LAW OFFICES
SHERMAN & HOWARD L.L.C.
2555 EAST CAMELBACK ROAD, SUITE 1050,
PHOENIX, ARIZONA 85016-4258
TELEPHONE: 602.240.3000
FACSIMILE: 602.240.6600
(AZ BAR FIRM NO. 00441000)
Craig A. Morgan (AZ Bar No. 023373)
(CMorgan@ShermanHoward.com)
Shayna Stuart (AZ Bar No. 034819)
(SStuart@ShermanHoward.com)
Jake T. Rapp (AZ Bar No. 036208)
(JRapp@ShermanHoward.com)
Attorneys for Arizona Secretary of State Adrian Fontes

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA DEMOCRATIC PARTY, et al.,

Plaintiffs,

v.

NO LABELS, et al.,

Defendants.

CASE NO. CV2023-004832

DEFENDANT ARIZONA SECRETARY OF STATE ADRIAN FONTES' REPLY IN SUPPORT OF MOTION TO DISMISS

BEFORE THE HON. KATHERINE COOPER

(ORAL ARGUMENT REQUESTED)

Both the Secretary's and No Labels' Motions explain why Plaintiffs' requested relief is unavailable as a matter of law.[1] In response, Plaintiffs decry "dismissal at this early stage, before any discovery," but no discovery is needed to resolve the purely legal issues (*i.e.*, statutory interpretation) central to, and dispositive of, this case. Resp. at 2:4, 2:24. Indeed, Plaintiffs' Complaint hinges on the wholesale legal conclusion that No Labels cannot be recognized as a party as a matter of statutory construction. Compl., ¶¶ 30–35. Thus, discovery is no impediment to resolving the issues the Defendants have raised.

As we know, when faced with a motion to dismiss, Arizona courts do not assume as true a complaint's legal conclusions. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005). And, *as a matter of law,* (1) A.R.S. §§ 16-801 through 804 do not allow

[1] All terms defined in the Secretary's Motion shall be ascribed the same definition in this Reply.

Plaintiffs to challenge the Secretary's decision to recognize No Labels as a new political party, (2) Plaintiffs' requested declaratory and injunctive relief are unavailable, and (3) Plaintiffs' requested mandamus relief is inappropriate.

Plaintiffs fail to state any claim as a matter of law. And their response does not compel a contrary conclusion. Thus, for the following reasons, this Court should dismiss the Complaint with prejudice.

A. PLAINTIFFS CANNOT CHALLENGE THE SECRETARY'S DETERMINATION BECAUSE THEY LACK A PRIVATE RIGHT OF ACTION

Plaintiffs admit there is no express private right of action in A.R.S. §§ 16-801 through 804. Resp. at 16:3–17. Relying on *Chavez v. Brewer*, Plaintiffs argue they nonetheless have an implied right to override the Secretary's duty to recognize No Labels as a political party. *Id.* (citing, 222 Ariz. 309, 318, ¶¶ 25, 28 (App. 2009)). Not so.

Arizona courts assess a purported implied private right of action by considering "whether such a right is consistent with the context, language, subject matter, effects, and purpose of the statutory scheme." *Chavez*, 222 Ariz. at 318, ¶ 25. There is no implied right "where third persons are only incidental beneficiaries of the statutory enactment." *McCarthy v. Scottsdale Unified Sch. Dist. No. 48*, 409 F. Supp. 3d 789, 820 (D. Ariz. 2019). "Similarly, where the statute's intended benefit was something broad, not designed for a special class of voters," courts have "found no implied right of action." *Id.* (citing *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 195, ¶ 8 (App. 2014)).

