



September 30, 2024

VIA EMAIL

Dear Arizona Election Officials:

Campaign Legal Center (CLC) writes to provide you with information regarding how Arizona election officials can properly adjudicate frivolous challenges to voter eligibility under A.R.S. §§ 16-182, 16-552, and 16-590 to 16-594 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

To that end, CLC is concerned about the potential for frivolous mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.² In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.³ These databases attempt to match voter registration records with

¹ This letter is not legal advice; it is intended to present a summary of relevant Arizona and federal law.

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Trump's Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html> (noting the recent wave of voter eligibility challenges in states such as Georgia, Michigan, and Nevada); David Gilbert, *Election Deniers are Ramping Up Efforts to Disenfranchise Voters*, Wired (Jul. 31, 2024), <https://www.wired.com/story/election-deniers-efforts-disenfranchise-voters>.

³ See Robyn Sanders & Alice Clapman, *Protections Against Mass Challenges*, Brennan Ctr. for Just. (July 17, 2024), <https://www.brennancenter.org/our-work/research-reports/protections-against-mass-challenges-voter-eligibility>. One common database is Eagle AI, which experts have criticized for its frequent identification of eligible voters as ineligible. See Alice Clapman & Andrew Garber, *A New Antidemocracy Tool*, Brennan Ctr. for Justice (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

publicly available information, but that information is almost always incomplete or out of date, making the database matches unreliable.⁴ They also often improperly flag registered voters with the same name as ineligible individuals, voters who are temporarily staying in another place but remain qualified at the address at which they are registered, and households where some but not all residents have moved.⁵ As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.⁶

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary disruption to the orderly administration of the 2024 elections. We recognize that many election offices have lost their most experienced officials because of threats and volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. We hope this letter will assist you as you provide guidance to your staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges without cause, allowing your office to ensure a fair and orderly election, safeguard voters from intimidation, and minimize administrative disruption.

To mitigate the potential harms to both voters and election administrators caused by such baseless challenges, CLC provides the election law summary below to support your development of uniform processes for adjudicating voter eligibility challenges in compliance with the following requirements of Arizona and federal law.

I. Voter Challenges in Arizona

As you are aware, Arizona law permits challenges (1) to a voter's registration before the election and (2) to a voter attempting to cast a ballot under certain circumstances.⁷ Such challenges are subject to various limitations, which we have detailed further below.

Challengers must be designated by county political parties, and there is a limit on how many may be present at one time at an early ballot counting board or polling place. For both early ballot and Election Day challengers, county chairs for the political parties must agree in advance on a number of party representatives to be present at a polling place; if they cannot agree, each party may send one observer.⁸

⁴ See Sanders & Clapman, *supra* note 3.

⁵ See *id.*

⁶ See *id.*

⁷ See A.R.S. §§ 16-552, -591.

⁸ *Id.* § 16-590; Arizona Department of State, *State of Arizona 2023 Election Procedures Manual* at 194 (December 30, 2023), https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf.

A. Pre-Election Challenges to Early Ballots

A challenge to an early ballot must be made before election officials open the affidavit envelope containing the ballot.⁹ Arizona law does not specify any qualifications for early ballot challengers (for instance, it does not require that they be county residents or qualified voters), and there are no limitations on *which* private parties the county political party may appoint as challengers.¹⁰

1. *Challenge Submission*

Challenges to early ballots must be in writing and specify the grounds for the challenge.¹¹ There are five possible bases for a challenge: (1) the voter has already voted in that election, (2) the voter “is not the person whose name appears on register,” (3) the voter “has not resided in th[e] state for twenty-nine days . . . preceding the election,” (4) the voter is not registered at a permissible address defined by A.R.S. § 16-121, or (5) the voter does not meet the voter eligibility requirements listed in A.R.S. § 16-101 (for instance, the voter is under age eighteen).¹² **If the challenge does not cite one of the specific grounds authorized by statute for disallowing the ballot, election officials must summarily reject it.**¹³

A challenge must be made before the early ballot is placed in the ballot box.¹⁴ If an early ballot is challenged, it must be set aside and held by the early election board or other officer in charge until the time at which the challenge is adjudicated.¹⁵

2. *Impermissible Bases for Challenges*

Even if a challenge is made following the correct procedure, certain frequently cited bases for pre-election challenges are invalid and should thus be summarily rejected. These invalid bases include, but are not limited to:

- The voter’s race, national origin, appearance, surname, language, or religion.¹⁶
- The voter did not provide documentary proof of citizenship (“DPOC”), provided that the voter meets one of the following categories:
 - The voter registered to vote using the National Mail Voter Registration Form (“Federal Form”);¹⁷
 - The voter registered to vote using the state voter registration form (“State Form”) prior to August 22, 2024;¹⁸ or

⁹ See A.R.S. § 16-552; EPM at 139.

