

ARIZONA SUPREME COURT

MARICOPA COUNTY RECORDER
STEPHEN RICHER, in his Official
Capacity

No. CV-24-0221-SA

Petitioner,

v.

ARIZONA SECRETARY OF STATE
ADRIAN FONTES, in his Official
Capacity

Respondent.

**BRIEF OF AMICI CURIAE SAN CARLOS APACHE TRIBE, LIVING
UNITED FOR CHANGE IN ARIZONA, LEAGUE OF UNITED LATIN
AMERICAN CITIZENS OF ARIZONA, MI FAMILIA VOTA, ACLU OF
ARIZONA, AND CAMPAIGN LEGAL CENTER IN RESPONSE TO
SPECIAL ACTION PETITION**
(with written consent of the parties)

James E. Barton II (#023888)
BARTON MENDEZ SOTO PLLC
401 W. Baseline Road, Suite 205
Tempe, Arizona 85283
(480) 550-5165
James@bartonmendezsoto.com

Danielle Lang*
Brent Ferguson*
CAMPAIGN LEGAL CENTER
1101 14th St. NW Suite 400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
bferguson@campaignlegalcenter.org

Alexander B. Ritchie (AZ Bar No.
019579)
DEPARTMENT OF JUSTICE
SAN CARLOS APACHE TRIBE Post
Post Office Box 40
San Carlos, AZ 85550
(928) 475-3344
Alex.Ritchie@scat-nsn.gov

Jared G. Keenan (AZ Bar #027068)
Lili Nimlo (AZ Bar #038535)

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
ARIZONA**

P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854
jkeenan@acluaz.org
lnimlo@acluaz.org

Patricia Yan*
**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION**

915 15th Street NW
Washington, DC 20005
(202) 457-0800
pyan@aclu.org

Faith E. Gay*
Corey Stoughton*
Jeffrey Zalesin*
SELENDY GAY PLLC
1290 Ave. of the Americas
New York, NY 10104
(212) 390-9000
fgay@selendygay.com
cstoughton@selendygay.com
jzalesin@selendygay.com

**Pro Hac Vice Application Forthcoming*

Attorneys for Amici Curiae

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Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, Proposed Amici Curiae submit this brief in support of Respondent Secretary of State Fontes. This brief is submitted with written consent by the parties. ARCAP 16(b)(1)(A).

INTERESTS OF AMICI CURIAE

All *Amici Curiae* have a profound interest in ensuring the proper application of constitutional law and equitable principles to protect the right to vote of Arizonans. The interests of each *amicus* are outlined in the appendix. LUCHA-App-001-002.

INTRODUCTION

This Court should not countenance the disenfranchisement of nearly 100,000 Arizona voters (the “Affected Voters”) on the eve of an election. All parties agree that these voters have done nothing wrong and are likely qualified eligible voters. Pet.20, n.3. The Affected Voters are long-time Arizona residents who have affirmed their citizenship. And while this issue came to light because of one erroneously registered noncitizen, that individual never voted. Pet.4. And despite the Petition’s suggestions otherwise, it is *not* clear that all the Affected Voters have not provided DPOC. Some likely provided additional DPOC when they registered, and that fact would not be apparent through a database search. Relegating all Affected Voters to Federal Only status would invariably disenfranchise individuals who have already provided election officials with DPOC.

It is now three days before voting begins. Recorder Richer suggests that this

Court disqualify nearly 100,000 Arizonans from state and local elections based on nothing more than the State's own errors. That could *more than triple* the number of Arizona voters restricted to Federal Only status. LUCHA-App-014.

Amici agree that election officials and voters need swift clarity about how to proceed. But *Amici* strongly disagree that the solution is to penalize long-time Arizona voters. As Recorder Richer's petition suggests, this Court's precedent charts a different path. Pet.20 (citing *Leibsohn v. Hobbs*, 254 Ariz. 1 (2022)). The Court should hold that because the State's own errors caused the Affected Voters' potential noncompliance with the State's DPOC requirement, strict adherence to the requirement "[u]nder these circumstances . . . would 'unreasonably hinder or restrict' the constitutional right [to vote.]" 254 Ariz. at 3 (emphasis added). Such a narrow ruling would be well-grounded in constitutional jurisprudence and the well-established principle that courts should maintain the status quo immediately before an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

**BACKGROUND:
SOME AFFECTED VOTERS LIKELY HAVE PROVIDED DPOC**

Recorder Richer's petition repeatedly suggests that none of the Affected Voters submitted DPOC. Not so.

An Arizona voter submitting a voter registration form can satisfy the DPOC requirement in several, non-mutually exclusive ways including providing a verified driver's license, a tribal identification number, an immigrant identification number, or with separate documentation of citizenship (such as a birth certificate). A.R.S. 16-

166(F).

