

1 Mark Brnovich
Attorney General

2 Linley Wilson (027040)
3 Kara Karlson (029407)
4 Dustin Romney (034728)
2005 North Central Avenue
5 Phoenix, AZ 85004-1592
6 Telephone (602) 542-4951
Facsimile (602) 542-4385
7 kara.karlson@azag.gov
8 linley.wilson@azag.gov
adminlaw@azag.gov

9 Mary R. O’Grady (011434)
10 Emma J. Cone-Roddy (034285)
OSBORN MALEDON, P.A.
11 2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012-2793
12 (602)640-9000
mogrady@omlaw.com
13 econe-roddey@omlaw.com

14 *Attorneys for Defendant*
Arizona Secretary of State Katie Hobbs

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**
17

18 Voto Latino, Inc., *et al*,

19 Plaintiffs,

20 v.

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

23 Defendant.
24

No: 2:19-cv-05685-DWL

ARIZONA SECRETARY OF STATE’S
REPLY IN SUPPORT OF MOTION TO
DISMISS PLAINTIFFS’ SECOND
AMENDED COMPLAINT

25 The Arizona law that Plaintiffs allege is unconstitutional—A.R.S. § 16–548(A)—
26 has existed for 23 years. *See* 1997 Ariz. Legis. Serv. 2nd Spec. Sess. Ch. 5 (S.B. 1003).
27 This statute plainly and simply requires ballots to be “received by the county recorder or
28 other officer in charge of elections or deposited at any polling place in the county no later

1 than 7:00 p.m. on election day.” A.R.S. § 16–548(A) (“Election Day Deadline”).
2 Plaintiffs do not contest that the State must impose a deadline for receiving ballots; they
3 simply prefer a later deadline that would require elections officials to accept any ballots
4 that are postmarked and received up to, “at a minimum, five business days” after an
5 election. (Doc. 21 at 25.) In support of their claim that the Election Day Deadline
6 imposes an undue burden on the right to vote and amounts to a denial of procedural due
7 process,¹ Plaintiffs note that in 2018, “more than 3,000 ballots” were rejected as late.
8 (*Id.* at ¶ 2.) But this number represents *less than 1%* of all ballots cast in that election
9 (*see id.* at ¶ 23 [noting that “over 1.9 million voters voted by mail” in the 2018 election]).
10 It is undisputed that over 99% of all ballots in Arizona arrive by Election Day to be
11 counted. (*See* Doc. 30 at 4.)

12 As discussed in the Secretary’s motion to dismiss, the organizational plaintiffs—
13 Voto Latino and Priorities USA—lack standing to challenge the Election Day Deadline,
14 under either an associational standing or organizational standing theory. (*See* Doc. 30
15 at 4–7.) Plaintiffs defend only an organizational standing theory (Doc. 36 at 10–12 & n.1
16 [disavowing any claim of associational standing]), but their arguments do not
17 demonstrate a frustration of their missions or a diversion of their resources in mitigating
18 the alleged effects of the Election Day Deadline. Indeed, the organizational plaintiffs
19 would still educate voters about any ballot deadline—even if it is the one Plaintiffs
20 propose—because voter education is core to their missions. (*See* Doc. 21 at ¶ 17
21 [Voto Latino “educates voters, among other things, on when to cast their mail ballots”],
22 ¶ 18 [Priorities USA “works to help educate, mobilize, and turn out voters”].)

23 Plaintiffs attempt to paint this lawsuit as one that involves the disenfranchisement
24 of Hispanic, Latino, Native American, and rural voters. (*See* Doc. 36 at 11.) Not so.
25 The Election Day Deadline applies to *all* voters, and it is well-established that generally-
26 applicable election regulations do not violate the Constitution simply because they may
27

28 ¹ Plaintiffs mistakenly assert that their Second Amended Complaint alleges an Equal
Protection violation. (*Compare* Doc. 21 with Doc. 36 at 6.)

