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**Admitted Pro hac vice*

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Voto Latino Foundation, Priorities USA, and
Shelby Aguallo,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as Arizona
Secretary of State,

Defendant.

No. 2:19-cv-05685-PHX-DWL

**SECOND AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 Plaintiffs Voto Latino Foundation, Priorities USA, and Shelby Aguallo, through the
2 undersigned attorneys, file this Amended Complaint for Declaratory and Injunctive Relief
3 against Katie Hobbs, in her official capacity as the Arizona Secretary of State (“Secretary”),
4 and upon information and belief allege as follows:

5 **NATURE OF THE CASE**

6 1. During the 2016 presidential preference election, 72,304 Arizonans cast their
7 ballot for Marco Rubio to become the Republican presidential candidate—even though
8 Rubio had withdrawn from the race several days prior to the election. Why did so many
9 Arizonans waste their vote on a ghost candidate? Because they were among the nearly 80%
10 of Arizonans who vote by mail, and Arizona’s law requiring that mail-in ballots be received
11 by 7:00 p.m. on Election Day—not postmarked—means that voters must cast and mail their
12 ballots well in advance of Election Day to be considered timely. A.R.S. § 16-548(A). By
13 the time voters heard of the critical information, their votes had already been cast.

14 2. Voters in that election were by no means the only voters negatively impacted
15 by Arizona’s deadline. Election after election, thousands of otherwise eager voters are
16 caught unaware by the fact that Arizona requires ballots to be received by 7 p.m. on Election
17 Day (“Election Day Receipt Deadline”). A.R.S. § 16-548(A). In 2008, at least 1,611 ballots
18 were rejected for arriving after the Election Day Receipt Deadline, even though many of
19 them were mailed multiple days before election day. That number is steadily increasing. In
20 2012, more than double that number—4,107 ballots—were rejected. And in the 2018
21 midterm election, a lower turnout election than either the 2008 and 2012 general election,
22 more than 3,000 ballots were rejected because they arrived after the Election Day Receipt
23 Deadline. A disproportionate number of these ballots were cast by Arizona’s Hispanic and
24 other minority voters.

25 3. It is not surprising that such a large number of ballots arrive after Arizona’s
26 Election Day Receipt Deadline; A.R.S. § 16-548(A) effectively creates a second, little-
27 known shadow deadline, the “Pre-Election Cutoff.” Arizona’s election officials define the
28 Pre-Election Cutoff in various ways, but all appear to agree that a ballot must be mailed at

1 least five full days in advance of the election—and sometimes six or seven days—to have
2 a reasonable certainty that it will arrive in time to be counted. If the ballot is received after
3 7 p.m. on Election Day, the ballot is discarded. Even if the ballot was postmarked well in
4 advance of Election Day, including before or during the five to seven recommended days,
5 but failed to arrive because of mail irregularities, the ballot is rejected.

6 4. As a result, Arizona's Election Day Receipt Deadline, and the corresponding
7 Pre-Election Cutoff it necessitates, confuses voters and confounds their reasonable
8 expectations. In nearly all other mail-related deadlines in modern life, mail is considered
9 timely if it is *postmarked* by the applicable deadline. Even in Arizona, in non-election
10 contexts such as tax and insurance payments, postmarks are used to guide deadlines for
11 mail-related activities. Further—as illustrated above—late-breaking changes routinely alter
12 political dynamics during the final days before an election. Voters have a reasonable
13 expectation that they can (and should) evaluate the candidates and issues up to and including
14 Election Day.

15 5. Arizona has no legitimate interest in enforcing the Election Day Receipt
16 Deadline, particularly where over the last decade it has pushed voters across the State to
17 utilize mail voting. Although Arizona may certainly set a reasonable deadline to receive
18 ballots to ensure the finality of election results, the current Election Day Receipt Deadline
19 is unreasonable and disenfranchising: it is contrary to voters' reasonable expectations,
20 necessitates that ballots be cast far earlier than they need to be, and is poorly communicated
21 to voters. Moreover, it has real consequences for elections. Over the last several election
22 cycles, multiple races in Arizona have been decided by margins of mere hundreds of votes
23 and in some cases far less—1,500 to even 30 votes could easily make the difference in an
24 election outcome. And allowing the State to count these votes could correspondingly save
25 the State and counties significant amounts of money spent on costly recounts and post-
26 election litigation.

27 6. The State can still serve its election administration interest by accepting ballots
28 postmarked by Election Day and received within a reasonable time—five business days, at

1 a minimum—thereafter. After all, Arizona need not complete its total vote count until 20
2 days after Election Day. A.R.S. § 16-642(A). And Arizona already contemplates that a
3 certain number of ballots will not be countable right away; ballots that arrive in a timely but
4 incomplete fashion are curable up to five business days after Election Day. *Id.* § 16-550.
5 Counting ballots that have been postmarked by Election Day, as long as they are received
6 within five business days of Election Day, at a minimum, would serve the State’s interests
7 in finality of results without unduly burdening its voters. It would also ensure that all
8 Arizona voters have sufficient protections in place to ensure that their right to vote is not
9 arbitrarily and repeatedly denied.

10 7. While the Election Day Receipt Deadline affects all Arizona voters, it
11 particularly disenfranchises Arizonans in rural counties. In 2018, for example, voters in
12 rural Navajo County were 4.5 times more likely to have their mail ballot rejected for arriving
13 after the Election Day Receipt Deadline than voters in urban Maricopa County. In rural
14 Cochise County, that ratio jumped to 5.1, and in rural Santa Cruz County, voters were 5.9
15 times more likely to have their ballot rejected for arriving after the Election Day Receipt
16 Deadline than voters in Maricopa County.

