IN THE SUPREME COURT

STATE OF ARIZONA

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, *et al.*, Petitioners, v. STEPHEN RICHER, *et al.*, Respondents.	No. CV-24-0263-SA

BRIEF OF *AMICI CURIAE* ARIZONA STATE SENATE PRESIDENT WARREN PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA

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Warren Petersen, in his official capacity as the President of the Arizona State Senate, and Ben Toma, in his official capacity as the Speaker of the Arizona House of Representatives, respectfully submit this brief as *amici curiae* in opposition to the petition for special action relief.

INTRODUCTION

In February of this year, the Legislature and Governor spoke with near-unanimity, in clear and categorical terms: if an early ballot affidavit signature is determined not to match the signature on file in the voter's registration record, "the county recorder or other officer in charge of elections shall allow signatures to be corrected not later than the fifth calendar day after the election." 2024 Ariz. Laws ch. 1, § 22 (H.B. 2785).[1] This emergency legislation—which crafted a careful concatenation of critical election administration deadlines—embodied a bipartisan effort to conduce finality and efficiency in Arizona elections, and to ensure the State will satisfy its obligation under federal law to timely certify its presidential electors.

The Court should not entertain the Petitioners' inexcusably belated effort to displace the elected branches' sensible policy prescription with an arbitrary signature curing deadline of their choosing. The Petitioners—who struggle to articulate any concrete injury to themselves or any identified member and whose claims are premised on dubious factual underpinnings—have not properly invoked this Court's

[1] H.B. 2785 garnered only two negative votes in each chamber on final passage.

original or special action jurisdiction. They do not seek an order requiring any state (or even county) officer to discharge a nondiscretionary legal duty or to remain within the confines of her statutory authority. Quite the contrary: they demand a court order commanding county officials to disobey or exceed their statutory obligations. Whatever that is, it is a not a cognizable form of special action relief. In any event, the speculative possibility that a small number of voters may be unable to timely cure their defective early ballot signatures does not constitute a denial of procedural due process or an unconstitutional deprivation of the franchise.

INTEREST OF THE *AMICI*

Warren Petersen is the President of the Arizona Senate and Ben Toma is the Speaker of the Arizona House of Representatives. The petition challenges the constitutionality of a provision of a state statute, *see* A.R.S. § 16-550(A), 2024 Ariz. Laws ch. 1, § 22, and Arizona law provides that the Speaker of the House and President of the Senate each is "entitled to be heard" and "may file briefs" "[i]n any proceeding in which a state statute . . . is alleged to be unconstitutional." A.R.S. § 12-1841(A), (D).

More broadly, *amici* proffer this brief as presiding officers of their respective chambers to voice the perspective of the legislative branch on the application of statutes it has enacted. The five-day post-election deadline for curing deficient early ballot affidavit signatures is integral to a broad-based and multifaceted bipartisan

reform of election procedures and deadlines designed to facilitate efficiency, secure compliance with federal mandates for the certification of presidential electors, and fortify public confidence in the integrity of Arizona elections.

ARGUMENT

I. The Court Should Deny Special Action Jurisdiction Because the Petitioners' Claims Rely on Disputed Factual Questions and Do Not Seek Any Valid Form of Special Action Relief

This Court exercises its original jurisdiction only in "rare" cases presenting "exceptional circumstances." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486, ¶ 11 (2006). This is not one of them. Preliminarily, the Petitioners' attempt to invoke the Court's "original jurisdiction of . . . mandamus, injunction and other extraordinary writs to state officers," Ariz. Const. art. VI, § 5(1), is belied by the caption of their petition. The Petitioners do not and cannot seek relief against ***any*** "state officer"; rather, the sole Respondents are the county officials who enforce the statutory processes and deadlines the Petitioners seek to obstruct. *See* A.R.S. §§ 16-550(A), 16-547, 16-548; 2024 Ariz. Laws ch. 1, § 22; *see also Collins v. Corbin*, 160 Ariz. 165, 166 (1989) (county justices of the peace are not "state officers").

More generally, the Petitioners' effort to shoehorn their case into the "highly discretionary," *Ariz. Early Child Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 468, ¶ 2 (2009), jurisdictional ambit of the Rules of Procedure for Special Action is infirm for at least two reasons.

