Daniel C. Barr (#010149)
Paul F. Eckstein (#001822)
Alexis E. Danneman (#030478)
Austin C. Yost (#034602)
Samantha J. Burke (#036064)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
DBarr@perkinscoie.com
PEckstein@perkinscoie.com
ADanneman@perkinscoie.com
AYost@perkinscoie.com
SBurke@perkinscoie.com
DocketPHX@perkinscoie.com

Attorneys for Defendant Kris Mayes

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ABRAHAM HAMADEH, et al.,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, et al.,

Defendants.

No. CV2022-015455

DEFENDANT KRIS MAYES' MOTION TO DISMISS AND PRETRIAL BRIEF

ORAL ARGUMENT REQUESTED

(Assigned to the Hon. Frank Moskowitz)

Introduction

Plaintiffs Abraham Hamadeh and the Republican National Committee seek from this Court what they could not get at the ballot box. They ask this Court to overturn Arizona's November 2022 election (the "Election") and declare Mr. Hamadeh the Arizona Attorney General-elect instead of Defendant Kris Mayes, who received the most votes. Without any detail, they allege that the election was fraught with poll worker "misconduct," ballot duplication and electronic adjudication errors, and unlawful counting of early ballot votes. But their claims are based on no more than speculation and conjecture. Ultimately, Plaintiffs improperly attempt to use this Court to engage in a fishing expedition to try to undermine Arizona's election.

Plaintiffs' claims also reveal a fundamental misunderstanding of Arizona's election laws. In bringing this election contest, Plaintiffs ignore that a contest may be brought only against a person "declared elected to a state office"—which will not happen until at least December 5. A.R.S. § 16-672(A). Moreover, an election contest can only be brought by an elector, *see id.*, which Plaintiff Republican National Committee is, of course, not. Further, "challenges concerning alleged procedural violations of the election process"—precisely Claim 5—"must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 342, ¶ 9 (2002) (emphasis added). Beyond these threshold issues, the complaint's claims all fail to state a claim on which relief can be granted.

For all these reasons, and others described below, the Court should dismiss Plaintiffs' meritless Complaint.

Factual Background

Plaintiffs allege with few facts that the Election was "afflicted with certain errors and inaccuracies in the management of some polling place operations, and in the processing and tabulation of some ballots." [Compl. ¶ 2] Factually, these alleged issues can be placed into four

buckets: (1) same day voting issues associated with voting center "check in" and "check out" procedures, (2) alleged errors in ballot duplication, (3) alleged errors in electronic adjudication, and (4) alleged unlawful early ballot signature verification. Plaintiffs offer little factual support for their claims.

Check-in, Check-out Procedures

Plaintiffs allege that, on election day, some ballot tabulation machines at various Maricopa County voting centers failed to properly process ballots. [*Id.* ¶ 23] As even Plaintiffs admit, voters had multiple options that would allow their votes to be counted. [*Id.* ¶ 25] Some of those options, however, required poll workers to "check out" voters before they could "check in" again and vote at a different voting center or vote their early ballot. [*Id.* ¶ 26] Plaintiffs allege that some voters were not properly "checked out" of the voting centers, resulting in their votes not being counted. Specifically, they allege that (1) 146 of these voters voted uncounted provisional ballots; (2) 273 of these voters voted uncounted early ballots, (3) an unspecified number of voters were denied the right to cast a provisional ballot. [*Id*. ¶¶ 29, 61, 62, 69]

Ballot Duplication

Next, based on "information and belief," Plaintiffs allege that an unspecified number of damaged ballots were "erroneously transposed, thereby resulting in the unlawful mistabulation of a ballot." [*Id.* ¶ 37, *see id.* 77] In support, they cite only a purported statistic from a different election (in 2020). [*Id.* ¶ 36] Plaintiffs allege no facts and cite no evidence of any issues from this election.