17 8. In rural areas, mail service is unreliable and delay-ridden. Instead of going
18 directly from one rural address to another nearby address, local mail in rural areas is often
19 re-routed through a central processing facility in Phoenix, which increases delivery times.
20 As a consequence, rural voters must take particular care to mail their ballot well in advance
21 of Election Day and are especially vulnerable to Arizona’s refusal to count ballots that
22 arrive after the Election Day Receipt Deadline.

23 9. Further, the Election Day Receipt Deadline has particularly profound
24 implications for Arizona’s Hispanic and Latino voters and Native American voters.
25 Statistically, they comprise a disproportionately significant portion of voters whose ballots
26 are rejected under the Election Day Receipt Deadline. Indeed, in Maricopa County,
27 Hispanic and Latino voters are almost four times as likely to be disenfranchised by the
28 Election Day Receipt Deadline than white voters, and Native American voters are five and

1 half more times likely to be disenfranchised by the Election Day Receipt Deadline than
2 white voters. And in rural counties with high Hispanic and Latino populations such as Santa
3 Cruz, where 83% of the population is Hispanic/Latino, ballots are 7.6 times more likely to
4 be rejected for arriving after the Election Day Receipt Deadline. Similarly, Native
5 Americans in rural counties also experience a higher rate of late rejected ballots than in
6 more urban counties like Maricopa.

7 10. The reasons for this disparity are varied, but each is traceable to Arizona's long
8 history of discrimination against minority voters and, particularly, against members of its
9 Hispanic and Latino community. *First*, discrimination in education has led to persistent
10 gaps that have left these minority voters less educated than their white counterparts, which
11 makes them less likely to be aware of the Election Day Receipt Deadline. *Second*, given the
12 lack of language assistance provided to voters—coupled with Arizona's sustained
13 resistance to bilingual education and mandated English-only education—Hispanic and
14 Latino voters and Native American voters are less likely to understand the instructions
15 provided by county election officials regarding the Election Day Receipt Deadline,
16 particularly when those instructions are inconsistent. *Third*, due to disparities in income,
17 Hispanic and Latino voters and Native American voters experience higher rates of poverty
18 than white voters, and have less access to reliable transportation and often less flexible work
19 schedules, both of which make it more difficult for them to turn in a mail ballot by other
20 means, such as in-person at the county recorder's office or a polling location by the Election
21 Day Receipt Deadline.

22 11. Arizona's unjustified imposition of the Election Day Receipt Deadline violates
23 the First and Fourteenth Amendments because it imposes an undue burden on voters that is
24 not outweighed by any legitimate interest on the part of the State. Further, the Election Day
25 Receipt Deadline strips voters of their right to procedural due process. For all these reasons,
26 the Election Day Receipt Deadline should be enjoined.

27 **JURISDICTION AND VENUE**
28

1 resources that it would otherwise spend on its efforts to accomplish its mission in other
2 states or its own registration efforts in Arizona, to turn out these voters and to combat the
3 effects that Arizona's Election Day Receipt Deadline has on Latino voters.

4 18. Plaintiff Priorities USA ("Priorities") is a 501(c)(4) nonprofit, voter-centric
5 progressive advocacy and service organization. Priorities' mission is to build a sustainable
6 infrastructure to engage Americans in the progressive movement by running a permanent
7 digital campaign to persuade and mobilize citizens around issues and elections that affect
8 their lives. In furtherance of this purpose, Priorities works to help educate, mobilize, and
9 turn out voters across the country, including in Arizona. In 2020, Priorities expects to make
10 millions of dollars of contributions and expenditures to educate, mobilize, and turn out
11 voters in state and federal elections around the country, including thousands of dollars to
12 educate, mobilize, and turn out voters in Arizona elections. Arizona's enforcement of its
13 Election Day Receipt Deadline for casting ballots directly harms Priorities because it
14 burdens and disenfranchises the voters Priorities supports through its work and
15 contributions in Arizona. As a result, Priorities has to expend and divert additional funds
16 and resources in GOTV, voter education efforts, mobilization, and turn-out activities in
17 Arizona, at the expense of its voter support initiatives in other states and other voter
18 education and turnout programs in Arizona.

19 19. Plaintiff SHELBY AGUALLO is a U.S. citizen and a registered voter in
20 Arizona. She is of Hispanic descent and was raised in rural Greenlee County, a remote
21 county in the southeastern corner of Arizona. In the fall of 2018, while a student at Northern
22 Arizona University in Flagstaff, Arizona, she requested a mail ballot to vote because she
23 was far from her home. While Aguallo cast her ballot before the polls closed on Election
24 Day, her ballot was not counted because it did not reach Greenlee County until Thursday,
25 November 8, 2018—two days after Election Day. At the time she cast that ballot, Aguallo
26 did not understand that her ballot would not count because she had not mailed her ballot
27 early enough. She thought instead—like many voters in the state—that her vote would count
28 because it was cast by Election Day.