¹⁰ A.R.S. § 16-552.

¹¹ *Id.* § 16-552(D).

¹² See *id.* §§ 16-101, -121, -121.01(B), -552(D), -591; EPM at 79-80.

¹³ *Id.* § 16-552(E).

¹⁴ *Id.* § 16-552(D).

¹⁵ *Id.*

¹⁶ EPM at 80; see also U.S. Const. amend. I, XIV, XV; 52 U.S.C. § 10301.

¹⁷ See EPM at 80.

¹⁸ See *id.*

- The voter registered to vote using the State Form on or after August 22, 2024, without DPOC, but the County Recorder was able to verify their U.S. citizenship in the Arizona Motor Vehicle Division database.¹⁹
- An alleged mismatch between the voter’s signature on the early ballot affidavit and the signature(s) on file in the voter’s registration record, where the County Recorder’s signature verification determined that the signatures sufficiently match.²⁰
- For reasons such as military service or college attendance, the voter is temporarily staying away from the residence at which they are registered to vote but has the intention of returning to that residence.²¹

3. *Decision and Processing*

Assuming the challenge meets the minimum requirements, election officials must mail the voter written notice of the challenge within twenty-four hours.²² After a four-day waiting period—but not later than the Monday after Election Day—officials must conduct a meeting to consider the challenge.²³ The voter must have “an informal opportunity to make, or to submit, brief statements regarding the challenge,” though the voter’s failure to appear “shall not be deemed to be an admission of the validity of the challenge.”²⁴ An election board need not to hold individualized hearings before dismissing a set of baseless challenges in bulk.

The challenger bears the burden of showing “by clear and convincing evidence” that the ballot should not be counted.²⁵ To meet this heightened standard, **the challenger must prove sufficient, individualized facts to establish that ineligibility is highly probable or reasonably certain.**²⁶ **As such, county recorders may not consider batches of names submitted without individualized evidence about specific voter’s ineligibility.**²⁷

If election officials reject the challenge, the vote must be counted.²⁸ If they find in favor of the challenger, the vote is not counted, and the election officials must mail the voter notice of the decision and the basis for it within three days.²⁹

¹⁹ *See id.*; Re: Treatment of State Forms Not Accompanied by DPOC, No. I24-015 Ariz. Att’y Gen. Op. (Sept. 20, 2024), <https://www.azag.gov/opinions/i24-015-r24-015>.

²⁰ *Id.*

²¹ *Id.*

²² A.R.S. § 16-552(E). The notice must include a copy of the written challenge and the time and place at which the voter may appear to defend against the challenge. *Id.* Notice must also be provided to the county chair of each political party represented on the ballot. *Id.*

²³ *Id.* The waiting period is shortened to two days if notice to the voter is sent by overnight mail or is hand delivered. *Id.*

²⁴ *Id.*

²⁵ EPM at 82; *see also* A.R.S. §§ 16-121.01(A)-(B), -552(E).

²⁶ EPM at 82.

²⁷ *See id.*, n. 41 (explaining that challenge must rebut presumption of a vote’s validity with individualized evidence).

²⁸ A.R.S. § 16-552(F).

²⁹ *Id.* § 16-552(G).

When adjudicating a challenge, the board may, in its discretion, decline to permit comments (both in-person and in writing) from anyone other than the voter, the challenger, and the designated party representatives.³⁰ Except for election contests made pursuant to A.R.S. § 16-672, the early election board’s decisions governing challenges are final and may not be appealed.³¹

B. Challenges Made at the Polling Place

Arizona law has detailed procedures governing polling place challenges.³² Election officials can protect against chaos, disruption, and wrongful disenfranchisement by ensuring that their local boards of election inspectors strictly enforce these procedures.

1. *Challenger Appointment and Qualifications*

On Election Day, “[a]ny qualified elector of the county may orally challenge a person offering to vote as not qualified . . . or on the ground that the person has voted before at that election.”³³ Thus, unlike early-ballot challengers, Election Day challengers must reside in the county and be qualified voters, and they make their challenges orally.³⁴ These observers may not enter the voting booth to make challenges.³⁵

2. *Requirements for Making a Polling Place Challenge*

Election Day challenges must cite one of the same five statutorily authorized grounds available for early-ballot challenges listed in Section I.A.1. above.³⁶ **Challenges based on other grounds are invalid on their face and must be summarily rejected.**³⁷ **As with early-ballot challenges, the burden is on the challenger to show by clear and convincing evidence that the vote should not be counted.**³⁸

3. *Decision and Processing*

Election Day challenges are resolved at the polling place before the challenged voter casts a ballot.³⁹ Election officials can address questions to the challenged voter designed to confirm the voter’s eligibility.⁴⁰ No other party may address questions to the voter, including the challenger, and the challenger may not harass or intimidate the challenged voter.⁴¹ If the challenged voter appears to be registered, election

³⁰ *Id.* § 16-552(E).

