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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee, Plaintiffs/Contestants, v. KRIS MAYES, Defendant/Contestee, and KATIE HOBBS, in her official capacity as the Secretary of State; et al., Defendants.	No. CV2022-015455 **ARIZONA SECRETARY OF STATE KATIE HOBBS' MOTION TO DISMISS STATEMENT OF ELECTION CONTEST** **(Oral Argument Requested)** (Assigned to Hon. Frank Moskowitz)

Introduction & Background

In this "election contest," Plaintiffs/Contestants Abraham Hamadeh and the Republican National Committee ("RNC") ask this Court to overturn the results of the 2022 General Election. In that election, based on the counties' unofficial results after tabulation, the people of Arizona chose Kris Mayes as their next Attorney General by a narrow margin of 510 votes. Plaintiffs' requested relief – declaring Hamadeh the winner of that race – is extreme, unfounded, and unavailable. An election contest must rest on facts known to Plaintiffs when a contest is filed, not wild speculation aimed at undermining the work of Arizona's election officials.

Though state and county election officials should be commended for their hard work, diligence, and integrity in administering the 2022 General Election, like all elections that came before it and all elections that will follow it, this election was not perfect – after all, elections are administered by humans. But that is emphatically not a reason for this Court to thwart the will of the people as expressed at the ballot box, which is precisely what Plaintiffs ask this Court to do. Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986), presumptions that Plaintiffs' threadbare allegations cannot overcome.

First, Plaintiffs' entire "contest" fails in perhaps the most fundamental way possible because Plaintiffs brought it far too early. This defect alone justifies its dismissal.

Second, Plaintiffs' allegations related to election day issues in Maricopa County (Count I) fail from the get-go because they do not establish "misconduct," and allege that the maximum universe of potentially affected voters is 419, which cannot change the outcome of the election.

Third, Plaintiffs' claims about Maricopa County's alleged failure to issue provisional ballots (Count II) and inaccurate ballot duplications and electronic adjudications (Counts III and IV, respectively) across all counties are based entirely on speculation. Plaintiffs' "mere suspicion and conjecture" cannot sustain an election contest. *Hunt v Campbell*, 19 Ariz. 254, 264 (1917). And because the Court need not accept Plaintiffs' "inferences or deductions that are not

necessarily implied by well-pleaded facts" and "unreasonable inferences or unsupported conclusions," *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005), these claims fail as a matter of law. Beyond that, Plaintiffs' requested relief for Count II – that an unknown number of unknown voters be allowed to cast provisional ballots weeks after election day – is not authorized by law (to say nothing of being unfair and likely unconstitutional).

Fourth, Plaintiffs' claim that an unidentified and unknowable number of early ballots constituted "illegal votes" because of an alleged conflict between A.R.S. § 16-550(A) and the 2019 Election Procedures Manual ("EPM") fails for any number of reasons. It was brought far too late (Plaintiffs knew about the EPM provision for years, and only complained about it when Hamadeh lost his election), it fails as a matter of law (a voter's "registration record" includes more than just the registration form), and, like Counts II-IV, it's based on pure speculation.

Finally, the Court should not defer ruling on these fundamental legal deficiencies to permit Plaintiffs to do any discovery. They filed this litigation to try and find proof to support their claims, and that's simply not how election contests work. The best evidence of this improper intent is their decision to name all county recorders and county boards of supervisors when they have no evidence of any alleged issues anywhere other than Maricopa County. The Court shouldn't reward Plaintiffs' attempted fishing expedition or tolerate their scattershot approach to this litigation.

Argument

Plaintiffs' election contest fails, and the Court should quickly dismiss it. But the Secretary recognizes that election contests are rare, and first provides the Court with some background and fundamental principles underlying this dispute.

To survive a motion to dismiss, an election contest must be based on well-pleaded facts, rather than on legal conclusions. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin*, 86 Ariz. at 169-70 (election contest subject to dismissal if it fails to state a claim upon which relief can be

granted, assessed using the criteria applicable under Rule 12(b)(6)). "A complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8," *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417. 419 ¶ 7 (2008), and the Court may not accept as true "inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter*, 211 Ariz. at 389 ¶ 4.

"[E]lection contests are purely statutory, unknown to the common law, and are neither actions at law nor suits in equity, but are special proceedings." *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959). They are thus the subject of deliberate legislative restriction because of a "strong public policy favoring stability and finality of election results." *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App. 2010) (cleaned up). And A.R.S. § 16-672(A) carefully circumscribes the valid grounds of a contest: (1) "misconduct" by election boards and canvassers; (2) the elected official was ineligible for the contested office; (3) the contested official gave a "bribe or reward" or "committed any other offense against the elective franchise"; (4) "illegal votes"; or (5) because of an "erroneous count of votes," the elected official didn't "receive the highest number of votes." The Legislature also provided that the exclusive remedies in election contests are (1) judgment confirming the election; (2) judgment annulling and setting aside the election for the contested race; (3) a declaration that the certificate of election of the person whose office is contested is of no further legal force or effect and that a different person secured the highest number of legal votes and is elected. A.R.S. § 16-676(B), (C). The Court lacks jurisdiction to grant any other form of relief.