Electronic Adjudication

Further, Plaintiffs allege that the hand count audit in a *different* race (the Governor's race) reveal *one* instance in which the Maricopa County Electronic Adjudication Board, which handles unclear ballots, allegedly "incorrectly characterized the voter's ostensible intent." [*Id.* ¶ 44]

From this, Plaintiffs speculate, on "information and belief," a "similar and proportionate rate of erroneous determinations afflict . . . all ballots that underwent electronic adjudication." [*Id.* ¶ 45; *see id.* ¶ 83] They allege no other facts and cite no evidence of any issues from this election.

Ballot Verification

Plaintiffs also assert that the 2019 Elections Procedures Manual ("EPM")'s procedures violate Arizona law. Specifically, they allege that A.R.S. § 16-550(A) requires election officials to compare the ballot envelope signature to "the signature of the elector on the elector's registration record." [*Id.* ¶ 48] Plaintiffs claim that, contrary to this mandate, the EPM allows election officials to use documents outside the "registration record" to verify signatures. [*Id.* ¶¶ 49–50, 91] Plaintiffs did not raise this challenge before this election, and they waited to raise it until almost three years after the EPM was finalized and approved.

Relief

Plaintiffs seek wide-ranging forms of relief. Among other things, they ask for an order requiring the Maricopa County Defendants to include certain individuals' votes in the canvass and also to allow certain individuals to vote again by provisional ballot. [Demand for Relief ¶¶ A, B] They also seek orders requiring the County Defendants to amend the canvass results to correct claimed errors and to throw out other individuals' early votes. [*Id.* ¶¶ C, D, E]

But what Plaintiffs ultimately ask this Court to do is to reverse the results of this election and "requir[e] the Secretary of State to declare Contestant Abraham Hamadeh elected to the office of Arizona Attorney General." [*Id.* ¶ I] This asks too much.

As explained below, Plaintiffs' complaint fails for multiple reasons. Thus, this Court should dismiss the complaint with prejudice.

Argument

I. This election contest is premature.

Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966). "The failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested." *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978). These principles dispose of this purported election contest because Arizona's statutes make clear that this contest is premature.

"Any elector of the state may contest the election of any person declared elected to a state office[.]" A.R.S. § 16-672(A). To do so, the elector must file a statement of contest "within five days after completion of the canvass of the election and declaration of the result thereof by the secretary of state or by the governor[.]" A.R.S. § 16-673(A).

Plaintiffs have no right to bring this election contest under these statutes. The complaint does not allege that Ms. Mayes has been "declared elected to a state office[.]" A.R.S. § 16-672(A). Nor does it allege "completion of the canvass of the election and declaration of the result thereof by the secretary of state or by the governor[.]" A.R.S. § 16-673(A). That is no surprise because, as Plaintiffs acknowledge, the canvass has *not* yet been completed and the Secretary of State has *not* yet declared Ms. Mayes elected to a state office. [*See* Compl. ¶¶ 10, 14, 15] Thus, this contest is premature.

That the election contest is premature is further evidenced by Arizona's recount statutes. The complaint alleges that Ms. Mayes and Mr. Hamadeh are "separated by just 510 votes out of more than 2.5 million ballots cast—a margin of two one-hundredths of one percent (0.02%)." [*Id.* ¶ 2] Accepting that allegation as true, after the canvass is complete, the election for the Arizona Attorney General will be subject to an automatic recount under A.R.S. § 16-661(A). Until that recount is complete, the superior court cannot "announce the result and make and enter

an order setting forth its determination" on the recount. *See* A.R.S. § 16-665(A). And until the court makes and enters such an order, the Secretary of State cannot deliver to the successful candidate "the certificate of election" and declare that candidate elected. *See* A.R.S. § 16-665(B)(2).

In short, Plaintiffs fail to carry their "burden of showing that his case falls within the terms of the statute providing for election contests." *Henderson v. Carter*, 34 Ariz. 528, 534 (1928). This Court should dismiss the complaint.