1 incidentally impact some voters more than others. *See Crawford v. Marion Cty. Election*
 2 *Bd.*, 553 U.S. 181, 198-200 (2008) (plurality op.) (upholding identification requirement
 3 to vote even though some voters would have a more difficult time managing “life’s
 4 vagaries” to obtain the required identification or go through a special process to cast a
 5 provisional ballot); *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802,
 6 810-11 (1969) (“Constitutional safeguards are not . . . offended simply because some
 7 [voters] . . . find voting more convenient than appellants.”). Thus, even taking Plaintiffs’
 8 allegations as true, their claims fail as a matter of law. The motion to dismiss should be
 9 granted.

10 ARGUMENT

11 I. Organizational Plaintiffs Lack Standing To Challenge The Election Day 12 Deadline

13 As noted above, Plaintiffs Voto Latino and Priorities USA lack standing to
 14 challenge the Election Day Deadline under an organizational standing theory, which
 15 requires these Plaintiffs to show: “(1) frustration of [their] organizational mission[s]; and
 16 (2) diversion of [their] resources” to mitigate the effects of the challenged law. *Smith v.*
 17 *Pac. Props. and Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). Plaintiffs must show
 18 that they would have “suffered some other injury” if they had not “diverted resources to
 19 counteracting the problem.” *La Asociacion de Trabajadores de Lake Forest v. Lake*
 20 *Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

21 Here, Voto Latino repeats its vague contention that it will have to “expend and
 22 divert additional funds and resources that it would otherwise spend on its efforts to
 23 accomplish its mission in other states or its own registration efforts in Arizona” as a
 24 result of the Election Day Deadline. (Doc. 36 at 10 [quoting Doc. 21 at ¶ 17].)
 25 Likewise, Priorities USA asserts that the Election Day Deadline frustrates its mission by
 26 “burden[ing] and disenfranchis[ing] the voters Priorities supports through its work and
 27 contributions in Arizona.” (Doc. 36 at 11 [quoting Doc. 21 at ¶ 18].) These assertions
 28 are too vague and conclusory to show that Voto Latino and Priorities USA have

1 organizational standing. Plaintiffs cite *Nat'l Council of La Raza v. Cegavske*, 800 F.3d
2 1032, 1040 (9th Cir. 2015), for the proposition that organizational standing can be
3 “broadly alleged” (Doc. 36 at 11), but in *Cegavske*, the allegations were much more
4 concrete and specific. In *Cegavske*, the plaintiffs alleged that they would spend “fewer
5 resources on voter registration drives in communities where DHHS clients should be
6 offered voter registration opportunities at DHHS offices” and that “[b]ut for defendant’s
7 violations[,]” the plaintiffs “would be able to allocate substantial resources to other
8 activities central to [their] mission[s].” 800 F.3d at 1040. Accordingly, the Ninth Circuit
9 concluded in *Cegavske* that the complaint “clearly allege[d] that Plaintiffs changed their
10 behavior as a result of [the] alleged violation” of the law. *Id.* The same cannot be said
11 here. Neither Voto Latino nor Priorities USA have alleged any resources they would
12 have allocated to other activities “but for” the Election Day Deadline.

13 Plaintiffs’ reliance on *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration*
14 *Review*, 959 F.2d 742, 748 (9th Cir. 1991) (Doc. 36 at 12), is also misplaced. There, the
15 Ninth Circuit relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982),
16 where the Supreme Court held that where the defendants’ “practices have perceptibly
17 impaired [the organizational plaintiff’s] ability to provide [the services it was formed to
18 provide] ... there can be no question that the organization suffered injury in fact.” See
19 *El Rescate*, 959 F.2d at 748 (quoting *Havens*, 455 U.S. at 379). In *El Rescate*, the
20 organizations “were established to assist Central American refugee clients, most of
21 whom are unable to understand English, in their efforts to obtain asylum and withholding
22 of deportation in immigration court proceedings.” 959 F.2d at 748. The defendant’s
23 policy at issue was “not to interpret many portions of immigration court hearings,” *id.* at
24 745, and thus, the Ninth Circuit held that the policy frustrated the goals of the
25 organizations and required them to “expend resources in representing clients they
26 otherwise would spend in other ways[,]” which was “enough to establish standing.” *Id.*
27 Here, Election Day Deadline has not impaired Voto Latino or Priorities USA from
28 providing any services or expending resources they would not otherwise provide.