To start, Plaintiffs do not explain how they are "members of the class for whose *especial* benefit the statutes were adopted." *See* Resp. at 16:12–13 (cleaned up, emphasis added). Indeed, A.R.S. §§ 16-801 through 804 are not designed for a special class of voters, but to "ensure the administration of free and fair elections" for *all* voters. *Id.* at 16:9–13. This is why Plaintiffs' reliance on *Chavez* is misplaced. The *Chavez* court held that "*certain* qualified electors could maintain a private cause of action based on election officials' alleged failure to provide voting machines in compliance with statutory requirements." *McNamara*, 236 Ariz. at 196, ¶ 9 (citing 222 Ariz. at 311, ¶ 1 (App. 2009)) (emphasis

added). "The *Chavez* plaintiffs *were not simply members of the electorate*, but individuals with disabilities and persons whose primary language was not English." *Id.* (emphasis added).

Conversely, in this action, Plaintiffs are a political party (the Democratic Party), and qualified elector who is also a member of that party, who are concerned with the competition a new recognized political party may bring to the ballot box. Compl., ¶¶ 10, 12. Plaintiffs are not "a special class of voters for whose *specific* benefit" the new political party recognition statutes were enacted; they are not seeking recognition of a new political party at all, or are even members of No Labels. *Id.* (emphasis added). Therefore, having no claims for being denied a specific benefit from the statutes at issue, Plaintiffs do not have an implied private right of action to challenge the Secretary's assessment of new political party petitions. *McNamara*, 236 Ariz. at 196, ¶¶ 9–10 (no private right of action in election statutes concerning campaign finance despite statutory purpose to broadly ensure "transparency and integrity" in elections).

Plaintiffs next assert that there is "long-standing precedent" that permits their requested relief "in the election-law context." Resp. at 2:28–29. Not so. No Arizona court has held that an established political party or its elector can challenge the Secretary's assessment of a new political party petition. And there is no blanket right to bring an action just because the claims relate to election laws. *See, e.g.*, *McNamara*, 236 Ariz. at 196, ¶ 14 (statute on how political committees must dispose of surplus monies does not have implied private right of action); *Pacion v. Thomas*, 225 Ariz. 168, 170, ¶ 12 (no right of action "to disqualify signatures on initiative and referendum petitions obtained before the formation of a political committee[]").

Moreover, the language of A.R.S. §§ 16-801 through 804 is inconsistent with an implied private right of action. Sec'y Mot. at 5:17–6:5. By contrast, there are express statutory mechanisms to challenge nomination petitions and election results. *See, e.g.*, A.R.S. §§ 16-351(B) ("Any elector may challenge a candidate for any reason relating to the office sought as prescribed by law, including age, residency, professional requirements, or

failure to fully pay fines, penalties or judgments"), 16-672(A) ("Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office[]"); *cf. also* A.R.S. § 16-552(D) (exclusive procedures for challenging an early ballot). But A.R.S. §§ 16-801 through 804 contain no such right of action. This must have been intentional since the legislature knows how to provide a private right of action when the legislature desires to do so. *See, e.g., id.*; *P.F.W., Inc. v. Superior Court*, 139 Ariz. 31, 34 (App. 1984) ("[W]e must assume that the legislature intended different consequences to flow from the use of different language.").

Plaintiffs argue that not having a right of action "would deprive citizens of any means or opportunity to challenge the legal sufficiency of the inclusion of a new party on their ballots." Resp. at 16:27–17:1 (cleaned up). But this concern boils down to a fear of frivolous candidates or ballot competition rather than new political parties. Resp at 9:2-12. The new political party petition statutes do "not qualify to have candidates on the ballot. Candidates must meet the additional support requirements through petition signatures or write-in votes." *Ariz. Libertarian Party v. Reagan*, No. CV-16-01019-PHX-DGC, 2017 WL 2929459, at *10 (D. Ariz. July 10, 2017), *aff'd sub nom. Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019). And as we know, candidate challenges exist, and private voters can bring such challenges to a candidate's nomination and qualifications. *See* A.R.S. § 16-351. Even so, the Secretary's recognition of a new political party does not entail that a particular candidate from that party may run in an election. Moreover, there is no precedent supporting the conclusion that a fear of competition at the ballot box from another political party is grounds to obtain judicial nullification of a political party's right to ballot access. Plaintiffs' unfounded fears simply do not imply a private right of action.