II. The Republican National Committee is not a proper plaintiff.

The Republican National Committee brought this election contest as a plaintiff along with Mr. Hamadeh. Even though election contests are "purely statutory and dependent upon statutory provisions for their conduct," the complaint cites no statute authorizing the Republican National Committee to bring a contest. *Fish*, 2 Ariz. App. at 605. That's because no such statute exists.

Arizona allows "[a]ny elector of the state" to bring an election contest. A.R.S. § 16-672(A). It is "obvious," of course, that any "statement of contest must set forth specifically that the contestant is such elector." *Kitt v. Holbert*, 30 Ariz. 397, 400 (1926). But the Republican National Committee obviously failed to do so. The complaint does not allege (and cannot allege) that the Republican National Committee is an Arizona elector. [*See* Compl. ¶ 9] Therefore, this Court should dismiss the Republican National Committee as a plaintiff.

III. The complaint fails to state a claim on which relief can be granted.

To challenge the results of an election, an elector must come forward with specific facts establishing a right to relief—not "mere suspicion and conjecture[.]" *Hunt v. Campbell*, 19 Ariz. 254, 264 (1917). Plaintiffs do not come close to alleging facts that would allow them to meet this burden. As a result, this Court should dismiss his complaint for failure to state a claim on which relief can be granted.

A. Count I

With respect to Count I, Plaintiffs allege that Maricopa County poll workers did not properly "check out" an unspecified number of voters who had "checked in" at a polling location and later sought to "leave" and go to "a different polling location" or cast an "early ballot." [Compl. ¶¶ 57–60] According to Plaintiffs, at most, 419 of these voters may have cast a ballot that, on "information and belief," the Maricopa County Defendants did not tabulate. [*See id.* ¶¶ 61–62] As a result, Plaintiffs claim "misconduct" under A.R.S. § 16-672(A)(1) and an alleged "erroneous count of votes" under A.R.S. § 16-672(A)(5). Even accepting Plaintiffs' factual allegations as true, Count I fails to state a claim under either of these statutes.

Count I fails as a matter of law because Plaintiffs allege no facts establishing that any "misconduct" occurred. A.R.S. § 16-672(A)(1). Misconduct involves a "dereliction of duty." *Misconduct*, Black's Law Dictionary (11th ed. 2019). It does not include "honest mistakes or mere omissions[.]" *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Courts apply a presumption of "good faith and honesty" to election officials' conduct that will control unless an election contestant presents "clear and satisfactory proof" to overcome it. *Hunt*, 19 Ariz. at 268. Plaintiffs, however, allege nothing of the sort. They rely entirely on alleged poll worker error, one tweet, and a legal conclusion. [Compl. ¶¶ 29, 30, 31, 64] But these factual allegations plead, at most, "honest mistakes" and "mere omissions[.]" *Findley*, 35 Ariz. at 269. And this Court "do[es] not accept as true allegations consisting of conclusions of law[.]" *Swift Transp. Co. of Ariz. L.L.C. v. Ariz. Dep't of Revenue*, 249 Ariz. 382, 385 ¶ 14 (App. 2020); *see also Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012) (holding that "mere conclusory statements are insufficient").

Beyond that, Count I fails because "all reasonable presumptions must favor the validity of an election" and, when a contestant fails to prove fraud, he carries the heavy burden of

showing that any misconduct "may have affected the result of the election." *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). Here, Plaintiffs admit that there was no "fraud, manipulation, or other intentional wrongdoing that would impugn the outcomes of the November 8, 2022 general election." [Compl. ¶ 1] And they allege no facts suggesting that any misconduct could have feasibly "altered the outcome [of the election] or clouded the reliability of the results." *Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183, 186 ¶ 10 (App. 2005). Plaintiffs allege that Mr. Hamadeh and Ms. Mayes are separated by "510 votes[.]" [Compl. ¶ 2] Yet even under the most liberal reading of Count I, it alleges that 419 voters did not have their votes counted. [*Id.* ¶¶ 61–62] Even assuming that *all* 419 voters cast a ballot for Mr. Hamadeh—something that the complaint does not allege (cannot allege, and this Court couldn't credit)—he *still* would have received fewer votes than Ms. Mayes. Thus, Count I cannot state a claim under A.R.S. § 16-672(A)(1).