First, a special action may bypass the Superior Court only if it "turns solely on legal issues rather than on controverted factual issues." *State Compensation Fund v. Symington*, 174 Ariz. 188, 192 (1993); *see also State ex rel. Montgomery v. Rogers*, 237 Ariz. 419, 421, ¶ 6 (App. 2015) (special action review is appropriate if the case "does not turn on the resolution of disputed facts").

The gravamen of Petitioners' special action is that "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." Pet. at 15. But Petitioners conflate the "processing" of early ballots, which entails the removal of the ballot from the envelope and its subsequent tabulation, with the antecedent step of signature verification. Upon information and belief, the Maricopa County Recorder concluded the review of early ballot signatures—which would have entailed notice to any early voter who submitted a facially deficient or inconsistent signature—no later than the morning of Friday, November 8. The ongoing "processing" of early ballots does not necessarily imply that the signature review phase (with attendant notices to voters who provided inconclusive signatures) also remains incomplete. More broadly, the Petitioners tellingly punctuate their assertions with qualifying hedges (*see, e.g.*, Pet. at 4–5 ("reportedly," "potentially")) that obscure critical questions—including the number of voters purportedly affected and how the extension that Petitioners demand may impact elections officials' ability

to comply with imminent canvassing deadlines—that are central to the viability of their claims and requested relief. The logistical and institutional infeasibility of tasking this Court with disentangling such factual questions precludes special action jurisdiction. *See Abeyta v. Soos ex rel. Cnty. of Pinal*, 234 Ariz. 190, 192, ¶ 1 (App. 2014) (court should accept special action jurisdiction only in cases "that require no further factfinding").

Second, the Petition does not present any claim that is remediable through a special action. "In Arizona practice, relief by 'special action' replaces relief 'previously obtained' by writs of certiorari, mandamus, or prohibition." *Boone v. Superior Court In & For Maricopa Cnty.*, 145 Ariz. 235, 237 (1985). While the Rules of Procedure for Special Action liberate parties from archaic common law pleading technicalities, the special action is not a shapeshifting vehicle for pursuing any and every claim against a public officer. *See Arizonans for Second Chances, Rehabilitation, and Public Safety*, 249 Ariz. 396, 423, ¶ 128 (2020) (Bolick, J., dissenting) ("The limited questions we are authorized to consider in a special action . . . must present the type of issues that were actionable under the common law writs of mandamus or prohibition"). To the contrary, "[t]he ***only*** questions that may be raised in a special action are" whether the defendant has (1) failed to exercise a non-discretionary legal duty, (2) is acting without or in excess of his legal authority, or (3) has acted in a manner that is arbitrary, capricious, or an abuse of discretion. *See*

Ariz. R. Special Action Procedure 3 (emphasis added); *see also id.* Rule 2(c) (effective Jan. 1, 2025) ("These rules do not enlarge the scope of relief those [common law] writs formerly granted.").

This case implicates none of those predicates. Far from compelling the performance of a statutory duty—*i.e.*, enforcement of the deadline for signature curing, *see* 2024 Ariz. Laws ch. 1, § 22—the Petition desires to thwart it. *See Sears v. Hull*, 192 Ariz. 65, 69, ¶ 11 (1998) ("The Sears seek not to compel the Governor to perform an act specifically imposed as a duty but rather to prevent the Governor from acting. Hence, the Sears actually seek injunctive relief, which is not available through an action for mandamus or any other form of special action."). Similarly, the Petitioners' gripe is not that the Respondents are exceeding the confines of their statutory authority, but rather that they are respecting them. Finally, it is (or should be) undisputed that the statutory deadline for signature curing does not afford to the county recorders any "discretion" that they could or will "abuse."

If there is a procedural avenue through which the Petitioners may bring their claims, it is not an appellate special action. The Court accordingly should deny jurisdiction.

II. The Petitioners Lack Standing Because They Cannot Identify Any Injured Member and Because Enforcement of the Curing Deadline Will Not Force Petitioners to Divert Resources

Although the Arizona Constitution imposes no "case or controversy" requirement, "as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue." *Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶ 19 (2003).[2] The Petitioners posit two theories of standing; neither persuades.

