No. 24A164

IN THE SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, *ET AL.*
APPLICANTS,
v.
MI FAMILIA VOTA, *ET AL.*

ARIZONA SECRETARY OF STATE'S
RESPONSE TO EMERGENCY APPLICATION FOR STAY

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

JOHN ALAN DORAN*
CRAIG ALAN MORGAN
SHAYNA STUART
JAKE TYLER RAPP
Sherman & Howard L.L.C.
2555 E. Camelback Rd., Suite 1050
Phoenix, AZ 85016
(602) 240-3000
*Counsel of Record
Counsel for Arizona Secretary of State

M. COLLEEN CONNOR
AMY B. CHAN
WILLIAM DAVIS
Office of the Arizona Secretary of State
1700 W. Washington St., Floor 7
Phoenix, AZ 85007
(602) 542-4285
Counsel for Arizona Secretary of State

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Adrian Fontes, Arizona's Secretary of State and Chief Election Officer ("Secretary Fontes"), asks this Court to deny Applicants' Emergency Application for a Stay (the "Application") because a stay this close to an election will create chaos and confusion, and in turn undermine the credibility of our elections.[1]

Our elections are a cornerstone of our democracy. Preserving their integrity and reliability are paramount among Secretary Fontes' responsibilities. He takes those responsibilities very seriously. That is why, although a nominal party to this action, he was willing to stipulate to the relief sought from the beginning, both to facilitate this action's swift resolution and preclude it from in any way interfering with the now ongoing 2024 election cycle. The district court, the litigating parties, and even the nominal parties worked extremely hard to ensure that this action was tried, and a decision rendered, in advance of 2024 election-related deadlines to minimize interference with election-related preparation and execution.

Now, Applicants seek *yet again* to stay the district court's decision just 7 weeks before the Arizona's voter registration deadline. This Court should deny the Application for multiple reasons.

First, "[i]n election matters, time is of the essence …." *Harris v. Purcell*, 973 P.2d 1166, 1169, ¶ 15 (Ariz. 1998). "Confidence in the integrity of our electoral processes is

[1] Generally, Arizona's County Recorders have all been nominal parties in this action, and thus, have not taken a position on the merits. Even so, Rose Winkeler, counsel for Coconino County Recorder Patty Hansen, has asked Secretary Fontes to notify this Court that she joins in Secretary Fontes' response. Ms. Hansen nonetheless remains a nominal party and maintains her nominal party status.

essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Applicants' request, on the eve of 2024 election deadlines, is unreasonable and should be denied based on either the *Purcell* doctrine, *see Purcell*, 549 U.S. at 5, or the related doctrine of laches. Our nation's courts have repeatedly emphasized that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1027 (D. Ariz. 2022) (cleaned up), *aff'd sub nom.*, 83 F.4th 1199 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1395 (Apr. 22, 2024), No. 23-1021, 2024 WL 1706042. This is why the *Purcell* Doctrine exists and "discourages courts from creating or altering election rules close to elections to avoid voter confusion." *Mi Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 985 (D. Ariz. 2020) (citing *Purcell*, 549 U.S. 1 at 4–5). Entry of a stay will, in effect, alter election rules and procedures on the cusp of the 2024 election cycle.

Second, granting Applicants' request will disrupt the status quo. The 2024 election cycle, including for the office of President of the United States, is upon us. Secretary Fontes' office has worked with election officials across Arizona for many months to prepare for the 2024 election cycle. In the 2020 election, the voter turnout was nearly 80%. *State of Ariz. Official Canvas* at 1, ARIZ. SEC'Y OF STATE (Nov. 24, 2020), https://tinyurl.com/2vek9x8b (*see* "TOTAL" for "Voter Turnout Percent). Secretary Fontes expects, and believes Arizona's counties are preparing for, *at least* a similar turnout in 2024. Applicants' explanation of its irreparable injury is scant, non-cognizable and self-inflicted. It pales in comparison to the injury that will be inflicted on newly registered Arizona voters, on the 42,301 federal only registrants who will not receive an early

ballot by mail and will not be able to vote in the next presidential election, and on the public trust in our elections and election officials. *Federal Only Registrants as of July 1, 2024*, ARIZ. SEC'Y OF STATE (July 1, 2024), https://tinyurl.com/dk3wywsu.

