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SUPREME COURT OF THE STATE OF ARIZONA

American Civil Liberties Union of
Arizona; League of United Latin American
Citizens-Arizona,

Petitioners,

vs.

STEPHEN RICHER, in his official
capacity as Maricopa County Recorder;
MARICOPA COUNTY; LARRY NOBLE,
in his official capacity as Apache County
Recorder; APACHE COUNTY; DAVID
W. STEVENS, in his official capacity as
Cochise County Recorder; COCHISE
COUNTY; PATTY HANSEN, in her

Civ. No. _____

**EMERGENCY PETITION FOR
SPECIAL ACTION**

**(Special Action Relief, Declaratory
Judgment)**

**EXPEDITED REVIEW
REQUESTED**

official capacity as Coconino County Recorder; COCONINO COUNTY; SADIE JO BINGHAM, in her official capacity as Gila County Recorder; GILA COUNTY; POLLY MERRIMAN, in her official capacity as Graham County Recorder; GRAHAM COUNTY; SHARIE MILHEIRO, in her official capacity as Greenlee County Recorder; GREENLEE COUNTY; RICHARD GARCIA, in his official capacity as La Paz County Recorder; LA PAZ COUNTY; LYDIA DURST, in her official capacity as Mohave County Recorder; MOHAVE COUNTY; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; NAVAJO COUNTY; GABRIELLA CÁZARES-KELLY, in her official capacity as Pima County Recorder; PIMA COUNTY; DANA LEWIS, in her official capacity as Pinal County Recorder; PINAL COUNTY; ANITA MORENO, in her official capacity as Santa Cruz County Recorder; SANTA CRUZ COUNTY; MICHELLE BURCHILL, in her official capacity as Yavapai County Recorder; YAVAPAI COUNTY; RICHARD COLWELL, in his official capacity as Yuma County Recorder; and YUMA COUNTY.

Respondents.

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INTRODUCTION

Petitioners seek emergency relief from this Court to remedy a serious, and otherwise irreparable, constitutional injury: the loss of the right to vote and to have that vote counted. Under Arizona law, voters who choose to vote by mail “shall” be provided with notice and opportunity to correct problems with their ballots in order to ensure that their ballots are counted. A.R.S. § 16-550(A). That process is colloquially known as ballot “curing.” The opportunity to cure a ballot is both granted by state statute and required by due process. *See, e.g., Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). But due to significant delays in processing early ballots in many Arizona counties and the fast-approaching deadline of 5 p.m. on Sunday for voters to correct perceived signature mismatches on their early ballots, tens of thousands of Arizonans stand to be disenfranchised without any notice, let alone an opportunity to take action to ensure their ballots are counted. Because these ballots have not even been processed, Respondents have not identified which ballots are defective and have not notified voters of the need to cure those defects. But historical precedent suggests that thousands of those unprocessed ballots will require signature curing. It would be inequitable, and indeed unconstitutional, to leave many Arizona voters with no meaningful notice or opportunity to cure their early ballot signature issues due to county processing delays outside of their control.

Without relief from this Court, potentially thousands of Arizonans, including

Petitioners' members and others they serve, will be disenfranchised in the November 5, 2024 election. Petitioners therefore respectfully request that this Court order Respondents to extend the deadline for correcting early mail ballot signature defects to allow voters 96 hours to correct their signature issues after notice of the defect is sent (or 48 hours after notice is sent, if notice is sent by overnight mail or hand delivered)—a remedy comparable to Arizona's procedures for providing voters notice and opportunity to address ballot challenges.