Second, Count I also fails to state a claim under A.R.S. § 16-672(A)(5). Plaintiffs allege no facts establishing that there has been an "erroneous count of votes"—or put another way, they plead no facts showing that someone counted the votes wrong—such that an accurate count would demonstrate that Mr. Hamadeh "receive[d] the highest number of votes[.]" A.R.S. § 16-672(A)(5). Rather, Plaintiffs allege that 419 voters did not have their votes counted *at all* supposedly based on "misconduct." [Compl. ¶¶ 61, 62, 64] But the misconduct allegations fail for all the reasons above and, even if a contestant could bring a separate claim under A.R.S. § 16-672(A)(5) based on these allegations, Plaintiffs' claim would still fail because they can't show that Mr. Hamadeh would have "receive[d] the highest number of votes" had those votes been counted or that an accurate counting would have "altered the outcome" of the election. *Swift Transp.*, 249 Ariz. at 385 ¶ 14.

B. Count II

Next, Plaintiffs allege that Maricopa County poll workers wrongly denied an unspecified number of voters a provisional ballot. [Compl. ¶¶ 69–72] This alleged denial, claim Plaintiffs, "was material to, and potentially dispositive of, the outcome" of this election. [*Id.* ¶ 73] Based on this conduct, Plaintiffs also claim "misconduct," A.R.S. § 16-672(A)(1), and an "erroneous count of votes," A.R.S. § 16-672(A)(5). Once again, though, these threadbare allegations fall far short of stating any claim for relief for all the same reasons that Count I fails.

To summarize, Plaintiffs claim of "misconduct" under A.R.S. § 16-672(A)(1) fails for multiple reasons. First, Plaintiffs allege no facts establishing that *anyone* engaged in "misconduct." A.R.S. § 16-672(A)(1). At best, they allege facts showing "honest mistakes" and "mere omissions[.]" *Findley*, 35 Ariz. at 269. Second, they allege nothing to suggest that this provisional ballot denial "may have affected the result of the election." *Moore*, 148 Ariz. at 159. The complaint identifies with no specificity whatsoever who was actually denied a provisional ballot—much less the hundreds or thousands of voters that Mr. Hamadeh would need to identify for this alleged ballot denial to have made a whit of difference in this election. [Compl. ¶ 2 (alleging that Ms. Mayes and Mr. Hamadeh are separated by "510 votes")] The complaint's mere "legal conclusion[] alleged as fact[]" is not nearly enough to overcome the absence of any real *facts* that—accepted as true—establish any right to relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14.

As with Count I, Count II also fails under A.R.S. § 16-672(A)(5) because Plaintiffs allege no facts demonstrating that anyone "erroneous[ly] count[ed]" any votes. A.R.S. § 16-672(A)(5). But even if they had alleged facts showing that there had been some miscounting by someone, this claim would independently fail because Plaintiffs allege no facts showing that Mr. Hamadeh he would have "receive[d] the highest number of votes" had those votes been correctly counted. *Id.*

C. Count III

Next, Plaintiffs allege that counties "incorrectly transcribed" voter selections when they "transpose[d] the voter's indicated selections to a duplicate ballot[.]" [Compl. ¶¶ 76–77] They claim that these "improperly duplicated ballots are material to, and potentially dispositive of, the outcome" of this election. [*Id.* ¶ 79] As a result of this, they bring Count III based on an "erroneous count of votes." A.R.S. § 16-672(A)(5). But Count III—like all the other Counts—is devoid of any specificity, presenting bare allegations based on "suspicion and conjecture." *Hunt*, 19 Ariz. at 264.