Simply put, Voto Latino and Priorities USA have not alleged a frustration of their organizational missions or diversion of resources as a result of the Election Day Deadline. And even though the Secretary has not challenged the voter's standing to bring this lawsuit, this Court should nonetheless dismiss the organizational Plaintiffs for lack of standing. *See We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) (stating that the general rule permitting appellate courts to determine whether one plaintiff has standing "does not strictly prohibit a district court, in a multiple plaintiff case ... from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing"). Voto Latino and Priorities USA should not be permitted to "effectively piggyback[]" on the voter's claims here. *See id.* at 1092 (discussing the "compelling reasons for addressing the standing of all of the remaining plaintiffs"). Moreover, Article III standing "is relevant not only with respect to who may access federal courts initially, but it is also relevant to who may obtain a judgment." *Id.* "Therefore, before deciding the precise nature of [any] relief to award herein, necessarily, this court would have to decide the issue of the organizations' standing." *Id.*

II. Plaintiffs' Claims Fail As A Matter of Law

Plaintiffs insist that their claims are fact-intensive and require a developed factual record. (Doc. 36 at 13.) But their claims should be dismissed because even taking their allegations as true, the Election Day Deadline is constitutional.

A. The Election Day Deadline Is Not An Undue Burden On The Right To Vote

Casting a ballot by the Election Day deadline is not burdensome, and the deadline is easily justified by the State's interests without factual development. The federal Constitution authorizes State legislatures to prescribe the "Times, Places and Manner of holding Elections . . ." US Const. art. I, § 4, cl. 1. States "retain broad authority to structure and regulate elections." *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018). As noted in the Secretary's motion to dismiss (Doc. 30 at 7–8), constitutional challenges to

election regulations are evaluated under the two-part *Anderson/Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this framework, courts “must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate.” *Short*, 893 F.3d at 676 (quoting *Anderson*, 460 U.S. at 789). If the asserted injury evidences no burden, there is “no reason to call on the State to justify its practice.” *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 n.12 (9th Cir. 2015). Minimal burdens from generally-applicable, even-handed regulations are justified by a State’s important regulatory interests. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Here, contrary to Plaintiffs’ contention that the Election Day Deadline “poses severe burdens on the right to vote” (Doc. 36 at 15), requiring a ballot to be received by elections officials by 7:00 p.m. on Election Day is, at most, minimal. *See Friedman v. Snipes*, 345 F. Supp.2d 1356, 1375 (S.D. Fla. 2004) (rejecting the argument that a ballot receipt deadline is subject to strict scrutiny) (citing *Burdick*, 504 U.S. at 434); *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (“We have repeatedly upheld as ‘not severe’ restrictions that are generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process.”). As the Secretary discussed in her motion to dismiss, the State’s interests in the Election Day deadline far outweigh the minimal burden that Plaintiffs allege. (Doc. 30 at 13.) The State’s interests include preventing voter confusion, preserving election integrity, promoting voter confidence, and establishing rules for orderly election administration. *See Timmons*, 520 U.S. at 364–65; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the function of our participatory democracy.”); *Crawford*, 553 U.S. at 192-97 (recognizing state’s interest in promoting voter confidence and improving and modernizing election administration). States have a substantial interest in regulating their elections through various deadlines, like the deadline

1 challenged here, to ensure that “some sort of order, rather than chaos, is to accompany
2 the democratic processes.” *Burdick*, 504 U.S. at 433.