1 20. Today, Aguallo is a law student at University of Arizona James E. Roger
2 College of Law in Tucson, Arizona, but she still considers Greenlee County to be her home.
3 Because Tucson is a three-hour drive one way from her home, she will need to vote by mail
4 again. Given her experience in the 2018 election, Aguallo reasonably fears that her mail
5 ballot will not count again, especially given the amount of time that it takes for mail to reach
6 Greenlee County, which must pass through a processing center in Phoenix before making
7 its way back across the state to Greenlee County. Greenlee County itself, moreover,
8 recommends that ballots be placed in the mail a full 10 days before the election to ensure
9 that they will be received on time. This means that voters in Greenlee County, to an even
10 greater extent than the rest of voters in Arizona, are forced to make difficult tradeoffs
11 between casting a fully informed vote and sending in their ballot far enough in advance to
12 increase the likelihood that it will be counted.

13 21. Aguallo intends to participate in upcoming elections in Arizona this year, and
14 she is excited to vote in her first presidential election. But under Arizona's current standard
15 for counting ballots, there is a substantial risk that Aguallo's ballot will not be counted
16 because it will not be received by her county by 7 p.m. on Election Day. Were Arizona to
17 instead count ballots that were cast by Election Day and received within a reasonable
18 amount of time after Election Day, it would be much more likely that Aguallo's ballot, like
19 those of many other voters in the state, would be counted.

20 22. Defendant Katie Hobbs is sued in her official capacity as Secretary of State for
21 the State of Arizona (the "Secretary"). The Secretary is a person within the meaning of 42
22 U.S.C. § 1983 and acts under color of state law. She is the Chief Elections Officer for
23 Arizona. A.R.S. § 16-142(A)(1). As Arizona's Chief Elections Officer, the Secretary is
24 responsible for overseeing the voting process in Arizona and is empowered with broad
25 authority to carry out that responsibility. The Secretary also issues the Arizona Election
26 Procedures Manual ("Manual"), which establishes election procedures and administration
27 across Arizona's 15 counties. A.R.S. § 16-452. The Manual is approved by the Governor
28 and the Arizona Attorney General and carries the force of law. A.R.S. § 16-452(B). Arizona

1 law also requires the Secretary, after consulting with county officials, to “prescribe rules to
 2 achieve and maintain the maximum degree of correctness, impartiality, uniformity and
 3 efficiency on the procedures for early voting and voting, and of producing, distributing,
 4 collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A). Thus, the
 5 Secretary directs county officials, who are responsible for physically counting ballots,
 6 regarding when to count or reject ballots.

7 **GENERAL ALLEGATIONS**

8 **Mail Voting in Arizona**

9 23. Arizonans have a right to vote by mail. A.R.S. § 16-541(A). Over the past
 10 decade, early voting by mail has grown exponentially in Arizona. In the 2008 general
 11 election, for example, just over a million Arizona voters cast their ballot by mail. By the
 12 2016 general election, that number had doubled to over two million voters. In 2018, a
 13 lower-turnout midterm election, over 1.9 million voters voted by mail. This rapid growth in
 14 mail ballots is not surprising. Arizona has engaged in extensive efforts to increase its use.

15 24. Since 2007, Arizona has maintained a Permanent Early Voter List, commonly
 16 known as the “PEVL,” under which any Arizona voter can choose to automatically receive
 17 a mail ballot for every election. A.R.S. § 16-544(A). Since the PEVL’s creation, Arizona
 18 has actively encouraged its voters to sign up and participate in the program. As a result,
 19 mail voting is exceedingly popular in Arizona, and today approximately 80% of Arizona
 20 voters receive their ballot in the mail.

21 25. Voters who are enrolled in the PEVL, or who request a mail ballot at least 27
 22 days before the election, are entitled to be sent a mail ballot between 24 and 27 days before
 23 the election. A.R.S. § 16-542(C). A mail ballot is sent to voters by first-class, non-
 24 forwardable mail. It must be accompanied by a postage-prepaid return envelope, an
 25 affidavit, and instructions to complete the mail ballot. *See* 2014 Arizona Elections Manual,
 26 Chapter 3 - Early Voting, 56.

27 26. To be counted, a voter’s ballot and accompanying affidavit must be received
 28 by the voter’s county recorder’s office by 7 p.m. on Election Day. A.R.S. § 16-548(A).

1 Ballots received after 7 p.m. on Election Day are rejected, even if they were mailed well in
2 advance of the election, and including ballots mailed by the five, six, and seven-day Pre-
3 Election Cutoff promoted by the Secretary of State and county recorders' offices.

4 27. Arizona voters have some non-mail alternative options to return their ballot
5 outside of the mail; however, by far the most popular method is to return the ballot the same
6 way that it arrived—via mail. In the most recent presidential election, approximately 90%
7 of Arizona voters who voted with a mail ballot returned their ballot to their county through
8 the U.S. postal service.

9 28. Voters also have the option to personally drop their ballot off at the county
10 recorder's office or at any polling location on Election Day. A.R.S. § 16-548. But these
11 options are more time-consuming and burdensome for voters in rural counties who often
12 live many miles from a drop-off location, as well as Hispanic and Latino voters who have
13 difficulty obtaining transportation or leaving work during the window in which recorders'
14 offices and polling locations are open. As a result, these options are less popular and less
15 accessible to Arizona voters. In the most recent presidential election, only 10% of Arizona
16 voters who voted with a mail ballot returned it to a physical location such as a polling place
17 or county recorder's office.

