

1 Sarah R. Gonski (Bar No. 032567)  
PERKINS COIE LLP  
2 2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
3 Telephone: 602.351.8000  
Facsimile: 602.648.7000  
4 SGonski@perkinscoie.com

5 Roy Herrera (Bar No. 032901)  
Daniel A. Arellano (Bar No. 032304)  
6 BALLARD SPAHR LLP  
1 East Washington Street, Suite 2300  
7 Phoenix, Arizona 85004-2555  
Telephone: 602.798.5400  
8 Facsimile: 602.798.5595  
HerreraR@ballardspahr.com  
9 ArellanoD@ballardspahr.com

10 *Attorneys for the Arizona Democratic Party*

11 [additional counsel listed on signature page]

12

13

**ARIZONA SUPERIOR COURT**

14

**COUNTY OF MARICOPA**

15

16

LAURIE AGUILERA, et al.,

Case No. CV2020-014562

17

Plaintiff,

**ARIZONA DEMOCRATIC PARTY'S  
MOTION TO DISMISS**

18

vs.

Expedited Election Matter

19

ADRIAN FONTES, et al.,

20

Defendants.

21

22

23

24

25

26

27

28

1 **INTRODUCTION**

2 This is Plaintiffs’ third iteration of their lawsuit stemming from the fringe  
3 “SharpieGate” conspiracy. The relief Plaintiffs seek is again both confusing and absurd:  
4 Ms. Aguilera, for her part, asks to vote twice—once on election day and once again more  
5 than two weeks later. Compl. ¶ 4.30(B). Mr. Drobina, meanwhile, acknowledges that his  
6 vote was deposited and his sole contention appears to be that his ballot should have been  
7 processed by a tabulator machine automatically onsite.

8 The Court should promptly dismiss this case. Plaintiffs lack standing, both because  
9 they have not alleged an injury-in-fact and because the relief they seek would either be  
10 illegal or would fail to redress any injury they purport to have suffered. Plaintiffs also fail  
11 to state a claim: there is no requirement under Arizona law that ballots cast on election day  
12 be tabulated “automatically and perfectly” *onsite* at the voting location.

13 Plaintiffs also circumvent the specific class action certification requirements of Rule  
14 23 by claiming, in a footnote, to bring their claims on behalf of other voters not present  
15 here. For these and the reasons stated in the Maricopa County Defendants’ Motion to  
16 Dismiss, Plaintiffs’ Complaint should be dismissed with prejudice.

17 **ARGUMENT**

18 **I. Plaintiffs Lack Standing.**

19 The Arizona Supreme Court “has, as a matter of sound judicial policy, required  
20 persons seeking redress in the courts first to establish standing, especially in actions in  
21 which constitutional relief is sought against the government.” *Bennett v. Napolitano*, 206  
22 Ariz. 520, 524 ¶ 16 (2003). Though not strictly bound by federal standing doctrine,  
23 Arizona courts nevertheless treat federal standing case law as “instructive.” *Fernandez v.*  
24 *Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 ¶ 11 (2005) (internal quotation marks omitted).  
25 And like the federal courts, Arizona courts have “established a rigorous standing  
26 requirement,” which requires a plaintiff to “allege a distinct and palpable injury.” *Id.* at  
27 140 ¶ 6 (internal quotation marks omitted). “An allegation of generalized harm that is  
28 shared alike by all or a large class of citizens generally is not sufficient to confer standing.”

1 *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998); *see also Aegis of Ariz., LLC v. Town of Marana*,  
2 206 Ariz. 557, 563 ¶ 18 (App. 2003) (The “injury must be distinct and palpable, such that  
3 the plaintiff has a personal stake in the outcome of the controversy.” (internal quotation  
4 marks and citations omitted)).

5 Plaintiffs must also seek relief that is likely to redress their alleged grievances.  
6 *Bennett*, 206 Ariz. at 525 ¶ 18; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)  
7 (“[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by  
8 a favorable decision.” (internal quotation marks omitted)). “Specifically, a party must  
9 show that their requested relief would alleviate their alleged injury.” *Arizonans for Second*  
10 *Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 406 ¶ 25 (2020).