3 Indeed, there is no constitutional right to early voting, *see McDonald*, 394 U.S. at
4 807–10, and the challenged law here “merely imposes a deadline”—nothing more.
5 *See Friedman*, 345 F. Supp.2d at 1376 (reasoning that Florida’s ballot-receipt-deadline
6 statute “does not deny the right to vote to a class of persons” and “merely imposes a
7 deadline by which Plaintiffs must return their absentee ballots”); *see also Mays v.*
8 *LaRose*, 951 F.3d 775, 791-92 (6th Cir. 2020) (“Ohio’s generally applicable deadline for
9 requesting absentee ballots is constitutional because it imposes only a minimal burden on
10 Plaintiffs’ right to vote” and the state’s interests “justify that burden”) (citing *McDonald*,
11 394 U.S. at 807–09). Accordingly, Arizona’s Election Day Deadline for receiving
12 ballots is constitutional, even assuming some voters may need to account for slower mail
13 service if they opt to send ballots back to elections officials through the United States
14 Postal Service. *See Friedman*, 345 F. Supp. 2d at 1377 (“Florida’s 7 p.m. deadline of
15 returning ballots on election day does not disenfranchise a class of voters.”).

16 Plaintiffs suggest that the Ninth Circuit held in *Soltysik v. Padilla*, 910 F.3d 438
17 (9th Cir. 2018), that it is never appropriate to dismiss a challenge to an election law
18 under Rule 12(b)(6). (Doc. 36 at 13.) *Soltysik* made no such holding. Rather, when a
19 plaintiff “adequately plead[s] ... more than a minimal burden, ... further factual
20 development is necessary.” *Soltysik*, 910 F.3d at 449. Because the burden is minimal
21 here, dismissal is appropriate. *See Storer v. Brown*, 415 U.S. 724, 728 (1974) (affirming
22 dismissal of challenges to election law); *Rubin v. City of Santa Monica*, 308 F.3d 1008,
23 1012–13, 1019–20 (9th Cir. 2002) (same). Plaintiffs have not adequately pleaded more
24 than a minimal burden, at best.

25 Plaintiffs also cite *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019,
26 1024 n.2 (9th Cir. 2016), for the proposition that courts should consider “the effects of
27 the restriction on those voters who are actually impacted by the law” to assess “the
28 severity of the burden” (Doc. 36 at 16), but *Pub. Integrity All., Inc.*, does not help them.

There, the Ninth Circuit noted that “[r]estrictions that block access to the ballot or impede individual voters or subgroups of voters in exercising their right to vote receive different treatment from rules establishing an overall, generally applicable electoral system.” *Pub. Integrity All., Inc.*, 836 F.3d at 1024 n.2. The law at issue here is a “generally applicable” deadline that applies to *all* early ballots. See A.R.S. § 16–548(A). It does not block access to the ballot or impede individual voters or groups in exercising their right to vote.

B. The Election Day Deadline Does Not Implicate Procedural Due Process

Plaintiffs’ claim that the Election Day Deadline violates voters’ right to procedural due process under the Fourteenth Amendment (Doc. 36 at 18–21) also fails as a matter of law. “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). The Election Day Deadline does not deprive anyone of liberty or property.

Plaintiffs’ procedural due process claim is governed by the *Anderson/Burdick* standard. Doc. 30 at 13–15. See *Dudum*, 640 F.3d at 1106 n.15 (stating that the Supreme Court has addressed First Amendment, Due Process, and Equal Protection claims “collectively using a single analytical framework”) (citing *Anderson*, 460 U.S. at 787 n.7); see also *Lemons v. Bradbury*, 538 F.3d 1098, 1104–05 (9th Cir. 2008) (rejecting procedural due process challenge to procedures for verifying referendum petition signatures under the *Anderson/Burdick* test, and reasoning State’s regulatory interests “are sufficient to justify the state’s ‘reasonable, nondiscriminatory restrictions’”) (quoting *Burdick*, 504 U.S. at 434).

As the Secretary noted in the motion to dismiss (Doc. 30 at 15), Arizona law requires *every* ballot to be accompanied by written instructions making clear to voters that ballots must be delivered to the officer in charge of elections by 7:00 p.m. on Election Day. A.R.S. § 16–547(C). That Arizona law provides this pre-election notice

1 about the deadline to voters refutes Plaintiffs’ allegation that the Election Day Deadline
2 is not a “reliable” or “fair” way of administering voting by mail. (Doc. 21 at ¶ 73.)