Plaintiffs next contend that "given the limits of the sampling procedure, [80%] of the petition signatures . . . will never receive any review at all[,]" presumably serving as a reason why a private right of action must be implied. Resp. at 8:27–9:1. This argument collapses under scrutiny. The legislature means what it says, and had it wanted to provide a private right of action in this context, it could have done so. *See Owner-Operator Indep. Drivers*

Ass'n v. Pac. Fin. Ass'n, Inc., 241 Ariz. 406, 410, ¶ 14 (App. 2017) ("When the language of a statute is clear and unambiguous, a court should not look beyond the language, but rather simply apply it without using other means of construction, assuming that the legislature has said what it means." (cleaned up)). The legislature made no such provision and we cannot rewrite the law to suit Plaintiffs' desires. *See Lewis v. Debord*, 238 Ariz. 28, 31, ¶ 11 (2015) ("It is not the function of the courts to rewrite statutes …." (cleaned up)).

Moreover, Plaintiff's argument ignores that *all* signatures are reviewed by the Secretary to confirm each signer provided all the required information. A.R.S. § 16-803(B)(2). And in any event, the random sample process identified is expressly required by statute. A.R.S. § 16-803(I) ("If the number of valid signatures as projected from the random sample . . . is at least [100%] of the minimum number required by this section, *the party shall be recognized*. If the number of valid signatures as projected from the random sample is less than [100%] of the minimum number, *the party shall not be recognized*." (emphasis added)). The legislature could have opted for something different but did not. And this Court is not the place for a party to rewrite the law. *See Debord*, 238 Ariz. at 31, ¶ 11. That relief must be sought through our legislature. *See McNamara*, 236 Ariz. at 196, ¶ 14 ("If a statute is [alleged to be] oppressive or unworkable, relief lies with the legislative department." (cleaned up)).

Plaintiffs argument also fails to account for the fact that the Secretary's review of a new political party petition is supplemented by other election officials, so even if Plaintiff's hypothetical fear of an inadequate review could give rise to a cause of action (and it cannot), that fear is unfounded. *See* A.R.S. § 16-803(C) (the Secretary must send a 20% random sample of the signatures to county recorders for verification), (E) (county recorders assess whether signatures should be disqualified), (H) (the Secretary determines the number of valid signatures by subtracting both those disqualified by the county recorders and "a like percentage from those signatures remaining"); *see also* 2019 EPM at 261. These layers of review help ensure that a new political party petition is support by the appropriate number of qualified electors. *Id.* And more critically, the legislature determined these protections

are enough; no other mechanisms were expressly provided and none can be inferred here. *See Roberts v. State*, 253 Ariz. 259, ¶ 20 (2022) ("It is a foundational rule of statutory construction that courts will not read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself, and similarly the court will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions." (cleaned up)). In fact, other election laws rely on limited random samples to assess the veracity of vote outcomes. *See, e.g.*, A.R.S. §§ 16-602(B) (post-election hand count audit of ballots cast in-person uses random sample) (F) (post-election hand count audit of early ballots use limited random sample). If Plaintiffs disagree with the legislature's statutory scheme for analyzing new political party petitions, then Plaintiffs' grievances must be addressed by the legislature rather than the courts. *McNamara*, 236 Ariz. at 196, ¶ 14 ("If a statute is [alleged to be] oppressive or unworkable, relief lies with the legislative department." (cleaned up)).

In the end, Plaintiffs fail to show they have a right of action to challenge the Secretary's assessment of new political party petitions. Thus, it follows that Plaintiffs cannot request any special action, declaratory, injunctive, or mandamus relief premised on the existence of such a right.[2] *Lancaster v. Ariz. Bd. Of Regents*, 143 Ariz. 451, 457 (App. 1984) ("Because no private right of action exists . . . there is no basis for the Declaratory Judgment relief sought . . . nor for the Mandamus relief sought"); A.R.S. § 12-1802(4) (injunctions "shall not" be issued to stop "enforcement of a public statute by officers of the law for the public benefit").

