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Attorneys for Plaintiff

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13 David Isabel, individually and on behalf
14 of all others similarly situated,

15 Plaintiff,

16 v.

17 Michele Reagan, in her individual
18 capacity; Maricopa County; Adrian
19 Fontes, in his official capacity as
20 Maricopa County Recorder,

21 Defendants.

No. CV-18-03217-PHX-DWL

FIRST AMENDED COMPLAINT

(Class Action)

(Jury Trial Demand)

Hon. Dominic W. Lanza

22 David A. Isabel (“Plaintiff”), on behalf of himself and all others similarly situated,
23 brings this Action against Defendants Michele Reagan, Maricopa County, and Adrian
24 Fontes (“Defendants”), and alleges as follows:
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NATURE OF THE CASE

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2 1. The right to vote is “a fundamental matter in a free and democratic
3 society.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quotation
4 marks omitted). “No right is more precious in a free country than that of having a voice
5 in the election of those who make the laws under which, as good citizens, we must live.
6 Other rights, even the most basic, are illusory if the right to vote is undermined.”
7 *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Plaintiff brings this lawsuit to protect this
8 most precious of rights.
9

10
11 2. This case concerns the disenfranchisement of hundreds of eligible Arizona
12 voters who cast ballots in the November 2016 General Election. These Arizona voters
13 were lawfully registered to vote and cast their ballots in accordance with state and federal
14 law. Nevertheless, despite clearly established law, their votes were not counted.
15

16 3. Plaintiff was denied his right to participate meaningfully in the November
17 8, 2016 General Election (the “November 2016 Election”) because Defendants
18 improperly deemed him ineligible to vote and refused to count his ballot.
19

JURISDICTION AND VENUE

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21 4. Plaintiff brings this action under 42 U.S.C. §§ 1983 and 1988 to redress the
22 deprivation under the color of state law of rights secured by the United States
23 Constitution and federal law.

24 5. This Court has original jurisdiction over the subject matter of this action
25 pursuant to 28 U.S.C. §§ 1331, 1343, and 1357 because the matters in controversy arise
26 under the Constitution and laws of the United States.
27
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1 6. Venue in this district is proper under 28 U.S.C. § 1391(b) because a
2 substantial part of the events or omissions giving rise to the claims occurred in this
3 judicial district and in this division.

4 7. This Court has personal jurisdiction over Defendants.

6 **PARTIES**

7 8. Plaintiff David Isabel is a United States citizen and a resident of Arizona,
8 residing in Phoenix, Arizona, in Maricopa County, within the jurisdiction of this Court.
9 Mr. Isabel moved to Phoenix from New York on Wednesday, October 5, 2016 to serve as
10 an officer in the Phoenix Police Department. Six days later, on October 11, 2016, he
11 registered to vote with the Arizona Motor Vehicle Department (“MVD”).

12 9. Defendant Michele Reagan is the Secretary of State for the State of Arizona
13 and is the Chief Elections Officer for Arizona. A.R.S. § 16-142. As Arizona’s Chief
14 Elections Officer, the Secretary is responsible for overseeing the voting process in
15 Arizona, and is empowered with broad authority to carry out that responsibility. She is
16 responsible for the ensuring Arizona’s compliance with federal elections laws, including
17 the National Voter Registration Act (“NVRA”) and the Help America Vote Act
18 (“HAVA”). She is also responsible for conducting the official canvass after a general
19 election and certifying the election results. *See* A.R.S. §§ 16-648, 16-650. Defendant
20 Reagan is sued in her individual capacity.

21 10. Defendant Reagan acted under color of law at all times material to this
22 complaint.
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11. Defendant Adrian Fontes is the elected County Recorder for Maricopa County, Arizona. Defendant Fontes is the chief official responsible for overseeing elections in Maricopa County, and is empowered with broad authority to carry out that responsibility. Defendant Fontes is the final policymaker for Maricopa County on matters relating to elections, including the verification, processing, and tabulation of ballots at issue in this lawsuit. He is sued in his official capacity.

