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ATTACHMENT NAME: <b>BRIEF - Amicus Curiae: Brief of Amicus Curiae League of Women Voters of Arizona in Opposition to Emergency Petition for Special Action</b>	
CASE NAME: <b>STEPHEN RICHER v ADRIAN FONTES</b>	CASE NUMBER: <b>CV-24-0221</b>
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**ARIZONA SUPREME COURT**

MARICOPA COUNTY RECORDER )  
STEPHEN RICHER, in his Official )  
Capacity, )  
 )  
Petitioner, )  
 )  
v. ) No. CV-24-0221-SA  
 )  
ARIZONA SECRETARY OF STATE )  
ADRIAN FONTES, in his Official )  
Capacity, )  
 )  
Respondent. )

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**BRIEF OF AMICUS CURIAE  
LEAGUE OF WOMEN VOTERS OF ARIZONA  
IN OPPOSITION TO EMERGENCY PETITION FOR SPECIAL ACTION<sup>1</sup>**

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Daniel J. Adelman (AZ Bar 011368)  
ARIZONA CENTER FOR LAW  
IN THE PUBLIC INTEREST  
352 E. Camelback Rd., Ste. 200  
Phoenix, AZ 85012  
Tel: 602-258-8850  
[danny@aclpi.org](mailto:danny@aclpi.org)

Jon Sherman (DC Bar 998271)\*  
Nina Beck (WI Bar 1079460)\*  
Emily Davis (DC Bar 90020129)\*  
FAIR ELECTIONS CENTER  
1825 K St. NW, Ste. 701  
Washington, DC 20006  
Tel: 202-331-0114  
[jsherman@fairelectionscenter.org](mailto:jsherman@fairelectionscenter.org)  
[nbeck@fairelectionscenter.org](mailto:nbeck@fairelectionscenter.org)  
[edavis@fairelectionscenter.org](mailto:edavis@fairelectionscenter.org)

*\*Pro Hac Vice Applications Forthcoming*

*Counsel for Amicus Curiae League of Women Voters of Arizona*

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<sup>1</sup> The parties have consented to the filing of amicus briefs.

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Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(A), the League of Women Voters of Arizona (“LWVAZ”) hereby files this amicus curiae brief in opposition to the petition and in support of Respondent Secretary of State Adrian Fontes. This brief is submitted with the written consent of the parties.

### **STATEMENT OF INTEREST**

LWVAZ is a non-partisan, grassroots organization dedicated to empowering all eligible voters to fully participate in our democracy and encouraging informed and active participation in the democratic process. For over 80 years, LWVAZ has dedicated itself to protecting and promoting democratic government through robust voter education and registration. LWVAZ consists of both a statewide organization and five local chapters with 900 members statewide—all of whom are eligible voters.

To advance its core mission, LWVAZ educates voters about upcoming elections including the voter registration process, works to encourage individuals to vote, and participates in statewide coalitions with other organizations that share similar goals. LWVAZ volunteers help tens of thousands of citizens in Arizona register to vote, check their registration status, and update their information. For all of these tasks, LWVAZ relies on information and forms provided, publicized, and maintained by election officials, including county recorders and the Arizona Secretary of State.

LWVAZ uses many tools to achieve these goals, and when its core mission-driven activities are negatively impacted, it has participated in litigation. It is for these reasons LWVAZ believes that its long history of promoting democracy lends it a unique perspective as an *amicus curiae*.

LWVAZ has a direct interest in this petition challenging Secretary Fontes' guidance to the fifteen county recorders to allow the affected voters to cast a full ballot in the 2024 General Election. The guidance is consistent with LWVAZ's mission and work to ensure access to the right to vote for all eligible voters and empower them to participate in elections. Stated another way, LWVAZ and its members would be harmed by the last-minute disenfranchisement of nearly 100,000 voters that is being requested by Petitioner Richer. The November general election is under seven weeks away, and Arizona's voter registration deadline is under three weeks away. Prohibiting these voters from participating in state and local elections at this late juncture—when they have relied on the state's representation for years that they are registered to vote as full-ballot voters—will create significant disenfranchisement and confusion for Arizona voters and election administrators alike, with the potential to discourage voters from participating in the electoral process. Thus, LWVAZ and its members would be harmed as a result.

