



October 22, 2018

Via certified mail and email

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Re: Arizona's Absentee Ballot Signature Matching Procedures

Dear Secretary Reagan and Arizona County Recorders:

We are writing on behalf of the League of United Latin American Citizens Arizona (LULAC-Arizona), the League of Women Voters of Arizona, the Arizona Advocacy Network Foundation, and All Voting is Local-Arizona, as well as the registered voters whom these organizations represent, to demand that every Arizona voter who sends in a mail-in ballot be accorded due process before their vote is rejected because of an alleged mismatched signature.

Given the popularity of voting by mail in Arizona, proper procedures for processing mail-in ballots are critical. In 2016, mail-in ballots accounted for nearly three-quarters of total votes in the state. But 2,657 of those ballots were rejected because election officials were not satisfied that the signature on the ballot's envelope matched the voter's registration signature.¹ And many of those voters did not find out that their votes did not count until after the fact, if ever. With another election in just two weeks' time, voters need to know that their ballots will not be rejected without due process.

¹ See Ex. A (a compiled list of the number rejected ballots for signature match problems in 2016 by county).

It appears that only one county, Pima County, currently ensures that *all* mail-in voters are given notice and an opportunity to respond before their ballot is rejected for a mismatched signature. Pima County’s policy is not only required by the Constitution, it also makes good administrative sense. For example, when voters cast a conditional provisional ballot in general elections, they are given until 5 p.m. on the fifth business day after the election to cure those ballots and have them counted. *See* ARIZ. SEC’Y OF STATE, *State of Arizona Elections Procedures Manual*, at 153 (2014) (hereinafter “Manual”). The same window of opportunity to cure contested ballots can and should be given to voters with allegedly “mismatched” signatures on their ballots. But, outside of Pima County, election officials cease providing notice to voters with “mismatched” signatures if the mail-in ballot is received on or near Election Day. Therefore, whether an eligible voter’s mail-in ballot is counted in Arizona can depend arbitrarily on which county she resides in and/or when—within the operative deadline—she turns in her ballot. In addition to being arbitrary, depriving these voters of the opportunity to verify whether their signatures are their own undercuts the state’s reasonable aim of maintaining accurate and complete voter rolls.

We urge Secretary Reagan to issue immediate guidance to the county recorders requiring that *all* voters with flagged ballots for “mismatched” signatures be provided notice and an opportunity to respond before their ballots are rejected. Courts that have considered the matter have held that absentee voters have this right.² In the absence of this guidance from the Secretary, we urge all county recorders to independently implement procedures ensuring notice to *all* voters with “mismatched” signatures, even if their ballots are received near to or on Election Day. These voters should be accorded the same opportunity as voters who cast provisional ballots on Election Day to cure their ballot and have their vote counted.

I. Arizona’s Current Policies on Signature Matching Lack Uniformity and Fail to Provide Voters with Due Process.

a. Lack of Uniform Standards for Comparing Signatures

Arizona law requires election officials to compare the signature on every mail-in ballot with the corresponding signature of the voter on her registration form and count those ballots if the official is “satisfied” that the signatures “correspond.” ARIZ. REV. STAT. ANN. §16-550 (2007). However, neither the statute nor the governing election procedures manual provides a uniform standard for judging whether signatures sufficiently “match.” The manual only instructs election officials to determine whether “the signatures were made by the same person.” Manual, ch. 3 Early Ballots; *see also Saucedo*, 2018 WL 3862704, at *11 (striking down the same standard-less rule). The

² *See Saucedo v. Gardner*, No. 17-cv-183-LM, 2018 WL 3862704 (D.N.H. Aug. 14, 2018); *Zessar v. Helander*, No. 05C1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006); *La Follette v. Padilla*, CPF 17-515931, 2018 WL 3953766 (Cal. Super. Ct. Mar. 5, 2018); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *1 (N.D. Fla. Oct. 16, 2016); *League of United Latin Am. Citizens of Iowa v. Pate*, No. CVCV056403, (Iowa Dist. Ct. July 24, 2018), *aff’d in the relevant part by League of United Latin Am. Citizens of Iowa v. Pate*, No. 18-1276, 2018 WL 3946147 (Iowa Aug. 10, 2018).

manual does not provide guidance or coherent standards on how to conduct signature matching; nor does it require handwriting analysis training. *Id.*