12. Defendant Maricopa County, Arizona is a political subdivision formed and designated as such pursuant to Title 11 of the Arizona Revised Statutes. Defendant Maricopa County can sue and be sued in its own name. Maricopa County is liable for the practices and policies of Defendant Fontes and his predecessor, Helen Purcell.¹

FACTUAL ALLEGATIONS

I. BACKGROUND

13. To be eligible to vote in a particular election, Arizona law requires that the voter's registration form be "received by the county recorder . . . prior to midnight of the twenty-ninth day" before that election. A.R.S. § 16-120.

14. In 2012, the 29th day before the general election was October 8, 2012, and, because that day was Columbus Day, the voter registration deadline in Arizona was October 9, 2012. Therefore, ballots cast by Arizona voters who registered on October 9, 2012 were counted in the General Election that was held in November of 2012.

¹ Defendant Fontes, in his official capacity, acts on behalf of and is the final policymaker for Maricopa County with respect to the conduct described in this lawsuit. If this is correct, naming Maricopa County as a defendant is redundant.

1 15. Columbus Day is a state and federal holiday. *See* A.R.S. § 1-301(A); 5
2 U.S.C. § 6103.

3 16. In 2016, the 29th day before the November 2016 Election was also
4 Columbus Day—Monday, October 10, 2016.
5

6 17. Post offices were closed on Sunday, October 9th and on Monday,
7 Columbus Day, October 10th.

8 18. Arizona Motor Vehicle Division (“MVD”) offices were closed on Saturday,
9 October 8, 2016, Sunday, October 9, 2016, and Monday, October 10, 2016.
10

11 19. Nevertheless, Defendant Reagan set the voter registration deadline for the
12 November 2016 Election on Monday, October 10, 2016.

13 20. Notably, on August 25, 2016, the Director of the Office of the Secretary of
14 State’s Elections Division (the “State Elections Director”) emailed all of Arizona’s
15 county recorders notifying them that October 10, 2016 was the correct deadline and that
16 the deadline “could not be lawfully moved to October 11th.”
17

18 21. On information and belief, the State Elections Director, at all relevant
19 times, was acting under the direction, supervision, and control of Defendant Reagan, and
20 held himself out as her agent.
21

22 22. Defendants adopted a policy that deemed invalid any ballot cast in the
23 November 2016 Election by a voter who registered on October 11, 2016 (the “October
24 10, 2016 Policy”).
25

26 23. The October 10, 2016 Policy represented the official policy of Defendant
27 Maricopa County.
28

1 Registration Act].” In sum, Judge Logan held that, under state and federal law, Tuesday,
2 October 11, 2016 was the proper voter registration deadline for the November 2016
3 Election.

4
5 29. Upon information and belief, the Defendants had notice of Judge Logan’s
6 order and its contents on or before November 8, 2016.

7
8 30. Upon information and belief, the Defendants understood that Judge
9 Logan’s order established that the October 10, 2016 deadline violated federal and state
10 law.

11
12 31. Moreover, upon information and belief, Defendants understood that federal
13 and state law *required* them to consider any voter who registered on October 11, 2016,
14 including Plaintiff Isabel, eligible to cast a ballot in the November 2016 Election.

15
16 32. This understanding is plainly reflected in the 2018 Elections Procedures
17 Manual at § 1.12.1.3.3 (“Eligibility When Registration Deadline Falls on a Weekend or
18 Holiday), which cites to Judge Logan’s Order for the proposition that “the voter
19 registration deadline **must** be moved closer to election day if the closure of State or
20 Federal offices would cause a method of registration to be unavailable within the 30-day
21 period preceding the next election.” *See* 2018 Elections Procedures Manual at
22 § 1.12.1.3.3 (emphasis added).

23
24 33. On information and belief, Defendant Reagan personally and formally
25 approved the 2018 Elections Procedures Manual, which included the language cited
26 above.