B. PLAINTIFFS' REQUESTED DECLARATORY AND INJUNCTIVE RELIEF IS UNAVAILABLE AS A MATTER OF LAW

The Secretary agrees with, and incorporates by reference, No Labels' argument that

[2] Plaintiffs assert that the Secretary admits they "at most may seek possible injunctive or mandamus relief." Resp. at 16:24–25. This misunderstands the Secretary's position. *See* Sec'y Mot. at 5:24–6:6 (lack of a private right of action entails that Plaintiffs' claims must be dismissed with prejudice). Plaintiffs are not entitled to injunctive or mandamus relief *here* because they do not have a private right of action and their interpretation of the law is wrong. *Id.* at 9:11–21.

Plaintiffs' interpretation of A.R.S. § 16-801 fails. In the interest of judicial economy, rather than repeat all those arguments again here, the Secretary highlights the fact Plaintiffs fail to rebut certain related points he made in his Motion, which further compels dismissal.

1. THE ELECTORS' AFFIDAVITS VERIFIED THE PETITION

Plaintiffs argue that "A.R.S. § 16-801(A)(1) obligates the affiants to verify the petition as a whole – that is, that they must attest to the accuracy, completeness, and integrity of the final packet of signature sheets filed with the Secretary." Resp. at 6:27–7:2. The problem with this argument is that there is no such express requirement anywhere in A.R.S. §§ 16-801 through 804.

Instead, A.R.S. §§ 16-801 through 804 prescribe the procedures for the Secretary and other public officials to evaluate a new political party petition's accuracy, completeness, and integrity. The Secretary performs an initial review of the signatures and removes those lacking all the required information. A.R.S. § 16-803(B)(2). Subsequent reviews of the petition involve other public officials. *See* A.R.S. § 16-803. None of these tasks are assigned to the Electors and we cannot create a statutory responsibility where none exists. *Ponderosa Fire Dist. v. Coconino Cnty.*, 235 Ariz. 597, 604, ¶ 30 (App. 2014) ("Where a statute is silent on an issue, we will not read into it . . . nor will we inflate, stretch or extend the statute to matters not falling within its expressed provisions.").

Plaintiffs also assert that the Petition "was never verified by any No Labels elector." Resp. at 7:5–6. But the Electors did just that, stating: "We, the ten undersigned qualified electors of the state of Arizona, request that the signers of the attached petitions be recognized as a new political party, to be called No Labels Party." Sec'y Mot., Ex. A. The Electors' job is to verify that there is a petition for formation of a new political party. A.R.S. § 16-801(A)(1). Conversely, the Electors' "status as qualified electors of the signers of the affidavit *shall be certified by the county recorder* of the county in which they reside." A.R.S. § 16-801(A)(1) (emphasis added). Detailed statutory procedures prescribe how public officials assess the signatures for a petition. A.R.S. § 16-803. And any verification of the "integrity" of a petition is done by public officials rather than the Electors, signers,

or any other private actors.[3] *Id.* Plaintiffs may prefer differently, but their remedy for change lies with the legislature, not with this Court.

2. THE ELECTORS' AFFIDAVIT FORMS COMPLY WITH THE LAW

First, Plaintiffs fail to address the Secretary's argument that, since A.R.S. § 16-801(A)(3) calls for specific wording for a petition caption but *not* for the Electors' affidavits, it follows that Plaintiffs' critique of the Electors' affidavits' language cannot state a claim. Sec'y Mot. at 7:22–4. Plaintiffs thereby concede the Secretary's point. *See* Ariz. R. Civ. P. 7.1(b)(1), (2); *Tapestry on Cent. Condo. Ass'n v. Liberty Ins.*, No. CV-19-01490-PHX-MTL, 2021 WL 1171504, at *14 (D. Ariz. Mar. 29, 2021) (collecting cases deeming a party's lack of response to argument made at summary judgment as a concession of the validity of an opposing party's argument on the merits).