3 Critically, Plaintiffs do not acknowledge A.R.S. § 16–547(C), let alone respond to
4 the Secretary’s argument. (See Doc. 36 at 18–21.) They instead assert that the Election
5 Day Deadline “disenfranchises voters each election because of the absence of post-
6 deprivation notice to voters that their ballot was not counted.” (Doc. 36 at 20.) But
7 voters indisputably have *pre*-deprivation notice as a matter of law under
8 A.R.S. § 16-547(C) (and post-deprivation notice, as discussed below). The Election Day
9 Deadline is not a secret; to the contrary, voters receive notice of the deadline with *every*
10 ballot they receive in advance of *any* election in which they decide to vote early.

11 Plaintiffs argue that their procedural due process claim is not governed by the
12 *Anderson/Burdick* test, and that the claim should instead be evaluated under *Mathews v.*
13 *Eldridge*, 424 U.S. 319, 335 (1976). (Doc. 36 at 18–21.) But as discussed above, the
14 Ninth Circuit has applied the *Anderson/Burdick* test to both substantive and procedural
15 due process claims. See *Dudum*, 640 F.3d at 1106 n.15; *Lemons*, 538 F.3d at 1104–05.
16 Nonetheless, even if Plaintiffs were correct, their claim still fails under *Mathews*, which
17 requires consideration of three factors: (1) “the private interest that will be affected by
18 the official action;” (2) “the risk of an erroneous deprivation of such interest through the
19 procedures used, and the probable value, if any, of additional or substitute procedural
20 safeguards;” and (3) the government’s interest, “including the function involved and the
21 fiscal and administrative burdens that the additional or substitute procedural requirement
22 would entail.” 424 U.S. at 321.

23 A voter has a liberty interest in the fundamental right to vote because, generally
24 speaking, fundamental rights constitute liberty interests under the Due Process Clause.
25 *Burdick*, 504 U.S. at 433. Plaintiffs cite a New Hampshire district court decision,
26 *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018), for their suggestion that
27 “a voter has a sufficient liberty interest” to vote by mail once ‘the State permits voters to
28 vote absentee.’” (Doc. 36 at 20 n.6.) But the Supreme Court has emphasized that “the

1 range of interests protected by procedural due process is not infinite,” *Roth*, 408 U.S. at
2 570, and has rejected the notion that states must extend absentee voting privileges in a
3 way that provides “a more convenient method of exercising the franchise[.]”
4 *McDonald*, 394 U.S. at 810–11. Thus, *Mathews*’ first factor does not weigh in Plaintiffs’
5 favor.

6 Arizona’s law establishing a deadline by which ballots must be received also does
7 not create a risk of erroneous deprivation of any liberty interest under *Mathews*’ second
8 factor. In *Saucedo*, this factor was significant because a voter could comply with all
9 legal requirements to have his/her ballot counted, but untrained election officials could
10 incorrectly declare a mismatched signature. See 355 F. Supp. 3d at 217–220 (providing
11 detailed explanation of uncontroverted evidence showing a relatively high risk that
12 untrained lay people would incorrectly find a mismatched signature and reject a ballot
13 for that reason). Here, in contrast, that voters must decide when to mail their ballots to
14 comply with the deadline—of which they have notice under A.R.S. § 16–547(C)—
15 cannot establish a “deprivation” under *Mathews*. Notably, the plaintiffs argued in
16 *Saucedo* that the New Hampshire law at issue violated procedural due process “because
17 it lacks any pre-deprivation process” where voters “receive neither prior notice of, nor an
18 opportunity to cure, a rejection due to a signature mismatch.” 335 F. Supp. 3d at 214.
19 Unlike *Saucedo*, Arizona voters have “pre-deprivation” notice that, “[i]n order to be
20 valid and counted, the ballot and affidavit must be delivered to the office of the county
21 recorder or other officer in charge of elections or may be deposited at any polling place
22 in the county no later than 7:00 p.m. on election day.” A.R.S. § 16–547(C). This notice
23 obviates any need for “post-deprivation notice” that Plaintiffs argue is lacking. (Doc. 36
24 at 20.)