18 29. Furthermore, in recent years Arizona has passed or contemplated legislation
19 that would strip away these non-mail alternative options. One previously popular method
20 of returning a ballot was ballot collection, in which a voter would entrust their ballot to an
21 advocate, volunteer, friend, or neighbor to personally deliver it to election officials. That
22 practice, which Arizona's Hispanic and Latino, Native American, and African American
23 voters relied on to overcome the challenges they face in returning mail-in ballots—e.g.,
24 unreliable mail service, restrictive work schedules, or lack of access to transportation—was
25 criminalized in 2016. *See* A.R.S. § 16-1005(H)-(I); *see also* *Democratic Nat'l Comm. v.*
26 *Reagan*, 329 F. Supp. 3d 824 (D. Ariz. 2018), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *reh'g en*
27 *banc granted*, 911 F.3d 942 (9th Cir. 2018) (“DNC”).
28

1 30. Further, during the most recent legislative session, the Arizona Legislature
2 contemplated, but ultimately decided against, banning all methods of ballot return other
3 than the mail. S.B. 1046 (2019). The bill’s sponsor has stated that she will introduce the
4 legislation again in the next session.

5 31. Once the Election Day Receipt Deadline has passed, Arizona begins
6 processing its ballots. When voters cast a mail ballot in Arizona, election officials must
7 confirm that each voter did not vote in person, verify the voter’s eligibility to vote, and open
8 and scan the voter’s ballot. *See* A.R.S. § 16-552. If a ballot was received in time, but appears
9 to be invalid (because it has, for example, an incomplete affidavit or an apparently
10 mismatched signature), election officials will contact the voter, who has five business days
11 in which to cure their ballot. A.R.S. § 16-550. Election officials have 20 days after Election
12 Day to complete the count and certify results. *Id.* § 16-642(A).

13 **The Election Day Receipt Deadline**

14 32. Every election a substantial and increasing number of ballots are discarded
15 because they arrive after the Election Day Receipt Deadline. While the publicly available
16 data is incomplete, even the partial picture is alarming. In 2008, only seven counties
17 reported data on late-returned ballots, but those counties collectively rejected 1,611 ballots
18 for arriving after the Election Day Receipt Deadline. In 2012, those same seven counties
19 rejected more than double that amount—4,107 ballots. And in the 2018 midterm election,
20 a lower turnout election than either the 2008 and 2012 general elections, ten of Arizona’s
21 fifteen counties collectively reported rejecting more than 3,000 ballots because they arrived
22 after the Election Day Receipt Deadline.

23 33. The numbers speak for themselves; clearly, thousands of Arizona voters
24 believe their ballot is timely even when it is not. Because of the challenges in estimating
25 mail delivery times, elections officials—much less the average voter—cannot accurately
26 predict when ballots must be mailed to ensure that they arrive by the Election Day Receipt
27 Deadline. In the 2014 general election, for example, the Arizona Secretary of State’s Office
28 “named Thursday, Oct. 30, the ‘deadline’ for mailing in early ballot so they will arrive in

1 time,” but noted that “[that] deadline is unofficial and was set as a guideline based on the
2 time it takes a ballot to reach a county recorder’s office.” As the Communications Director
3 for the Arizona Secretary of State’s Office explained, if a voter did not mail their ballot by
4 that Thursday, voters should not put their ballot in the mail “because it *may or may not* get
5 here on time,” and if “it arrives [the day after the election] it won’t count.” See Rachel Lund,
6 *Late With Your Early Ballot? Here Are Tips for Making Sure Your Vote is Counted*, Arizona
7 Capitol Times (Oct. 30, 2014), [https://azcapitoltimes.com/news/2014/10/30/az-late-early-](https://azcapitoltimes.com/news/2014/10/30/az-late-early-ballot-tips-to-make-sure-vote-counts/)
8 [ballot-tips-to-make-sure-vote-counts/](https://azcapitoltimes.com/news/2014/10/30/az-late-early-ballot-tips-to-make-sure-vote-counts/) (emphasis added).

9 34. County Recorders have not been able to provide any more clarity to voters. In
10 fact, just last month, the Pima County Recorder’s Office provided two different
11 “recommended deadlines” for when voters were “required” to mail their ballot for it to be
12 counted.¹ Counties’ recommendations on when to place a ballot in the mail shift for a simple
13 reason: those recommendations are purely guesses.

14 35. Without clear guidance from election officials, Arizona voters are themselves
15 forced to guess when their ballots must be placed in the mail to ensure that they will be
16 counted. In any event, many ballots that are rejected for arriving too late are mailed and
17 postmarked *before* Election Day, on the erroneous belief that a ballot is timely as long as it
18 is postmarked by Election Day.

19 36. The Election Day Receipt Deadline, and the confusion it generates, contributes
20 to Arizona voters’ remarkable lack of confidence that their ballots are actually counted.
21 Compared to voters in all 50 states, Arizona voters are the least likely to say that they are
22 confident that their own vote was actually counted. And compared to voters in all 50 states,
23 Arizona voters are the most likely to say they were “not too confident” or “not at all
24 confident” that the votes of other people in their city or county were actually counted.

25
26 ¹ The Pima County Recorder’s Office website, for example, currently recommends
27 that voters mail their ballots by the Thursday before the election to ensure their ballots
28 would be counted. But just weeks ago, the same Pima County Recorder’s Office issued a
press release for the most recent election instructing voters to mail their ballots on or before
the Wednesday before the election to ensure their ballots would be counted.