## ARGUMENT

The most straightforward basis to reject Maricopa County Recorder Stephen Richer’s eleventh-hour petition for a special action is to focus on the due process rights of the 97,688 registered Arizona voters at issue. Specifically, the Fourteenth Amendment’s Due Process Clause has repeatedly been found to prohibit election administrators from inducing voters to rely to their detriment on officials’ representations as to registration and voting rules. Because Arizona election officials, documents, and systems have repeatedly communicated to these voters that they are full-ballot voters, an eleventh-hour about-face is not consistent with federal due process protections. Furthermore, because of this constitutional problem, a ruling in Petitioner’s favor as a matter of Arizona law will not settle the matter. Rather, such an outcome in this Court would trigger immediate federal constitutional litigation that will leave a cloud hanging over the status of these 97,688 Arizona voters—and what ballot type they must be issued—for weeks to come.

The Due Process Clause is violated when an “election process reaches the point of patent and fundamental unfairness.” *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (internal quotations omitted). When “an officially-sponsored election procedure” is “in its basic aspect . . . flawed” and fundamentally unfair, it violates due process. *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978) (citing *Briscoe v. Kusper*, 435 F.2d 1046, 1054–56 (7th Cir. 1970)). Courts have

routinely found “patent and fundamental unfairness” when election officials induce voters’ detrimental reliance. *Griffin*, 570 F.2d at 1077–79 (enjoining rejection of absentee ballots that had been cast in reliance on previously announced requirements). In *Bennett v. Yoshina*, the Ninth Circuit summarized this line of due process precedent in this way:

A general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or *official pronouncements about what the procedure will be in the coming election*; and (2) *significant disenfranchisement* that results from a change in the election procedures.

140 F.3d 1218, 1226–27 (9th Cir. 1998), *as amended on denial of reh’g and reh’g en banc* (June 23, 1998) (emphasis added). Where voters or candidates rely upon and act “on the basis of the old rules,” state and local election officials may not deny the right to register and vote, “having failed *effectively* to announce the new.” *Griffin*, 570 F.2d at 1078 (emphasis added) (describing *Briscoe v. Kusper*, 435 F.2d 1046, 1054–56 (7th Cir. 1970) as holding “unannounced eleventh-hour change” in requirements for nomination petitions could not serve as basis for invalidation).

To this end, election officials must clearly communicate legal voting requirements and, once they have induced voters’ reliance on those official representations, may not change those requirements to the detriment of voters. *See, e.g., Hoblock v. Albany Cty. Bd. of Elections*, 487 F. Supp. 2d 90, 94–96 (N.D.N.Y.



2006) (holding that voters who should have been required to reapply to receive absentee ballots under state law reasonably relied on election officials' erroneous issuance of absentee ballots and suffered a deprivation of their due process rights when election officials subsequently refused to count their votes). It is patently and fundamentally unfair to permit election officials to induce eligible voters to rely on repeated representations of voting requirements and voters' eligibility status and then change those representations at the eleventh hour.

Nothing in Arizona law has changed in this case, but the effect on voters is exactly the same as a last-minute change in the law. Arizona's state and local election officials have repeatedly—for years and, in many cases, decades—represented to these 97,688 Arizona voters that they are duly registered, full-ballot voters. Now, due to a database interface error discovered less than two months before a general election and mere days before county recorders start mailing early ballots, it turns out that those repeated representations may be erroneous. As in the above due process cases, these voters have relied to their detriment on official representations of their full-ballot voter status. Moreover, there is simply not enough runway left before the election to adequately communicate this change in status—and the steps a voter can take to reverse that demotion to federal-only status—to 97,688 people.

On information and belief, many of these 97,688 Arizona voters have likely been registered and voting since before the documentary proof of citizenship

(“DPOC”) requirement, A.R.S. § 16-166(F), went into effect in 2005. Such voters who were registered prior to 2005 were exempted under the DPOC requirement’s “safe harbor” provision. A.R.S. § 16-166(G). Some of these voters may have subsequently provided DPOC, but that data has not been properly preserved or has been overwritten through no fault of the voter. Regardless, it would appear that the Arizona Secretary of State and the county recorders have no record of these voters providing DPOC and, at this point, with just 48 days before Election Day, there is no way to cure the detrimental reliance that these officials and systems have induced for at least the following reasons:

- These 97,688 voters have been looking up their registration status and voting full ballots for years and, in many cases, decades.
- These voters have received registration cards and official election mail on state and local races for years and decades.
- Many will have moved from the residential addresses on file in the statewide voter registration system that would be used to mail any notice of this demotion to federal-only status and how to cure the demotion.
- Many older Arizonans will have moved to assisted living residential facilities. And most basically, having never shown DPOC, many of these voters may not have a certified copy of their birth certificate and would need to apply to vital records offices, including those in other states. Copies of other forms of

DPOC such as replacement naturalization certificates take even more time and money to obtain.

