SUPREME COURT OF ARIZONA

MARICOPA COUNTY RECORDER STEPHEN RICHER, in his Official Capacity, Petitioner, v. ARIZONA SECRETARY OF STATE ADRIAN FONTES, in his Official Capacity, Respondent.	Arizona Supreme Court No. CV-24-0221-SA **FILED 09/20/2024**

DECISION ORDER

Petitioner Maricopa County Recorder Stephen Richer filed an emergency petition for special action on September 17, 2024. Respondent Secretary of State Adrian Fontes filed a response on September 18, 2024.

On September 18, 2024, Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma filed a motion to intervene as of right or on a permissive basis. Alternatively, Petersen and Toma ask the Court for leave to file their response as an amici curiae brief and for waiver of the 2000 word limit for amicus briefs.

Amicus briefs were filed on September 18, 2024 by: the Arizona Republican Party; the League of Women Voters of Arizona; Coconino County Recorder Patty Hansen and Pima County Recorder Gabriella Cazares-Kelly; potentially impacted voters Martin Brannan, Doug Van der Veen, and John Groseclose; a collective consisting of the San

Carlos Apache Tribe, Living United for Change in Arizona, League of United Latin American Citizens of Arizona, Mi Familia Vota, ACLU of Arizona, and Campaign Legal Center; and Strong Communities Foundation of Arizona and Yvonne Cahill ("Strong Communities"). On September 19, 2024, Richer filed a consolidated response to the briefs of amici curiae, and Strong Communities filed a notice of supplemental authority. The Court thanks all parties and amici for their expeditious and helpful briefing.

This matter concerns the obligations and authority of county recorders and the Arizona Secretary of State in connection with A.R.S. § 16-166. In 2004, Arizona voters approved Proposition 200, which requires those registering to vote in Arizona to provide documentary proof of citizenship ("DPOC") and which became effective on January 24, 2005. A.R.S. § 16-166(F), which was enacted in connection with Proposition 200, provides that "[t]he county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." That provision also states that "[s]atisfactory evidence of citizenship shall include . . . the number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation . . . if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship." A.R.S. § 16-166(F)(1).

Persons registered to vote in Arizona by January 24, 2005, when Proposition 200's voting provisions became effective, are deemed to have provided satisfactory evidence of DPOC and are not required to resubmit evidence of citizenship unless the person is changing voter registration from one county to another. A.R.S. § 16-166(G). In 2013, the United States Supreme Court determined that Proposition 200's DPOC requirement could not be enforced for registration to vote in federal elections because it violated the National Voter Registration Act ("NVRA"). *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013). Arizona thereafter adopted a bifurcated voter registration system in which voters who complete a voter registration form and attest under penalty of perjury that they are United States citizens, but who do not provide DPOC, are registered as "federal only" voters. Those who complete the voter registration form, attest under penalty of perjury that they are United States citizens, and also provide DPOC are registered as "full ballot" voters; these full ballot voters may vote in both federal elections and state and local elections.

Earlier this month, state election officials learned that some voters, who were originally issued an Arizona driver's license before October 1, 1996 and who were issued a duplicate or updated Arizona driver's license after October 1, 1996, received licenses that listed, as their issue date, the duplicate or updated license date, rather than the originally issued date. If those individuals

registered to vote after Proposition 200's January 24, 2005 effective date, then they would be automatically, but incorrectly, understood by voter registration systems to have provided DPOC. Fontes has identified 97,928 registered voters who fall within this group of voters (the "Affected Voters").

Fontes issued guidance to the county recorders indicating that they should take no action at this time regarding the absence of DPOC for the Affected Voters and that the Affected Voters should be permitted to vote full ballots in the upcoming 2024 General Election. Richer contends that Fontes exceeded his authority in issuing the guidance and that, pursuant to A.R.S. § 16-166(F), the Affected Voters are limited to voting federal only ballots unless and until the Affected Voters provide DPOC. Fontes and several amici contend that county recorders lack statutory authority to move the Affected Voters to federal only voter status. Richer and Fontes both ask that the Court accept emergency special action jurisdiction over this matter.