STATEMENT OF FACTS

In the last few days, there have been significant delays in counting ballots throughout Arizona. As of 8 p.m. on Friday, November 8, over **250,000** early mail ballots had not yet been *processed*, meaning they have not yet been checked for signatures or otherwise verified." ARIZ. SEC'Y OF STATE, 2024 GENERAL ELECTION: BALLOT PROGRESS, <https://apps.arizona.vote/electioninfo/BPS/47/0> (last visited Nov. 8 2024, 9:15 PM). Those figures include data from Maricopa and Pima Counties as of 6:53 and 3:23 p.m. on Friday, November 8, respectively. On Friday, Maricopa County

reported a remaining 235,000 early ballots left to process and Pima County reported 3,301 early ballots left to process.¹

These processing delays mean that election workers have not yet determined whether any of these ballots have perceived signature mismatches that require curing. The county recorders' offices must compare the signatures on the mail ballot envelopes with the signatures of the voters from their registration records and additional known signatures from other official election documents, such as signature rosters and other early ballot applications and affidavits. A.R.S. § 16-550(A); 2023 Election Procedures Manual at 83. If the recorders determine that the signatures are "inconsistent," they must make "reasonable efforts to contact the voter" to advise them of the inconsistent signature and allow them to correct or confirm their signature. A.R.S. § 16-550(A).² These reasonable efforts should be made "as soon as practicable" and include attempts to contact the voter via mail, phone, text message, and/or email, depending on the contact information available for the affected voter. 2023 Election Procedures Manual at 83. Pursuant to a 2024 emergency statute, the deadline for voters to cure inconsistent

¹ An official with Maricopa County told undersigned counsel that the County finished counting its ballots. The County has not publicly confirmed this statement, nor has counsel been able to corroborate it independently. Moreover, the County has not stated when it will notify individuals with alleged defects of the need to cure, or if it will be able to contact all those individuals before Sunday's deadline.

² There is a separate process and timeline for allowing voters to cure ballots that have missing (as opposed to inconsistent) signatures. The deadline for that cure process is on Election Day. This action does not address missing signature issues—only ballots where an election official has deemed the signatures "inconsistent," which is outside the control of the voter.

signatures on their ballot envelopes is “the fifth calendar day after the election.” Laws 2024, Ch. 1 § 22 (H.B. 2785) (hereinafter “2024 emergency statute”); *see also* 2024 Ariz. Legis. Serv. Ch. 2 (S.B. 1285).³ This year, the deadline is this Sunday, November 10, 2024.⁴

When Arizona voters learn about their signature mismatch with enough notice to correct the problem, they can and do take action to cure the problem and ensure their ballots are counted. For example, in 2020 in Maricopa County, about 26,000 signatures were flagged for verification issues, and about 24,000 of these ballots were cured. *See* VoteBeat, Jen Fifield & Hannah Bassett, *Signed, Sealed, Rejected*, Oct. 16, 2024, <https://www.votebeat.org/arizona/2024/10/16/maricopa-county-signature-verification-process-flaws-disenfranchisement>. In 2022, 15,500 of 18,500 ballots flagged for a mismatched or missing signature were cured. *Id.* In other words, between 83 and 92 percent of ballots flagged for signature issues were cured when voters had the opportunity to do so.

But Respondents reportedly have not even begun this signature-verification and curing process for thousands of remaining ballots. And because of Respondents’ delays,

³ The ordinary deadline for curing signature issues is the fifth *business* day after a federal election. A.R.S. § 16-550(A). However, the emergency 2024 law shortened that period for elections in 2024, 2025, and 2026.

⁴ *See* Ariz. Sec’y of State, Elections Calendar & Upcoming Events, <https://azsos.gov/elections/calendar-dates>.

potentially thousands of Arizona voters will not receive reasonable notice of a perceived signature mismatch in time to cure the problem by Sunday at 5 p.m.

JURISDICTION AND RULE 7(B) STATEMENT

I. This Court Has Jurisdiction to Resolve the Time-Sensitive Issues of Statewide Importance Raised in This Petition.

This Court has original special action jurisdiction to consider the issues raised in this Petition and to grant the requested relief. Ariz. Const. art. 6, § 5(1), (6). This Court has historically accepted original special action jurisdiction over cases like this one that raise “election matters in which there is a need for immediate relief based on rapidly approaching election deadlines and where the key facts are not in dispute.” *Richer v. Fontes*, No. CV-24-0221-SA, 2024 WL 4299099 (Ariz. Sept. 20, 2024) (citing *Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶ 15, 405 ¶ 20 (2020)).