Third, the balance of equities and public interest considerations tip sharply against Applicants. They oversimplify and minimize the significant hardship to election officials that would result from a last-minute judicial modification of Arizona's voter registration and early voting procedures. It cannot be sincerely contested that the processes and procedures that must be put in motion now so that our 2024 elections in Arizona can occur timely and without voter confusion are well under way.

Entering a stay, at this late stage, will create uncertainty for voters and election officials alike, and erode public confidence in the integrity of Arizona's election processes – which "has independent significance." *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008). At some point, the status quo during an appeal must be set and remain undisturbed so chaos cannot reign. That point, in this action, is *now*.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. ARIZONA'S DOCUMENTARY PROOF OF CITIZENSHIP PROCEDURES

Since 2013, election officials have been required to register individuals who register to vote with the Federal Form, but without documentary proof of citizenship ("DPOC"), for all federal elections. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013) (referred to as "*ITCA*").

After *ITCA*, the Arizona Secretary of State established a bifurcated voter registration system as outlined in Arizona's 2014 Elections Procedures Manual ("2014 EPM").[2] *See State of Ariz. Elections Procedures Manual Rev. 2014* at 10 (June 2014), ARIZ. SEC'Y OF STATE, https://tinyurl.com/34tv93j3. Implementation required one system for voters who submitted a state voter registration form with DPOC who would be eligible to vote a Full Ballot,[3] and one system for voters who submitted a federal form, but failed to provide DPOC, and would only be eligible to vote in federal elections and be identified as Federal Only voters. *Id.* at 11–12. An applicant who submitted a state voter registration form but failed to provide DPOC would have their voter registration rejected. *Id.* at 15.

Importantly, from 2014 through 2018, in an attempt to reduce the number of Federal Only voters, the Arizona Secretary of State created a procedure whereby County Recorders for each of the 15 counties in Arizona could obtain DPOC on behalf of the registrant to make that registrant a full ballot voter. Secretary Fontes' App. at 76 (LULAC Consent Decree, at 2); *see* 2014 EPM, at 24–25. Election officials, however, were not permitted to proactively seek DPOC on behalf of registrants who submitted a state voter registration form that lacked DPOC. Because of this disparate treatment of voters, the then Secretary of State and Maricopa County Recorder were named in a lawsuit, which ultimately was resolved through what became known as

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[2] Arizona's Election Procedures Manual has the force of law in Arizona. *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 308, ¶ 16 (Ariz. 2020) ("Once adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.").

[3] However, registrants who had properly been registered to vote as a Full Ballot voter in one Arizona county would have to re-register and provide DPOC if the voter moved to another Arizona county. *See* 2014 EPM at 18, ¶ 9.

the LULAC Consent Decree. *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1084 (D. Ariz. 2023).

Since the LULAC Consent Decree was entered in 2018, election officials have registered voters who used the State Form without DPOC for all federal elections. *See* Applicants' App. at 50–51 (Doc. 709). Through the LULAC Consent Decree and Arizona's 2019 Election Procedures Manual ("2019 EPM"), the Arizona Secretary of State created uniform procedure to treat all new voter registrants equally while still complying with federal and state law. *See 2019 Election Procedures Manual*, ARIZ. SEC'Y OF STATE (Dec. 20, 2019), https://tinyurl.com/bdd39usv. This process was continued and incorporated into the 2023 Election Procedures Manual ("2023 EPM"). *2023 Election Procedures Manual*, ARIZ. SEC'Y OF STATE (Jan. 11, 2024), https://tinyurl.com/2xymhmzu.