Plaintiffs also must prove their entitlement to the extraordinary remedy of overturning election results against several important backstops:

- Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore*, 148 Ariz. at 159;
- the "returns of the election officers are prima facie correct," *Hunt*, 19 Ariz. at 268; and

- courts apply a presumption of "good faith and honesty of the members of the election board" that must control unless there is "clear and satisfactory proof" to the contrary, *id.*

All told, to obtain relief in this case, Plaintiffs must overcome all these presumptions and make either "a showing of fraud or . . . a showing that had proper procedures been used, the result would have been different." *Moore*, 148 Ariz. at 159. Because Plaintiffs "are not . . . alleging any fraud" [Stmt. ¶ 1], to state a valid election contest, Plaintiffs must allege facts sufficient to show "the result would have been different."

With this background in mind, we turn to each of Plaintiffs' deficient claims.

I. This "Election Contest" Fails Because it Is Premature.

To begin, the Court should dismiss this action because it is premature and violates A.R.S. § 16-672 and 16-673. There is no question that an election contest cannot be brought until after the statewide canvass and after the challenged candidate has been declared elected, neither of which has occurred. *See* A.R.S. § 16-672(A) ("Any elector of the state may contest the election of any person declared elected to a state office") (emphasis added); A.R.S. § 16-673(A) ("The elector contesting a state election shall, 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, file in the court in which the contest is commenced a statement in writing") (emphasis added). The Court can dismiss this action for this obvious reason – which should have been obvious to experienced election law attorneys like Plaintiffs' – alone. *See Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) ("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.").[1]

[1] As more evidence of Plaintiffs' inexplicable failure to observe the strictures of the election contest statutes, the RNC is not an "elector of the state" entitled to bring an election contest, A.R.S. § 16-672(A), yet Plaintiffs' counsel signed a pleading in which the RNC is a contestant. The RNC should thus be dismissed. The Court should not overlook these fundamental deficiencies and should examine why Plaintiffs' counsel brought an election contest that violates two basic provisions of the governing statutes without even considering the merits (or as here, the sheer lack thereof).

II. Plaintiffs Do Not Allege a Viable Election Contest Based on Election Day Issues in Maricopa County.

Plaintiffs first contend (Count I) that there was either an erroneous count of votes or election board misconduct because "[u]pon information and belief," "various poll workers across Maricopa County refused or failed to 'check out' some or all . . . voters" who checked in at vote centers with printer problems on election day but did not cast their ballots there, thereby allegedly preventing provisional or early ballots those voters submitted elsewhere from being tallied. [Stmt. ¶¶ 60-63] They allege that "at least 146 of those voters" submitted provisional ballots that weren't counted, that at least 273 other voters who tried to cast their early ballots did not have their ballots counted, and that poll workers who did not "check out" these voters engaged in "misconduct." [*Id.* ¶¶ 62-64] According to Plaintiffs – again, only "upon information and belief" – votes that Maricopa County "improperly failed to tabulate are material to, and potentially dispositive of, the outcome of the election for . . . Arizona Attorney General." [*Id.*]

Plaintiffs go out of their way to state that they "are not, by this lawsuit, alleging any fraud, manipulation or other intentional wrongdoing." [Stmt. ¶ 1] Further, and fatal to their claims, the election day issues they identify are also not "misconduct" under the election contest statutes.[2] Here again, the "returns of the election officers are prima facie correct," and courts apply a presumption of "good faith and honesty of the members of the election board" that must control unless there is "clear and satisfactory proof." *Hunt*, 19 Ariz. at 268. But more importantly,

[2] And Plaintiffs also allege no facts supporting an "erroneous count" as to Count I. No Arizona decision explains precisely what an "erroneous count" claim encompasses, but both its plain language and common sense make clear that it relates to the miscounting of votes on ballots by election officials. For example, if 100 ballots were cast and a correct count would have led to 48 votes for Candidate A, 46 votes for Candidate B, and 6 votes for Candidate C in the contested race but officials counted the votes on those 100 ballots incorrectly (because of, for example, an equipment or aggregation error that counted all 6 votes for Candidate C for one of the other candidates), that would constitute an "erroneous count." Nothing about the statute suggests that this contest ground is implicated by Plaintiffs' allegations about Maricopa County election day issues, which don't allege any error in vote counting.

"honest mistakes or mere omissions on the part of the election officers" are not enough to establish "misconduct." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). That there were unintentional errors with printer settings and that poll workers may have unintentionally made errors with voter "check ins" and "check outs" is simply not "misconduct" as a matter of law. *See Aguilera v. Fontes*, No. CV 2020-014562, 2020 WL 11273092, at *4 (Ariz. Super. Ct. Nov. 30, 2020) ("A flawless election process is not a legal entitlement under any statute, EPM rule, or other authority[.] Rather, a perfect process is an illusion.").