In determining whether to accept special action jurisdiction, this Court considers several factors, including (1) whether the issues presented are of statewide significance; (2) whether the petition raises purely legal questions; (3) whether the issues raised concern the responsibilities of state officials; and (4) whether the petitioner lacks an equally plain, speedy, and adequate remedy through the ordinary appeals process. *See City of Surprise v. Arizona Corp. Comm’n*, 246 Ariz. 206, 209 ¶¶ 6-7 (2019) (“Special action jurisdiction is appropriate in cases that involve ‘purely legal questions of statewide importance’ or that require an ‘immediate and final resolution.’”); *Quality*

Educ. & Jobs Supporting I-16-2012 v. Bennett, 231 Ariz. 206, 207 ¶ 2 (2013) (accepting special action jurisdiction “because the purely legal issue raised is of statewide importance, and there is no ‘equally plain, speedy, and adequate remedy by appeal’”); *Rios v. Symington*, 172 Ariz. 3, 5 (1992) (accepting jurisdiction “[b]ecause this case involves a dispute at the highest levels of state government, the issues are substantial and present matters of first impression in this state, and a prompt determination is required.”).

Each of these four factors, taken together, call for this Court’s acceptance of special action jurisdiction over this matter.

A. The Issues Presented Are of Statewide Importance.

This Court will generally grant jurisdiction over a special action that raises issues of statewide importance. See *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 7 (2020) (“Because this case involves election and statutory issues of statewide importance, we [] accepted special action jurisdiction.”); *Ariz. Indep. Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 351 ¶ 14 (2012) (“We exercised our discretion to accept special action jurisdiction because the legal issues raised required prompt resolution and are of first impression and statewide importance”); *Randolph v. Groscost*, 195 Ariz. 423, 425 ¶ 6 (1999) (similar); *Dobson v. State ex rel. Comm’n on Appellate Court Appointments*, 233 Ariz. 119, 121 ¶¶ 7–8 (2013) (similar). This petition is of significant statewide importance because it would protect a substantial number of

Arizonans' fundamental right to have their votes counted and would impact voters throughout the state.

B. The Questions Raised are Purely Legal in Nature.

This Court has also found that special action review is warranted when “the issue presented . . . is purely a question of law.” *Piner v. Superior Court (Jones)*, 192 Ariz. 182, 185 ¶ 9 (1998) (quoting *In re Denton*, 190 Ariz. 152, 154 (1997)); see also *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) (“This case involves a purely legal issue, which is appropriate for resolution by special action in this court.”); *Univ. of Arizona Health Scis. Ctr. v. Superior Court of State in & for Maricopa County*, 136 Ariz. 579, 581 (1983) (finding special action jurisdiction appropriate when “[t]he question . . . turns entirely on legal principles rather than controverted issues of fact...”).

Here, the question presented is whether the November 10, 2024 ballot curing deadline shall be overcome when, due to state processing delays outside voters' control, that deadline would lead to the arbitrary disposal of votes and total or effective deprivation of the opportunity to cure. This question is a purely legal matter that can be resolved by this Court without the need for fact discovery. Therefore, special action review by this Court is appropriate.

C. The Issues Presented Concern the Responsibilities of State Officials.

The need to ensure that state constitutional officers carry out their duties in accordance with the law is another reason this Court has traditionally accepted special

action petitions. *See Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 10 (noting that that this Court “has original jurisdiction to issue extraordinary writs against state officers[.]”); *Ariz. Ind. Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 350-51 ¶¶ 13–14 (2012) (accepting original special action jurisdiction to determine whether governor acted within her legal authority). This consideration weighs in favor of granting special action review in this case because state election officers now face potentially contradictory legal obligations, creating the need for swift clarification from this Court.

On the one hand, Arizona law establishes a fundamental right to vote that would be abridged if voters were given no, or inadequate, opportunity to cure signature discrepancies on their ballots. *See Chavez v. Brewer*, 222 Ariz. 309, 320 (Ct. App. 2009) (holding the right to vote in the Arizona Constitution “is implicated when votes are not properly counted,” or “if any substantial number of persons entitled to vote are denied the right to do so”). Moreover, Arizona statute specifically establishes that “the county recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the inconsistent signature and allow the voter to correct or the county to confirm the inconsistent signature.” A.R.S. § 16-550(A). On the other hand, state law also prohibits election officials from allowing signatures to be cured beyond the fifth calendar day following the 2024 general election. In this case, that deadline is this Sunday, November 10, 2024.