1 37. The widespread belief that a ballot is timely as long as it is postmarked by
2 Election Day is reasonable; it is consistent with the way mail-related deadlines are
3 administered under the state law and across modern life. Postmarks are used to assess the
4 timeliness of payments, applications, and other documents submitted to the government in
5 other contexts: taxes and other state-mandated deadlines are determined according to
6 postmarks, not the date—much less the time of day—the mailed item is actually received.
7 *See, e.g.*, A.R.S. § 1-218(A) (requiring documents related to taxes, including returns,
8 statements, and payments, that have been mailed to “be deemed filed and received by the
9 addressee on the date shown by the postmark”); A.R.S. § 20-191 (stating that insurance
10 premium payments made by mail are deemed timely as of the date shown on the postmark);
11 Ariz. Admin. Code R17-4-304 (stating the date of receipt of applications for vehicle
12 registrations is the date of the postmark stamp).

13 38. Postmark rules make good sense. Mail delivery times in Arizona are
14 unpredictable, particularly in rural areas where home delivery is not common and even local
15 mail is often re-routed through central processing facilities in far-flung cities. This
16 unpredictability increases the risk of a late-arriving ballot, even when voters mail their
17 ballots well in advance of Election Day.

18 39. A postmark rule is also particularly key in the voting context because it aligns
19 with practical realities of the election cycle. Campaigns often consider the final week before
20 the election to be a key week of voter engagement and activity. Candidates, advocacy
21 organizations, political volunteers and the like conduct “get-out-the-vote” activities,
22 canvasses, town hall meetings, candidate Q&A sessions, and all manner of voter
23 engagement during the final crucial days of the election cycle. Frequently, late-breaking
24 news can entirely change the landscape for a race, and voters can and should remain open
25 to new information until Election Day itself.

26 40. For example, during the 2016 presidential preference election, tens of
27 thousands of votes arrived for Marco Rubio, even though he dropped out of the race in the
28 final days before Election Day. But due to the Election Day Receipt Deadline, and the

1 corresponding Pre-Election Cutoff deadlines for casting their ballots, those voters were
2 unable to consider that information before casting a ballot for a nonexistent candidate. If
3 the Election Day Receipt Deadline had not been in place, those voters could have re-
4 allocated their votes among other Republican candidates who actually remained in the race,
5 giving those voters the opportunity to truly participate in the election. It is clear that what
6 happens in the final days before an election matters, and the Election Day Receipt Deadline
7 deprives voters of the opportunity to take those events into account.

8 41. Further, the Election Day Receipt Deadline is unreasonable because it
9 unnecessarily shortens voters' time to return their ballots. A postmark rule would allow the
10 State to accept ballots received within a reasonable time after Election Day, which makes
11 sense given that Arizona has 20 days after Election Day to complete the vote-counting
12 process. A.R.S. § 16-642(A). Arizona already permits voters to cure incomplete ballots up
13 to five business days after Election Day. *Id.* § 16-550. Thus, counting ballots that have been
14 postmarked by Election Day, as long as they are received within a reasonable period after
15 Election Day (at a minimum, within the five-business-day cure period), would align with
16 Arizona's existing voting laws and provide all Arizona voters sufficient time to have their
17 votes counted.

18 42. In addition to the unreasonable burdens the Election Day Receipt Deadline
19 places on Arizona voters, it has real consequences for Arizona elections. Over the last
20 several election cycles multiple races in Arizona have been decided by narrow margins of
21 anywhere from 100 votes to a mere margin of 20 votes. The 2,500 to 4,000 votes rejected
22 by Arizona each year because of its Election Day Receipt Deadline could easily have made
23 the difference in these election outcomes. And allowing the State to count these votes would
24 correspondingly have saved the State and counties significant resources spent on costly
25 recounts and post-election litigation.

26 43. The State has no legitimate interest in imposing the Election Day Receipt
27 Deadline, particularly where it has pushed Arizona voters to utilize mail voting and has
28 provided very limited alternative options for returning those ballots. While Arizona may set

1 a reasonable deadline for receiving ballots to ensure the finality of election results, the
2 Election Day Receipt Deadline is not reasonable: voters do not reasonably expect that they
3 must submit their ballots so far ahead of Election Day—nor could they, given that even
4 election officials are not sure what the precise date for mailing in ballots should be, the
5 requirement to do so is poorly communicated to voters, and it is completely unnecessary to
6 ensure that all ballots are received and counted within a reasonable time.

7 **The Election Day Receipt Deadline’s Effect on Rural and Minority Voters**

8 44. The Election Day Receipt Deadline has a disproportionate impact on rural and
9 Hispanic and Latino voters in Arizona. In 2018, for example, voters in rural Navajo County
10 were 4.5 times more likely to have their mail ballot rejected for arriving after the Election
11 Day Receipt Deadline than voters in urban Maricopa County. In rural Cochise County, the
12 ratio jumps to 5.1, and in Santa Cruz County, voters are 5.9 times more likely to have their
13 ballot rejected for arriving after the Election Day Receipt Deadline than voters in Maricopa
14 County. And Arizona’s Hispanic and Latino voters are disparately disenfranchised no
15 matter where they live. Indeed, not only are ballots 7.6 times more likely to be rejected for
16 failure to arrive by the Election Day Receipt Deadline in rural Hispanic and Latino counties
17 such as Santa Cruz, but even in urban Maricopa County, Hispanic and Latino voters are
18 almost four times as likely to be disenfranchised by the Election Day Deadline Receipt than
19 white voters are. Similarly, while Native American voters are more likely to experience a
20 higher rate of late rejected ballots in rural counties than in more urban areas, within
21 Maricopa County they are still five and a half times more likely to be disenfranchised by
22 the Election Day Receipt Deadline than white voters.

23 45. None of this is surprising; mail delivery in rural Arizona is complicated and
24 riddled with delays, and Arizona’s long-history of discrimination interacts directly with the
25 Election Day Receipt Deadline to make it more difficult for Hispanic and Latino voters to
26 timely cast their mail-in ballots.