Even if Plaintiffs could prove that the election day errors in Maricopa County amount to "misconduct" or led to an "erroneous count" (which they did not and cannot do), those errors could not have changed the outcome of the election. The maximum number of voters implicated by Plaintiffs' allegations is 419, an insufficient number in the aggregate to show that the "result would have been different." But that, of course, assumes that all 419 of these unidentified and unknown voters would have cast a ballot for Hamadeh. And the Court simply cannot make such a sweeping and dangerous assumption. When, as here, a plaintiff claims that certain voters were deprived of an opportunity to cast a ballot, courts cannot rely on evidence that a voter would have voted for a particular candidate. This is for good reason:

> it would be an uncertain and dangerous experiment to attempt the task of ascertaining and giving effect to their intentions, as ballots actually cast and returned. Uncertain, because it would be simply a matter of speculation; dangerous, because it would give to such electors the power of determining the result of an election, in a close contest. All that it would be necessary for them to do, in such a case, to decide the election, would be to declare that they intended to vote for a particular candidate. It would enable them to sell the office to the candidate offering the highest price for it, because they would not be called upon for their declaration until a contest arose, after the actual ballots had been counted, and the precise effect of their statement known.

Babnew v. Linneman, 154 Ariz. 90, 93 (App. 1987) (quotation omitted). The Court thus cannot – and should not – indulge any arguments about alleged voter intent and dismiss this Count.

III. Plaintiffs' Counts II-IV Are Speculative and Should Be Dismissed.

Next, Count II-IV should all be dismissed because they rest on speculation, and there is no plausible allegation that the errors complained of would have any effect on the outcome of this race. All should be dismissed.

Plaintiffs fail to support Counts II-IV with "well-pleaded facts," instead relying on the following conclusory allegations:

- In Count II, Plaintiffs allege that Maricopa County denied "certain voters" their right to cast a provisional ballot, and that "[u]pon information and belief," this error was "material to, and potentially dispositive of, the outcome of the election for the office of Arizona Attorney General." [Stmt. ¶¶ 68-73]
- In Count III, Plaintiffs allege that "the counties' Ballot Duplication Boards have incorrectly transcribed a material number of voters selections in the race for Arizona Attorney General." [*Id.* ¶ 77] The only alleged fact anywhere in Plaintiffs' Statement that could even remotely relate to this claim is that in the 2020 presidential race, a small sampling of Maricopa County ballots had an apparent error rate of 0.37% in duplication. [*Id.* ¶ 36]
- In Count IV, Plaintiffs allege that "the counties' Electronic Adjudication Boards have incorrectly recorded a material number of voters selections in the race for Arizona Attorney General." [*Id.* ¶ 83] The only alleged fact anywhere in Plaintiffs' Statement that could even remotely relate to this claim is that the statutory hand count audit of the Governor's race in Maricopa County revealed a single electronic adjudication error. [*Id.* ¶ 44] Plaintiffs then declare on "information and belief" that "a similar and proportionate rate of erroneous determinations" would affect the Attorney General race. [*Id.* ¶ 45]

All three of these claims turn on Plaintiffs' rank speculation both that these alleged errors occurred, and that they occurred in numbers sufficient to affect the outcome of the Attorney General's race. This cannot satisfy Plaintiffs' burden, and almost certainly violates Rule 11,

Ariz. R. Civ. P., and A.R.S. § 12-349. Plaintiffs, quite literally, have no idea that any of these errors occurred at all with votes cast for Attorney General, and they certainly have no idea how many votes were affected. There isn't a shred of credible factual support for any of these claims, and this Court cannot credit Plaintiffs' wild "inferences or deductions that are not necessarily implied by well-pleaded facts" and "unreasonable inferences or unsupported conclusions." *Jeter*, 211 Ariz. at 389 ¶ 4.

Applied here, it is unreasonable to simply presume that a "material number" of voters in Maricopa County were denied provisional ballots (Count II). It is unreasonable to presume that a "material number" of ballots across all fifteen counties suffer from ballot duplication errors affecting the race for Attorney General in 2022 because two years ago, there were some errors found in a single race in a single county (Count III). And it is unreasonable to presume that a "material number" of ballots across all fifteen counties suffer from electronic adjudication errors affecting the race for Attorney General because a single ballot in a single county had such an error in a different race altogether (Count IV). If fanciful allegations of this sort could support an election contest claim, every election would be subject to challenge by anyone unhappy with the result. But they don't; indeed, election contests must rest on facts, not "mere suspicion and conjecture," *Hunt*, 19 Ariz. at 264, which could never be enough to overcome the presumptive validity of the election returns, *Moore*, 148 Ariz. at 159. As a result, the Court should also dismiss Counts II-IV.

IV. Plaintiffs' Requested Relief as to Count II Is Legally Unsupported

As to Count II, Plaintiffs also seek extraordinary relief – allowing some unidentified and unknown number of voters to cast provisional ballots weeks after election day. Such relief falls well outside the Court's jurisdiction in an election contest.