Given the fast-approaching November 10 deadline and the potentially hundreds of thousands of ballots that reportedly remain to be counted, it is highly unlikely that election officials will be able to give voters reasonable time to cure their ballots while also complying with the statutory ballot-curing deadline. This Court’s clarifying opinion on this matter will allow statewide election officials to “know where they stand and [to] take such action as they determine necessary . . .” *Hull v. Albrecht*, 192 Ariz. 34, 36 (1998). For this reason, special action review by this Court is called for.

D. Immediate Resolution is Needed.

Finally, given the urgency of the issues raised in this Petition and the rapidly approaching November 10, 2024 deadline for curing signatures, traditional trial and appellate court avenues cannot afford affected voters the necessary prompt and immediate redress. *See Bennett*, 231 Ariz. 206, 207 ¶ 2 (2013) (accepting special action jurisdiction given the lack of ‘equally plain, speedy, and adequate remedy by appeal’). Petitioners brought this action promptly upon becoming aware that state delays and the statutory ballot cure deadline are likely to irreparably deprive a substantial number of Arizonans of their fundamental right to vote and right of due process—undermining the democratic process in Arizona. *Cf. Dobson*, 233 Ariz. 119 (granting special action review where the Commission on Appellate Court Appointments would be subject to the contested statute on the same day the Court enjoined its effect).

The issue raised in this petition is highly time-sensitive such that following the ordinary appeals process would likely preclude timely resolution and adequate remedy. The legal issues presented concern the application of A.R.S. § 16-550(A) to those who voted on or before November 5, 2024, many of whom, as of today, have not yet had their ballots counted, and therefore have not been notified if they must cure their ballots by this Sunday, November 10 to avoid having their vote discarded. Many of these impacted voters may not be notified of the need to cure their ballot until just before that deadline has passed, if they are notified at all. Accordingly, the need for immediate clarity is paramount to protecting the democratic principles underlying our electoral system. This Court alone is capable of providing the legal resolution needed within the unusually urgent timeline faced. For all these reasons, this Court should exercise its discretion to accept original special action jurisdiction over this matter.

II. Petitioners Have Standing to Bring This Petition.

Because standing is a “prudential doctrine,” *Dobson v. State ex rel., Comm’n on App. Ct. Appointments*, 233 Ariz. 119, 122 (2013), this Court need not address standing if no party contests it, *see Welch v. Cochise County Board of Supervisors*, 251 Ariz. 519 (2021); *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 (2020); *Rios v. Symington*, 172 Ariz. 3, 5 n.2 (1992). Here, even if the issue is raised, it has a straightforward answer: Petitioners have standing and this Court should reach the merits.

ACLU of Arizona and LULAC-Arizona have representational standing because their members face a substantial risk of disenfranchisement absent relief. An organization has representational standing when “given all the circumstances in the case, the association has a legitimate interest in an actual controversy involving its members and . . . judicial economy and administration will be promoted by allowing representational appearance.” *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Arizona*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (en banc). That test is met here. ACLU of Arizona is a statewide, nonprofit, nonpartisan organization dedicated to protecting constitutional rights, including the fundamental right to vote, for all Arizonans. *See* Declaration of Victoria Lopez (“Lopez Decl.”) ¶¶ 3-4. The organization has over 16,000 members across every county in Arizona, including registered voters, and has a strong interest in protecting those members’ ability to participate in the democratic process. *Id.* ¶ 8.