Campaign Legal Center (“CLC”) sent a request for records to all fifteen county recorders on August 23, 2018 regarding policies and procedures for matching signatures on mail-in ballots. Thus far, CLC has only received responses from eight county recorders. *See* Ex. B (compiled responses). These responses provide little meaningful guidance on how recorders go about the difficult task of signature matching. However, they do demonstrate a lack of uniformity. For example, some counties (Pima, Mohave, and La Paz) require handwriting analysis training while other counties do not appear to have any such requirement. Likewise, Pima and Yavapai County require a consensus among three officials before rejection, Graham County requires two, and others do not have any policy requiring more than one official to review a signature mismatch.

b. Lack of Uniform Notice to Voters

There is no uniform standard across the state for ensuring that all voters in danger of having their ballot rejected for a “mismatched” signature are given notice and an opportunity to respond before their ballot is rejected. The current election procedures manual instructs officials to “make a reasonable and meaningful attempt to contact the early voter,” Manual at 60, but also states the officials “*if time permits, may* contact the voter to ascertain whether the voter actually voted the early ballot and any reasons why the signatures may not match,” *id.* at 166. The Manual goes on to state that any voter with a “mismatched” ballot must not only affirm that he or she did vote the ballot but also must be able to “explain why the signatures do not match.” *Id.* at 167. No guidance is given as to what explanations might be sufficient or insufficient. The 2018 draft manual that the Secretary has approved, but that is not yet approved by the Governor, removes even these meager and vague notice provisions. ARIZ. SEC’Y OF STATE, State of Arizona Elections Procedures Manual, § 2.9 Processing and Tabulating Early Ballots (2018).

The responses to CLC’s records requests demonstrate that the counties have significantly differing policies with respect to the notice they provide to voters with “mismatched” signatures. Some counties rely solely on the procedures Manual as their written policy while others have strict protocols requiring numerous contact attempts by phone, email, and mail.

But the most important difference concerns whether a voter receives *any* notice at all before her vote is discarded. Pima County’s instructions make clear that all voters who have their ballots flagged for “mismatched” signatures should be contacted and given an opportunity to respond, even if their ballot is received on or near to Election Day. *See* Ex. B. The deadline in Arizona to turn in a mail-in ballot is 7 p.m. on Election Day. Manual at 39; ARIZ. REV. STAT. ANN. §§ 16-547 (2011).

Pima County continues to contact these voters until the Saturday after Election Day and allows them until 5 p.m. that following Saturday to resolve the issue. Therefore, every voter is given some form of notice and opportunity to respond before their vote

goes uncounted because of an alleged mismatch. *See* Ex. B at 752. And this notice procedure works. In the 2018 primary election, Pima County was able to resolve over 50% of their problem ballots on the first contact with a voter. *See* Ex. B at 689.

But no other county engages in the common-sense protocols that Pima County has put in place. Rather, the remaining counties rely on the “if time permits” language in the Manual to not contact voters with mismatched signatures if the ballots are received on or near Election Day.³ On October 19, 2018, the Maricopa County Attorney’s Office confirmed that for this upcoming Election Day, the County does not plan to contact voters to cure their “mismatched” signature after Election Day, even if the ballots are received by the deadline. *See* Ex. C; *see also* Ex. D (email from Maricopa County Recorder’s office in 2016 confirming that the office did not call voters on Election Day or thereafter regarding signature mismatch issues).

The number of potentially affected voters by this near statewide policy is significant. A substantial number of mail-in ballots are received on or near Election Day. In 2016, news reports suggested that approximately 200,000 mail-in ballots were received on Election Day in Maricopa County alone.⁴

Every voter who turns in their mail-in ballot by the deadline of Election Day should be given notice and an opportunity to resolve a “mismatched” signature issue before their ballot is rejected. The Secretary must implement uniform standards that ensure these minimal procedures are adopted across the state in Arizona.