To begin, there is no statutory basis for the requested relief, which does not appear among the remedies listed in A.R.S. § 16-676. By enumerating the relief the court may grant, A.R.S. § 16-676 also serves to limit the court's discretion to fashion other remedies. *See McNamara v.*

Citizens Protecting Tax Payers, 236 Ariz. 192, 196 ¶ 13 (App. 2014) (noting that where "a statute expressly provides a particular remedy or remedies, a court must be [wary] of reading others into it.") (cleaned up).

The requested relief would also require the court to invent, from whole cloth, an election schedule and process different from the ones established by Title 16, which no court is empowered to do. Plaintiffs' proposed remedy also implicates the concerns that animated the Arizona Supreme Court's decision in *Babnew*, discussed above. Allowing a self-identified subset of the electorate an opportunity to essentially cast their votes after the fact—once the gap between the candidates is known—would be a "dangerous experiment" that would amplify the potential and incentives for dishonesty and manipulation. *Babnew*, 154 Ariz. at 93. Indeed, Arizona's law setting strict timelines for the release of election results – and imposing criminal penalties for any premature release of results – was crafted to avoid this precise scenario where election results are known to the public, and could influence voter behavior, before the close of voting. *See* A.R.S. § 16-551(C); 2019 EPM, Ch. 12(I).

V. Plaintiffs' Claims About Early Ballot Signature Verification Are Barred by Laches and Legally Baseless.

Finally, Plaintiffs contend (Count V) – again, based solely "on information and belief" – that there were an unidentified number of "illegal votes" cast because "a material number of early ballots" were validated by county recorders across the state based on a signature match from "an election-related document that was not the voter's 'registration record,' such as a prior early ballot affidavit of early ballot request form." [Stmt. ¶ 90] This claim rests on Plaintiffs' presumption that a voter's "registration record" is narrowly limited to a voter's registration form, and further on the idea that any provision of the EPM that authorizes early ballot validation based on other "specimen[s]" is invalid and unenforceable. [*Id.* ¶¶ 90-91] Again, Plaintiffs say on "information and belief" that these ballots – a number they do not identify – "is material to, and potentially dispositive of, the outcome of the election for the office of Arizona Attorney

General." [*Id.* ¶ 93] And they ask for an order "proportionally reducing the tabulated returns of early ballots to exclude early ballots" validated in alleged violation of the law. [*Id.* ¶ 94] Count V fails for multiple, independent reasons.

A. Laches.

To begin, the equitable doctrine of laches bars Count V. Laches "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." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Plaintiffs check off all the boxes. Plaintiffs waited years to challenge this practice and provision of the EPM, their delay is unreasonable, and that delay causes significant prejudice to our elections system, the Courts, and above all, voters whom Plaintiffs ask this Court to disenfranchise.

In deciding whether a plaintiff's delay is unreasonable, a court should consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence[.]" *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). And here, Plaintiffs knew or should have known of this practice since at least 2019, when the EPM was approved by the Secretary, Governor, and Attorney General and thus obtained the force and effect of law. In fact, the Secretary's office put out a summary document describing the updates in the 2019 EPM that called out this provision.[3] Courts uniformly reject challenges to election procedures like this brought only after an election.

Indeed, "[c]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) (citation omitted). Here, rather than seeking relief as to this alleged conflict between the statute and EPM years or even months ago, Plaintiffs waited until after the election (and after Hamadeh lost his race) to sue. But "by filing their complaint after the completed election,"

[3] https://azsos.gov/sites/default/files/Summary_Updates_to_Draft_2019_Elections_Procedures_Manual.pdf (at p. 5).

Plaintiffs "essentially ask [the Court] to overturn the will of the people, as expressed in the election." *Sherman*, 202 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiffs' attempt to "subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful at the polls." *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (quotation omitted).

Plaintiffs' belated claim – brought after all votes have been counted – also causes significant prejudice to voters. Many Arizonans' early ballots were validated and tabulated based on the challenged EPM provision, and throwing their votes out after-the-fact in service of Plaintiffs' speculative claim would disenfranchise those voters. And while Arizona law generally requires early voters whose signatures cannot be verified receive notice and an opportunity to "cure" those signatures, A.R.S. § 16-550(A) (giving voters five business days after an election with a federal race to cure signature issues), the unidentified voters implicated by Plaintiffs' arguments here would have no such opportunity. *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (finding claims barred by laches and considering fairness to the parties, the court, "election officials, and the voters of Arizona").[4] This would treat similarly situated voters differently and