Likewise, LULAC-Arizona is the Arizona-based branch of the nation’s oldest and largest national Latino civil rights organization. *See* Declaration of Arcelia Banuelos (“Banuelos Decl.”) ¶¶ 4-5. LULAC-Arizona has members across the state of Arizona and has local councils in Phoenix, San Luis, Tucson, Tempe, Yuma, and other smaller communities. Banuelos Decl. ¶ 6. If Respondents are permitted to enforce the ordinary ballot-cure deadline without providing voters with notice and a meaningful opportunity to cure their ballots, thousands of voters across the state—including ACLU of Arizona’s

and LULAC-Arizona's members—stand to be disenfranchised. ACLU of Arizona and LULAC-Arizona therefore have a legally cognizable interest in extending the deadline for affected voters, and judicial economy will be served by adjudicating Respondents' obligations to voters in a single action. *Cf. Arizona Sch. Boards Ass'n, Inc. v. State*, 252 Ariz. 219, 225, 501 P.3d 731, 737 (2022) (trade association had standing to challenge rule that impeded local control over pandemic-related restrictions affecting businesses).

ACLU of Arizona and LULAC-Arizona, as organizations, also have standing because their missions would be directly thwarted absent relief. To advance its core mission of safeguarding civil rights, ACLU of Arizona has expended significant resources to educate voters across the state through public communications about their right to vote including about the process to track and cure one's ballot, casting a provisional ballot, and ballot challenges. Lopez Decl. ¶ 5. ACLU of Arizona has also taken positions on, and educated its members and the general public about, several ballot propositions appearing on the 2024 ballot on which Arizonans voted on in the November 5, 2024 Election. *Id.* ¶ 7. Similarly, to advance its core mission of advancing the economic, educational, political, health, and civil rights conditions of the Hispanic population in Arizona and the broader United States, LULAC-Arizona has expended significant resources on the 2024 general election. Banuelos Decl. ¶¶ 5, 11-12. Specifically, LULAC-Arizona has expended volunteer time and expenses in educating its members and the public about ballot propositions on the 2024 ballot and on the voting

process, including how members can effectuate their right to vote. *Id.* ¶¶ 11-12.

Respondents' failure to timely tabulate these ballots and notify voters of the need to cure them directly impedes petitioners' efforts to promote democratic participation and advance its own policy priorities. ACLU of Arizona and LULAC-Arizona therefore have a legally cognizable interest in ensuring that voters have a meaningful opportunity to cure their ballots and have them counted. *Cf. Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405, 471 P.3d 607, 616 (2020) (political action committees which sought to place initiatives on ballot had standing to challenge state policy due to "potential denial of access to the ballot due to difficulty collecting signatures"); *Food & Drug Admin. v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395 (2024) (a cognizable injury exists under Article III where a defendant's actions have "directly affected and interfered with [the plaintiff organization's] core business activities").

ARGUMENT

I. Respondents' Delays Threaten to Unlawfully Disenfranchise Thousands of Arizona Voters.

Respondents' delays have threatened the fundamental right to vote for thousands of Arizonans. "Arizona's Constitution recognizes that 'governments derive their just powers from the consent of the governed,' and provides that "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *City of Tucson v. State*, 229 Ariz. 172, 179 (2012)

(quoting Ariz. Const. art. 2, §§ 2, 21). “Arizona’s constitutional right to a ‘free and equal’ election is implicated [whenever] votes are not properly counted.” *Chavez v. Brewer*, 222 Ariz. 309, 319–20 (Ct. App. 2009). Consequently, this Court has recognized that “restrictions that disenfranchise voters or violate the one-person, one-vote principle are generally subject to strict scrutiny.” *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 414, 471 P.3d 607, 625 (2020)⁵; see *Simpson v. Miller*, 241 Ariz. 341, 347 (2017) (noting, “in voting rights context,” that a challenged action “rarely survives [strict] scrutiny”); *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm’n*, 211 Ariz. 337, 364 (Ct. App. 2005).⁶

There is no heavier burden on the right to vote than the complete denial of the right to have a lawfully cast ballot counted. Respondents are poised to deprive thousands of Arizonans of this fundamental right by discarding their ballots based on perceived signature defects that could be cured. As noted *supra*, Statement of Facts, Maricopa and