11 Plaintiffs fail to allege the threshold elements of standing. Mr. Drobina, for his part,  
12 fails to allege any injury at all: while he alleges that his ballot was initially ejected by the  
13 vote tabulator, Compl. at ¶ 3.31, he acknowledges that, as instructed by a poll worker, he  
14 deposited his ballot into the “lower slot” that ballots placed in the “lower slot” are counted  
15 manually at the County’s central counting facility, and that Maricopa County’s records  
16 confirmed that his ballot was counted. *Id.* at ¶¶ 3.32–3.33. Mr. Drobina does not allege  
17 that he was in any way deprived of the right to vote or to have his vote counted. Instead,  
18 he purports to have been deprived of the right to have his ballot “read and tabulated on  
19 site.” *Id.* at 7 ¶ 3.36. But there is no such right; as discussed further below, Arizona law  
20 does not guarantee on-site tabulation, but rather provides for manual ballot processing and  
21 counting at a central counting facility when a ballot cannot be read on site because it is  
22 damaged or defective. *See* A.R.S. § 16-621(A).

23 While Ms. Aguilera, on the other hand, speculates that her ballot was not counted  
24 at all, she does not seek any relief that could redress that purported injury. She cannot cast  
25 a new ballot; that is against the law. Neither declaratory nor injunctive relief can correct  
26 any alleged past deprivation of her right to vote. *See Riley v. Cochise County*, 10 Ariz. App.  
27 55, 59 (1969) (to be entitled to declaratory relief, a plaintiff must establish “consequential  
28 relief, immediate or prospective”); *Canova v. Trustees of Imperial Irrigation Dist.*

1 *Employee Pension Plan*, 150 Cal. App. 4th 1487, 1497, 59 Cal. Rptr. 3d 587, 595 (2007)  
2 (“Declaratory relief operates prospectively to declare future rights, rather than to redress  
3 past wrongs.”). Because she does not allege that she will be deprived of the ability to vote  
4 in the future, prospective declaratory or injunctive relief provides no redress either. *See*  
5 *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (“Because injunctive and declaratory  
6 relief ‘cannot conceivably remedy any past wrong,’ plaintiffs seeking injunctive and  
7 declaratory relief can satisfy the redressability requirement only by demonstrating a  
8 continuing injury or threatened future injury.” (quoting *Steel Co. v. Citizens for a Better*  
9 *Env’t*, 523 U.S. 83, 108 (1988))).

10 **II. Plaintiffs Fail to State a Claim.**

11 Plaintiffs’ claims center on a purported right to onsite tabulation, but Arizona law  
12 does not grant any such right. The Complaint points to a statutory requirement that  
13 electronic voting systems “[w]hen properly operated, record correctly and count accurately  
14 every vote cast.” A.R.S. § 16-446(B)(6). But this statute merely states an unremarkable  
15 requirement for voting machines; it nowhere creates an affirmative right to have a ballot  
16 counted *onsite* at a polling place, let alone a private right of action by individual voters any  
17 time a ballot requires additional processing at a central counting facility.

18 Critically, Arizona law explicitly contemplates that ballots that cannot be read by a  
19 machine onsite will require further manual processing at the central counting place:

20 If any ballot, including any ballot received from early voting, is damaged or  
21 defective so that it cannot properly be counted by the automatic tabulating  
22 equipment, a true duplicate copy shall be made of the damaged or defective  
23 ballot in the presence of witnesses and substituted for the damaged or  
24 defective ballot. All duplicate ballots created pursuant to this subsection shall  
be clearly labeled “duplicate” and shall bear a serial number that shall be  
recorded on the damaged or defective ballot.

25 A.R.S. § 16-621(A). The Election Procedures Manual confirms the same, providing that  
26 ballots that cannot be read onsite are to be duplicated by hand by a ballot duplication board,  
27 with the duplicated ballot then tabulated electronically. *Arizona Election Procedures*

1 *Manual* at 201, Ch. 10(II)(D).<sup>1</sup> What matters, ultimately, is that ballots are counted;  
2 whether they are counted at the polling place or at a central counting facility is beside the  
3 point.