[4] Count V, which seeks to invalidate an unspecified number of early ballots – after the election and based on alleged signature verification deficiencies – is also little more than a belated and improper attempt to challenge early ballots in violation of Arizona's early ballot challenge laws. Under Arizona law, efforts to challenge – and, thereby, invalidate – early ballots must be brought by designated political party challengers before the affidavit envelope is opened and the ballot removed from the envelope for tabulation. *See* A.R.S. § 16-552(D). Further, challenged voters must be provided notice and an opportunity to be heard before their early ballots can be invalidated based on an early ballot challenge. A.R.S. § 16-552(E). And finally, a challenger's allegation that the affidavit signature does not match the voter's signature in the registration record – despite the county recorder's determination that the signatures do match – is not a valid basis for an early ballot challenge. A.R.S. §§ 16-552(D) & 16-591; *McEwen v. Sainz*, No. CV-22-163 (Santa Cruz Cty. Sup Ct.), Aug. 22, 2022 Minute Entry Order ("Signature verification is a function and responsibility of the County Recorder's office and not the bas[i]s for an early ballot challenge") (attached as **Exhibit 1**). Yet Plaintiffs here seek to invalidate untold numbers of early ballots, disenfranchising untold numbers of voters, in direct contravention of all these legal requirements and guardrails. The Court should swiftly reject this unlawful effort.

violate both the equal protection and due process rights of voters who would not receive the benefit of the statutory cure period. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

Beyond that, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the [applicable] deadline[s].'" *Sotomayor*, 199 Ariz. at 83 ¶ 9. (citation omitted). Late filings, such as Plaintiffs', "deprive judges of the ability to fairly and reasonably process and consider the issues . . . leaving little time for . . . wise decision making." *Id.*

In sum, Plaintiffs' delay in challenging this EPM provision prejudices county election officials, the Secretary, and above all else, Arizona voters. Laches thus precludes their Count V.

B. Merits.

Even if not barred by laches, Plaintiffs' Count V claims and their challenge to the EPM provision about early ballot signature verification are legally baseless. "A party attacking the validity of an administrative regulation has a heavy burden." *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 24 (App. 1994). An agency's rulemaking powers "are measured and limited by the statute creating them," *Caldwell v. Arizona State Bd. of Dental Examiners*, 137 Ariz. 396, 398 (App. 1983), and courts will not invalidate a regulation "unless its provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate." *Watahomigie*, 181 Ariz. at 25. Plaintiffs fail to carry their heavy burden here.

1. Plaintiffs' interpretation of A.R.S. § 16-550 contradicts the statute's text and legislative history.

A.R.S. § 16-550(A) requires the county recorder to compare the signature on early ballot affidavits with the signature in the voter's "registration record." Consistent with this

requirement, the 2019 EPM, at page 68, specifies that, besides the voter's registration form, the county recorder "should also consult additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/PEVL request forms," when conducting early ballot signature verification.[5] Plaintiffs' erroneous argument [Stmt. ¶ 91] that this EPM provision conflicts with A.R.S. § 16-550(A) assumes that the statutory reference to a voter's "registration record" is narrowly limited to the registration form or some other singular document. But that assumption is contrary to both the plain text and legislative history of A.R.S. § 16-550(A).

Nothing in the plain text of A.R.S. § 16-550(A) limits the county recorder's review to the voter registration form; nor does A.R.S. § 16-550(A) or any other law prohibit county recorders from consulting other official documents in the voter's registration record when verifying early ballot affidavit signatures. Indeed, if, as Plaintiffs insist, the Legislature wanted to restrict the county recorder's review to the registration form alone, it knows how to do so because that's exactly what the law said before the Legislature explicitly amended it. Before 2019, A.R.S. § 16-550(A) required the county recorder to compare the signature on early ballot affidavits to "the signature of the elector on his registration form." But in 2019, the Legislature amended A.R.S. § 16-550(A) to replace the reference to "the signature of the elector on his registration

[5] The Governor and Attorney General approved this EPM provision in 2019. And when the Secretary submitted an updated 2021 EPM for approval under A.R.S. § 16-452, the Attorney General retained Tim La Sota – Plaintiffs' co-counsel here – to review the draft for legal compliance. Mr. La Sota objected to several provisions, demanding removal of close to a third of the manual, and the Attorney General ultimately refused to approve the 2021 EPM based on those alleged legal deficiencies. Yet Mr. La Sota and the Attorney General did not object to the signature verification provision at issue. *See* 12/9/2021 Letter from T. La Sota to K. Hobbs & Excerpted Exhibit (attached as **Exhibit 2**) (full document available at https://www.azag.gov/sites/default/files/2021-12/Letter%20%26%20redline.pdf). In any case, even the objections Mr. La Sota raised were rejected in a failed legal action brought by the Attorney General to force the Secretary to accept his demanded changes. *See Brnovich v. Hobbs*, No. P1300CV2022200269 (Yavapai Cnty. Super. Ct.), June 17, 2022 Under Advisement Ruling and Order (attached as **Exhibit 3**).

form" with today's construction referencing "the elector's registration record." S.B. 1054, 54th Leg., 1st Reg. Sess. (Ariz. 2019). When interpreting a statute, "each word, phrase, clause, and sentence must be given meaning so that no part . . . will be void, inert, redundant, or trivial." *Ariz. Dep't of Revenue v. S. Point Energy Ctr., LLC*, 228 Ariz. 436, 441 ¶ 18 (App. 2011) (citation omitted). Here, the Legislature acted to expressly expand the county recorder's review from just the "registration form" to documents in the "registration record." The Court should reject Plaintiffs' baseless effort to undo or render this legislative amendment meaningless.