First, Petitioners cite the principle of associational standing—*i.e.*, the ability of an organization to vindicate the legal rights of its members. But "[a] primary consideration in this test is whether the association's members would have standing to sue in their own right." *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 535 P.3d 932, 939, ¶ 24 (Ariz. App. 2023); *see also Armory Park Neighborhood Ass'n v. Episcopal Cmty Sers. in Ariz.*, 148 Ariz. 1, 6 (1985) (associational standing requires "members who would have standing in their individual capacities"). The Petitioners apparently have located certain members who have ***not*** been injured—namely, voters who received notice of a deficiency in their early ballot signature before the cure deadline, *see* App'x 2–3. But they do not

[2] While an "injury" is not a condition precedent to a declaratory judgment claim in Arizona, *see Mills v. Ariz. Bd. of Technical Registration*, 253 Ariz. 415, 424–25, ¶ 30 (2022), Petitioners supply no support for the notion that this Court can exercise original jurisdiction over a declaratory judgment action.

identify (or even represent that they could identify) any actual qualified elector in Arizona who is a member of their respective organizations and who will not receive notice of a defect in their early ballot affidavit signature before the cure deadline. Supposition and speculation are not substitutes for the articulation of an actual injury. *See Arcadia Osborn Neighborhood*, 535 P.3d at 939, ¶ 25 ("Because [plaintiff] has failed to establish individual standing on behalf of any of its members, it cannot assert representational standing.").

Petitioners' alternative theory of organizational standing fares no better. They allege that they have "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." Pet. at 12. Preliminarily, Arizona courts do not agree that "diversion of resources is sufficient to show a concrete injury justifying standing." *Arcadia Osborn Neighborhood*, 535 P.3d at 939, ¶ 28 (citing *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224, ¶ 18 (2022)); *see also Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1175 (9th Cir. 2024) (repudiating notion that "the mere diversion of resources in response to a policy can provide standing"). And "an organization may not establish standing simply based on the 'intensity of the litigant's interest' or because of strong opposition to the government's conduct." *Food and Drug Admin. v. All. for Hippocratic Medicine*, 602 U.S. 367, 394 (2024) (citations omitted). Similarly, an organization "cannot

spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.*

More to the point, Petitioners' ostensible diversion-of-resources theory makes no sense even on its own terms. Assuming that the Petitioners do, in fact, expend resources on contacting affected voters, a prolongation of the cure period could only induce them to direct ***more*** resources to that program. Absent a plausible explanation for the facially illogical proposition that an extension of the curing deadline will ***conserve*** organizational resources that otherwise would have been diverted to ballot curing outreach—and the petition offers none—the Petitioners have not posited a colorable claim of organizational standing.

III. The Petitioners' Unreasonable Delay Prejudices the Efficient and Timely Administration of the Election

Even if their petition pleaded a valid claim, the Petitioners waited too long to bring it. The familiar elements of laches are (1) unreasonable delay and (2) resulting prejudice to the opposing party. *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009). Both facets are satisfied here.

The unreasonableness of a delay is gauged primarily by reference to "party's knowledge of his or her right," and celerity in acting to vindicate it. *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993). The premise of Petitioners' special action is that "there have been significant delays in counting ballots throughout Arizona." Pet. at 2. But even assuming for the moment that delays in *tabulation* imply delays

in *signature verification*, the Petitioners were on notice of this backlog for several days. Maricopa County announced on Election Night that its initial release of results encompassed only "ballots that have been received through Tuesday, Oct. 29, 2024" and that "it is expected that approximately 700,000 ballots will be left to tabulate in the coming days." Press Release, *Initial Unofficial Returns from the 2024 General Election Posted*, Nov. 5, 2024, *available at* https://elections.maricopa.gov/news-and-information/elections-news/initial-unofficial-results-2024-general-election-posted.html; *see also* Jen Fifield, *Arizona Election Results Delayed After a Long Ballot and a Court Order Slow Counting*, VOTEBEAT (Nov. 6, 2024 at 12:51 p.m.), *available at* https://www.votebeat.org/arizona/2024/11/06/arizona-delayed-election-results-long-ballot-court-order/ ("Typically, in the first round of results at 8 p.m. on Tuesday night, the county releases the results from all early ballots cast up to the Friday before Election Day. This time, that round included only ballots received up until Oct. 29, a week before Election Day."). Further, the Secretary of State publishes a tracker that allows the general public to monitor in real time the progression of ballot processing and tabulation in all fifteen counties.[3]