1 34. Moreover, on information and belief, the Arizona Attorney General
2 reviewed Defendant Reagan's proposed 2018 Elections Procedures Manual, which
3 included the language cited above, for legal errors, approved it without alterations, and
4 submitted it to the Arizona Governor for his signature.
5

6 **II. NOVEMBER 8, 2016 ELECTION**

7 35. On November 8, 2016, Plaintiff Isabel went to his assigned polling location
8 to cast his ballot. Although he presented sufficient identification to the poll workers, he
9 was instructed to fill out a provisional ballot because he was not on the list of eligible
10 voters. Plaintiff Isabel completed a provisional ballot as instructed and deposited the
11 completed ballot as instructed.
12

13 **III. POST-ELECTION CONDUCT**

14 36. Arizona law requires each County Recorder to verify all provisional ballots
15 within 10 calendar days after the general election.
16

17 37. The provisional ballot that was cast by Plaintiff was verified, but not
18 counted due to the October 10, 2016 Policy enacted and adopted by Defendants.
19

20 38. Nevertheless, Defendants certified the results of the November 2016
21 Election knowing that the ballots cast by Plaintiff and others similarly situated were not
22 counted in violation of State and Federal law.

23 39. Specifically, on or about November 28, 2016, Defendant Maricopa County
24 and Defendant Fontes's predecessor, certified the 2016 General Election Official
25 Canvass.
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1 40. Specifically, on or about December 5, 2016, Defendant Reagan instructed
2 the Assistant Secretary of State to serve as the Acting Secretary of State and certify the
3 2016 General Election Official Canvass.

4 41. Defendant Reagan signed the 2016 General Election Official Canvass
5 Certification as both the Secretary of State and the Acting Governor.

6 42. Notably, Defendants never informed Plaintiff that his ballot was not
7 counted.
8

9 43. Plaintiff first learned that his ballot was not counted in 2017.
10

11 **IV. CLASS ALLEGATIONS**

12 44. Plaintiff is a United States Citizen living in Arizona. He brings this action
13 against the Defendants both as an individual and as a representative of a class of all
14 Arizona voters who had their ballots discarded due to the unlawful October 10, 2016
15 Policy, which set an unlawful voter registration deadline.
16

17 45. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure
18 23(b)(2) to certify a class of individuals who did not have their ballots counted due to the
19 unlawful October 10, 2016 voter registration deadline.
20

21 a. Plaintiff seeks to represent a class of all Arizona voters who
22 registered to vote on October 11, 2016 and cast a provisional ballot
23 in the November 8, 2016 General Election.

24 b. Plaintiff also seeks to represent a subclass of all Maricopa County
25 voters who registered to vote on October 11, 2016 and cast a
26 provisional ballot in the November 8, 2016 General Election.
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1 46. The members of the Class and Subclass are so numerous that joinder of all
2 members is impracticable. The Class and Subclass consist of hundreds of individuals
3 who registered to vote on October 11, 2016 and cast a provisional ballot in the November
4 8, 2016 General Election.
5

6 47. There are questions of law and fact common to the Class and Subclass,
7 including:
8

9 a. Whether the Defendants violated the Class and Subclass members'
10 right to register to vote by adopting a voter registration deadline that did not
11 comply with the National Voter Registration Act;

12 b. Whether the Defendants violated Class and Subclass members' right
13 to vote by refusing to count their ballots and certifying election results that
14 did comply with the Help America Vote Act;
15

16 c. Whether the Defendants violated Class and Subclass members'
17 federal and constitutional rights by engaging in conduct that led to the
18 disenfranchisement of all voters who registered on October 11, 2016.
19

20 48. Plaintiff's claims are typical of those of the Class and Subclass because the
21 policies, practices, and conduct that violated Plaintiff's rights are the same as those that
22 were applied to all members of the Class and Subclass. Plaintiff is a member of the Class
23 and Subclass he seeks to represent.
24

25 49. Plaintiff, as the Class and Subclass Representative, will fairly and
26 adequately protect the interests of the Class and Subclass members and is unaware of any
27 conflict among or between the Class and Subclass members that would preclude their fair
28

1 and adequate representation. Class counsel has the legal knowledge and resources to
2 fairly and adequately represent the interests of all class members in this action.

3 50. Defendants have acted on grounds applicable to the Class and Subclass, in
4 that their policies, practices, and conduct have affected all Class and Subclass members.
5

6 **FIRST CAUSE OF ACTION**

7 **(42 U.S.C. § 1983; Violation of the National Voter Registration Act Against** 8 **Defendants Reagan, Maricopa County, and Fontes)**

9 51. Plaintiff realleges and incorporates by reference all prior paragraphs of this
10 Complaint and the paragraphs in the counts below as though fully set forth herein.