⁶ Petitioners have a right of action to enforce the Arizona Constitution. See *Chavez*, 222 Ariz. at 317–18 (“Arizona case law, which unlike the federal rule that generally prohibits recognition of a private right of action . . . , more broadly implies such a right when consistent with ‘the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.’”); see also *McCarthy v. Scottsdale Unified Sch. Dist. No. 48*, 409 F. Supp. 3d 789, 820 (D. Ariz. 2019) (“Arizona law implies a private right of action more broadly than federal law.”) (citation omitted). The right to vote is an individual right, and individual enforcement of that right is fully consistent with Arizona’s election laws. Absent a right of action, disenfranchised voters could be forced to depend on the very state actors responsible for their disenfranchisement to enforce their rights. Such a result could not have been intended by the Legislature and would not be consistent with the Legislature’s instruction to construe statutes to achieve justice. See A.R.S. § 1–211(B).

Pima Counties alone have reportedly failed to process nearly 300,000 mail ballots just 48 hours before the deadline for voters to cure problems with those ballots. Ariz. Sec’y of State, <https://apps.arizona.vote/electioninfo/BPS/47/0>. The delays in processing ballots will leave many Arizona voters without any reasonable or meaningful notice or opportunity to correct signature issues with their early ballots and thereby prevent them from having their votes counted. Extending the deadline to correct early ballot signature issues in this case is the only way to prevent the disenfranchisement of Petitioners’ members. Respondents cannot demonstrate a compelling state interest in precluding Petitioners and other qualified voters from having reasonable and meaningful notice and opportunity to correct their early ballot signature issues so that they can have their votes counted. *Cf. Gallardo v. State*, 236 Ariz. 84, 87–88 (2014).

Voters reasonably relied on state law providing that if they submitted their ballot by the statutory deadline, it would be counted, and that if there was any problem with their ballot that needed correction, they would be provided with notice and an opportunity to cure that problem. They complied with the law and expected the law to work as designed. But Respondents’ delays have made it difficult, if not impossible, for voters to cure their ballots by the deadline. No state interest could justify application of the ordinary ballot cure deadline to these voters under these circumstances. This Court should not allow Respondents’ “administrative failure[s]” to “disenfranchise voters en masse.” *See Richer v. Fontes*, No. CV-24-0221-SA at 6-7. Instead, this Court should

decline to impose strict adherence to the cure deadline when “[u]nder these circumstances . . . [it] would ‘unreasonably hinder or restrict’ the constitutional right [to vote.]” *Leibsohn v. Hobbs*, 254 Ariz. 1, 3 (2022).

II. Respondents’ Conduct Violates Petitioners’ Members’ Right to Procedural Due Process.

The Arizona Constitution provides that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Ariz. Const. art II, § 4. Due process protects fundamental rights, *see Trisha A. v. Dep’t of Child Safety*, 247 Ariz. 84, 90 ¶¶ 25(2019), such as the right to have one’s lawful ballot counted, *see Arizona Farmworkers Union v. Agric. Emp. Rels. Bd.*, 148 Ariz. 47, 51 & n. 2, 3 (Ct. App. 1985) (collecting cases recognizing “the right to vote in normal governmental elections” as “fundamental”); *see also Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1356 (D. Ariz. 1990) (“Because voting is a fundamental right, the right to vote is a ‘liberty’ interest which may not be confiscated without due process.”). And because the Due Process Clause protects this right, the State cannot deprive individuals of it without providing “notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Huck v. Haralambie*, 122 Ariz. 63, 65 (1979) (en banc) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). *See Frederick v. Lawson*, 481 F. Supp. 3d 774, 798 (S.D. Ind. 2020) (holding that rejecting defective absentee ballots without notice placed undue burden on right to vote).