Yet Petitioners inexplicably dallied until approximately 30 hours prior to the statutory curing deadline before filing suit. Delay is a relative concept; increments

[3] *Available at* https://apps.arizona.vote/electioninfo/BPS/47/0.

of hours and even days can exert substantial repercussions in the warp speed realm of election administration. *See McClung v. Bennett*, 225 Ariz. 154, 157, ¶ 15 (2010) (finding appeal in nomination petition challenge barred by laches despite being filed before the statutory deadline); *Lubin v. Thomas*, 213 Ariz. 496, 498, ¶ 10 (2006) (cautioning that "merely complying with the time limits in [a statute]. . . may be insufficient" to avoid finding of unreasonable delay).

Petitioners' delay redounds to the detriment of the other parties, the courts, and Arizona's broader interest in the timely and conclusive certification of election results. The signature curing deadline does not stand in a vacuum; it is merely one component of a finely-wrought series of procedures and timelines to ensure that any necessary recounts are completed, *see* A.R.S. § 16-662, that final results are promptly canvassed, *see id.* §§ 16-642(A)(1)(b) (November 21 deadline for completing county canvass), 16-648(A) (November 25 deadline for completing statewide canvass), and that Arizona can certify its presidential electors in compliance with federal law, *see* 3 U.S.C. §§ 5(a)(1), 7 (December 11 deadline for issuing certificates of ascertainment). An earlier-initiated action may have allowed sufficient time for remedies that would not risk a cascade of missed deadlines or jeopardize the State's fulfillment of its legal obligations.

More generally, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance." *Sotomayor v.*

Burns, 199 Ariz. 81, 83, ¶ 9 (2000). Specifically, "[u]nreasonable delay can . . . prejudice the administration of justice by compelling the court to 'steamroll through . . . delicate legal issues.'" *Lubin*, 213 Ariz. at 497, ¶ 10 (quoting *Mathieu*, 174 Ariz. at 459). By ambushing the counties and judiciary with eleventh-hour litigation, Petitioners are straining the Court's capacity to adjudicate this challenge and election officials' ability to honor key canvassing and certification deadlines.

IV. Enforcement of the Statutory Cure Deadline Does Not Deprive Voters of Due Process or Severely Burden Voting Rights

Even if the Court accepts jurisdiction, finds standing, and forgives Petitioners' dilatoriness, the petition does not depict any actionable constitutional violation. Plaintiffs' procedural due process claim—which relies on the balancing test formulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976)—is constructed on an erroneous premise. Like their federal counterparts, Arizona courts "evaluate[] procedural due process challenges to a voting restriction under the framework articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)." *In re Matter of Wood*, 551 P.3d 1163, 1169, ¶ 15 (Ariz. App. 2024) (cleaned up); *see also Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021) ("We hold that the *Anderson/Burdick* framework applies to Plaintiffs' procedural due process claim" challenging Arizona's deadline for curing

missing early ballot signatures).[4] The upshot is that procedural due process claims in this context are subsumed into the broader rubric for adjudicating all vote denial claims.

Under this standard, "[a] law that imposes a 'severe' burden on voting rights must meet strict scrutiny. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022) (cleaned-up). In this lower tier of scrutiny, the government is "*not* required to show that its system is narrowly tailored." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011).[5]

Even assuming *arguendo* that some county recorders have been unable to promptly notify affected voters of deficiencies in their early ballot affidavit

[4] In crucial contrast, *Richer v. Fontes*, 2024 WL 4299099 (Ariz. Sept. 20, 2024), featured not a challenge to the validity of an election procedure, but rather implicated the unique procedural due process questions engendered by elections officials' systemic failure to fully enforce a statutory requirement over a period of many years.