The uniform system is as follows: The County Recorder proactively runs any voter registrant, whether they submitted a state or federal form, through Arizona's Motor Vehicle Division ("MVD") system to attempt to verify DPOC (i.e. citizenship) on behalf of the voter registrant. *Id.* at 6. If the registrant did not provide DPOC with their voter registration, or their DPOC was not previously provided to the MVD and accessible to the County Recorder via the MVD database, but the registrant otherwise met the minimum requirements to register to vote, then the registrant would be eligible to vote in federal elections regardless of the form used.

B. APPLICANTS' LAST-MINUTE APPLICATION TO PROHIBIT REGISTERED VOTERS FROM VOTING EARLY BY MAIL OR VOTING FOR PRESIDENT OF THE UNITED STATES

After losing their request for a stay in the district court, Applicants obtained a partial stay from the Ninth Circuit on July 18, 2024. Applicants' App. at 6–7. Realizing the issuance of a stay was improper because, among other things, Applicants likely would not prevail on the merits, on August 1, 2024, the Ninth Circuit vacated its entry of a stay. *Id.* at 7–19.

Applicants waited one week to then file their Application on August 8, 2024. In it, Applicants request a stay of the Ninth Circuit's ruling and the issuance of a decision by August 22, 2024. Applicants blame the tight timeframe on the ballot printing deadline:

> … to implement its prohibition on voting in presidential elections by individuals who have not provided documentary proof of citizenship, Arizona must either not print the presidential candidates on federal only ballots, or configure its tabulation machines not to count presidential votes on federal only ballots.

Application, at 2–3. The tight timeframe, however, is in part due to the Applicants' delay in seeking post-judgment stay relief.

All elections in Arizona *must* permit voters to vote as early as 27 days prior to an election. A.R.S. § 16-541(A) ("Any election called through the laws for this state shall provide for early voting…."). Most registered voters cast their ballot through early voting (for example, 75-80% in the 2020 Presidential Election). *See* 2020 General Election County Canvass Returns, ARIZ. SEC'Y OF STATE, https://tinyurl.com/dzwp9b2p. With only weeks before early voting starts in Arizona, the Applicants seek to disenfranchise and prevent an entire category of voters,

Federal Only voters, from voting early by mail, let alone voting at all for President of the United States.

Applicants offer no compelling interest to deprive Federal Only voters of their fundamental constitutional right to vote for President of the United States or access to early voting. Nor could there be. The Ninth Circuit's merits panel correctly rejected the stay issued by the motions panel. *See* Applicants' App. at 6–19. That decision should not be disturbed. We will explain why.

II. THIS COURT SHOULD DENY THE APPLICATION

A. THE *PURCELL* AND LACHES DOCTRINES PRECLUDE A STAY

In *Purcell*, this Court affirmed the cardinal rule that federal courts should not alter election rules on the eve of an election. 549 U.S. at 5. This Court explained that "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. The risk of voter confusion will only increase "[a]s an election draws closer." *Id.*

In *Republican Nat'l Comm. v. Democratic Nat'l Comm.* – within the first month of the COVID-19 pandemic – this Court stayed a district court's injunction that changed absentee ballot deadlines to "allow[ ] ballots to be mailed … after election Day." 589 U.S. 423, 424 (2020). Doing so, this Court emphasized that the injunction changed the election rules "close to the election date" and "in essence enjoined nonparties to th[e] lawsuit." *Id.* Thus, the district court "contravened [the Supreme Court's] precedents" which "repeatedly emphasize[ ] that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* (citations omitted). The relief Applicants seek will have the very same effect and

defies the *Purcell* doctrine.

In just a mere 7 weeks, early voting in Arizona will begin. To be sure, at this juncture in Arizona elections, time is not only of the essence, but it is in short supply. Election officials across Arizona are preparing for what is expected to be an extremely active 2024 election cycle. Secretary Fontes' office understands that Counties across Arizona have implemented processes and procedures, or are well into the process of doing so, reliant and compliant with the district court's Order as set forth in the current EPM. Secretary Fontes' App. at 45–46, ¶ 17. Last minute statewide policy changes like those requested in the Application, no matter how small they may seem to some, can (and Secretary Fontes believes will) drastically impact how affected votes are collected and processed. Conflicting court decisions, one after the other, on the cusp of an election will undoubtedly cause voters to harbor doubts about our election procedures, our election officials, and our elections themselves. *Id.* That risk alone, in the context of this action, strongly cautions against "creating or altering election rules close to elections to avoid voter confusion." *Mi Familia Vota*, 492 F. Supp. 3d at 985; Secretary Fontes' App. at 45–46, ¶ 17 (Secretary Fontes' declaration where he expresses agreement with this sentiment).

