (DHS) Systematic Alien Verification for Entitlements (SAVE), A.R.S. §§ 16-121.01(D)(3) and -165(I); the Social Security Administration (SSA) database, A.R.S. §§ 16-121.01(D)(2) and -165(H); and the National

[4] 2022 Ariz. Legis. Serv. Ch. 370 (H.B. 2243); 2022 Ariz. Legis. Serv. Ch. 99 (H.B. 2492).

Association for Public Health Statistics and Information Systems (NAPHSIS) electronic verification of vital events system (EVVE). A.R.S. §§ 16-121.01(D)(4) and -165(J).

However, State and federal law impose additional list maintenance obligations beyond just consulting these three databases. State law also requires that "[w]ithin ten days after receiving an application for registration on a form produced by the United States election assistance commission that is not accompanied by satisfactory evidence of citizenship, the county recorder or other officer in charge of elections *shall use all available resources* to verify the citizenship status of the applicant...." A.R.S. § 16-121.01(D) (emphasis added). State law also requires that County Recorders "at a minimum shall compare the information available on the application for registration with the following, provided the county has access.... Any other ... federal database ... to which the county recorder or officer in charge of elections has access...." A.R.S. § 16-121.01(D) and (D)(5). Additionally, for all registrants, State law requires that "[t]o the extent practicable, the county recorder shall review relevant ... federal databases to which the county recorder has access to confirm

information obtained that requires cancellation of registrations pursuant to this section." A.R.S. § 16-165(K).

Furthermore, federal law requires "local election official[s]" to "perform list maintenance" of their voter rolls and to ensure that "voters ... who are not eligible to vote [in federal elections] are removed." 52 U.S.C. § 21083(a)(2)(A) and (a)(2)(B)(ii). It also requires that election officials "ensure that voter registration records in the State are accurate and are updated regularly, including .... [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(A). Because it is illegal for foreign citizens[5] to register to vote in federal elections, any foreign citizen who is registered to vote is ineligible. Therefore, federal law requires County Recorders to "perform list maintenance" and to engage in "reasonable efforts" to ensure that foreign citizens are not registered to vote.

[5] In this brief, "foreign citizen" means "any person not a citizen or national of the United States," the defined meaning for the term "alien" in federal law. 8 U.S.C. § 1101(a)(3).

The NVRA requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office" must be "uniform [and] nondiscriminatory." 52 U.S.C. § 20507(b)(1). Election officials violate these requirements when their voter-roll maintenance singles out one group of voters for different treatment. *See, e.g., Mi Familia Vota v. Fontes* ("*Mi Familia*"), --- F.Supp.3d ----, 2024 WL 862406, at *41 (D. Ariz. Feb. 29, 2024) (provision of H.B. 2243 under which "[o]nly naturalized citizens would be subject to scrutiny" violated NVRA's uniformity and nondiscrimination requirements); *United States v. Florida*, 870 F. Supp. 2d 1346, 1350 (N.D. Fla. 2012) (voter list maintenance targeted at removing foreign citizens "probably ran afoul" of the NVRA's uniform and nondiscriminatory provision because it was "likely that the properly registered citizens who would be required to respond and provide documentation would be primarily newly naturalized citizens").

The Defendants currently submit citizenship checks to DHS only for Federal-Only Voters who have provided an alien number or other

DHS numeric identifier but not for other Federal-Only Voters. 3-ER-387-89 ¶¶ 91-105; 3-ER-400 ¶¶ 192-199. However, DHS has the ability to look up citizenship information for *any* individual using only that person's name and date of birth through DHS's PCQS database. *Infra* at 19,25; *see also* 3-ER-392-93 ¶¶ 127-29; 3-ER-400-01 ¶¶ 192-99.

III. Foreign citizens *do* register to vote.

The possibility of foreign citizens registering to vote is not just hypothetical. States and local election officials who proactively search for foreign citizens registered to vote find them. For example, since 2021, the State of Texas has removed over 6,500 potential foreign citizens from its voter rolls.[6] Of those 6,500 foreign citizens, 1,930 actually voted.[7] On August 21, 2024, Ohio Secretary of State Frank LaRose announced that his

[6] 3-ER-386 ¶¶ 84-85; *Governor Abbott Announces Over 1 Million Ineligible Voters Removed From Voter Rolls* ("Texas Press Release"), OFFICE OF THE TEXAS GOVERNOR, (Aug. 26, 2024), https://perma.cc/SPG8-GWPB. Courts "take judicial notice of 'matters of public record,'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (quoting Fed. R. Evid. 201), including "press release[s]." *Arce v. Douglas*, 793 F.3d 968, 975 n.3 (9th Cir. 2015).

[7] 3-ER-386 ¶¶ 84-85; Texas Press Release.

office had identified 597 foreign citizens registered to vote in Ohio and that 138 had actually voted.[8]

On August 7, 2024, Virginia Governor Glenn Youngkin issued an executive order requiring more thorough list maintenance procedures because "between January 2022 and July 2024, records indicate we removed 6,303 non-citizens from the voter rolls."[9] The U.S. Department of Justice challenged removals of foreign citizens from Virginia's voter rolls that were made in response to this executive order, claiming they violated the NVRA's 90-day blackout period on systematic cancellations of voter registrations. *See* 52 U.S.C. § 20507(c)(2)(A). However, the U.S. Supreme Court issued a 6-3 stay decision allowing Virginia to keep these aliens off its voter rolls, even though they had been removed within 90 days of the election. *See* Order in Pending Case, *Beals v. Va. Coalition for Immigrant*

[8] 3-ER-387 ¶ 87; *Secretary LaRose Refers Evidence of Non-Citizen Voter Registrations to Ohio Attorney General for Potential Prosecution*, OHIO SECRETARY OF STATE'S OFFICE, (Aug. 21, 2024), https://perma.cc/H3TZ-YMVS.