2. Plaintiffs' interpretation would lead to absurd results.

As the state's Chief Election Officer, the Secretary must maintain the statewide voter registration database, which contains the voter registration record of all Arizona voters. *See* A.R.S. § 16-142; EPM, Ch. 1(IV)(A). These registration records in the voter registration database often include not just the voter's registration form, but also other – more recent – documents associated with the voter's registration and voting activity, such as the signature roster or electronic poll book signatures, early ballot request forms, active early voting list request forms, and early ballot affidavits from prior elections. That a voter's registration record includes other documents beyond the registration form is apparent from the Legislature's usage of the term "registration record" in other parts of Title 16. *See, e.g.*, A.R.S. § 16-153(A) (allowing certain voters to protect from public disclosure their personal identifying information, "including any of that person's documents and voting precinct number contained in that person's voter registration record" (emphasis added)); A.R.S. § 16-168(F) (protecting "the records containing a voter's signature" within a voter's registration record (emphasis added).

Indeed, for long-time registered voters, the registration form in the voter's record may be decades old, and their signature may degrade or change over time, as reflected in more recent official documents in the registration record. Plaintiffs' insistence that officials may only consult the registration form – and not any other official documents in the voter's registration record – both defies the plain text and legislative history of A.R.S. § 16-550(A) and would lead to absurd

results. Counties would have to reject early ballots based on signature comparison to an outdated exemplar while ignoring more recent signatures available in the voter's registration record. Further, Plaintiffs' argument would absurdly lead to some voters being required to cure their signature for every early ballot they cast or face disenfranchisement because the county, according to Plaintiffs, must always compare the voter's early ballot affidavit signature to their decades-old registration form, despite knowing that the voter's signature has changed based on recent documents in the registration record. The Court should reject Plaintiffs' erroneous and nonsensical reading of the law. *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293, 297 ¶ 11 (App. 2017) (courts "will not interpret a statute in a manner that would lead to an absurd result.").

C. Speculation.

Even if Plaintiffs' claims in Count V were not barred by laches (they are) and even if those claims had any basis in law (they do not), like the four counts before it, Count V also fails because it is based entirely on speculation. As with "misconduct" and "erroneous count of votes," a contest based on "illegal votes" requires the contestant to prove (1) that illegal votes were cast and (2) that those illegal votes "were sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Plaintiffs don't – and obviously can't – allege a single fact to support this claim. This fundamental failure independently dooms these claims. *Cullen*, 218 Ariz. at 419 ¶ 7 ("A complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8") (cleaned up).

Beyond that, however, Plaintiffs provide no principled way for the Court to even consider this claim and the remedy Plaintiffs seek. Plaintiffs cavalierly ask this Court to "proportionally reduc[e] the tabulated returns of early ballots to exclude early ballots" validated in alleged violation of the law. [Stmt. ¶ 94] But they don't allege how many early ballots were validated using a signature exemplar on something other than a voter registration form, and they could never prove what that number is because the counties have no data that could ever show which signature exemplar was used to verify a particular ballot. And this should go without saying, but

it would be impracticable for counties to re-do early ballot signature verification at this stage. Granting Plaintiffs' request would therefore require the Court to: (1) guestimate how many early ballots would have been rejected had counties applied Plaintiffs' absurd interpretation of A.R.S. § 16-550(A); and then (2) guestimate how these voters would have voted in the Attorney General's race to "proportionally reduce" the vote totals. The Court should reject Plaintiffs' request to apply conjecture upon conjecture to overturn the election result.

* * * * * *

Count V fails and should be dismissed for any number of reasons, all of which should have been obvious to Plaintiffs and their counsel before filing an election contest on this ground.

VI. The Election Contest Statutes Do Not Give Contestants Carte Blanche to Conduct Discovery or Inspect Ballots.

As the Secretary notes throughout the Motion, Plaintiffs' election contest is little more than a claim in search of a factual basis. But an election contest is subject not only to Arizona's traditional pleading standards at a base level, but also to the presumptions and substantive requirements that apply to such claims, making an election contest even harder to sustain (as it should be given the important public policy concerns at issue).