For similar reasons, the Application should be denied under the laches doctrine. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002) (courts consider "the length of delay, which is measured from the time the plaintiff knew or should have known about its potential cause of action" and assess the reasonableness of the period of inaction) (citations omitted)). The district

court ruled on the legality of the DPOC provisions at issue in this case on September 14, 2023. Applicants' App. at 187–90 (Doc. 534). The district court subsequently informed the parties that it would "not consider either evidence or further legal argument" regarding the DPOC provisions at trial. Secretary Fontes' App. at 1 (Doc. 600).

After trial, the district court issued its Findings of Fact and Conclusions of Law, addressing all remaining claims, on February 29, 2024. Applicants' App. at 47–155 (Doc. 709). The parties filed a proposed judgment on April 30, 2024. Secretary Fontes' App. at 3–5 (Doc. 713) (granting parties' joint motion for entry of judgment and ordering parties to jointly lodge a proposed form of judgment), 5–6 (Doc. 718) (ordering counsel to file a status report regarding the proposed form of judgment within 7 days of the order), 6–19 (Doc. 719) (proposed judgment); *see also* Applicants' App. 191–95 (Final Judgment). It was not until May 17, 2024, that Applicants filed a Motion for Stay in the Ninth Circuit acknowledging the rapidly "approaching series of election-related deadlines." Secretary Fontes' App. at 19 (requesting "expedited consideration"), 59–60 (intervenor-defendants' waiver of reply).

A stay was entered. On August 1, 2024, the Ninth Circuit vacated its entry of a stay. Applicants' App. at 6. All the while, the one date everyone has known of all along – the date of the 2024 general election – continued to creep closer. It is far too late, now, to again disturb the status quo. Given the timing of events in this case, and the fact that we are on the cusp of critical election deadlines, laches compels the denial of the Application.

B. APPLICANTS' REQUESTED RELIEF WILL DESTROY THE STATUS QUO

Applicants appear to have overlooked the myriad of consequences that would result from Applicants' overly simplistic request.

Granting the Application will require Secretary Fontes and the 15 County Recorders in Arizona to divert and expend significant time and resources "scrambling to implement and to administer a new procedure [for registering voters without DPOC] at the eleventh hour" of the election for President of the United States *and with no guidance*. *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020). Implementing new procedures would be quite challenging under even the best of circumstances. It would require Secretary Fontes' office to completely recode and change the Arizona Voter Registration Database System ("AVID") because it currently does not differentiate between a state and federal form. Similarly, AVID would need to be recoded and changed to add an identifier to document that voter registration forms were rejected for this reason. *See* 2023 EPM, at 21. Such a programmatic overhaul and endeavor requires money, time, and resources which, frankly, Arizona and its voters do not have the luxury to afford given we are on the eve of Presidential election deadlines.

In addition, the LULAC Consent Decree has been incorporated into Arizona's voter registration procedures since it went into effect in 2018. For the past six years, the County Recorders in Arizona have processed all forms similarly, and regardless of the type of form a voter registrant used. If the Application is granted, however, a state form registrant's failure to provide DPOC will result in the voter's registrations

being rejected.[4] And given the injunction issued by the district court regarding the implementation of A.R.S. § 16-121.01(C) and A.R.S. § 16-127, Secretary Fontes did not include procedures or guidance in the current EPM about how to execute these statutes. *See* **Exhibit A** (Secretary Fontes' Affidavit), ¶ 18. Granting the Applicants' requested relief would impose undue hardship on Secretary Fontes, the 15 County Recorders on to how to receive and process voter registration forms for state form voters verses Federal Only voters. *Id.* at ¶¶ 18–20.