[9] 3-ER-387 ¶ 88; Va. Exec. Order No. 35 at 2 (2024), *available at* https://perma.cc/JU3V-J5UE.

Rights, 24A407, (U.S. Oct. 30, 2024), available at https://perma.cc/C3SL-LTSL.

IV. SAVE, SSA, and EVVE are insufficient to verify citizenship definitively.

Even if the Defendants had access to SAVE, SSA, and EVVE for list maintenance, these three databases would be insufficient to definitively verify the citizenship of all Federal-Only Voters. Only consulting SAVE, SSA, and EVVE to verify citizenship, without more, is insufficient to fulfill a County Recorder's list maintenance duties under State and federal law.

A. SAVE

SAVE was created by the Immigration Reform and Control Act of 1986 (IRCA).[10] The heading for the section that created SAVE explains its purpose: "VERIFICATION OF IMMIGRATION STATUS OF ALIENS APPLYING FOR BENEFITS UNDER CERTAIN PROGRAMS."[11] As the

[10] Pub. L. No. 99–603, § 121, 100 Stat 3359 (1986); *see also Peters v. United States*, 853 F.2d 692, 700 n. 9 (9th Cir. 1988).

[11] IRCA § 121; *Ram v. INS*, 243 F.3d 510, 514 n.3 (9th Cir. 2001) ("a statute's title and a section's heading may be used to interpret its meaning" (citing *Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998)).

Ninth Circuit explained, Congress created SAVE to "set forth specific procedures to verify alien eligibility for public benefits." *Peters*, 853 F.2d at 700 n.3. The Central District of California also explained that SAVE "is an existing federal eligibility system used to verify status for various federal-state cooperative programs such as the Aid to Families with Dependent Children ("AFDC"), Food Stamps, Medicaid and Unemployment Compensation programs under which eligibility is dependent on lawful immigration status." *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995).

A critical design flaw hobbles SAVE: The system requires at least one of the following DHS-specific "numeric identifier[s]": "Alien / USCIS Number (A-Number)," "Form 1-94, Arrival/Departure Record Number," "Student and Exchange Visitor Information System (SEVIS) ID number," "Naturalization / Citizenship Certificate Number," "Card / 1-797 Receipt Number," "Visa Number," or "Foreign Passport Number (if entered along with a U.S. immigration enumerator)."[12] This is no surprise, as providing

[12] *Tutorial: Introduction to SAVE and the Verification Process for SAVE Users*, DEP'T OF HOMELAND SEC., (Mar. 2024), https://perma.cc/MS43-GBWM.

a DHS-specific numeric identifier (hereinafter referred to as an "alien number") for SAVE is a statutory requirement.

IRCA requires that foreign citizens applying for government benefits present their "alien registration documentation or other proof of immigration registration from the Immigration and Naturalization Service that *contains the individual's alien admission number or alien file number (or numbers if the individual has more than one number).*" IRCA § 121(a), codified at 42 U.S.C. § 1320b-7(d)(2)(A) (emphasis added). Once a foreign citizen applying for benefits has provided immigration documents containing an alien number, IRCA requires that "the State shall utilize the individual's *alien file or alien admission number* to verify with the Immigration and Naturalization Service the individual's immigration status through an automated or other system (designated by the Service for use with States)." IRCA § 121(a), codified at 42 U.S.C. § 1320b-7(d)(3) (emphasis added). SAVE is the "automated or other system" required by IRCA that is "designated ... for use with States." *Id.* IRCA specifically requires that SAVE "utilize[] the individual's name, *file number,*

admission number, or other means permitting efficient verification." IRCA § 121(a), codified at 42 U.S.C. § 1320b-7(d)(3)(A) (emphasis added).

Put simply, SAVE doesn't work without submitting an alien number for the person being looked up. SAVE was designed to be used in a context where a foreign citizen's alien number is provided as part of the process of applying for benefits. SAVE was never intended to be a general-purpose citizenship verification tool, and it was never designed to be used in the voting context, where such alien numbers are not required.

As a district court judge recently observed, "the [EAC's] Federal Form does not include a space for registrants to provide this information" about "immigration numbers." *Mi Familia*, 2024 WL 862406, at *6. Furthermore, SAVE does not process social security or driver's license numbers, which are the ID numbers that registrants are most likely to provide on their voter registration forms.[13] Thus, in practice, SAVE is

[13] *See, e.g.*, *Register to Vote in your State by Using this Postcard Form and Guide* at 3-4, U.S. ELECTION ASSISTANCE COMMISSION, https://perma.cc/7L5H-RCFR (Arizona-specific instructions from the EAC for filling out the federal voter registration form requiring registrants to provide, if available, a driver license number or the last four digits of their social security number).

practically useless for verifying the citizenship of voter registrants because it can only provide citizenship information if a registrant has provided an alien number, which is the searchable variable required for SAVE. However, alien numbers are not required under the current version of the EAC federal voter registration form, nor are they required on Arizona's state voter registration form.