27 46. Voters living in rural areas of Arizona lack reliable mail service. These voters
28 typically do not have mailboxes at their homes and often do not receive personal mail

1 delivery services. Rather, they must frequently travel to one of a few post offices, many
2 miles away from where they live and work, to either pick up or drop off their mail. Given
3 the long distance, long work days, lack of readily available transportation, whether public
4 or personally owned, and correspondingly poor roadways, these voters are not able to visit
5 the post office with any regularity. As a consequence, arranging to pick up their ballots at
6 the post office 24 and 27 days before the election, and then dropping them off not long
7 thereafter to meet the Election Day Receipt Deadline is particularly difficult for rural voters.

8 47. Further, there is no guarantee that rural voters' ballots will arrive by the
9 Election Day Receipt Deadline given the unusual routing system used in rural parts of
10 Arizona. Because local mail in rural areas is not sent directly from one rural address to
11 another nearby address and is instead re-routed through a central processing facility in some
12 other part of the state, delivery times increase. Consequently, rural voters are uniquely
13 required to mail their ballots well in advance of Election Day. Otherwise, they risk having
14 their ballots rejected—through no fault of their own—for arriving after the Election Day
15 Receipt Deadline. Mailing their ballots a significant number of days before Election Day is
16 no guarantee that their ballots will arrive on time.

17 48. Rural Arizona also contains a number of communities that are predominately
18 populated by minority voters. And as an Arizona district court recently found, “[r]eady
19 access to reliable and secure mail service is nonexistent” in some of these minority
20 communities. *See DNC*, 329 F. Supp. 3d at 869. Native American voters, in particular,
21 traditionally struggle with mail service because of, among other things, a severe lack of
22 postal service infrastructure within their communities.

23 49. Rural Hispanic and Latino voters in Arizona also face similar problems in
24 accessing secure and reliable mail service. For example, in heavily Hispanic San Luis and
25 Somerton, for example, voters often lack home delivery mail service or live miles away
26 from the nearest post office. In San Luis specifically, which is 98% Hispanic, nearly all of
27 the city's residents must rely on a single post office that is located across a major highway
28 to send and receive mail, even though the vast majority of San Luis' residents lack reliable

1 transportation and there is no available taxi service. Given the distance they must travel to
2 send mail, these residents tend to visit the post office infrequently.

3 50. Even in more urban neighborhoods, Hispanic and Latino voters often face
4 difficulties with unsecure mail boxes and fear that mail will be stolen from their homes. For
5 example, some voters live in neighborhoods with one community mailbox that does not
6 accept outgoing mail and voters are required to put their mail in an open basket next to the
7 mailbox, with no means of securing it. These voters are thus reluctant to mail a ballot from
8 their homes and must make longer journeys to mail their ballots from a more secure
9 location. Despite the difficulties in mailing back ballots, it still is the best return method in
10 those communities because inflexible work schedules and a lack of transportation often
11 mean that dropping a ballot off in person at the county recorder's office or at a polling
12 location on Election Day is not feasible.

13 51. These difficulties are exacerbated when voters, through no fault of their own,
14 do not receive their ballots in the mail until close to a week before the election is scheduled
15 to take place, requiring that the voter return the ballot personally, rather than by mail, to
16 ensure that it arrives by the deadline.

17 52. Hispanic and Latino voters and Native American voters are also
18 disproportionately more likely than white voters to have economic or personal
19 circumstances—including, but not limited to, language barriers and limited English fluency,
20 lack of reliable transportation to mail their ballots, or difficulties in taking time off work to
21 do the same—that make it even more challenging to comply with the Election Day Receipt
22 Deadline.

23 53. For example, the Election Day Receipt Deadline disparately impacts Arizona's
24 Hispanic and Latino voters and Native American voters who are often less educated than
25 white voters due to persistent gaps in education caused by historical and on-going
26 discrimination. See James Thomas Tucker, et al., *Voting Rights in Arizona: 1982-2006*, 17
27 Rev. L. & Soc. Justice 283, 284 - 341 (2008). As a result, as one court has explained, "[d]ue
28 to their lower levels of literacy and education, minority voters are more likely to be unaware

1 of certain technical rules, such as the requirement that early ballots be received by the
2 county recorder, rather than merely postmarked, by 7:00 p.m. on Election Day.” *See DNC*,
3 329 F. Supp. 3d at 868.

4 54. Further, given the lack of language assistance provided to voters—coupled
5 with Arizona’s sustained resistance to bilingual education and mandated English-only
6 education, *see Tucker, supra* at 284-341—Hispanic and Latino voters and Native American
7 voters experience ongoing language barriers that make them less likely to understand the
8 instructions provided by county election officials regarding the Election Day Receipt
9 Deadline. This is further complicated by the fact that, historically, Spanish-speaking voters
10 have received incorrect and misleading information from election officials. In the two most
11 recent presidential cycles, for example, Spanish-speaking voters received incorrect
12 information about the election, ranging from wrong election dates to wrong titles for
13 measures on those voters’ official ballots.

14 55. Moreover, Arizona’s dissemination of incorrect and inaccurately translated
15 information breeds distrust and infuses more confusion into the election process, making it
16 particularly difficult for Hispanic and Latino voters to understand the shifting five, six, and
17 seven day deadlines for mailing in a mail-in ballot, particularly where those deadlines do
18 not comport with other standard deadlines for mailing government documents in Arizona.