Moreover, Arizona has no procedures for removing presidential electors from appearing on a Federal Only ballot. *Id.* at ¶ 21. Arizona also currently has no procedures to remove Federal Only voters from the Active Early Voting List or outright preclude them from receiving an early ballot by mail. *Id.* at ¶ 21. The Application makes no effort to address these very practical concerns or the very devastating impact granting the Application will have on these voters.

Similarly, Applicants make no effort to address the district court's ruling that obstacle preemption bars the Arizona's enforcement of H.B. 2492. Applicants' App. at 169–70 (Doc. 534). The district court specifically found that "H.B. 2492's limitation on voting by mail frustrates the purpose of the NVRA, as it impedes Arizona's 'promo[tion] of the right' to vote[,]" and that this presents an obstacle to the NVRA's findings and purpose. *Id.* (quoting 52 U.S.C. § 20501(a); *Crosby v. Nat'l Foreign Trade Council*, 530

[4] The implementation of A.R.S. § 16-121.01(C) would require the County Recorder to reject state voter registration forms that lack DPOC. Arizona's voter registration database has no status code that would deem a voter registration form as being "rejected." Instead, the system uses status codes such as "ineligible" for an applicant who is not a U.S. citizen or "suspense" for a voter who lacks one of the required qualifications to register to vote.

U.S. 363, 373 (2000) (citation omitted)). The district court later concluded that Applicants "have not shown that they are likely to succeed on appeal regarding H.B. 2492's DPOC requirement for voting by mail." Secretary's App. at 69 (Doc. 752). Nothing at all has changed.

This Court should maintain the status quo and deny the Application.

C. APPLICANTS HAVE NOT DEMONSTRATED IRREPARABLE HARM

Because Applicants' likelihood of success on the merits is extremely low, their threshold requirement for showing irreparable harm is heightened. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005).

Applicants' claim of irreparable injury is self-serving – they claim harm because without a stay of the district court's order, their "chances of victory would be reduced." Application at 17 (citation omitted). "And because elections, like admissions, 'are a zero-sum', a 'benefit provided to [one] but not to others necessarily advantages the former . . . at the expense of the latter." *Id.* (citation omitted). But Applicants' fear that they may not win an election cannot satisfy the heightened threshold to show irreparable harm (let alone disenfranchise voters). Applicants' explanation of its irreparable injury is scant, non-cognizable, and self-inflicted given their tactical timing delays. These theoretical harms pale in comparison to the injury that will be inflicted on newly registered Arizona voters, and on the 42,301 federal only registrants who will not be eligible to receive an early ballot by mail and will not be able to vote in the next presidential election.

D. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR DENYING THE APPLICATION

A stay is ordinarily a mechanism to preserve, not upset, the status quo pending appeal. *See Nken v. Holder*, 556 U.S. 418, 429 (2009). That principle applies with even greater force in the elections context, where court orders – especially "bare" orders offering "no explanation" – can "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5.

It cannot be sincerely contested that the processes and procedures that ensure our 2024 elections in Arizona are timely, reliable, and occur without voter confusion are well under way. For example:

- On May 1, 2024, election officials sent voters their 90-day notice. *See* A.R.S. § 16-544(D); Secretary Fontes' App. at 44, ¶ 7; Ex. A at ¶ 7.
- The deadline to print sample ballots was June 20, 2024. *See* A.R.S. § 16-461; Secretary Fontes' App. at 44, ¶ 8; Ex. A at ¶ 8.
- Early voting began, and the initiative filing deadline, was on July 3, 2024. *See* A.R.S. § 16-542(C); Secretary Fontes' App. at 44–45, ¶ 9; Ex. A at ¶ 9.
- Signature rosters were printed on July 20, 2024, the DPOC cure deadline was on July 25, 2024, and early voting ended on July 30, 2024. *See* A.R.S. § 16-542(E) (early voting); 2023 EPM at 7, ARIZ. SEC'Y OF STATE (Jan. 11, 2024), https://tinyurl.com/2xymhmzu (incorporating LULAC Consent Decree requirements related to DPOC); A.R.S. § 16-166(A) (signature rosters); Secretary Fontes' App. at 45, ¶ 10; Ex. A at ¶ 10.
- Non-partisan election challenges were filed by July 22, 2024 and decided by

August 1, 2024. Secretary Fontes' App. at 45, ¶ 11; Ex. A at ¶ 11.