B. SSA and EVVE

Arizona "county recorders currently do not have access to NAPHSIS [EVVE] or the SSA database." *Mi Familia*, 2024 WL 862406, at *5.

Even if County Recorders had access to the SSA database, it would be insufficient to verify citizenship: "[Arizona] [c]ounty recorders ... lack direct access to SSA records.... Approximately one quarter of SSA records lack citizenship information," and "the federal government does not allow access to this [citizenship] information." *Mi Familia*, 2024 WL 862406, at *7 (cleaned up).

Similarly, even if County Recorders had access to EVVE, it would also be insufficient to verify citizenship. NAPHSIS is a nonprofit organization that represents state and local vital records, health statistics, and information system agencies. NAPHSIS's EVVE database contains

information on most births in the United States. 3-ER-390 ¶¶ 110-112. However, EVVE does not have information about births in Texas. *Id.* EVVE, therefore, is insufficient for verifying citizenship because it cannot verify the birth of anyone born in Texas. EVVE is also inadequate for verifying citizenship because it cannot verify the citizenship of U.S. citizens who were not born in the United States. EVVE thus does not contain information about the births of persons born overseas who acquire citizenship at birth because one or more of their parents are U.S. citizens.[14] NAPHSIS also cannot be used to verify the citizenship of naturalized citizens.

V. Federal Law Entitles County Recorders to Submit Citizenship Inquiries to DHS

Fortunately, there is an easy method for County Recorders to confirm the citizenship of Federal-Only Voters, and this method does not require using SAVE, SSA, or EVVE. The Immigration and Nationality Act (INA), at 8 U.S.C. § 1373, requires DHS to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain

[14] *See* 8 U.S.C. §§ 1401-1409; *Sessions v. Morales-Santana*, 582 U.S. 47 (2017).

the citizenship or immigration status of *any individual* within the jurisdiction of the agency for *any purpose authorized by law*, by providing the requested verification or status information." 8 U.S.C. § 1373(c) (emphasis added). Verification of a voter registrant's citizenship is a purpose authorized by law. *Supra* at 2-9.

Section 1373 specifically preempts the requirements of "any other provision of Federal, State, or local law." 8 U.S.C. § 1373(a). Section 1373 was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[15] The House Judiciary Committee explained that, with Section 1373:

> [t]he Committee intends to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, and activities of illegal aliens. *This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.*

H.R. REP. 104-469, at 277 (1996) (emphasis added).

[15] Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104–208, § 642, 110 Stat 3009 (1996).

The INA also states, in 8 U.S.C. § 1644, that "*[n]otwithstanding any other provision of Federal, State, or local law*, no State or local government entity may be prohibited, *or in any way restricted*, from sending to or receiving from ... [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644 (emphasis added). Section 1644 was enacted as part of the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA). Pub. L. 104–193, § 434, 110 Stat 2105 (1996). The House Conference Report for PRWORA explained Congress's intent in enacting Section 1644:

> The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. *This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.*

H.R. Conf. Rep. 104-725, at 383, 1996 U.S.C.C.A.N. 2649, 2771 (1996) (emphasis added).

Because Sections 1373 and 1644 both expressly preempt any other federal or State law provisions, no other federal or State law could

prevent a County Recorder from submitting citizenship confirmation requests to DHS. *See* U.S. Const. art. VI, cl. 2.

Section 1373 "*requires* the Federal Government to 'verify or ascertain' an individual's 'citizenship or immigration status' in response to a state request." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 602 (2011) (quoting 8 U.S.C. § 1373(c)) (emphasis added). As the Supreme Court has explained, "Congress has *obligated* ICE to respond to *any* request made by state officials for verification of a person's citizenship or immigration status." *Arizona v. United States*, 567 U.S. 387, 412 (2012) (citing 8 U.S.C. § 1373(c)) (emphasis added). Thus. DHS's "ICE's Law Enforcement Support Center operates 24 hours a day, seven days a week, 365 days a year and provides, among other things, immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies." *Id.* (cleaned up).

DHS has the capability to verify an individual's citizenship status without using the alien number that SAVE requires. For example, DHS maintains the Person Centric Query System (PCQS) database, which allows agency employees to look up individuals and quickly and easily

verify their citizenship and immigration status using only a name and date of birth.[16] This means that, *right now*, DHS can answer all inquiries from a County Recorder about the citizenship status of registered voters and all persons attempting to register to vote.

The citizenship information to which County Recorders are lawfully entitled under 8 U.S.C. §§ 1373 and 1644 qualifies as an "available resource[]" under A.R.S. § 16-121.01(D). Therefore, County Recorders have a mandatory obligation under A.R.S. § 16-121.01(D) to submit citizenship and immigration status requests about Federal-Only Voters to DHS under 8 U.S.C. §§ 1373 and 1644 ("1373/1644 Requests"). The citizenship information to which County Recorders are lawfully entitled under 8 U.S.C. §§ 1373 and 1644 qualifies as a "relevant ... federal database[] to which the county recorder has access" under A.R.S. §§ 16-121.01(D) and

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[16] *Privacy Impact Assessment Update for the USCIS Person Centric Query Service Supporting Immigration Status Verifiers of the USCIS Enterprise Service Directorate / Verification Division*, DEP'T OF HOMELAND SEC. (June 8, 2011), https://perma.cc/32CZ-467V. ("Status verifiers may conduct queries based on an individual's name and date of birth."); DEP'T OF STATE, Foreign Affairs Manual, 9 FAM 202.2-5(C)(c), (Aug. 2, 2024), https://perma.cc/C8QM-H5Z4 (instruction to consular officers about using PCQS stating that "[y]ou can review the applicant's information by ... entering the name and date of birth of the individual").