³¹ *Id.*

³² *See id.* § 16-591.

³³ *Id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.* §§ 16-121.01(B), -591; EPM at 194.

³⁷ *Id.* at 194-95.

³⁸ A.R.S. § 16-121.01(B); EPM at 194.

³⁹ *See* A.R.S. § 16-592; EPM at 196. Challenges are considered by the inspector and two election judges. *Id.*

⁴⁰ A.R.S. § 16-592(A); EPM at 196.

⁴¹ A.R.S. § 16-592(A); EPM at 196.

officials must have them orally take the oath printed on the state voter registration form.⁴² The voter may also swear in her answer to “questions material to the challenge” asked by an election official.⁴³

If the voter appears to be registered and takes the oath, election officials must reject the challenge and permit the voter to cast a regular ballot.⁴⁴ If the voter refuses to affirm her eligibility or answer material questions from election officials, or if the election officials find the challenge valid by a majority vote, then the voter must be permitted to cast a provisional ballot.⁴⁵

II. Other Legal Requirements

As you know, both federal and Arizona law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted in bulk—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, all Arizona election officials have the responsibility to protect Arizona voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

A. Racially Discriminatory Challenges

Organized challengers frequently target voters from historically disenfranchised communities in an attempt to intimidate or deter members of those communities from voting.⁴⁶ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment⁴⁷ and Section 2 of the Voting Rights Act⁴⁸ prohibit the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”⁴⁹ Because these are often the exact groups targeted by mass challenges, local elections officials should consider carefully whether granting mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race.

⁴² A.R.S. § 16-592(A); EPM at 196. Specifically, the voter must repeat: “I swear or affirm that the information in my voter registration is true, that I am a resident of Arizona, I have not been convicted of a felony or my civil rights have been restored, and I have not been adjudicated incapacitated with my voting rights revoked.” *Id.*

⁴³ See A.R.S. § 16-592(A); EPM at 196.

⁴⁴ A.R.S. § 16-592(B); EPM at 196.

⁴⁵ A.R.S. § 16-592(C); EPM at 196.

⁴⁶ See, e.g., Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Just. at 11-12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

⁴⁷ U.S. Const. amend XIV, § 1.

⁴⁸ 52 U.S.C. § 10301.

⁴⁹ See *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies*, U.S. Dept. of Justice (Sept. 1, 2021), <https://www.justice.gov/opa/press-release/file/1429486/download>.

B. Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation, because such challenges are often made in bad faith to deter eligible citizens—including members of historically disenfranchised groups—from voting. Such voter intimidation is illegal under both federal and Arizona law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a federal election has committed a federal crime.⁵⁰ Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”⁵¹ In 2016, a federal court determined that voter challenges that intentionally target geographic areas with a large percentage of racial or ethnic minorities and that had the purpose or effect of deterring qualified members of those minority groups from voting violated a court order in a case involving claims under Section 11(b).⁵² Further, the U.S. Department of Justice has cautioned that challenges made with the intention of or that have the effect of intimidating a reasonable voter can violate Section 11(b).⁵³ And the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of their choice.⁵⁴

Similarly, Arizona law criminalizes “in *any manner* practice[ing] intimidation upon or against any person” in order to “induce or compel such person to vote or refrain from voting[.]”⁵⁵

Under state law, challenges at a polling place must be directed only to poll workers.⁵⁶ Importantly, no challenger may confront or question a voter directly.⁵⁷ Any challenges based at all on race, national origin, disability, language, or religion may constitute voter intimidation.⁵⁸ Repeated frivolous challenges, or those that are made to harass

⁵⁰ 18 U.S.C. § 594.

⁵¹ 52 U.S.C. § 10307(b).

⁵² See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at *2 (D.N.J. Nov. 5, 2016).

⁵³ See *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act*, 52 U.S.C. § 20507, U.S. Dept. of Justice at 3 (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

⁵⁴ 42 U.S.C. § 1985(3).

⁵⁵ A.R.S. § 16-1013(A)(1) (emphasis added).

⁵⁶ See *Arizona: Protections Against Intimidation of Voters and Election Workers*, Brennan Ctr. for Just. (2024), https://www.brennancenter.org/our-work/research-reports/arizona-protections-against-intimidation-voters-and-election-workers#footnote6_gOZipCnsmyzr.