11 52. The purpose of the National Voter Registration Act (“NVRA”) is to, among
12 other things, “establish procedures that will increase the number of eligible citizens who
13 register to vote in elections for Federal office.” 52 U.S.C. § 20501(b)(1).
14

15 53. To accomplish this, the NVRA requires that states provide for voter
16 registration via several methods: registration with an application for a driver’s license, 52
17 U.S.C. § 20504; registration by mail, 52 U.S.C. § 20505; and in-person registration at
18 registration sites or government offices, 52 U.S.C. § 20506.
19

20 54. Section 8 of the NVRA, 52 U.S.C. § 20507(a)(1), requires that each state to
21 ensure that an eligible applicant is registered to vote in an election if “the valid voter
22 registration form of the applicant” is: i) “submitted to the appropriate State motor vehicle
23 authority;” ii) “postmarked;” iii) “accepted at the voter registration agency;” or iv)
24 otherwise “received by the appropriate State election official . . . not later than the lesser
25 of 30 days, or the period provided by State law, before the date of the election.” 52
26 U.S.C. § 20507(a)(1)(A)–(D).
27
28

1 55. Arizona law requires that voter registration forms be “received . . . prior to
2 midnight of the twenty-ninth day preceding the date of the election.” A.R.S. § 16-120.
3 Twenty-nine days before the November 2016 Election was October 10, 2016, which is
4 the registration deadline the Defendants set. That date, however, fell on Columbus Day.
5 It was thus impossible for Arizonans to register using certain NVRA-mandated methods
6 on that date. For example, MVD and post offices were closed on Columbus Day. The
7 same was true of October 9, 2016 because it was a Sunday. Therefore, Arizonans were
8 required to register to vote via these methods, by the latest, Saturday, October 8, 2016.
9 This deadline was 31 days before the election and violates the NVRA. *See* 52 U.S.C.
10 § 20507(a)(1).
11

12 56. Put differently, given that 29 days before the November 2016 Election fell
13 on Columbus Day, the first available day to require voters to register through the NVRA
14 methods that was “not later” than 29 days before the election was Tuesday, October 11,
15 2016. Accordingly, Defendants’ insistence that voters who registered by October 11,
16 2016 were ineligible vote in the November 2016 Election was inconsistent with, and a
17 violation of, the NVRA and Arizona law.
18
19

20 57. Defendants, either by evil motive or intent, or through reckless, callous, and
21 deliberate indifference to Plaintiff’s federally protected rights, violated 52 U.S.C.
22 § 20507(a)(1). To the extent that these violations were also carried out by their
23 subordinates, Defendants are also liable for such violations because Defendants either
24 directed their subordinates’ conduct, or had knowledge of and acquiesced in the
25 unconstitutional conduct carried out by their subordinates.
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58. Defendants' violations of 52 U.S.C. § 20507(a)(1) directly and proximately caused Plaintiff to suffer injuries and damages.

SECOND CAUSE OF ACTION

(42 U.S.C. § 1983; Violation of the Help America Vote Act Against Defendants Reagan, Maricopa County, and Fontes)

59. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

60. Under the Help America Vote Act ("HAVA"), "[i]f the appropriate State or local election official to whom [a] [provisional] ballot or voter information is transmitted ... determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." 52 U.S.C. § 21082(a)(4).

61. Because all of the provisional ballots described herein were cast by voters, who should have been eligible to vote under state law, the plain language of 52 U.S.C. § 21082(a)(4) required that those votes should have been counted.

62. Even if the October 11th Registrants were not eligible under state law to vote in the November 2016 Election, HAVA expressly precludes determinations based on "State requirements [that are] inconsistent with the [NVRA]." 52 U.S.C. § 21084.