At bottom, this case should proceed no further and be immediately dismissed. Plaintiffs may seek an opportunity to inspect ballots pursuant to A.R.S. § 16-677 in hopes of securing evidence to support their wishful thinking and speculation. This statute, however, should not be read to allow such discovery if the election contest itself is not cognizable. Although no Arizona appellate court has addressed the issue, courts have elsewhere held that election contests must pass the pleading threshold to justify discovery. For instance, the Minnesota Supreme Court recently denied a candidate the opportunity to inspect ballots under a similar law because of deficiencies in the candidate's election contest allegations. The candidate alleged that "irregularities" in the conduct of the election and in the absentee ballot canvass "raised questions over who received the largest number of votes legally cast in the election," and argued that

"transparency and public confidence in the integrity of the election require[d]" that she be allowed to inspect the ballots and conduct discovery. *Bergstrom v. McEwen,* 960 N.W.2d 556, 558 & 566 (Minn. 2021) (internal quotation marks omitted). The court held that her pleading included only speculative allegations unsupported by facts or evidence, and also held that the complaint must first meet the pleading requirements before ballot inspection was permitted. *Id.* at 565–66; *see also Zahray v. Emricson,* 182 N.E.2d 756, 757-58 (Ill. 1962) ("Equally certain is the principle that the proceeding cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence").[6]

Conclusion

Arizona has a "strong public policy favoring stability and finality of election results," *Ariz. City Sanitary Dist*, 224 Ariz. at 334 ¶ 12, which means that the judiciary must be wary of interfering with presumptively valid election results. The burden on an election contestant is thus exceedingly high, and here, is a burden that Plaintiffs failed to meet. For all the reasons discussed above, the Court should dismiss Plaintiffs' "election contest" with prejudice, and without leave to amend. The Secretary further reserves her right to seek an award of fees against Plaintiffs and their counsel under Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349.

Respectfully submitted this 26th day of November, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
D. Andrew Gaona

STATES UNITED DEMOCRACY CENTER
Sambo (Bo) Dul

[6] *See also*. *Green v. Nygaard*, 213 Ariz. 460, 466 ¶ 18 (App. 2006) (discovery rules are not meant to enable "wild fishing expeditions"); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 425-26 (1st Cir. 2007) ("[P]laintiffs should not be permitted to conduct fishing expeditions in hopes of discovering claims that they do not know they have.")

Attorneys for Defendant Arizona Secretary of State Katie Hobbs

ORIGINAL efiled and served via electronic means this 26th day of November, 2022, upon:

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/s/ Diana Hanson

Exhibit 1

Exhibit 1

ARIZONA SUPERIOR COURT, SANTA CRUZ COUNTY

STEVEN MCEWEN, chairman of the Santa Cruz County Republican Committee; Plaintiff, VS. SUZANNE SAINZ, in her official capacity as SANTA CRUZ COUNTY RECORDER and ALMA SCHULTZ, in her official capacity as DIRECTOR of the SANTA CRUZ COUNTY ELECTIONS DEPARTMENT, Defendants.	Case No. CV-22-163 MINUTE ENTRY ORDER Date: August 1, 2022	

EVENT: ORDER TO SHOW CAUSE
START TIME: 2:00 p.m. END TIME: 3:11 p.m.
COURTROOM: #5
JAVS: [X] **HON. VANESSA CARTWRIGHT**
COURT INTERPRETER: N/A
COURT REPORTER: N/A
DEPUTY CLERK: Lisette Quijada
PRESENT: Steven McEwen, Plaintiff
Veronica Lucero Esq., Attorney for Plaintiff
Jackie Parker Esq., Attorney for Plaintiff
Christina Estes-Werther Esq., Attorney for Defendants
Justin Pierce Esq., Attorney for Defendants
Sambo Bo Dul Esq., Attorney for Amicus Curiae Arizona Secretary of State Katie Hobbs- appearing through ZOOM

The Court having set this matter for an Order to Show Cause in the above captioned matter; the Court called the case and the following proceedings were had:

Preliminary Matters are addressed and resolved on the record.

Veronica Lucero, Esq., avows to the Court as to the allegations filed in the Verified Complaint for a Special Action and Application to Show Cause Why Relief Should not be Granted.

Christina Estes-Werther Esq. argues the matter on the record.

Sambo Bo Dul Esq., states her position on the record.

Veronica Lucero, Esq. makes rebuttal arguments.

Veronica Lucero, Esq. advises the Court that there is a written declaration, that said declaration is in regard to the plaintiff's testimony; that if the Court decides that the space of the room is an issue, then she would like to present it as an offer of proof so that it can be on the record for appeal purposes.

The Court advises Ms. Lucero that she can collect said testimony now or present it as proof.

Justin Pierce, Esq. and Veronica Lucero, Esq. state on the record their position regarding the above-mentioned declaration.

The Court states on the record that the Court's position is that if the Court were to determine that he has the right to be present in the room or to be involved in signature verification, the accommodations to allow him to do so would need to be made regardless of the size of the room, location, or whatever would require.

Veronica Lucero, Esq. states that if that as long as the ruling is based purely on the legal arguments and this factual issue isn't going to be a part of the decision, then we don't need to submit evidence.

The Court **FINDS** that it has jurisdiction and that Venue is proper. The plaintiff does have standing in this matter. The Court has reviewed the pleadings, the cited statutes, the cited case law, and the relevant portions of the 2019 Elections Procedure Manual, and listened carefully to the arguments presented in Court today, the Court does not find the legal authority to grant what is being requested by the Plaintiff in this case.