The practical reality of the situation demonstrates why it will not be possible to undo the detrimental reliance of such a large number of voters in such a short amount of time.

For similar reasons, as Petitioner Richer anticipates in a footnote, *see* Pet. at 20 n.3, the relief he seeks may also separately violate procedural due process, as this group of nearly 100,000 voters cannot be provided with adequate notice and a meaningful opportunity to cure at this late juncture. *See Armstrong v. Reynolds*, 22 F.4th 1058, 1066 (9th Cir. 2022) (“The Due Process Clause ‘forbids the governmental deprivation of substantive rights without constitutionally adequate procedure.’”) (quoting *Shanks v. Dressel*, 540 F.3d 1082, 1090–91 (9th Cir. 2008)).

Moreover, LWVAZ has itself been induced to rely on official representations concerning these 97,688 voters’ status as full-ballot voters and the accuracy of registration look-up tools. LWVAZ’s core mission is to educate Arizona voters on how to register and vote and, as part of that effort, it has told voters to confirm their registration status using Arizona’s online look-up tools. It also has communicated the details of the state’s byzantine DPOC regime and has for years assured older, safe-harbor voters that they do *not* need to provide DPOC if they have been registered since before DPOC took effect in 2005 and have not moved to a new

county. A.R.S. §§ 16-166(G), 16-166(H).<sup>2</sup> Many of LWVAZ's members are older and have relied on LWVAZ's representations which have, in turn, been based on both official representations as to the accuracy of their systems and the established pattern and precedent of these 97,688 voters casting votes in state and local elections.

A ruling in Petitioner's favor would be profoundly disruptive and disenfranchising for senior Arizonans, in particular those with disabilities, and LWVAZ counts many such people among its members. Many of these voters reside in assisted-living communities and other facilities and have no need to drive, and so some lack a post-October 1, 1996 driver's license or state ID number that can be used as valid DPOC. It would be quite burdensome, and in some cases impossible, for such voters to assemble the necessary DPOC on a moment's notice, make photocopies, and submit it by mail or in person. These Arizonans—all of whom have attested to their U.S. citizenship and all of whom have been voting in federal, state, and local elections for years and, in many cases, decades—should not and may not be penalized for a systemic technological error that election and MVD officials themselves just discovered this month. Consistent with due process principles, voting requirements should be construed in voters' favor, and the voters in question

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<sup>2</sup> It is unclear whether any of the 97,688 voters have remained within their county and stayed protected under the safe harbor provision. Implicit in Petitioner's representations is that these voters are not exempt under A.R.S. § 16-166(G).

should not be required to provide DPOC to vote in state and local elections until after this November general election.

### CONCLUSION

Both the reality and timing of this data interface error are deeply unfortunate, and it may be true that no Arizona election official could have discovered this problem any sooner. But, consistent with federal due process principles, this Court cannot shift the burden and responsibility for this mistake onto these 97,688 voters. The Emergency Petition for Special Action should be rejected.

Dated: September 18, 2024

Respectfully submitted,

/s/ Daniel J. Adelman

Daniel J. Adelman (AZ Bar 011368)  
ARIZONA CENTER FOR LAW  
IN THE PUBLIC INTEREST  
352 E. Camelback Rd., Ste. 200  
Phoenix, AZ 85012  
Tel: 602-258-8850  
[danny@aclpi.org](mailto:danny@aclpi.org)

Jon Sherman (DC Bar 998271)\*  
Nina Beck (WI Bar 1079460)\*  
Emily Davis (DC Bar 90020129)\*  
FAIR ELECTIONS CENTER  
1825 K St. NW, Ste. 701  
Washington, DC 20006  
Tel: 202-331-0114  
[jsherman@fairelectionscenter.org](mailto:jsherman@fairelectionscenter.org)  
[nbeck@fairelectionscenter.org](mailto:nbeck@fairelectionscenter.org)  
[edavis@fairelectionscenter.org](mailto:edavis@fairelectionscenter.org)

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*Counsel for Amicus Curiae League of Women Voters of Arizona*