25 Additionally, voters in Arizona have an opportunity to track the status of their
26 early or provisional ballots via the Secretary’s online voter information portal.² Thus, a

27 ² See <https://my.arizona.vote/PortalList.aspx> (last visited Apr. 26, 2020). This Court
28 may take judicial notice of the publicly-available information displayed on the online
portal. See *Daniels-Hall v. Nat. Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010)

1 voter has pre-deprivation notice of the deadline *and* post-deprivation notice of whether
2 his/her ballot was counted. Plaintiffs’ reliance on *Raetzel v. Parks/Bellefont Absentee*
3 *Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (*see* Doc. 36 at 20–21), is
4 misplaced because in *Raetzel*, there was an “absence of *any* procedure which furnishes
5 post-deprivation notice to an individual whose absentee ballot has been disallowed[.]”
6 (Emphasis added.) *Mathews*’ second factor does not support Plaintiffs.

7 Third, as discussed above, the State has numerous interests that support the
8 Election Day Deadline—preventing voter confusion, preserving election integrity,
9 promoting voter confidence, and establishing rules for orderly election administration.
10 *See Lemons*, 538 F.3d at 1104 (noting that a state’s interest “in the orderly administration
11 of elections are weighty and undeniable”). The “substitute procedural requirement” that
12 Plaintiffs request here, *see Mathews*, 424 U.S. at 335, would entail additional
13 administrative burdens requiring election officials to count ballots for up to *seven* full
14 days after an election. For example, such a procedure would be burdensome for county
15 boards of supervisors, who must comply with statutory deadlines that are triggered after
16 every primary and general election for canvassing election results. *See*
17 A.R.S. §§ 16-642(A), –645. Thus, the value of Plaintiffs’ substitute procedure “is
18 negligible, and the burden on plaintiffs’ interests from the state’s failure to adopt their
19 proposed procedures is slight at most.” *See Lemons*, 538 F.3d at 1105.

20 Due process requirements are “flexible and cal[l] for such procedural protections
21 as the particular situation demands[.]” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
22 Arizona has extended more than adequate process to voters to ensure that voters’ ballots
23 are fairly counted.

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27 (taking judicial notice of information on websites of school districts in reviewing district
28 court’s dismissal for failure to state a claim, noting the information “was made publicly
available by government entities” and “neither party disputes the authenticity of the
websites or the accuracy of the information displayed therein”) (citing Fed. R. Evid. 201).

1 Finally, despite Plaintiffs' discussion of the current COVID-19 public health crisis
2 (Doc. 36 at 7, 15 18), the circumstances surrounding COVID-19 do not affect the legal
3 analysis of the Secretary's motion to dismiss.

4 **III. Conclusion**

5 The Court should dismiss the complaint in its entirety.

6 RESPECTFULLY SUBMITTED this 27th day of April, 2020.

7
8 MARK BRNOVICH
ATTORNEY GENERAL

9
10 /s/ Linley Wilson
Linley Wilson (027040)
11 Kara Karlson (029407)
Dustin Romney (034728)
12 2005 North Central Avenue
Phoenix, AZ 85004-1592
13 (602) 542-4951

14 OSBORN MALEDON, PA

15
16 Mary R. O'Grady (011434)
Emma J. Cone-Roddy (034285)
17 OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
18 Phoenix, Arizona 85012-2793
19 (602) 640-9000

20 *Attorneys for Defendant Arizona*
21 *Secretary of State Katie Hobbs*
22
23
24
25
26
27
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CERTIFICATE OF SERVICE

The foregoing was e-filed with the Clerk of the Federal Court for the District of Arizona using the CM/ECF System on April 27, 2020.

Copy emailed this same day to:

Alexis E. Danneman
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
adanneman@perkinscoie.com

Amanda R. Callais
Christina A. Ford
John M. Devaney
K'Shaani O. Smith
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 600
Washington, D.C. 20005-3960
acallais@perkinscoie.com
christinaford@perkinscoie.com
jdevaney@perkinscoie.com
kshaanismith@perkinscoie.com

/s/ Susan Peterson