Although courts assess the constitutional sufficiency of a procedural regime using

the *Mathews v. Eldridge* balancing test—which calls for weighing the private interest affected against the government interest and the risk of erroneous deprivation absent additional procedural safeguards, see *Trisha A.*, 247 Ariz. at 90 ¶ 25 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))—the test for assessing the adequacy of notice is more streamlined, see *Dusenbery v. United State*, 534 U.S. 161, 168 (2002). Specifically, “[n]otice is sufficient for due process purposes if it is ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’ or claims.” *Matter of Rts. to Use of Gila River*, 171 Ariz. 230, 236 (1992) (quoting *Mullane*, 339 U.S. at 314); accord *Dusenbery*, 534 U.S. at 168.⁷

Here, many voters will not receive constitutionally adequate notice because Respondents will either fail to inform them of the need to cure their ballots before the deadline expires or provide the information so close to the deadline that voters will not have a meaningful opportunity to act. With a significant number of early ballots yet to be processed, the counties may not learn of a potential error until the literal eleventh hour

⁷ An intermediate appellate court in this State concluded that the *Anderson-Burdick* framework governs procedural due process challenges in the voting context, *In re Matter of Wood*, 551 P.3d 1163, 1169 (Ariz. Ct. App. 2024); however, this Court has never adopted that conclusion, nor has the Supreme Court of the United States. And such a reading is improper. Election procedures can substantively impair right to vote established by the First and Fourteenth Amendment; they can also offend the minimum procedural protections guaranteed by the Due Process Clause. “Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands.” *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). When that happens, courts must “examine each constitutional provision in turn.” *Id.*

before the deadline to cure arises, or even after that deadline. If, for instance, a county learned of a possible defect on Sunday, it would not *send* notice until hours before the 5:00 pm cure deadline. Notice delivered via mail would not arrive in time for the voter to take action. Even notice delivered by email, text, or phone call, might not offer the voter enough time, as voters are unlikely to expect urgent messages on a Sunday afternoon and therefore might not be near their phones or computers. Moreover, in some counties, voters must cure in person—a burden that, for voters with childcare or work obligations, may effectively be impossible to overcome. And even eleventh-hour notice is not guaranteed; counties may not complete their processing until *after* the Sunday deadline altogether. *See, supra*, (reporting that Maricopa County may not finish processing ballots until next week).

Arizona officials have provided no reason to conclude that voters will receive meaningful notice. Officials have not publicly stated that voters will receive notice of a signature defect in time to do something about it. Nor have officials made such commitments privately. Prior to filing this lawsuit, Petitioners contacted the Attorney General and Solicitor General for Arizona to alert them to their concerns. Neither officials suggested Petitioners' concerns were misplaced; nor did they offer any assurances that, absent judicial intervention, voters would learn of the defects in their ballots before the deadline to cure arose. Thus, absent an extension on the cure deadline, voters face a grave risk that the government will deprive them of their fundamental right

to vote without providing any meaningful opportunity to contest the deprivation. That offends due process. “While the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection.” *Raetzel*, 762 F. Supp. at 1358.

Because, as noted above, the *Mathews* test does not apply to claims of inadequate notice, the government interest at stake does not bear on the analysis. However, even if that consideration were relevant, it would not change the result. At most, extending the time to cure could create administrative burdens for county officials, though it is likely an extension would end up relieving more burdens than it creates by allowing officials time to count ballots without fear of running over a statutory deadline. An extension might also relieve administrative challenges that will arise as, without judicial intervention, officials rush to send notice of the need to cure at the same time as they try to canvas ballots. In any event, administrative concerns cannot excuse the government’s failure to provide the safeguards needed to prevent erroneous deprivations of rights. *See Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991) (“[I]t is doubtful that cost alone can ever excuse the failure to provide adequate process.”). Moreover, the result of Respondents’ contemplated approach may be that many voters receive *no process at all*. “[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero—that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior

to final deprivation of a [liberty] interest.” *Id.* at 1332 (emphasis original).

III. Respondents’ Conduct Violates Equal Protection.

Enforcing the ballot cure deadline against voters who have not been notified of a problem with their ballot would also violate the equal protection clause of the Arizona Constitution. *See* Ariz. Const. art. II, § 13. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98 at 104) (internal quotations omitted). Respondents are required “to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush v. Gore*, 531 U.S. 98, 105 (2000); *see also* *State v. Bonnewell*, 196 Ariz. 592, 596, 2 P.3d 682, 686 (Ct. App. 1999) (federal and state constitution equal protection clauses are “essentially the same”).