³ *See*, Howard Fischer, Discarded early ballots in Maricopa County prompt lawsuit, Tucson.com, Nov. 15, 2016, https://tucson.com/news/local/govt-and-politics/elections/discarded-early-ballots-in-maricopa-county-prompt-lawsuit/article_cbd4b882-0e1f-5b36-9e8f-bdaf6c85a8c7.html (“Purcell is discarding the envelopes containing about 1,400 ballots received Monday and Tuesday for which her staffers could not immediately match the signature on the outside with the signature on file. She’s not alone: state Elections Director Eric Spencer said that’s the same policy followed by officials in 14 of the state’s 15 counties.”); *see also* Mary Jo Pitzi, What you need to know about ‘signature verification’ on ballots in Arizona, AZCentral.com, Nov. 8, 2016, <https://www.azcentral.com/story/news/politics/elections/2016/11/08/arizona-ballots-voting-signature-verification/93508238/> (“ ‘Unfortunately, if we find there’s an issue with your signature or there’s no signature on your early ballot after 7 p.m. tonight, they will not count,’ Bartholomew said Tuesday.”); Jude Joffe-Block, Democrats Criticize Policy To Reject Early Maricopa County Ballots Without Contacting Voters, KJZZ, Nov. 15, 2016, <https://kjzz.org/content/3955555/democrats-criticize-policy-reject-early-maricopa-county-ballots-without-contacting>.

Pinal County Recorder’s response to CLC’s record request indicates that they allow for signature mismatches to be cured through the Friday after Election Day. *See* Ex. B. Therefore, Pinal County may be following Pima County’s lead. It is not clear, however, if voters who turn in their ballots on or near Election Day receive notice to do so.

⁴ *See* Election 2016: Helen Purcell ousted as Maricopa County Recorder, AZCentral.com, Nov. 8, 2016, <https://www.azcentral.com/story/news/politics/elections/2016/11/08/arizona-election-results-2016-voting-updates/93289328/>.

II. Arizona’s Signature Matching Policies, or Lack Thereof, Violate the Fourteenth Amendment.

Arizona’s current haphazard policies on signature matching violate the Fourteenth Amendment in three distinct ways: (1) they deprive voters of procedural due process; (2) they impose an undue burden on the fundamental right to vote; and (3) they count votes in an arbitrary manner in violation of the Equal Protection Clause.

a. Procedural Due Process

First, voters have a procedural due process right to receive notice, and an opportunity to resolve a “mismatched” signature on their ballot, before it is rejected, and they are irreversibly disenfranchised. Under the *Matthews v. Eldridge* standard, the court must balance three factors: (1) the private interest at stake, (2) the risk of erroneous deprivation and probable value of additional procedures, and (3) the government’s interests. The current policies fail this test.

First, the private interest at stake is nothing less than the right to vote, “a fundamental political right, because it is preservative of all rights.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Second, the risk of erroneous deprivation is high and implementing simple notice procedures for all voters would significantly mitigate this risk. The signature-matching requirement results in the rejection of thousands of ballots in large elections. Indeed, it is a very real possibility that this provision could sway the outcome of close elections in Arizona. In 2016, a congressional primary was decided by only sixteen votes.⁵ See *Saucedo*, 2018 WL 3862704, at *11 (“[E]ven rates of rejection well under one percent translate to the disenfranchisement of dozens, if not hundreds, of otherwise qualified voters, election after election. . . . Given how close some races are in New Hampshire, that is a risk with real consequences.”).

There is a high risk of error that ballots will be improperly flagged as “mismatches.” Laypersons are not equipped to conduct proper handwriting analysis. They are not able to account for a verity of unintentional factors that will cause signature variation including “age, physical and mental condition, disability, stress, . . . and stance.” *Id.* at *7. Indeed, “lay persons are more likely ‘to wrongly determine that authentic signatures are *not* genuine than to make the opposite error.” *Id.* at *11; see also *LULAC v. Pate*, No. CVCV056403 (Iowa Dist. Ct. July 24, 2018) (attached as Ex. E) (“Dr. Mohammad also stated voters who are younger, older, or do not speak English as a first language are more likely to have their signatures rejected for failing to match.”).

The close 2016 congressional Republican primary in Arizona’s Fifth Congressional District provides just a few anecdotal examples of erroneous rejections resulting from a lack of notice to the voters:

⁵ See 2016 Primary Election Official Canvass, <https://apps.azsos.gov/election/2016/Primary/canvass2016primary.pdf> (Republican primary in CD 5 between Andy Biggs and Christine Jones).

Chandler resident, Taylor Tometich, said she only learned on Wednesday night that her early ballot did not count because the signature on the envelope she sent it in differed from the one on file with the county. It was too late to contact county officials to verify her ballot.

The original signature was when she was “18, when I was cute and bubbly. Now I’m in my mid-20s and scribbly,” she testified.