Second, Plaintiffs fail to rebut the reality that the Complaint fails to provide any well-pled facts supporting their legal conclusion that the Electors' affidavits do not substantially comply with A.R.S. § 16-801(A). For example, Plaintiffs do not rebut the Secretary's argument that the Complaint does not allege subtracting the number of signatures after the last Elector executed their affidavit reduces the number of signatures below the required amount for ballot access. Sec'y Mot. at 9 n.5. Plaintiffs also concede these points by ignoring them. *See* Ariz. R. Civ. P. 7.1(b)(1), (2); *Tapestry on Cent. Condo. Ass'n*, 2021 WL 1171504, at *14.

Both the Petition and the Secretary's electronically available forms substantially comply with A.R.S. § 16-801.[4] That is sufficient to justify the Secretary's decision to

[3] Plaintiffs assertion that the Electors are required to know "the identities of all the petition signers[]" is nowhere to be found in the statutes. Resp. at 8:16–18. Again, Plaintiffs are forced into imposing public officials' duties onto private actors in order to make their claims viable. This we cannot do. *Ponderosa Fire Dist..*, 235 Ariz. at 604, ¶ 30 ("Where a statute is silent on an issue, we will not read into it . . . nor will we inflate, stretch or extend the statute to matters not falling within its expressed provisions.").

[4] Plaintiffs opine that the 2019 EPM provisions related to new political party petitions lack the force of law. Resp. at 12:2–19. But Plaintiffs are not seeking any relief to enjoin enforcement of these provisions. *See* Compl., Prayer for Relief, ¶¶ A–D (only seeking mandamus, declaratory, and injunctive relief on the Secretary's actions and No Labels' status as a new political party).

recognize No Labels as a new political party.

3. NO LABELS' CORPORATE STATUS IS IRRELEVANT

No Labels' corporate status simply does not matter for purposes of this action. *See* Resp. at 3:8–19 (complaining about No Labels corporate status without explaining how this affects the Petition). Critically, Plaintiffs do not even attempt to address either Defendants' arguments in this regard, let alone explain why or how this matters. *See id.*; *see also* Sec'y Mot. at 9:23–10:9. So, Plaintiffs again concede the Secretary's point. *See* Ariz. R. Civ. P. 7.1(b)(1), (2); *Tapestry on Cent. Condo. Ass'n*, 2021 WL 1171504, at *14.

C. PLAINTIFFS ARE NOT ENTITLED TO MANDAMUS RELIEF

Plaintiffs assert that "[m]andamus is available as a procedural mechanism here because [they] allege . . . a nondiscretionary duty to reject the No Labels' petition . . . ." Resp. at 14:16–19. This is wrong for multiple reasons.

First, as explained above and in No Labels' briefing, the Secretary followed the law in recognizing No Labels as a new political party. And no law "specifically imposes" on the Secretary a duty to review the Petition *to Plaintiffs' satisfaction*. *Sensing v. Harris*, 217 Ariz. 261, 263, ¶ 6 (App. 2007). Plaintiffs argue that this truth confuses the merits of their claims with the procedures for bringing mandamus. Resp. at 14:14–19. But a mandamus claim that rests upon a faulty legal conclusion necessarily fails as a matter of law. *See Joshua Tree Health Ctr., LLC v. State*, No. ___ Ariz. ___, ¶ 20, 1 CA-CV 22-0427, 2023 WL 3312945, at *4, ¶ 20 (App. 2023) (mandamus relief not available where law at issue did not require public agency to perform act demanded by plaintiffs). And Plaintiffs' mandamus claim rests upon the faulty legal conclusion that the Secretary has a duty to act as Plaintiff prefers. Thus, Plaintiffs' mandamus claim fails.

Second, Plaintiffs fail to engage with, let alone overcome, the Secretary's argument that mandamus in unavailable because Plaintiffs' claim targets alleged errors in performance rather than a total refusal to act. Sec'y Mot. at 11:13–12:2. The mandamus statute only permits relief based on allegations that a public official "refused to perform [his] statutory duties . . . ." *Transp. Infrastructure Moving Ariz.'s Econ. v. Brewer*, 219 Ariz. 207, 213, ¶

32 (2008). Not allegations, as Plaintiffs proffer, that a public official erred in the performance of his duties. *Id.*; *Stagecoach Trails MHC, L.L.C.*, 231 Ariz. at 370, ¶ 21. Plaintiffs' failure to even try to clear this hurdle speaks volumes and is dispositive of their mandamus claim.