Article 6, section 5 of the Arizona Constitution provides that this Court has original jurisdiction of "habeas corpus, and quo warranto, mandamus, injunction and other extraordinary writs to state officers." This Court has accepted original special action jurisdiction when disputes are "at the highest levels of state government, the issues are substantial and present matters of first impression in this state, and a prompt determination is required."

Rios v. Symington, 172 Ariz. 3, 5 (1992); *see also Ariz. Ind. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 350-51 ¶¶ 13–14 (2012) (accepting original special action jurisdiction to determine whether governor acted within her legal authority). This Court has also accepted original special action jurisdiction over election matters in which there is a need for immediate relief based on rapidly approaching election deadlines and where the key facts are not in dispute. *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶ 15, 405 ¶ 20 (2020). Based on these considerations, the Court accepts special action jurisdiction of this matter.

The authority of county recorders is "limited to those powers expressly or impliedly delegated to him by the state constitution or statutes." *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62 ¶ 14 (2020). A.R.S. § 16-166(F), upon which Richer relies, addresses "Verification of registration" and provides that the "county recorder *shall reject any application* for registration that is not accompanied by satisfactory evidence of United States citizenship." (Emphasis added.) Here, the Affected Voters have long since applied for, and received, their voter registration; the time for the county recorder to reject their applications pursuant to § 16-166(F) has passed. Section 16-166(F) includes no mechanism by which a county recorder may, years after a voter applied to vote and became registered to vote, remove that voter's ability to vote a full

ballot.

Although A.R.S. § 16-165(A)(10) authorizes cancellation of voter registration "[w]hen the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen," the parties do not suggest that they believe the Affected Voters are actually not United States citizens. In fact, as set forth in the joint stipulation of facts, "[t]he Recorder and Secretary of State believe that most of the Affected Voters likely are citizens" and that "all of the Affected Voters have attested under penalty of perjury to being United States citizens and have no reason to believe they needed to provide additional documentation to election officials." Furthermore, Fontes and Richer acknowledge that "[i]t is possible that Affected Voters have, in fact, provided satisfactory evidence of DPOC." Therefore, this provision does not authorize county recorders to modify the Affected Voters' registration record to deny the right to vote in Arizona elections unless they provide DPOC.

In sum, Richer has not established that the county recorders have statutory authority to remove the Affected Voters from being able to vote in the upcoming 2024 General Election for federal offices and with respect to matters on an Arizona ballot. This is particularly true under the present facts, where a state administrative failure permitted the Affected Voters to be registered without confirming that they provided DPOC when they received their

driver's licenses and where there is so little time remaining before the beginning of the 2024 General Election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (recognizing that courts will generally not alter election rules or procedures on the eve of an election).

Arizona law provides that "[w]hen the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen," the county recorder is to initiate a process to cancel a registration that includes sending the person notice that the person's registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship. A.R.S. § 16-165(A)(10). Although challenges are pending to various aspects of the statute, subsection (A)(10) recognizes the right of any voter to notice and an opportunity to contest any determination of a voter's ineligibility. A county recorder can therefore proceed with respect to individual voters under § 16-165(A)(10) as long as the provision's due process requirements are followed. *See also Mi Familia Vota v. Fontes*, 691 F.Supp.3d 1077, 1092 (2023). Regardless, we are unwilling on these facts to disenfranchise voters en masse from participating in state contests. Doing so is not authorized by state law and would violate principles of due process.

In light of the above, it is unnecessary for us to address the

other issues raised in the parties' briefing, including whether the Secretary of State exceeded his authority to issue the blanket guidance here.

Accordingly, and upon consideration,

IT IS ORDERED accepting special action jurisdiction.

IT IS FURTHER ORDERED denying Richer's request for relief. Nonetheless, we commend Richer for seeking a judicial determination of the appropriate scope of his authority under Arizona law.

IT IS FURTHER ORDERED denying the motion to intervene filed by Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma. The Court grants Petersen and Toma's request to alternatively file their response to the petition as amicus curiae and their request to exceed the permitted word limit in their brief.

DATED this _____ day of September, 2024.

/s/
ANN A. SCOTT TIMMER
Chief Justice

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