Brian R. Smith, a Gilbert resident now working in a remote area of Utah, said by telephone testimony that he was surprised to discover only on Wednesday that his ballot didn’t count. Two other ballots he had submitted while deployed in the Middle East had also been tossed.⁶

With respect to the value of additional procedures, the results speak for themselves. Pima County is often able to resolve about half of all problem ballots with a single phone call to a voter. *See* Ex. B at 689.

Finally, the government’s interest in cutting off notice procedures for mismatched ballots on Election Day is low. County recorders already have notice procedures in place that they employ prior to Election Day (although they should be made more uniform). County recorders also continue to process and resolve provisional ballots until five business days after Election Day. Therefore, it should not be particularly disruptive to ensure that all voters, even those who turn in their ballots on time but on or near Election Day, receive notice that their ballots are being contested. Pima County’s standing notice practices demonstrate the feasibility of these low-cost, administrable procedures.

b. Burden on the Fundamental Right to Vote

For many of the same reasons that these scant procedures violate voters’ due process rights, they also impose undue burdens on the right to vote under the *Anderson-Burdick* standard. As a district court in Florida explained, these signature-matching procedures can lead to the absolute denial of the right to vote for wrongly flagged voters:

After the election, thousands of those same voters—through no fault of their own and without any notice or opportunity to cure—will learn that their vote was not counted. If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does . . . [T]he State of Florida has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time.

⁶ Ronald J. Hansen, Judge to rule Friday on Andy Biggs-Christine Jones court case, AZCentral.com, Sept. 8, 2016, <https://www.azcentral.com/story/news/politics/elections/2016/09/08/judge-rule-friday-andy-biggs-christine-jones-court-case/90100568/>.

Fla. Democratic Party v. Detzner, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6-7 (N.D. Fla. Oct. 16, 2016). Arizona has likewise categorically disenfranchised voters who return their ballots by the deadline for no other reason than variants in their handwriting. The court held that this disenfranchisement far outweighed the minimal additional procedures that would be required to alleviate this real risk of disenfranchisement.

c. Arbitrary and Disparate Treatment of Voters

All of the foregoing legal infirmities are aggravated by the “hodgepodge of procedures” that different counties employ in their signature matching process. *Id.* at *7. The Supreme Court has held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 105 (2000). In this case, whether a voter’s ballot will ultimately count can depend both on what county they live in and when they turn in their ballot, even if they turn it in well within the statutory deadline. The Secretary should be “deeply troubled by that complete lack of uniformity.” *Detzner*, 2016 WL 6090943, at *7.

As noted above, courts that have addressed this question have held that absentee voters have a procedural right to notice and an opportunity to resolve the alleged “mismatch” between their signatures before they are stripped of their vote. *Saucedo*, 2018 WL 3862704, at *15; *Zessar v. Helander*, No. 05C1917, 2006 WL 642646, at *10 (N.D. Ill. Mar. 13, 2006); *La Follette v. Padilla*, CPF 17-515931, 2018 WL 3953766, at *3 (Cal. Super. Ct. Mar. 5, 2018). Of particular note is *LULAC v. Pate*, an Iowa state court case that recently addressed Iowa’s refusal to give notice to voters who turned in their absentee ballots after 5 p.m. on the Saturday before Election Day. The fact that the ballots were turned in close to or on Election Day did not excuse the state’s failure to provide voters with adequate notice. *See Ex. E.* Nor was the fact that the mail-in ballots were not reviewed for signature matches until Election Day in *Saucedo* and *Zessar* an excuse for not creating a notice mechanism for affected voters.

III. Election Officials Should Take Immediate Action to Ensure Equality and Due Process for All Arizona Voters.

The current signature matching procedures, that election officials plan to use in this upcoming election, violate the United States Constitution and deprive voters of an equal opportunity to have their ballots counted. Voters who properly turn in their ballot on or near to Election Day should not have their ballot discounted based solely on a layperson’s belief that their signature does not match a prior one. Given the time between Election Day and the final canvass, and the time already afforded to provisional ballot voters to cure their ballots after the Election, it is both administratively feasible and constitutionally mandated to give voters notice and opportunity to respond before rejecting their ballots for alleged signature mismatches.

We are prepared to meet with you at your earliest convenient to discuss a resolution of this matter for this election and future elections. If we are not able to agree upon a

reasonable solution for this matter, we will consider all appropriate legal action to protect voters' ability to cast a ballot and have that ballot counted.

Sincerely,

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