-165(K). Therefore, County Recorders have a mandatory obligation under A.R.S. § 16-121.01 and -165(K) to submit 1373/1644 Requests to DHS.

County Recorder submissions of 1373/1644 Requests about Federal-Only Voters are also consistent with, and required by, County Recorders' obligations under federal law to conduct "list maintenance" and make "reasonable effort[s]" to remove potentially ineligible voters. 52 U.S.C. § 21083(a)(2)(A), (a)(4)(A), and (a)(2)(B)(ii). Furthermore, the County Recorders' sole use of SAVE to verify citizenship violates the NVRA's requirement that voter list maintenance be uniform and non-discriminatory. 52 U.S.C. § 20507(b)(1). This is because SAVE can only be used to verify the citizenship of Federal-Only Voters who provide an alien number. County Recorders do not perform a citizenship check of Federal-Only Voters who fail to provide an alien number, which means they are not verifying with DHS the citizenship of natural-born citizens and of unlawfully present aliens.

VI. County Recorders are obligated to provide to the Arizona Attorney General a list of Federal-Only Voters

Additionally, H.B. 2492 required that County Recorders "shall make available to the attorney general a list of all individuals who are

registered to vote and who have not provided satisfactory evidence of citizenship" and also that they "shall provide, on or before October 31, 2022, the applications of individuals who are registered to vote and who have not provided satisfactory evidence of citizenship."[17] The Arizona Legislature imposed this requirement on County Recorders so that the Attorney General could fulfill her obligation that she "shall use all available resources to verify the citizenship status of the applicant[s]." A.R.S. § 16-143(B).

This statutory provision requiring Recorders to transmit the information and registration applications about Federal-Only Voters to the Attorney General is currently in force and not enjoined by any court. Yet, surprisingly, the Defendants have failed to comply by sending to the Attorney General a list of all Federal-Only Voters registered in each of their respective counties. The Defendants have also failed to provide to the Attorney General the applications of all Federal-Only Voters registered in each of their respective counties.

[17] 2022 Ariz. Legis. Serv. Ch. 99 (H.B. 2492); A.R.S. § 16-143(A).

VII. Pre-Litigation Efforts to Request Compliance as to Maricopa County

On July 16, 2024, Plaintiff EZAZ.org sent a letter to Stephen Richer, the County Recorder of Maricopa County, Arizona. The letter reminded Richer of his obligations to perform list maintenance and explained how 1373/1644 Requests would allow him to fulfill those obligations. The letter pointed out that Arizona law requires that he "shall review relevant ... federal databases to which the county recorder has access," A.R.S. § 16-165(K), and that he is, therefore, obligated to submit 1373/1644 Requests to DHS for all Maricopa County Federal-Only Voters. 3-ER-250-56.

Recorder Richer's counsel responded through a letter sent on July 23. 3-ER-258-59. In the letter, Recorder Richer claimed that he already complies with all applicable State and federal laws related to voter registration. He also claimed to have no legal authority to submit 1373/1644 Requests to DHS about Maricopa County Federal-Only Voters. Recorder Richer also claimed that the Federal District of Arizona had ruled that using 1373/1644 Requests and SAVE for list maintenance violates the Voting Rights Act. These claims were false.

Rather, the Federal District of Arizona had ruled precisely the opposite, explicitly holding that "Arizona is entitled to investigate the citizenship status of registered voters to ensure that only qualified individuals are registered to vote.... For example, County recorders must check SAVE and/or NAPHSIS for all voters without DPOC, i.e., Federal-Only Voters." *Mi Familia*, 2024 WL 862406 at *38. That court also specifically ordered that "Arizona may conduct SAVE checks on registered voters who have not provided DPOC." *Id.* at *57.

Recorder Richer also claimed that he had fully complied with the requirements of A.R.S. § 16-143 but failed to describe any steps he has taken to actually comply. However, Recorder Richer has failed to transmit to the Attorney General a list of Maricopa County Federal-Only Voters or their voter applications, as required by A.R.S. § 16-143. Recorder Richer was also not complying with his ongoing obligation under A.R.S. § 16-143 to transmit to the Attorney General updated lists and applications of Federal-Only Voters as new voters register. Accordingly, his claim to be in compliance with A.R.S. § 16-143 was also false.