Respondents cannot enforce the ordinary ballot-cure deadline equally against voters who received reasonable notice of a signature-verification problem and voters who did not receive such notice. It is axiomatic that once a state grants the right to vote in a particular way—including by mail—it cannot arbitrarily deprive voters of that right. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019) (signature-matching scheme for absentee ballots created disparate treatment of Florida voters and likely violated equal protection clause); *Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1403 (N.D. Ga. 2019) (unreliable voting machines created disparate

treatment of Georgia voters and likely violated equal protection clause); *see also Luft v. Evers*, 963 F.3d 665, 677 (7th Cir. 2020) (“The problem here is that students are treated differently from other potential voters, and the state has left that difference unjustified.”).

Absent relief, Respondents will arbitrarily deprive thousands of Arizonans of their right to vote compared with similarly situated Arizonans who also voted by mail, simply because they live in counties with the most significant processing delays. *Cf. Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (state could not apply different early-voting rules to similarly situated voters); *Mullins v. Cole*, 218 F. Supp. 3d 488, 494, 492 (S.D.W. Va. 2016) (enjoining burdensome voter registration procedure that applied only in one county because “[t]he constitution prohibits people from being classified in such a way that it unnecessarily abridges the right to vote”).

IV. This Court Should Order Defendants to Provide 96 Hour or 48 Hour Notice to Voters.

Arizona law requires Respondents to make “reasonable” efforts to provide mail voters with notice and an opportunity to cure signature problems with their ballots, and the Constitution requires that voters have notice and an opportunity to cure so that they may vindicate their fundamental right to vote. Respondents are on track to provide voters with no notice at all. The question for this Court is how to fashion an appropriate remedy to safeguard voters’ right to cure their ballots without unduly burdening Respondents.

Petitioners acknowledge that neither § 16-550 nor the 2024 emergency statute

expressly provide a precise deadline for election workers to provide notice to voters of a signature problem. *See, e.g., Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 837 (D. Ariz. 2022) (concluding that § 16-550, as amended by S.B. 1003, does not specify the reasonable effort a County Recorder must make to cure a ballot missing a signature). But the Election Procedures Manual (“EPM”) advises the County Recorder to “contact the voter via mail, phone, text message, and/or email . . . *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 (emphasis added). The mandate to provide notice “as soon as practicable” underscores the importance of providing some reasonable period of time *between* the notice and the deadline for voters to take action in response.

Other provisions of the election code provide guidance to this Court on how long voters must be given to respond. For example, A.R.S. § 16-552 prescribes a minimum period between the time when a voter must receive notice of a challenge to their mail-in ballot and the time when an election board must hear and resolve that challenge. The Early Election Board must notify voters of a challenge by first class mail within 24 hours of receiving a challenge and cannot hear the challenge “earlier than ninety-six hours after the notice is mailed, or forty-eight hours if the notifying party chooses to deliver the notice by overnight or hand delivery.” *Id.* § 16-552(E). In other words, the board must allow voters five days (if notified by standard mail) or two days (if notified by overnight mail or hand delivery) to respond to a challenge after receiving notice of it. This

framework indicates that the legislature believes it is reasonable to ensure voters receive at least two days to protect their ballots from being discarded. Because counties open ballots on a rolling basis, it may have been impracticable to set statutory hourly deadlines on when they must notify voters of a signature problem; but the challenge statute provides a helpful benchmark for what constitutes reasonable notice, and it should guide this Court as it fashions an equitable remedy for the constitutional violation.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant special action jurisdiction, and declare that in this circumstance given the extraordinary delays in processing early mail ballots, an extension to the deadline for correcting early mail ballot signatures be granted to avoid violating the Arizona Constitution's rights to free and equal elections, Ariz. Const. art. 2, §§ 2, 21, procedural Due Process, Ariz. Const. art II, § 4, and equal protection, Ariz. Const. art. II, § 13. Petitions request that the Court order Respondents to extend the deadline for correcting early mail ballot signature mismatches to allow voters 96 hours after notice is sent (or 48 hours after notice is sent, if notice was sent by overnight mail or hand delivered).

Respectfully submitted this 9th day of November, 2024.

By /s/ Jared G. Keenan

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