In a recent trial addressing the DPOC requirement, testimony from election officials established that the State's voter registration databases only consistently indicate whether a voter has provided DPOC, not *how* they satisfied the requirement. *See, e.g.*, LUCHA-App-037 (Deposition testimony of Maricopa County Recorder employee Janine Petty). So, Voter A might have provided both a driver's license number and a birth certificate copy. This is probable for at least some Affected Voters given that the State Form asks for a driver's license number for everyone but explains that pre-1996 licenses will not qualify as DPOC. App-0038-39. Thus, even if Voter A is an "Affected Voter" because her license number was insufficient DPOC, that voter does not lack DPOC because she provided her birth certificate. But that information may not show up in the database and certainly not in a uniform searchable manner. *Id.* Therefore, it's all but certain that the 97,688 "Affected Voters" includes voters that have satisfied Arizona's DPOC requirement.¹

The only way to account for these instances of duplicate DPOC would be a manual review of all 97,688 voter registrations.² That is administratively unfeasible at this point. Moreover, it would not solve the problem. Arizona law only requires registrars to maintain copies of DPOC for two years. A.R.S. 16-166(J). Recent

¹ *Amici* understand that the Secretary has screened out voters who have tribal numbers in the database. But that is only one alternative source of DPOC.

² For individuals who provided immigration numbers as their DPOC, that would further require election officials to verify that information through the SAVE system. A.R.S. 16-166(F)(4).

testimony confirms that many recorders do not maintain those records beyond that period. See LUCHA-App-041 (Deposition testimony of Janine Petty); LUCHA-App-021-022 (Trial testimony of same). Therefore, for many of these voters, a full review of potential DPOC submitted with their applications is impossible.

ARGUMENT

I. This Court Should Apply the *Purcell* Doctrine to Maintain the Status Quo.

Before an election, courts must avoid creating “voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)). This equitable doctrine is widely applied by state courts. *E.g.*, *Jones v. Sec’y of State*, 239 A.3d 628, 631 (Me. 2020) (recognizing “strong public interest in not changing the rules for voting at this late time”); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio Ct. App. 2020). Petitioner agrees that this Court “could apply the *Purcell* doctrine and stay any changes to the voter roll.” Pet.19.

The Petition indisputably comes on the eve of an election. The eleventh-hour order requested by Recorder Richer would wreak havoc. It would leave many voters confused about their registration status. Some voters would likely believe that they are now ineligible to vote in *any* election, creating a chilling “incentive to remain away from the polls.” *Purcell*, 549 U.S. at 4-5; *cf. League of Women Voters v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016) (late change requiring proof of citizenship for voter registration would “confuse the public” and “create a disincentive ... to register to vote,” contravening *Purcell*).

Petitioner further invites the Court to task election administrators with “provid[ing] notification to the Affected Voters to maximize their ability to present DPOC and vote a Full Ballot.” Pet.3. While that would be necessary if the Court grants

Recorder Richer’s requested relief, it would require herculean efforts³ that would distract from crucial tasks. Meanwhile, more litigation would inevitably ensue—including claims by Affected Voters challenging the deprivation of their right to vote—exposing Arizonans to *more* confusion. The Court should decline to initiate such chaos.

II. Stripping Affected Voters of Their Full Ballot Status Would Violate Both the Arizona and Federal Constitutions.

A. The purge would violate voters’ rights to procedural due process and equal protection.

Recorder Richer’s petition recognizes that stripping almost 100,000 people of the right to vote just weeks before an election “may present procedural due process concerns.” Pet.20. That seriously understates things: such action would unquestionably violate the federal and state constitutions.

Such a purge would unequivocally fail this Court’s procedural due process test, which considers the (1) private interest; (2) risk of erroneous deprivation of that interest; and (3) government’s interest. *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 (2017). Here, the private interest, the right to vote, is of the highest importance. The risk of erroneous deprivation is also extremely high—most Affected Voters are likely citizens, and many would be unable to provide DPOC on a moment’s notice (or perhaps no notice at all) and would be disenfranchised. The government’s interest in using a shortcut cannot outweigh those concerns, especially when the government’s error created this problem.

³ Indeed, it may be entirely impossible for UOCAVA votes at this late stage.