VIII. Pre-Litigation Efforts to Request Compliance as to the Other Counties

On July 16, 2024, Plaintiff EZAZ.org also sent letters to the County Recorders of the other counties in Arizona,[18] reminding them of their obligations to perform list maintenance and explaining how 1373/1644 Requests would allow them to fulfill those obligations. 3-ER-261-358. On July 26, 2024, Pima County Recorder Gabriella Cázares-Kelly responded by letter. 3-ER-360-65. In her letter, Cázares-Kelly refused to submit 1373/1644 requests to DHS, claiming that "we believe our current list maintenance procedures are thorough and address many of the concerns you expressed." 3-ER-360. Cázares-Kelly also claimed, incorrectly, that "[t]he Person Centric Query System (PCQS) does not use any new data not already available to SAVE." 3-ER-361-62. This was incorrect because,

[18] The letters were sent to the following parties, who are all Defendants-Appellees in this case, along with their respective counties: Apache County Recorder Larry Noble, Cochise County Recorder David W. Stevens, Coconino County Recorder Patty Hansen, Gila County Recorder Sadie Jo Bingham, Graham County Recorder Polly Merriman, Greenlee County Recorder Sharie Milheiro, La Paz County Recorder Richard Garcia, Mohave County Recorder Lydia Durst, Navajo County Recorder Michael Sample, Pima County Recorder Gabriella Cázares-Kelly, Pinal County Recorder Dana Lewis, Santa Cruz County Recorder Anita Moreno, Yavapai County Recorder Michelle Burchill, and Yuma County Recorder Richard Colwell.

as explained above, SAVE requires an alien number, whereas PCQS only requires a name and date of birth. Cázares-Kelly also implicitly admitted that she had not submitted a list of Federal-Only Voters to the Arizona Attorney General, claiming that "the 15 recorders in the state of Arizona agreed in 2022 that the report would come from the Secretary of State." 3-ER-360. However, A.R.S. § 16-143(A) imposes independent obligations on the Secretary of State and each County Recorder to each separately transmit their lists of Federal-Only Voters.

Yavapai County Recorder Michelle Burchill and Cochise County Recorder David Stevens responded favorably to the letter.

The remaining County Recorders did not respond to the letter.

IX. Procedural History

On August 5, 2024, the Plaintiffs filed this suit in Arizona state court against Maricopa County Recorder Stephen Richer, as well as against Maricopa County itself (the "Maricopa County Defendants"). 4-ER-426-45. At the same time, the Plaintiffs filed an Application for Order to Show Cause, which was the appropriate vehicle under State law to request expedited relief. 4-ER-450-55; *see also* Ariz. R. P. Special Action 4(c). In their Application, the Plaintiffs requested the following: 1) an

order "directing the Defendants to show cause why Plaintiffs should not be granted the relief sought in Plaintiffs' Complaint for Special Action Relief"; 2) for an expedited briefing schedule under which briefing would have been complete after one week; and 3) a court hearing "at the earliest date and time available to the Court." 4-ER-450.

The Arizona Superior Court scheduled a return hearing for August 9. 4-ER-488-89. At that hearing, counsel for the Maricopa County Defendants announced their intent to remove the case to federal court. 4-ER-494. The Arizona Superior Court ordered the Maricopa County Defendants to file their notice of removal by August 12; otherwise, the state court would issue a briefing schedule. *Id.*

The Maricopa County Defendants removed the case to federal court on August 12. 4-ER-406-12. On September 3, the Plaintiffs filed their First Amended Complaint, adding as defendants all remaining county recorders and counties in Arizona and alleging a new claim for relief

under the National Voter Registration Act (NVRA) 2 U.S.C. §§ 20507(b)(1) and 20510(b). 3-ER-370-404.[19]

On September 15, 2024, the Plaintiffs filed their Motion for Leave to File an Overlength Motion for a Temporary Restraining Order and Preliminary Injunction (TRO/PI). 3-ER-367-69. At the same time, they lodged their proposed TRO/PI Motion, 1-ER-10, alleging imminent irreversible harm. 3-ER-210, 3-ER-225-26. In their TRO/PI Motion, the Plaintiffs argued that the Defendants had mandatory duties under state and federal law to submit 1373/1644 Requests and asked the court to "issue a temporary restraining order and preliminary injunction requiring the Defendants to submit 1373/1644 Requests to DHS and to 'make available' and 'provide' to the Arizona Attorney General the information about Federal-Only Voters required by A.R.S. § 16-143." 3-ER-226.

[19] The Plaintiffs had not sought relief against all counties in their initial action in state court because a quirk of Arizona's procedural rules only allows for one county to be sued at a time in Arizona superior court in a state special action. *See Maricopa Cnty. v. Ainley*, No. 1 CA-SA 24-0086, 2024 WL 2783782 at *3 ¶14 (Ariz. Ct. App. May 30, 2024), review denied (Aug. 2, 2024).

The district court granted the motion for over-length brief on September 30, 2024. 2-ER-67. In the meantime, on September 27, 2024, the Maricopa County Defendants had filed a proposed overlength response brief opposing the TRO/PI Motion. 2-ER-68-199. On October 1, the district court set a deadline of October 3 for the remaining defendants to respond to the TRO/PI Motion and ordered the Plaintiffs to file their reply by October 7. 2-ER-64-66. "Twelve counties joined Maricopa County's opposition." 1-ER-8. Mohave County and Mohave County Recorder Lydia Durst filed a short response claiming they were already in compliance with the law but were "open to accessing databases to which they have legal access and that will not violate any other laws or rights." 2-ER-56. Greenlee County and Greenlee County Recorder Sharie Milheiro filed a response affirming that they did "not oppose the Plaintiffs' motion" because they "cannot, at this point, find a reasonable reason for opposing the Plaintiffs' motion." 2-ER-62-63. On October 7, the Plaintiffs filed their proposed overlength reply in support of the TRO/PI Motion. 2-ER-25-53.[20]

[20] The court granted the motion to file an overlength brief on October 11. 1-ER-23.