[5] Petitioners' procedural due process claim also flounders under the *Matthews* test. Petitioners proffer no evidence or even a comprehensive rationale underpinned by specific facts illuminating "the probable value, if any" of the requested extension or "the fiscal and administrative burdens that the [extension] would entail" for the counties. *Matthews*, 424 U.S. at 335. Indeed, "[p]recisely what procedures the Due Process Clause requires in any given case is a function of context. After all, 'unlike some legal rules,' due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Brewer v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) (citations omitted). This fact-sensitive appraisal is singularly ill-suited to an appellate special action.

signatures, Arizona's November 10 cure deadline does not unreasonably encumber voting rights. Petitioners' (speculative) contention that "the government will deprive [voters] of their fundamental right to vote," Pet. at 18, confuses the burden attributable to the challenged statute with the consequences of noncompliance. This is an obvious fallacy. "If the burden imposed by a challenged law were measured by the consequence of noncompliance, then every voting prerequisite would impose the same burden and therefore would be subject to the same degree of scrutiny . . . But this cannot be true." *Ariz. Democratic Party*, 18 F.4th at 1188.

It follows that the possibility of incidental disenfranchisement is not the measure of the relevant "burden." Early voting is a privilege; there is "no constitutional right to use [this] alternative voting method." *Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 848 (D. Ariz. 2022); *see also Election Integrity Project Cal. LLC v. Weber*, 113 F.4th 1072, 1091 (9th Cir. 2024) ("[W]e note that any voter in California can choose whether to vote by mail or in person, undermining any assertion that the election rules themselves arbitrarily treat voters unequally."). A voter who wishes to avail himself of this convenience incurs merely the "burden" of affixing to an early ballot affidavit a signature that is not "inconsistent with the elector's signature on the registration record." A.R.S. § 16-550(A). If he opts to wait until the end of the 27-day early voting period to cast his ballot and fails to either provide a conforming signature to update the signature on file with the county

recorder, he risks a finding of a mismatch and potentially insufficient time in which to cure it.

This contingency is unfortunate, but it does not evince a constitutionally suspect burden. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 237 (5th Cir. 2020) (noting that "[e]ven if some voters have trouble duplicating their signatures, that problem is 'neither so serious nor so frequent as to raise any question about the constitutionality' of the signature-verification requirement," and rejecting argument that "a dearth of opportunities to cure transmogrifies [the] signature-verification requirement into a severe burden"); *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (finding that "the absence of notice and an opportunity to rehabilitate rejected [petition] signatures imposes only a minimal burden on plaintiffs' rights"); *cf. Election Integrity Project*, 113 F.4th at 1096 (explaining that, under due process principles, "even errors, irregularities, *ex post* changes in law or procedure, and fraud will not amount to a denial of due process if they are of the 'garden variety' sort reasonably associated with the public administration of elections").

These modest limitations on the franchise are amply justified by Arizona's important regulatory interests in orderly election administration and the implementation of election canvassing and certification deadlines. *See Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (recognizing the "important regulatory task of ensuring elections are fair and orderly"); *Ariz. Democratic Party*, 18 F.4th at

1192 (concluding in signature verification context "that the State's interest in reducing administrative burdens outweighs the minimal burden on the voter"); *Lemons*, 538 F.3d at 1104–05 ("Requiring the state to provide thousands of petition signers with individual notice that their signatures have been rejected and to afford them an opportunity to present extrinsic evidence during the short thirty-day verification period would impose a significant burden on the Secretary and county elections officials.").

In short, the five-day post-election signature curing period is a product of legislative grace, not a constitutional entitlement. The Petitioners tellingly cannot identify specific eligible voters whose ballots will be disqualified because they lacked sufficient time to cure a mismatched signature. And even if they could, these isolated and discrete occurrences are an untenably brittle foundation on which to upend the Legislature's considered policy determinations and further complicate the county recorders' already formidable task of concluding the administration of the 2024 election.

CONCLUSION

For the foregoing reasons, the Court should decline special action jurisdiction or, in the alternative, deny relief.

RESPECTFULLY SUBMITTED this 10th day of November, 2024.

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