Third, Plaintiffs are not entitled to mandamus merely because they allege the Secretary should have assessed a petition differently. Resp. at 13:16–25. As explained above and in No Labels' briefing, the Secretary need only assess a new political party petition for substantial compliance with the applicable statutes. Sec'y Mot. at 8:5–18. And the assessment of new political party petition falls within the discretion of the Secretary and other election officials. A.R.S. § 16-804(C) ("The secretary of state shall determine the political parties qualified for continued representation on the state ballot"), (D) ("Each county recorder shall determine the political parties for the county ballot"), (E) ("Each city or town clerk of a city or town providing for partisan elections shall determine the political parties qualified for such city or town ballot"). Mandamus relief cannot be used to control or dictate a public official's discretionary power to assess whether a petition substantially complies with the law. *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995) ("Mandamus may compel the performance of a ministerial duty or compel the officer to act in a matter involving discretion, but not designate how that discretion shall be exercised.").

D. CONCLUSION

This Court should dismiss this action with prejudice.

RESPECTFULLY SUBMITTED: June 5, 2023.

SHERMAN & HOWARD L.L.C.

By /s/ *Craig A. Morgan*
Craig A. Morgan
Shayna Stuart
Jake T. Rapp
2555 East Camelback Road, Suite 1050
Phoenix, Arizona 85016
Attorneys for Arizona Secretary of State Adrian Fontes

ORIGINAL of the foregoing electronically filed and copy delivered via email and eServed via the AZTurboCourt eFiling system on June 5, 2023 to:

Roy Herrera
Daniel A. Arellano
Jillian L. Andrews
Austin T. Marshall
Herrera Arellano LLP
1001 N. Central Avenue, Suite 404
Phoenix, AZ 85004
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com
austin@ha-firm.com
Attorneys for Plaintiffs

David Rosenbaum
Andrew Pappas Emma Cone-Roddy
Osborn Maledon, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
drosenbaum@omlaw.com
apappas@omlaw.com
econe-roddy@omlaw.com
Attorneys for Defendant No Labels

Celeste Robertson
Apache County Attorney's Office
245 West 1st South
St. Johns, Arizona 85936
crobertson@apachelaw.net
groupmail@apachecountyaz.gov
Attorneys for Defendant Apache County Board of Supervisors

Christine J. Roberts
Paul Correa
Cochise County Attorney's Office
PO Drawer CA
Bisbee, AZ 85603
CRoberts@cochise.az.gov
PCorrea@cochise.az.gov
Attorneys for Defendant Cochise County Board of Supervisors

William Ring
Monique Coady
Heather Mosher
Lindsay Daley
Coconino County Attorney's Office
110 East Cherry Avenue
Flagstaff, Arizona 86001
WRing@coconino.az.gov
MCoady@coconino.az.gov
HMosher@coconino.az.gov

LDaley@coconino.az.gov
Attorneys for Defendant Coconino County Board of Supervisors

Jean A. Roof
Graham County Attorney's Office
800 Main Street
Safford, Arizona 85546
JRoof@graham.az.gov
Attorneys for Defendant Graham County Board of Supervisors

Jefferson R. Dalton
Deputy County Attorney
Gila County Attorney's Office
1400 E. Ash St.
Globe, Arizona 85501
Telephone: (928) 402-8630
jdalton@gilacountyaz.gov
Attorneys for Gila County Board of Supervisors

Gary Griffith
Greenlee County Attorney's Office
PO Box 1717
Clifton, Arizona 85533
GGriffith@greenlee.az.gov
Attorneys for Defendant Greenlee County Board of Supervisors

Tony Rogers
Jason Mitchell
La Paz County Attorney's Office
1320 Kofa Ave.
Parker, Arizona 85344
jmitchell@lapazcountyaz.org
Attorneys for Defendant Laz Paz County Board of Supervisors