19 56. Finally, “[r]acial disparities between minorities and non-minorities in
20 socioeconomic standing, income, employment, education, health, housing, transportation,
21 criminal justice, and electoral representation have persisted in Arizona.” *DNC*, 329 F. Supp.
22 3d at 876. As a result, Hispanic and Latino voters and Native American voters experience
23 higher rates of poverty than white voters, and often have less access to reliable
24 transportation and less flexible work schedules, both of which make it more difficult for
25 them to travel to the post office, polling location, or county recorder’s office to submit their
26 ballots in time to meet the Election Day Receipt Deadline.

27 57. Indeed, according to the U.S. Census Bureau’s 2013-2017 American
28 Community Survey 5-Year Estimates, Hispanic, African-American, and Native-American

poverty rates in Arizona exceeded the white poverty rate for that same time period. Based on the 5-Year Estimates, as of 2017, Hispanics, Native Americans, and African Americans were all less likely to graduate high school in Arizona than whites were. Further, whites were nearly 1.5 times more likely to have a bachelor's degree than African Americans, almost three times more likely than Hispanics, and more than three times as likely as Native Americans in Arizona.

58. Decades of research have demonstrated that deficiencies in socio-economic standing, such as those described above, significantly impact an individual's ability to fully participate in the political process, and the interaction between these deficiencies and the Election Day Receipt Deadline is no different. Thus, while Arizona's Election Day Deadline Receipt burdens all voters, it also imposes a disproportionate burden on Arizona's rural and Hispanic and Latino voters.

CLAIMS FOR RELIEF

COUNT I

First and Fourteenth Amendments U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202 *Undue Burden on the Right to Vote*

59. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

60. Under the *Anderson-Burdick* balancing test, a court considering a challenge to a state election law must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the justifications put forward by the State for the burdens imposed by the rule. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

61. This balancing test utilizes a flexible sliding scale, where the rigorousness of scrutiny depends upon the extent to which the challenged law burdens voting rights. *See Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016); *see also Akins v. Sec'y of State*, 154 N.H. 67 (2006) (applying *Anderson-Burdick* and holding that

1 strict scrutiny was the correct test to determine constitutionality of ballot order system that
2 prioritized candidate names alphabetically).

3 62. Courts need not accept a state's justifications at face value, particularly where
4 those justifications are "speculative," otherwise it "would convert *Anderson-Burdick's*
5 means-end fit framework into ordinary rational-basis review wherever the burden a
6 challenged regulation imposes is less than severe." *Soltysik v. Padilla*, 910 F.3d 438, 448–
7 49 (9th Cir. 2018) (citing *Pub. Integrity All.*, 836 F.3d at 1024–25); *see also Crawford v.*
8 *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) ("However
9 slight th[e] burden may appear, . . . it must be justified by relevant and legitimate state
10 interests *sufficiently weighty to justify the limitation.*") (internal citation and quotation
11 marks omitted) (emphasis added).

12 63. Arizona's Election Day Receipt Deadline imposes a severe burden on all
13 Arizona voters—and rural and Hispanic and Latino voters in particular—who vote by mail.
14 These voters must first learn about the Election Day Receipt Deadline and accurately guess
15 when their ballot must be mailed for it to be counted. For voters who, through no fault of
16 their own, misjudge how long it will take for their ballot to arrive back to their county, or
17 for those who never learn about Arizona's Election Day Receipt Deadline, the punishment
18 is swift and severe: total disenfranchisement. But Arizona's Election Day Receipt Deadline
19 also severely burdens all voters who vote by mail even if those voters' ballots are
20 successfully counted. By requiring its voters to cast their mail ballots a week before the
21 election in order for those ballots be counted, Arizona's Election Day Receipt Deadline
22 forces Arizona voters to cast their ballots before they can account for any critical
23 information about the election or the candidates that arises during the final week leading up
24 to Election Day—arguably, the most critical week in an entire election cycle. Arizona's
25 Election Day Receipt Deadline thus deprives voters of the ability to engage in this robust
26 period of civic engagement, because it effectively requires them to have already cast their
27 vote.

Due Process
U.S. Const. Amend. XIV, 42 U.S.C. § 1983
Denial of Procedural Due Process

67. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

68. The Due Process Clause of the United States Constitution prohibits the states from depriving “any person of . . . liberty . . . without due process of law.” U.S. CONST. amend. XIV, § 1. Which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1192 (9th Cir. 2015). Courts must first consider “the nature of the interest that will be affected” by the government’s action as well as the “degree of potential deprivation that may be created” by existing procedures. *Nozzi*, 806 F. 3d at 1192–93. Second, “courts must consider the ‘fairness and reliability’ of the existing procedures and the ‘probable value, if any, of additional procedural safeguards.’” *Id.* at 1193 (quoting *Mathews*, 424 U.S. at 343). Finally, courts must consider “the public interest, which ‘includes the administrative burden and other societal costs that would be associated with’ additional or substitute procedures. *Id.* (quoting *Mathews*, 424 U.S. at 347). Overall, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334, (quotation and citation omitted).

69. Arizona’s procedures for voting by mail must comport with due process. *See Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). “Such due process is not provided when the election procedures [for voting by mail]” do not adequately protect the right to vote or ensure that an “individual is not continually and repeatedly denied so fundamental a right.” *Id.*; *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”).