Count III fails for two reasons. For one thing, Plaintiffs allege no facts showing that anyone "count[ed]" any votes incorrectly. A.R.S. § 16-672(A)(5). The complaint identifies zero (0) voters who selected Mr. Hamadeh but who had their vote wrongly counted for Ms. Mayes. And that's not Plaintiffs' only problem. They also fail to allege any facts establishing that—had the votes been counted right—Mr. Hamadeh would "in fact [have] receive[d] the highest number of votes[.]" *Id.* Even accepting the complaint's factual allegations as true, it's just as possible that correcting any ballot duplication errors would lead only to *more* votes for Ms. Mayes. As the party seeking extraordinary remedies that could disturb an election, it's Plaintiffs who bear the heavy burden to come forward with "well-pleaded facts" showing that they have the right to that relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14. One looks in vain for any such facts in support of Count III.

D. Count IV

In Count IV, Plaintiffs claim "illegal votes," A.R.S. § 16-672(A)(4), and an "erroneous count of votes," A.R.S. § 16-672(A)(5). They allege that the County Defendants caused an unspecified number of "illegal votes to be included in the canvassed returns" by tabulating votes that supposedly should have been "disqualified as invalid over-votes." [Compl. ¶¶ 82-84]

Plaintiffs also allege that the County Defendants "caused an erroneous count of votes" by "mischaracterizing" the "manifested intent" of unidentified voters. [*Id.* ¶ 85] These bald allegations fail to state any claim on which relief can be granted.

First, Count IV fails to state a claim on the grounds of "illegal votes" under A.R.S. § 16-672(A)(4). Plaintiffs needed to allege facts showing that (1) "illegal votes were cast" in the election and (2) those illegal votes were "sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Plaintiffs, however, fail to allege any facts in support of either of these elements. Accepting the complaint's factual allegations as true, Plaintiffs allege that one (and only one) over-vote was improperly tabulated in the election for the Governor's Office. [Compl. ¶ 44] They complaint alleges no facts establishing that any over-voter was improperly tabulated in the election for the Attorney General's Office. But even were the Court to assume that the single alleged illegal vote that Mr. Hamadeh identified also affected the election for the Attorney General's Office, it would make no difference because Mr. Hamadeh admitted that he's behind by "510 votes[.]" [*Id.* ¶ 2]

Second, Count IV also fails to state a claim based on the "erroneous count of votes" under A.R.S. § 16-672(A)(5). As with Count III, Plaintiffs allege no facts establishing that any votes were "count[ed]" wrong. A.R.S. § 16-672(A)(5). The complaint identifies zero (0) votes where the County Defendants supposedly "mischarateriz[ed]" the "manifested intent" of the voter. [Compl. ¶ 85] Necessarily, then, Plaintiffs also fail to allege any facts showing that—had any such votes been counted right—Mr. Hamadeh would "in fact [have] receive[d] the highest number of votes[.]" A.R.S. § 16-672(A)(5). Plaintiffs allege only "conclusions"—but conclusions can't state a claim for relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14.

E. Count V

Finally, Plaintiffs bring Count V based on "illegal votes" under A.R.S. § 16-672(A)(4). Plaintiffs allege that the EPM authorizes County Recorders to verify voters' signatures on the affidavits accompanying early ballots using documents outside the voters' "registration record" in violation of A.R.S. § 16-550(A). [Compl. ¶¶ 49, 50, 91, 92] From that premise, Plaintiffs claim that an unspecified number of "illegal votes" were tabulated in the election. [*Id.* ¶¶ 90, 92] But Plaintiffs' premise is wrong and, at any rate, they fail to allege any facts in support of this claim.