63. The October 10, 2016 Policy is a State requirement inconsistent with the NVRA.

64. Thus, Defendants violated HAVA when they based their eligibility determinations on the October 10, 2016 Policy.

65. Defendants, either by evil motive or intent, or through reckless, callous, and deliberate indifference to Plaintiff's federally protected rights, violated 52 U.S.C. § 21082(a)(4) and 52 U.S.C. § 21084. To the extent that these violations were also carried out by their subordinates, Defendants are also liable for such violations because Defendants either directed their subordinates' conduct, or had knowledge of and acquiescenced in the unconstitutional conduct carried out by their subordinates.

66. Defendants' violation of 52 U.S.C. § 21082(a)(4) and 52 U.S.C. § 21084 directly and proximately caused Plaintiff to suffer injuries and damages.

THIRD CAUSE OF ACTION

(42 U.S.C. § 1983; Violation of the Right to Vote Secured by the U.S. Constitution Against Defendants Reagan, Maricopa County, and Fontes)

67. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

68. Article I, Section 2 of the United States Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States"

69. Article I, Section 2 secures the right of qualified voters within a state to cast their ballots and have them counted in Congressional elections. *See United States v. Classic*, 313 U.S. 299, 314–15 (1941) ("Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. . . . Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their

1 ballots and *have them counted at Congressional elections*. This Court has consistently
2 held that this is a right secured by the Constitution.”) (emphasis added).

3 70. Subsequent amendments to the Constitution have repeatedly acknowledged,
4 secured, and expanded the Constitutionally-protected right to vote. *See, e.g.*, Amend.
5 XV, § 1 (“*The right of citizens of the United States to vote* shall not be denied or abridged
6 by the United States or by any state on account of race, color, or previous condition of
7 servitude.”) (emphasis added); Amend. XVII (“The Senate of the United States shall be
8 composed of two Senators from each state, elected by the people thereof”); Amend.
9 XIX (“*The right of citizens of the United States to vote* shall not be denied or abridged by
10 the United States or by any state on account of sex.”) (emphasis added); Amend. XXIV
11 (“*The right of citizens of the United States to vote in any primary or other election for*
12 *President or Vice President, for electors for President or Vice President, or for Senator*
13 *or Representative in Congress*, shall not be denied or abridged by the United States or
14 any state by reason of failure to pay any poll tax or other tax.”) (emphasis added);
15 Amendment XXVI (“*The right of citizens of the United States, who are 18 years of age or*
16 *older, to vote*, shall not be denied or abridged by the United States or any state on account
17 of age.”) (emphasis added).

18 71. Because all of the provisional ballots described herein were cast by
19 qualified voters within the State of Arizona, the U.S. Constitution required Defendants to
20 count their votes.

21 72. Defendants, either by evil motive or intent, or through reckless, callous, and
22 deliberate indifference to Plaintiff’s federally protected rights, violated Plaintiff’s right to
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1 vote in Congressional elections. To the extent that these violations were also carried out
2 by their subordinates, Defendants are also liable for such violations because Defendants
3 either directed their subordinates' conduct, or had knowledge of and acquiesced in the
4 unconstitutional conduct carried out by their subordinates.
5

6 73. Defendants' violation of the Constitutionally protected right to vote directly
7 and proximately caused Plaintiff to suffer injuries and damages.

8 **WHEREFORE**, Plaintiff prays as follows:

- 9
- 10 1. For an order certifying a Class and Subclass pursuant to Rule 23(b)(2);
 - 11 2. For compensatory and punitive damages in an amount to be determined
12 according to proof²;
 - 13 3. For costs of suit and attorneys' fees as provided by law; and
 - 14 4. For such other relief as the Court deems just and proper.
15

16 **DEMAND FOR JURY TRIAL**

17 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a
18 trial by jury in this action of all issues so triable.
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28 ² Punitive damages are only sought against Defendant Reagan.

1 Dated: June 27, 2019

2 **SCHARFF PLLC**

3 By: s/ Spencer G. Scharff
4 Spencer G. Scharff

5 **MILLER, PITT, FELDMAN**
6 **&MCANALLY P.C.**

7 By: s/ Nathan Fidel
8 Nathan Fidel

9 *Attorneys for Plaintiff*
10 David A. Isabel

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically transmitted the above document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Spencer G. Scharff