4 **III. This is Not a Class Action, and Plaintiffs Cannot Sue on Behalf of Others.**

5 Plaintiffs purport to bring this case on behalf of themselves as well as “Does I–X”  
6 and “other election day voters who followed Defendants’ instructions.” Compl. ¶ 3.41.  
7 Putting aside the questionable practice of alleging fictional plaintiffs, Plaintiffs cannot  
8 purport to bring suit on behalf of other non-parties without complying with the strictures  
9 of Arizona Rule of Civil Procedure 23 applicable to class actions. Nor can Plaintiffs bring  
10 suit on behalf of others when they lack standing to bring suit on their own behalf. *See*  
11 *Fernandez*, 210 Ariz. at 141 ¶ 10 (“Because a plaintiff who cannot allege that a defendant  
12 inflicted a distinct and palpable injury on her cannot sue that defendant, it logically follows  
13 that the same plaintiff should not be able to sue that defendant by bringing a class action  
14 purporting to represent a class of people who actually were harmed by the defendant. To  
15 permit a plaintiff to do that would severely weaken, if not entirely eliminate, our standing  
16 requirement.” (citation omitted)).

17 **CONCLUSION**

18 For the foregoing reasons, the Court should dismiss Plaintiffs’ Complaint with  
19 prejudice.

20  
21  
22  
23  
24  
25  
26  
27  
28  

---

<sup>1</sup> The Manual carries the force of law, A.R.S. § 16-452(C).

1 DATED: November 16, 2020

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

By: /s/ Sarah R. Gonski  
Sarah R. Gonski (Bar No. 032567)  
**PERKINS COIE LLP**  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
Telephone: 602.351.8000  
Facsimile: 602.648.7000  
SGonski@perkinscoie.com

Mark E. Elias\*  
**PERKINS COIE LLP**  
700 Thirteenth Street NW, Suite 600  
Washington, D.C. 20005-3960  
Telephone: 202.654.6200  
Facsimile: 202.654.6211  
MElias@perkinscoie.com

Roy Herrera (Bar No. 032901)  
Daniel A. Arellano (Bar No. 032304)  
**BALLARD SPAHR LLP**  
1 East Washington Street, Suite 2300  
Phoenix, Arizona 85004-2555  
Telephone: 602.798.5400  
Facsimile: 602.798.5595  
HerreraR@ballardspahr.com  
ArellanoD@ballardspahr.com

*\*Pro hac application to be filed*

*Attorneys for the Arizona Democratic Party*

1 ORIGINAL of the foregoing e-filed with  
2 AZTurbo Court this 16th day of November,  
2020 with electronic copies e-served to:

3 Alexander Kolodin  
4 Christopher Viskovic  
KOLODIN LAW GROUP PLLC  
5 3443 N. Central Avenue, Suite 1009  
Phoenix, AZ 85012  
6 alexander.kolodin@kolodinlaw.com cviskovic@kolodinlaw.com

7 Sue Becker  
8 Public Interest Legal Foundation  
32 E. Washington Street, Suite 1675  
Indianapolis, IN 4624  
9 sbecker@publicinterestlegal.org

10 *Attorneys for Plaintiffs*

11 Thomas P. Liddy  
12 Emily Craiger  
Joseph I. Vigil  
Joseph J. Branco  
13 Joseph E. LaRue (031348)  
Deputy County Attorneys  
14 liddyt@mcao.maricopa.gov  
craigere@mcao.maricopa.gov  
15 vigilj@mcao.maricopa.gov  
brancoj@mcao.maricopa.gov  
16 laruej@mcao.maricopa.gov  
CIVIL SERVICES DIVISION  
17 225 West Madison Street  
Phoenix, Arizona 85003  
18 ca-civilmailbox@mcao.maricopa.gov

19 *Attorneys for Maricopa County Defendants*

20  
21  
22  
23  
24  
25  
26  
27  
28