Plaintiffs allege that the EPM's procedures are somehow inconsistent with Arizona law. They are not. Arizona law provides that election officials "shall" compare the signature on the ballot envelope with the "signature of the elector on the elector's registration record." A.R.S. § 16-550(A). Unsurprisingly, the EPM provides identical guidance. It counsels that election officials compare the ballot envelope signature with the "voter's signature in the voter's registration record." EPM at 68. It then goes on to provide examples of documents within the "registration record" that contain signatures. These documents might include, for example, the "voter registration form," the "signature roster," or the "early ballot/PEVL request forms." *Id.*

While lacking in specifics, and against the clear text of both the statute and the EPM, the complaint (at ¶¶ 49, 50, 91) nonetheless seems to complain that certain of the exemplar documents identified by the EPM are not part of the "registration record." *See* EPM at 68.

But why not? "[W]e give the words their ordinary meaning, unless the context suggests a different one." *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244 ¶ 21 (2020). By providing that the ballot envelope signature can be verified by comparison to the voter's "registration record," the Legislature plainly chose something different, and broader, than the "registration form" alone. *See, e.g.*, *United States v. Yung*, 37 F.4th 70, 79 (3d Cir. 2022)

("[W]here Congress uses different words, we read those words to have different meanings."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (describing the presumption of consistent usage). The "record" of a voter's registration encompasses all the entire "documentary account" of the registrant's ability to vote. *Record*, Black's Law Dictionary (11th ed. 2019).

If the Legislature had intended to limit signature comparison to the voter registration form in A.R.S. § 16-550(A), as Plaintiffs imply, then it would have done so. *Compare* A.R.S. § 16-550(A) (discussing an "elector's registration record") *with* A.R.S. § 16-152 (discussing the "registration form"). Indeed, a prior version of the statute *did* limit the signature comparison to the "registration form." A.R.S. § 16-550(A) (2017). They legislature then amended the statute in 2019 to remove that limitation and to permit comparison to the voter's "registration record" instead. *See* A.R.S. § 16-550(A).

In the end, there is no support, textual or otherwise, for the illogical claim that "registration records" would not include the examples listed in the EPM, among others. Plaintiffs' claim collapses at the very start.

Even if Plaintiffs could ground an "illegal votes" claim on their challenge to the EPM's procedures, Count V would still fail as a matter of law because they allege no facts establishing that any illegal votes were "sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Count V identifies zero (0) votes that were supposedly illegally tabulated on this ground—much less the hundreds or thousands of votes that Mr. Hamadeh would need to identify to demonstrate that these votes made any difference to the outcome of this election. [Compl. ¶ 2 (acknowledging that Ms. Mayes and Mr. Hamadeh are separated by "510 votes")]

IV. Count V also fails for additional reasons.

A. Count V improperly alleges procedural violations after the election.

As explained above, Count V is based on Plaintiffs' quarrel with the EPM's procedures. The premise underlying the claim is that the EPM allegedly authorizes County Recorders to verify voters' signatures on the affidavits accompanying early ballots using documents outside the voters' "registration record" in violation of A.R.S. § 16-550(A). [Compl. ¶¶ 49, 50, 91, 92] But Plaintiffs can't raise this procedural challenge after the election.

Alleged procedural violations "*must* be challenged before the election is held." *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). And Plaintiffs' challenge to the process by which County Recorders verify voters' signatures is precisely the type of challenge "concerning alleged procedural violations of the election process [that] must be brought prior to the actual election." *Sherman*, 202 Ariz. at 342 ¶ 9 (2002). Having waited almost *three years* since the EPM was approved to allege these "defects" in its procedures—and after not one, but *two general elections* were held using those same procedures—Plaintiffs violated their "duty . . . to act promptly" before this election to assert his challenge and therefore "waived" it. *Abbey v. Green*, 28 Ariz. 53, 68 (1925); *see also Zajac v. City of Casa Grande*, 209 Ariz. 357, 360 ¶ 14 (collecting cases to the same effect). This challenge "should have been—and could have been—addressed before the vote," and so Plaintiffs can't raise it now. *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *3 ¶ 14 (Ariz. Ct. App. July 22, 2019).