On October 11, 2024, the district court issued an order denying the TRO/PI Motion because, in its view, the Plaintiffs lacked standing, 1-ER-12-21, and because the court believed that the *Purcell* principle foreclosed relief because of the proximity of the 2024 general election. 1-ER-21-23.

Standard of Review

This Court "review[s] the district court's decision to grant a preliminary injunction for abuse of discretion. A district court abuses its discretion if it rests its decision on an erroneous legal standard or on clearly erroneous factual findings." *Tucson v. City of Seattle*, 91 F.4th 1318, 1324 (9th Cir. 2024) (cleaned up). "[S]tanding is a legal issue subject to de novo review." *Arizona All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1171 (9th Cir. 2024).

Argument

I. The erred in holding that the Plaintiffs lacked standing.

A. EZAZ.org has organizational standing.

EZAZ.org has organizational standing because the conduct challenged in this suit causes injury to EZAZ.org's pre-existing activities, apart from the challenged conduct.

The district court improperly held that EZAZ.org did not have standing because of this Court's recent holding in *Arizona Alliance for Retired Americans v. Mayes* ("*AARA*"), 117 F.4th 1165 (9th Cir. 2024) and because of the Supreme Court's holding in *FDA v. All. for Hippocratic Medicine* ("*Hippocratic Medicine*"), 602 U.S. 367 (2024),

However, at the outset, it is important to note that neither *Hippocratic Medicine* nor *AARA* held that organizations *never* have organizational standing. Yet, under the district court's reading of these cases, that would nearly always be the result: virtually *no* organization could ever establish standing.

Yet, *AARA* held that organizations have standing if they "can show that a challenged governmental action directly injures the organization's *pre-existing core activities* and does so apart from the plaintiffs' response to that governmental action." *Id.* at 1170. EZAZ.org submitted uncontroverted evidence demonstrating precisely that. 3-ER-224-27, 3-ER-237-41.

Specifically, that unrebutted evidence established that an already existing core activity for EZAZ.org is conducting voter outreach. 3-ER-226, 3-ER-239 ¶¶ 12-13. The Defendants' failure to remove ineligible

voters causes the organization to expend resources not only to reach out to ineligible voters but also to notify the counties to initiate cancellation procedures. *Id*. Further, part of EZAZ.org's core activities is conducting voter education to make civic action "as easy as pie." 3-ER-238 ¶ 9. However, because of increasing concerns among voters about foreign citizens voting, a considerable amount of resources for voter education is now being diverted to responding to these issues caused not only by the Defendants' failure to conduct, but also their vocal opposition to conducting, their statutory duties of investigating Federal-Only voters and removing foreign citizens from voter rolls. 3-ER-240 ¶ 15. EZAZ.org voter education mission pre-exists the conduct being challenged here and exists apart from that conduct.

The Plaintiffs detailed six ways EZAZ.org is suffering concrete and particularized harms and how the Defendants' failure to act in accordance with the law directly impacts EZAZ.org's ability to carry out its pre-existing core activities. 3-ER-226-27 and 3-ER-238-41. The district court improperly characterized these specific, pre-existing core activities as "'broadly stated mission[s] or goal[s]' on which organizational standing

may no longer be premised" that did not "harm[] its core activities sufficient to establish an injury in fact." 1-ER-18 (citing *AARA*, 117 F.4th at 1177).

However, EZAZ.org articulated specific pre-existing activities in which it engaged and demonstrated how the Appellees' wrongful conduct directly harms EZAZ.org's realization of those activities. Specifically, EZAZ.org articulated the following activities and harms:

> *First*, EZAZ.org conducts door-knocking campaigns to educate voters, and during the resulting conversations, registered voters sometimes voluntarily disclose that they are not eligible to vote and that their registration is in error. Whenever EZAZ.org volunteers discover such information, EZAZ.org reports this information to the relevant County Recorder's office. When there are more ineligible persons who are incorrectly registered to vote, EZAZ.org volunteers will encounter them more often, and the burden and financial expense of reporting such information also increases for EZAZ.org. [3-ER-239 ¶¶12-13] *Second*, EZAZ.org's volunteers have been encountering an increasing number of voters (of all political persuasions) who state that they do not believe that their votes matter because they believe that their votes will be canceled out by illegal votes because County Recorders are not doing enough to remove ineligible voters—including foreign citizens—from voter rolls. This is a reasonable concern, given the unprecedented crisis at the border in which more than 10 million foreign citizens have entered the United States since January 21, 2021. Such voters are concerned that, with such an unprecedented surge in illegal immigrants entering the country, and with County Recorders not conducting proper voter list maintenance, it is inevitable that ineligible foreign citizens illegals have been registering to vote, and will vote, in the

