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ARIZONA SUPERIOR COURT

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COUNTY OF MARICOPA

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LAURIE AGUILERA, et al.,

Case No. CV2020-014562

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Plaintiff,

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

18

vs.

Expedited Election Matter

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ADRIAN FONTES, et al.,

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Defendants.

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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).¹ 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.

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

1 DATED: November 16, 2020

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**Pro hac application to be filed*

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