Joseph E. La Rue
Anna G. Critz
Jack L. O'Connor III
Maricopa County Attorney's Office
225 West Madison Street
Phoenix, Arizona 85003
laruej@mcao.maricopa.gov
critza@mcao.maricopa.gov
oconnorj@mcao.maricopa.gov
ca-civilmailbox@mcao.maricopa.gov
Attorney for Defendant Maricopa County Board of Supervisors

Ryan H. Esplin
William Davis
Mohave County Attorney's Office
PO Box 7000
Kingman, AZ 86402
EspliR@mohave.gov
DavisW@mohave.gov
Attorneys for Defendant Mohave County Board of Supervisors

Jason S. Moore
Navajo County Attorney's Office
PO Box 668
Holbrook, AZ 86025
Jason.Moore@navajocountyaz.gov
Attorneys for Defendant Navajo County Board of Supervisors

Daniel Jurkowitz
Pima County Attorney's Office
32 North Stone Ave., Suite 2100
Tucson, Arizona 85701
Daniel.Jurkowitz@pcao.pima.gov
Attorneys for Defendant Pima County Board of Supervisors

Craig Cameron
Pinal County Attorney's Office
PO Box 887
Florence, Arizona 85132
Craig.cameron@pinal.gov
Attorneys for Defendant Pinal County Board of Supervisors

Robert F. May
Santa Cruz County Attorney's Office
2150 N. Congress Dr., #201
Nogales, Arizona 85621
rmay@santacruzcountyaz.gov
Attorneys for Defendant Santa Cruz County Board of Supervisors

William J. Kerekes
Yuma County Attorney's Office
250 W. 2nd Street, Suite G
Yuma, Arizona 85364
Bill.Kerekes@yumacountyaz.gov
Attorneys for Defendant Yuma County Board of Supervisors

Thomas M. Stoxen
Michael J. Gordon
Yavapai County Attorney's Office
255 East Gurley Street
Prescott, Arizona 86301
Thomas.Stoxen@yavapaiaz.gov
Michael.Gordon@yavapaiaz.gov
Attorneys for Defendant Yavapai County Board of Supervisors

/s/ *Tammy Sue Potter*

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Andrew Pappas at apappas@omlaw.com
Anna G. Critz at critza@mcao.maricopa.gov
Austin Marshall at austin@ha-firm.com
Bill Kerekes at bill.kerekes@yumacountyaz.gov
Celeste Robertson at crobertson@apachecountyaz.gov
Christine Roberts at croberts@cochise.az.gov
Craig Cameron at craig.cameron@pinal.gov
Daniel Arellano at daniel@ha-firm.com
Daniel Jurkowitz at daniel.jurkowitz@pcao.pima.gov
David Rosenbaum at drosenbaum@omlaw.com
Emma Cone-Roddy at econe-roddy@omlaw.com
Gary Griffith at ggriffith@greenlee.az.gov
Heather Mosher at hmosher@coconino.az.gov
Jack O'Connor III at oconnorj@mcao.maricopa.gov
Jason Mitchell at jmitchell@lapazcountyaz.org
Jason Moore at jason.moore@navajocountyaz.gov

Jean Roof at jroof@graham.az.gov
Jefferson Dalton at jdalton@gilacountyaz.gov
Jillian Andrews at jillian@ha-firm.com
Joseph LaRue at laruej@mcao.maricopa.gov
Lindsay Daley at ldaley@coconino.az.gov
Maricopa County Attorney's Office at ca-civilmailbox@mcao.maricopa.gov
Michael Gordon at michael.gordon@yavapaiaz.gov
Monique Coady at mcoady@coconino.az.gov
Paul Correa at pcorrea@cochise.az.gov
Robert F. May at may@santacruzcountyaz.gov
Roy Herrera at roy@ha-firm.com
Ryan Esplin at eplir@mohave.gov
Thomas Stoxen at thomas.stoxen@yavapaiaz.gov
William Davis at davisw@mohave.gov
William Ring at wring@coconino.az.gov