upcoming 2024 general election. EZAZ.org has to expend significant amounts of time and money responding to such voter concerns and on conducting voter education about this issue. [3-ER-239-40 ¶¶ 14-15.] *Third*, the Defendants' voter list maintenance failures are also extremely discouraging to potential EZAZ.org volunteers. Because of this, EZAZ.org is encountering ever-greater difficulty in recruiting volunteers. Fewer people want to get involved in civic engagement since they perceive that their efforts have no effect and because elected officials do not take their concerns seriously. [3-ER-240 ¶ 16] *Fourth*, since the organization's start, EZAZ.org has been deeply involved in activism on the issue of Federal-Only Voters. EZAZ.org has worked with State Legislators to educate them about the issue of Federal-Only Voters and suggest ways that Arizona can more securely protect and enhance the integrity of voter rolls and ensure increased transparency. The County Recorders' failure to conduct sufficient list maintenance of Federal-Only Voters requires EZAZ.org to expend more resources on educating State Legislators. *Id.* ¶¶ 17-19. *Fifth*, County Recorders' recent failures to do proper list maintenance of Federal-Only Voters have been particularly egregious, with the number of Federal-Only Voters increasing in recent months by unprecedented amounts. These failures have caused EZAZ.org to expend significant resources and money to monitor data about the registration of Federal-Only Voters. The unprecedented rapid increase in Federal-Only Voters strongly suggests that County Recorders are failing to do proper list maintenance. If they were, they would be either confirming citizenship (and thus moving them to full-ballot voter status) or confirming them as foreign citizens (and removing them from voter rolls). If the registration rates of Federal-Only Voters had not started increasing this year at such unprecedented rates, then there would be less cause for concern and EZAZ.org would not have been forced to expend as much time and money on monitoring the situation. [3-ER-240-41 ¶¶ 20-21] *Sixth*, the failure of Arizona County Recorders to use all available resources to verify the citizenship of Federal-Only Voters significantly contributes to the problem of increasing numbers of Federal-Only Voters. It causes EZAZ.org to expend more

> resources addressing the issue and encouraging legal voters to still cast a ballot despite their concerns on whether their vote will matter. [3-ER-241 ¶ 22]

3-ER-226-27. Any *one* of the above would be enough to satisfy the requirements of *AARA*. However, the district court dismissively rejected them without analysis.

The Plaintiffs' evidence clearly demonstrated that the Defendants' conduct harmed EZAZ.org's pre-existing core activities. For example, the district court ignored that the undisputed evidence was that EZAZ.org's personnel conduct door-knocking campaigns and voter education efforts *apart* from anything to do with voter list maintenance and that the Defendants' conduct as alleged in the First Amended Complaint harmed those pre-existing door-knocking and voter education efforts. 3-ER-226 and 3-ER-239-40 ¶¶ 12-15. The district court also ignored the unrebutted evidence demonstrating that the Defendants' failure to engage in proper voter list maintenance has harmed EZAZ.org's ability to recruit volunteers. 3-ER-226-27 and 3-ER-240 ¶ 16. The district court rationalized away this evidence, stating that "Defendants' actions do not prevent EZAZ.org volunteers from ... making efforts to recruit new volunteers."

1-ER-18. This, however, is irrelevant because the claimed harm was that the Defendants' actions *caused* individuals to stop volunteering. 3-ER-226-27 and 3-ER-240 ¶ 16. In other words, the harm wasn't that EZAZ.org couldn't try to recruit volunteers but that people were no longer willing to volunteer because of the Defendants' actions. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that standing may be premised on the "predictable effect of Government action on the decisions of third parties.")

And the district court ignored the unrebutted evidence that since EZAZ.org's founding in 2018, it has been deeply engaged in the issue of Federal-Only Voters, that this engagement has always included outreach to, and education of, State legislators about the topic, and that the Defendants' failure to conduct proper list maintenance has forced EZAZ.org to expend additional resources engaging in this pre-existing organizational focus. 3-ER-227 and 3-ER-240 ¶¶ 17-19.

The district court similarly ignored EZAZ.org's unrebutted contention that the Defendants' failure to conduct proper list maintenance recently has caused the number of Federal-Only Voters to increase at

unprecedented rates, which has required EZAZ.org to devote additional resources to monitoring this issue or pre-existing focus. 3-ER-227 and 3-ER-240-41 ¶¶ 20-21. And the district court ignored the unrebutted evidence that the Defendants' failures to conduct proper list maintenance caused EZAZ.org to expend additional resources in its pre-existing mission of encouraging discouraged eligible voters to cast a ballot. 3-ER-227 and 3-ER-239 ¶¶ 12-13.

EZAZ.org, therefore, satisfies the requirements for standing articulated in *AARA*.

II. If any doubt remains about the applicability of *AARA*, this Court should wait to decide this appeal until it decides whether to rehear *AARA en banc*.

The *AARA* appellees have filed a petition for rehearing *en banc*, to which the appellants have responded. If there is any doubt remaining as to whether *AARA* applies here, this Court should wait to render a decision in this appeal until there has been a decision on the *en banc* petition in *AARA*.

III. Plaintiff Yvonne Cahill has standing.

Plaintiff Yvonne Cahill has standing because she is a naturalized citizen subject to greater scrutiny because she has an alien number that

can be checked using DHS's SAVE database, whereas registered voters who are natural born citizens or who are unlawfully present aliens are not subject to such scrutiny. Notwithstanding this, the district court found that Plaintiff Yvonne Cahill had not demonstrated injury because Cahill was already registered to vote. 1-ER-13-15.