1 70. “When an election process ‘reache[s] the point of patent and fundamental
2 unfairness,’ there is a due process violation.” *Fla. State Conference of N.A.A.C.P. v.*
3 *Browning*, 522 F.3d 1153, 1183 (11th Cir. 2008) (quoting *Roe v. Alabama*, 43 F.3d 574,
4 580 (11th Cir. 1995)). A state’s elections system, “the specifics of which are not explicitly
5 made known to potential voters, that leaves potential voters in the dark as to its effect on a
6 voter’s [ability to vote] and that fails to give voters a fair opportunity to [participate], is
7 fundamentally unfair and violative of the Due Process Clause of the Fourteenth
8 Amendment.” *Id.* at 1185.

9 71. The nature of the interest at stake in this case—the right to vote and to have
10 that vote count—is the most precious liberty interest of all because it is preservative of all
11 other basic civil and political rights.

12 72. But Arizona’s existing procedures for counting mail ballots too often deprive
13 voters of having their ballot counted because (1) many voters do not learn of the Election
14 Day Receipt Deadline before Election Day, and (2) even voters who do learn of the Election
15 Day Receipt Deadline may not have their ballots counted if those ballots do not arrive in
16 the mail at the county recorder’s office, through no fault of their own, by 7 p.m. on Election
17 Day. Arizona’s Pre-Election Cutoff further deprives all Arizona voters who vote by mail of
18 the ability to cast a meaningful and informed vote by requiring voters to cast their ballots a
19 full week (or more) before Election Day if they wish to ensure that their ballots will actually
20 be counted.

21 73. Arizona’s Election Day Receipt Deadline is neither a reliable nor fair way to
22 administer voting by mail. The Election Day Receipt Deadline and the corresponding Pre-
23 Election Cutoff for casting ballots is, in fact, devoid of reliability because Arizona’s
24 elections officials can only offer voters their best guess of when voters must place their
25 ballots in the mail for it to be counted. Nor is the Election Day Receipt Deadline fair because
26 it effectively requires some voters—particularly rural voters and minority voters—to cast
27 their ballots before the rest of the electorate if they wish to be afforded the same process as
28 other voters in the State and to have their votes counted. Arizona’s Election Day Receipt

1 Deadline is also not fair to all Arizona voters who vote by mail because it forces those voters
2 to cast their ballots with incomplete information and before candidates have delivered their
3 final pitches to the voters.

4 74. The value of additional or substitute procedural safeguards to ensure that the
5 votes of Arizona's mail voters are both meaningfully cast and actually counted is readily
6 apparent. A substitute procedure—requiring mail ballots to be postmarked on or before
7 Election Day and received by the county within, at a minimum, five business days after
8 Election Day to be counted—solves the inequities inherent in Arizona's Election Day
9 Receipt Deadline. A postmark date not only offers a reliable date to Arizona voters by which
10 they must cast their ballots, but it also ensures that rural voters and minority voters are not
11 more likely to have their ballot rejected simply because they live in a town with slower mail
12 service. A postmark date additionally ensures that all of Arizona's voters can consider any
13 information that may arise and influence voters' choices in the last week of the election.

14 75. Because Arizona is not required to finalize its election results for 20 days after
15 the election and already allows voters to cure incomplete ballots within five business days
16 of the election, requiring Arizona to accept ballots that are postmarked on or before Election
17 Day and which arrive, at a minimum, within five business days of Election Day would put
18 a minimal administrative burden on the state, if any. And as the Supreme Court has
19 explained, "administrative convenience" cannot justify the deprivation of a constitutional
20 right. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

21 76. Having induced its voters to vote by mail, Arizona must establish adequate
22 procedures to ensure that voters have a reliable, fair, and effective method to cast their
23 ballots. Because Arizona's Election Day Receipt Deadline is markedly inadequate in all of
24 those respects, and Arizona is readily capable of instituting a substitute procedure which
25 would protect those voters' rights with minimal burden to the state, Arizona's Election Day
26 Receipt Deadline violates Arizona voters' procedural due process rights.

27 **PRAYER FOR RELIEF**

28 **WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment:

1 A. Declaring that Arizona’s imposition of its Election Day Receipt Deadline for
2 casting mail ballots and its failure to count the votes of otherwise eligible voters who
3 lawfully mail their ballots before or on Election Day, but whose ballots are not received—
4 through no fault of their own—by 7 p.m. on Election Day, violates the First and Fourteenth
5 Amendments to the United States Constitution by placing an undue burden on those voters
6 and particularly on Arizona’s rural and Hispanic and Latino voters by subjecting them to
7 arbitrary and disparate treatment;

8 B. Declaring that Arizona’s imposition of its Election Day Receipt Deadline for
9 casting mail ballots and its failure to count the votes of otherwise eligible voters who
10 lawfully mail their ballots before or on Election Day, but whose ballots are not received—
11 through no fault of their own—by 7 p.m. on Election Day violates the Due Process Clause
12 of the Fourteenth Amendment to the United States Constitution;

13 C. Permanently enjoining the Secretary, her respective agents, officers,
14 employees, and successors, and all persons acting in concert with each or any of them,
15 from rejecting ballots that are postmarked by Election Day and arrive at a county recorder’s
16 office within, at a minimum, five business days of Election Day;

17 D. Awarding Plaintiffs their costs, expenses, and reasonable attorneys’ fees
18 pursuant to, *inter alia*, 42 U.S.C. § 1988 and other applicable laws; and

19 E. Granting such other and further relief as the Court deems just and proper,
20 including requiring the Secretary to accept ballots that were postmarked on or before
21 Election Day if received within, at a minimum, five business days of Election Day.
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1 Dated: February 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on, February 24, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

s/ Michelle DePass