Applying the *Anderson-Burdick* framework leads to the same result. *See In re Matter of Wood*, 551 P.3d 1163, 1169 (Ariz. Ct. App. 2024). Under *Anderson-Burdick*, courts weigh the character and magnitude of the injury against the interests put forth by the state as justifications for the burden. Critically, “[t]erminating the right to vote is the most severe burden on that right” and is therefore subject to strict scrutiny. *Id.*

The purge would fail strict scrutiny because it is not narrowly tailored to serve a compelling interest. *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 417 (2020) (quotation marks omitted). First, state law makes plain the State does not believe disenfranchisement of all voters lacking DPOC is necessary. Arizona does not require DPOC of *all* voters who received a driver’s license before 1996, only the ones who registered to vote in 2004 or later. A.R.S. § 16-166(G). Thus, even if the purge is implemented, many voters without DPOC will be allowed to vote a Full Ballot. In fact, Arizona has never demonstrated that DPOC is necessary to avoid noncitizen voting. *Mi Familia Vota v. Fontes*, 2024 WL 862406 (“The Court finds that though it may occur, non-citizens voting in Arizona is quite rare, and non-citizen voter fraud in Arizona is rarer still.”); LUCHA-App-008-013 (LUCHA Brief Ninth Circuit in *MFV*). Even assuming that the government’s interest in requiring DPOC *in general* is compelling, there is no compelling interest in denying the rights of *these voters*, who are mostly citizens and have followed all the state’s instructions.

Further, the purge would not be the least restrictive means of accomplishing the government’s goal: rather than eliminating the voting rights of 98,000 people in one

fell swoop, the government could more meaningfully review voter registration files to determine which voters had already provided DPOC and limit its last-minute actions only to those voters for whom it has affirmative evidence of noncitizenship. More fundamentally, if ensuring that all voters had provided DPOC were vital to the government, it could have previously ensured that its database properly recorded voters' citizenship information, and maintained DPOC information for longer periods in order to prevent this problem.⁴

Recorder Richer asserts that *allowing* the Affected Voters to vote could violate the Equal Protection clause. Pet.19. But that ignores the fact that not all Arizona Full-Ballot voters are required to provide DPOC, A.R.S. § 16-166(G), as well as two much bigger Equal Protection problems. First, the Affected Voters followed the instructions on the voter registration form and were informed that they were fully registered. Thus, it is these voters who should be treated “consistently” with all other voters who followed proper procedures and were put on the voter rolls. “Having once granted the right to vote on equal terms” to Affected Voters, the state may not arbitrarily take that right away from only a subset of those who followed rules. *Bush v. Gore*, 531 U.S. 98, 104-05 . Second, Recorder Richer cannot deny that those Affected Voters who have already provided DPOC may not lose their voting rights consistent with the Equal

⁴ The purge would fail even under more lenient scrutiny: it would not impose a “reasonable” restriction on Affected Voters, *see Wood*, 551 P.3d at 1169, but would impose a last-minute surprise on Arizonans who have long relied on the state’s promise that they were fully registered.

Protection Clause.

B. *The purge violates Arizonans' fundamental right to vote.*

Under the Arizona and federal constitutions, the right to vote is paramount. The right to vote in the Arizona Constitution “is implicated when votes are not properly counted.” *Chavez v. Brewer*, 222 Ariz. 309, 320 (Ct. App. 2009). That right is similarly violated “if any substantial number of persons entitled to vote are denied the right to do so.” *Id.* at 319 (quoting *Wallbrecht v. Ingram*, 164 Ky. 463 (1915)).

Here, the proposed purge runs headlong into the constitutional right to vote. By Recorder Richer’s own admission, a “substantial number of persons entitled to vote [will be] denied the right” due to the state’s late-discovered error. *Id.* (concluding injunctive relief might be appropriate if “significant number of votes cast” were improperly counted). And as discussed, no government interest justifies that sudden termination of the rights of so many voters who relied on the state’s representation that they were fully registered.

CONCLUSION

For the foregoing reasons, the Court should hold that the Affected Voters retain their status as Full Ballot voters for the upcoming election.

DATED: September 18, 2024

By: /s/ James E. Barton II

James E. Barton II (#023888)

BARTON MENDEZ SOTO PLLC

401 W. Baseline Road, Suite 205

Tempe, Arizona 85283

(480) 550-5165

James @bartonmendezsoto.com

Danielle Lang*

Brent Ferguson*

CAMPAIGN LEGAL CENTER

1101 14th St. NW Suite 400

Washington, DC 20005

(202) 736-2200

dlang@campaignlegalcenter.org

bferguson@campaignlegalcenter.org

Alexander B. Ritchie (AZ Bar No.

019579)

DEPARTMENT OF JUSTICE

SAN CARLOS APACHE TRIBE Post

Post Office Box 40

San Carlos, AZ 85550

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Phoenix, AZ 85011

(602) 650-1854

jkeenanacluaz.org

lnimlo@acluaz.org

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915 15th Street NW

Washington, DC 20005

(202) 457-0800

pyan@aclu.org

Faith E. Gay*
Corey Stoughton*
Jeffrey Zalesin*
SELENDY GAY PLLC
1290 Ave. of the Americas
New York, NY 10104
(212) 390-9000
fgay@selendygay.com
cstoughton@selendygay.com
jzalesin@selendygay.com

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