However, the court improperly assumed that Cahill would never need to re-register to vote in Arizona for any reason, including an assumption that Ms. Cahill would never move to another county or out of and back into Arizona. It was precisely the type of injury alleged by Cahill (naturalized citizens being subjected to greater scrutiny) that was sufficient for the district court in *Mi Familia Vota v. Fontes* ("*Mi Familia*") to determine that "because SAVE requires an immigration number, county recorders can only ever conduct SAVE checks on naturalized citizens who county recorders have 'reason to believe' are non-citizens[,]" that "[n]aturalized citizens will always be at risk of county recorders' subjective decision to further investigate these voters' citizenship status, whereas the Reason to Believe Provision will never apply to native-born citizens [who don't have immigration numbers,]" violating the Different Practices

Provision of 52 U.S.C. § 10101(a)(2)(A). 719 F.Supp.3d 929, 995 (D. Ariz. Feb. 29, 2024). Furthermore, just as in *Mi Familia*, because Cahill possesses an alien number, she "will always be at risk of county recorders' subjective decision to further investigate ... [her] citizenship status," *Mi Familia*, 719 F.Supp.3d at 995, whereas Federal-Only Voters who are aliens or natural-born U.S. citizens face no such risk. Additionally, the court ignored EZAZ.org's contention that its similarly situated members, some of whom may be in the naturalization process and not yet registered to vote, are also subject to this injury.

The district court also found that there was no injury to Cahill because the additional scrutiny to which Cahill is subject "does not require any action on her part." 1-ER-14. However, as discussed above, the same was also true for naturalized citizens in *Mi Familia*, where such greater scrutiny *was* held to be an injury.

IV. The *Purcell Doctrine* does not foreclose relief.

The district court erred when it denied the Appellants' TRO/PI Motion on the basis of the *Purcell Doctrine*.

A. *Purcell Doctrine* is inapplicable.

Although one of the *Purcell Doctrine's* purposes is to prevent last-minute "administrative burdens for election officials[,]" (*Lake v. Hobbs*, 623 F.Supp.3d 1015, 1031 (D. Ariz. 2022) (citing *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020)), the primary purpose is to prevent "voter confusion" by changing election procedures, laws, or rules with which voters must comply to vote. *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006). Under either purpose, the *Purcell Doctrine* is inapplicable.

Appellees have federal and state statutory duties requiring them to remove ineligible voters from the voter registration records before each election. *See supra* pp. 4-9. Specifically, Arizona law requires County Recorders to consult federal databases to determine the citizenship status of voters who failed to provide DPOC. *Id*. The relief the Plaintiffs sought did not "alter the election rules on the eve of an election," as suggested by the district court. 1-ER-21 (quoting *Republican Nat'l Comm. V. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020)). Rather, the Plaintiffs sought an order requiring Defendants to perform mandatory list

maintenance duties by consulting federal databases as required by law. Further, to the extent that the court's order was issued in the midst of voting in the 2024 General Election, the *timing* was caused by the Defendants' refusal to comply with the law.

The Defendants' failure to conduct list maintenance duties in compliance with state and federal law and the Plaintiffs' resulting attempt to seek redress cannot be reasonably construed as a *change* in election rules, otherwise *Purcell* would become a shield to blatantly unlawful activity. Therefore, the district court erred by applying the *Purcell Doctrine* to deny the Appellants' TRO/PI Motion.

B. Even if the *Purcell Doctrine* were applicable, any perceived administrative burdens were feasible "without significant cost, confusion, or hardship."

Even if the *Purcell Doctrine* could be construed as applicable, administrative burdens may be tempered where "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

Here, to the extent that the Plaintiffs' requested relief constitutes a "change" to existing procedures, the relief is *minimally* burdensome. Specifically, the Plaintiffs merely an order requiring the Defendants to send a letter to DHS ("submit 1373/1644 Requests to DHS") and forward a list of "Federal-Only Voters" and the registrants' application to the Arizona Attorney General ("'make available' and 'provide' to the Arizona Attorney General the information about Federal-Only Voters required by A.R.S. § 16-143"). 3-ER-234. In fact, this protracted litigation has expended far more resources than the remedy sought.

Critically, the Plaintiffs' requested relief says nothing about how and when the Defendants must respond to information from DHS about the citizenship status of registrants. Instead, the Plaintiffs presume Defendants will follow existing state procedures to either move confirmed citizens to the list of "full-ballot" voters in compliance with A.R.S. § 16-121.01(E) or initiate NVRA-compliant cancellation procedures of foreign citizens as delineated in A.R.S. § 16-165(A)(10).

Therefore, the district court erred by applying the *Purcell Doctrine,* as any plausible administrative burdens were minimal.

C. The district court's denial of the TRO/PI Motion is not moot merely because the election has passed.

The Plaintiffs claimed two types of harms in this case: pre-election harms that could only addressed before the election 3-ER-231 *and* ongoing harms to EZAZ.org based on the increased costs as EZAZ.org continues to engage in its longstanding pre-existing mission of voter outreach and education and addressing Arizona's problems with Federal-Only Voters 3-ER-231-32.

The district improperly focused only on the Appellants' claims for pre-election harms. However, EZAZ.org continues to suffer harm, even post-election, and so the district court's denial of the TRO/PI Motion is not moot.

Conclusion

Therefore, for the preceding reasons, this Court should reverse the district court's denial of the TRO/PI Motion and remand.

Dated: November 13, 2024

Respectfully submitted

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Arizona Alliance for Retired Americans v. Mayes, Case No. No. 22-16490, 117 F.4th 1165 (9th Cir. 2024)

The case is related because it raises the same or closely related issues and the appellees have filed a petition for re-hearing en banc.

Signature s/James Rogers **Date** November 13, 2024

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