B. Laches bars Count V.

Count V also fails for another reason: Even if electors could theoretically allege procedural violations after an election (they can't), laches would bar Plaintiffs from asserting this claim because they unreasonably delayed in bringing it to the detriment of Ms. Mayes, Arizona's election officials, and every voter who voted in this election.

"In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922–23 (D. Ariz. 2016) (citation omitted). Prejudice to the administration of justice includes prejudice to "election officials[] and the voters of Arizona." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000). That's because election matters—including "election contests"—implicate "interests well beyond the parties to the case." *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993).

Applying these principles, courts have not hesitated to dismiss claims brought after elections based on laches when the plaintiffs could have brought the claims before the elections. Courts are justifiably "wary" of such post-election claims, "lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). Or as one court put it: The "failure to require pre-election adjudication would permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in court action." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (citation omitted). Thus, "if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." *Soules*, 849 F.2d at 1180.

Here, Plaintiffs took the "gamble" that courts have repeatedly cautioned against. *Hendon*, 710 F.2d at 182 (citation omitted). They sat in silence for almost *three years* since the EPM was approved with no hint that they believed that its signature verification procedures were unlawful. Multiple elections were held in the intervening time—including a primary election three months ago that Mr. Hamadeh himself participated in—yet Plaintiffs never said a word about these procedures before they learned that Mr. Hamadeh is on the brink of losing this election. "[T]ime

is of the essence" in election matters, and Plaintiffs' challenge to the EPM's procedures is untimely by any measure. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998).

Plaintiffs' unreasonable delay is all the more significant given the extreme prejudice that his claim would impose on Ms. Mayes, election officials, and voters who voted in this election. Election officials would be prejudiced because there's no way to connect an early ballot that's been removed from its envelope and placed in the ballot box with its accompanying affidavit. That's why A.R.S. § 16-552(D) requires challenges to early ballots to be made *before* the ballot is placed in the ballot box. Beyond that, Ms. Mayes and Arizona voters would be prejudiced because Plaintiffs seek to disenfranchise voters *after* voting has concluded. They seek an order "*reducing* the tabulated returns of early ballots to *exclude* early ballots" that they claim were unlawfully cast. [Compl. ¶ 94 (emphasis added)] But Plaintiffs do not even try to justify the "havoc" that this relief would create were Mr. Hamadeh successful in this contest. *Soules*, 849 F.2d at 1180; *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (recognizing that "interference with an election after voting has begun is unprecedented"). Throwing out the lawfully cast votes of Arizona voters after the election is over is a plain violation of due process.

In sum, Plaintiffs unreasonably and prejudicially delayed in bringing this challenge to the EPM's procedures. Thus, laches bars Count V.

V. The election contest statutes do not authorize most of the requested relief.

Plaintiffs seek several wide-ranging forms of relief. But they can't recover most of this relief as a matter of law because their requests are untethered from any election contest statute.

To repeat: Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish*, 2 Ariz. App. at 605. As a result, an election contestant like Mr. Hamadeh may recover only relief that is "specifically set forth by statute." *Id.*

Arizona's election contest statutes authorize limited forms of relief. When a contestant fails to meet his burden of proof, the Court must enter an order "confirming . . . the election." A.R.S. § 16-676(B). When a contestant succeeds, on the other hand, the Court may enter an order "annulling and setting aside the election." *Id.* And when "it appears that a person other than the contestee has the highest number of legal votes," the Court must "declare that person elected and that the certificate of election of the person whose office is contested is of no further legal force or effect." A.R.S. § 16-676(C). That's all that the election contest statutes authorize.[1]