⁵⁷ See *id.*

⁵⁸ EPM at 182-83. Note that this section of the EPM has been preliminarily enjoined by a trial court. *Arizona Free Enterprise Club v. Fontes*, No. CV 2024-002760 (Ariz. Superior Ct., Maricopa Cty., Aug. 5, 2024). That decision is currently being appealed. Regardless of the

or intimidate voters, may amount to prohibited voter intimidation, and the challenger may be removed from the polling place.⁵⁹

Election officials may remove political party observers for failure to comply with a request to cease an activity that interferes with the election process or violates Tribal, state, or federal law.⁶⁰ If an observer is asked by the inspector or other officer in charge to cease an activity that interferes with the election process or election staff or poll workers, the observer must comply or face possible ejection.⁶¹

To that end, each county recorder and local board of elections inspector should review their duties and responsibilities to maintain a peaceful and orderly polling place and be prepared to remove any challengers who fail to abide by Arizona law. County recorders and boards of elections inspectors should also promptly refer incidents of voter intimidation, including repeated impermissible voter challenges orchestrated by partisan outside groups, to the Arizona Attorney General's Office⁶² and U.S. Department of Justice (DOJ).⁶³

C. Uniform and Nondiscriminatory Standards

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.⁶⁴ Under the U.S. Constitution, counties in the same state are prohibited from “us[ing] varying standards to determine what [i]s a legal vote” when processing ballots in presidential elections.⁶⁵ Similarly, the National Voter Registration Act (NVRA) mandates that any voter registration list maintenance activity be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]”⁶⁶ including “any list maintenance activity based on third party submissions.”⁶⁷ The U.S. Department of Justice has advised that numerous list maintenance methods commonly used in mass voter eligibility challenges might violate the NVRA, including “comparing voter files to outdated or inaccurate records or databases, taking action that erroneously affects a particular class of voters (such as newly naturalized

court's rulings on the specific guidance in the EPM, however, as detailed herein, both Arizona and federal law prohibit voter intimidation and discrimination in the administration of elections.

⁵⁹ EPM at 182-83.

⁶⁰ *Id.*

⁶¹ *Id.* at 194, n.83.

⁶² The Arizona Attorney General's office can be reached at 602-542-5025.

⁶³ The DOJ Civil Rights Division can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ's resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

⁶⁴ *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution's Equal Protection Clause).

⁶⁵ *Id.* at 107.

⁶⁶ 52 U.S.C. § 20507(b).

⁶⁷ DOJ Guidance at 3.

citizens), or matching records based solely on first name, last name, and date of birth.”⁶⁸

The NVRA further mandates that election officials may not “systematically remove” ineligible voters from voter registration rolls within 90 days preceding an election for federal office.⁶⁹ According to the U.S. Department of Justice, this restriction “applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.”⁷⁰

County recorders should work to eliminate any meaningful divergence among them in the standards and processes used to evaluate voter challenges in different municipalities and replace them with uniform standards and processes. By doing so, Arizona voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.⁷¹

D. Removals Based on Change of Address

The NVRA strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when removals are triggered by mass eligibility voter challenges.⁷² Election officials may only remove a voter from the list of registered voters based on change in residence when: (1) the voter confirms in writing that they have moved outside of the jurisdiction; or (2) election officials have satisfied the process outlined in Section 8(d)(2) of the NVRA.⁷³ The United States Department of Justice has cautioned that “[a] third-party submission—such as a submission of another individual’s information via an online portal or a challenge based solely on public database information—is not confirmation by the registrant of a change of address.”⁷⁴ Consequently, **removing individuals from the list of registered voters due to suspected change of address on the basis of mass voter eligibility challenges alone likely violates the NVRA.**⁷⁵

* * *

By ensuring compliance with the processes, requirements, and limitations of Arizona’s voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. Our hope is that this summary of the relevant law will help you to prepare proactively to develop written procedures and policies for adjudicating such challenges where necessary—and train your staff, volunteers, and

⁶⁸ *Id.*

⁶⁹ 52 U.S.C. § 20507(b)(1).

⁷⁰ DOJ Guidance at 4.

⁷¹ *Bush*, 531 U.S. at 104-05.

⁷² *See* 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

⁷³ *See* 52 U.S.C. § 20507(b)-(d); DOJ Guidance at 4. The DOJ Guidance also provides detailed information on the requirements of Section 8(d)(2). Election officials may only remove a voter under Section 8(d)(2) of the NVRA if that voter: (1) does not vote in any election between the date the notice was sent and the second general election following the notice; and (2) does not respond to the notice. 52 U.S.C. § 20507(d)(2).

⁷⁴ DOJ Guidance at 4.

⁷⁵ *Id.* at 4-5.

election inspectors on the requirements of Arizona and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Arizonans' freedom to vote.

Sincerely,

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