- The Primary Election occurred on July 30, 2024. Secretary Fontes' App. at 45, ¶ 12; Ex. A at ¶ 12.
- The deadline for the Secretary of State to transmit a 5% random sample of signatures related to ballot measures was August 1, 2024. *See* A.R.S. § 19-121.01; Secretary Fontes' App. at 45, ¶ 13; Ex. A at ¶ 13.
- The deadline for counties to complete review of ballot-related signature samples is August 22, 2024. Secretary Fontes' App. at 45, ¶ 14; Ex. A at ¶ 14.
- The deadline to print publicity pamphlets is August 29, 2024. Secretary Fontes' App. at 45, ¶ 15; Ex. A at ¶ 15

Entering a stay would drastically change Arizona's election procedures and erode public confidence in the integrity of Arizona's election processes – a fact that "has independent significance." *See Crawford*, 553 U.S. at 197; Ex. A at ¶¶ 16–23.

Moreover, Secretary Fontes, as Arizona's Chief Election Officer, is charged with creating the state's voter registration form. A.R.S. § 16-152(C). In the most recent version of the form, the instructions provided include a section about how a voter is required to prove citizenship and how a voter will be registered as a Federal Only voter if citizenship (i.e. DPOC) is not provided. *Ariz. Voter Registration Instructions*, ARIZ. SEC'Y OF STATE (June 13, 2024), https://tinyurl.com/nszjr8mn. Secretary Fontes and County Recorders have ordered thousands of the new state voter registration forms. Ex. A at ¶ 22. These voter registration forms have been

distributed to Arizona's MVD and public service agencies that are required to offer customers the form and an opportunity to register to vote. *Id.* These voter registration forms have also already been provided to organizations that conduct voter outreach and register voters. *Id.* at ¶ 23. It would be impossible to pull back the tens of thousands of blank voter registration forms with the instructions regarding DPOC at this juncture. *Id.* All of this will harm Arizona voters, election officials, and election integrity. Such an outcome should be avoided this close to an election.

III. CONCLUSION

Applicants do not acknowledge the clear tension between their requested relief and the impending statutorily mandated election deadlines with which state and county officials must comply. Applicants' requested relief clearly conflicts with information already in the 2023 EPM, the new voter registration forms distributed to the 15 Arizona Counties and public service agencies, the information in Secretary Fontes' Publicity Pamphlet, or other official election-related communications that have already been published and disseminated.

Applicants overlook important public interest implications associated with enjoining long established election procedures that treat similarly situated voters equally under the law. Deviation from these election procedures would have significant consequences, not the least of which is likely disenfranchisement. Applicants have not established that the balance of equities and public interest favor their requested stay relief. And, Applicants have not demonstrated that the law or the facts clearly favor their position to warrant a mandatory injunction.

Accordingly, this Court should deny Applicants' Application for an Emergency Stay.

Submitted August 16, 2024.

/s/ *John Alan Doran*
JOHN ALAN DORAN*
CRAIG ALAN MORGAN
SHAYNA STUART
JAKE TYLER RAPP
Sherman & Howard L.L.C.
2555 E. Camelback Rd., Ste 1050
Phoenix, AZ 85016
(602) 240-3000
*Counsel of Record

Counsel for Arizona Secretary of State

M. COLLEEN CONNOR
AMY B. CHAN
WILLIAM DAVIS
Office of the Arizona Secretary of State
1700 W. Washington St., Floor 7
Phoenix, AZ 85007
(602) 542-4285

Counsel for Arizona Secretary of State