The bulk of Plaintiffs' relief requests fall far outside the bounds of these limited statutory remedies. Under Count I, for instance, Plaintiffs seek an order "requiring the Maricopa County Defendants to tabulate for inclusion in the canvass all provisional ballots and early ballots submitted by qualified electors who had 'checked in' at a voting center but did not cast a regular ballot in the November 8, 2022 general election." [Compl. ¶ 66; Demand for Relief ¶ A] The complaint cites no part of the contest statute (because there is none) that would authorize this relief. Likewise, under Count II, Plaintiffs request an order "requiring the Maricopa County Defendants to afford to all individuals who were refused a provisional ballot a reasonable opportunity to cast in the November 8, 2022 general election a provisional ballot, which must be duly processed and included in the canvass in conformance with applicable law." [Compl. ¶ 74; Demand for Relief ¶ B] The complaint again fails to cite anything that would allow Plaintiffs to recover this relief. Many more of Plaintiffs' relief requests suffer from this same defect. [Compl. ¶¶ 80, 87; Demand for Relief ¶¶ C, D, F, G, I] Therefore, this Court should dismiss all these relief requests—including the relief requests that Plaintiffs cast as factual allegations.

[1] Mr. Hamadeh's counsel know this. Mr. LaSota recently argued in another case that "the Court's only power pursuant to [an election contest] is to issue a ruling 'confirming or annulling and setting aside the election.'" Petition for a Review of a Special Action Decision, *Torgeson v. Town of Gilbert*, 2021 WL 7967716, at *5 (Ariz. Dec. 29, 2021) (quoting A.R.S. § 16-676(B)).

Fish v. Redeker is on point. There, a contestant sought "forfeiture of office" as a remedy in an election contest because the successful candidate electioneered at the polling place. 2 Ariz. App. at 44. The Court of Appeals rejected that request, holding that it is "reluctant to deprive a successful candidate of the fruits of an election unless such penalty is specifically set forth by statute." *Id.* "If forfeiture is to be the penalty for electioneering, it is up to the Legislature[,] not the courts, to so declare." *Id.* And because the Legislature had not declared that forfeiture of office was the penalty for electioneering, the contestant could not recover that relief. *Id.*; *see also People ex rel. B.J.B. v. Ducey*, No. CV-21-0114-SA, 2021 WL 1997667, at *2 (Ariz. May 11, 2021) (dismissing electors' petition because there was "no legal basis for the relief requested").

So too here. Plaintiffs seek several forms of relief that are not "specifically set forth by statute." *Fish*, 2 Ariz. App. at 605. This Court should dismiss all those relief requests. [Compl. ¶¶ 66, 74, 80, 87; Demand for Relief ¶¶ A, B, C, D, F, G, I]

Conclusion

Mr. Hamadeh and the Republican National Committee ask this Court to overturn the will of Arizona's voters and declare Mr. Hamadeh the winner of the election for Arizona Attorney General. But their complaint fails for multiple independent reasons. Thus, this Court should dismiss the complaint in full with prejudice. Kris Mayes also asks for her attorneys' fees pursuant to A.R.S. § 12-349(A)(1) for bringing a claim "without substantial justification."

Dated: November 25, 2022

PERKINS COIE LLP

By: *s/ Daniel C. Barr*
Daniel C. Barr
Paul F. Eckstein
Alexis E. Danneman
Austin C. Yost
Samantha J. Burke
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Attorneys for Defendant Kris Mayes

Original of the foregoing efiled with the Maricopa County Superior Court and served through AZTurboCourt this 25th day of November, 2022:

Kory Langhofer
Thomas Basile
STATECRAFT LAW
649 N. Fourth Ave., First Floor
Phoenix, Arizona 85003
kory@statecraftlaw.com
tom@statecraftlaw.com

Timothy A. La Sorta
TIMOTHY A. LA SOTA, PLC
21 E. Camelback Rd., Ste. 305
Phoenix, Arizona 85016
tim@timlasota.com

s/ Jennifer McNamara