It is the Court's determination, that from listening to the arguments, and from the pleadings and statutes that essentially what is being asked from the Court is the connect the dot analysis, to pick and choose, and to piecemeal various sections of the different statutes, to go outside the plain meaning and plain reading of those statutes, to reach a conclusion that is not expressly provided for in the laws. It would essentially be the creation of a new law or a new procedure. This Court is not going to do that.

While pursuant to ARS 16-552(C), the County Chairperson for each political party may designate a party representative to act as an early ballot challenger, the laws under ARS 16-591 and 16-121.01 are very clear about the bases on which an early ballot challenge can be made and they do not include voter signature review or verification.

In contrary to the Plaintiff's arguments, the Court will not infer ARS 16-121.01(B)(1) or (B)(4), that the registrant is not the person whose name appears on the register or the making of the mark to mean that in order for the party representative to effectively challenge an early mail-in ballot on this basis, the party representative has the right to view the signatures on the affidavit to compare those to known signatures, or that it is the only way that a challenge can be made.

The Court **FINDS** that if it is what the legislature had intended, that is what would have been, or should have been stated. However, even if the Court was willing to make this leap on its own, this conclusion is further unsupported by the other statutes and the Elections Procedure Manual.

To include the very serious issue of voter signature confidentiality; ARS 16-168(F) prohibits disclosure of voter signatures except in limited circumstances, none of which apply to this case.

Again, if the legislature had intended for Party representatives to be able to personally view and compare the signatures on the early ballot affidavit with a known signature, there are many different places in the

statutes that they could have stated as such.

It could have been included in the signature verification mention of Section F, to include signature verification not just for petitions or candidate filings, but also early ballot verification. The Court does not believe that it should be a catch all provision for election purposes; it does not apply.

It could have been stated in ARS 16-550 (A). It clearly states on the receipt of the envelope containing the early ballot and the ballot affidavit, the county recorder or other officer in charge or elections shall compare the signatures. If they had intended for an early ballot challenge to be made, it could've been stated that the party representative is included. And, of course, it could have been expressly listed as a grounds for a challenge in ARS 16-121.01 (B), but it does not.

The Election Procedure Manual also does not support the Plaintiff's arguments in this case. The Court does not believe the communication between the County and the Plaintiff in this matter created a right that doesn't otherwise exist in the law.

Signature verification is a function and responsibility of the County Recorder's office and not the bases for an early ballot challenge.

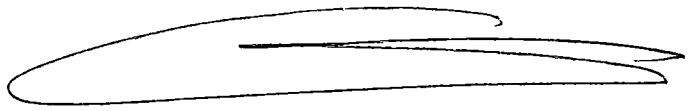
Therefore , the requested relief is **DENIED,** to include the request for attorney's fees and costs.

Any other motions are moot.

This is a final and appealable order as of today's date.

The Court orders that a Minute Entry Order be prepared for the Court's signature.

There being no further issues pending before the Court at this time, the hearing is adjourned.



JUDGE OF THE SUPERIOR COURT
HONORABLE VANESSA CARTWRIGHT

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Exhibit 2

Exhibit 2

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December 9, 2021

Via email and hand-delivery to:

The Honorable Katie Hobbs
Arizona Secretary of State
1700 West Washington Street
Phoenix, Arizona 85007
khobbs@azsos.gov

Dear Secretary Hobbs:

This firm represents the Attorney General in relation to the Attorney General's statutory duties with regard to the Arizona Elections Procedures Manual under Arizona Revised Statutes § 16-452(B).

Enclosed is a draft of the Arizona Elections Procedures manual with changes identified in redlined form. The Attorney General will not approve the manual, pursuant to his power under A.R.S. § 16-452(B), unless those changes are made.

Very truly yours,

TIMOTHY A. LA SOTA PLC

Timothy A. La Sota

cc: Sambo "Bo" Dul
Allie Bones

writing no later than 90 days prior to the election for which the exception is requested.

A. County Recorder Responsibilities

1. Signature Verification

Upon receipt of the return envelope with an early ballot and completed affidavit, a County Recorder or other officer in charge of elections shall compare the signature on the affidavit with the voter's signature in the voter's registration record. In addition to the voter registration form, the County Recorder should also consult additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/AEVL request forms, in determining whether the signature on the early ballot affidavit was made by the same person who is registered to vote.

- If **satisfied** that the signatures were made by the same person, the County Recorder shall place a distinguishing mark on the unopened affidavit envelope to indicate that the signature is sufficient and safely keep the early ballot and affidavit (unopened in the return envelope) until they are transferred to the officer in charge of elections for further processing and tabulation.

- If **not satisfied** that the signatures were made by the same person the County Recorder shall make reasonable and meaningful attempts to: (1) contact the voter via mail, phone, text message, and/or email; (2) notify the voter of the inconsistent signature; and (3) allow the voter to correct or confirm the signature. The County Recorder shall attempt to contact the voter as soon as practicable using any contact information available in the voter's record and any other source reasonably available to the County Recorder.

Voters must be permitted to correct or confirm an inconsistent signature until 5:00 p.m. on the fifth business day after a primary, general, or special election that includes a federal office or the third business day after any other election. ~~For the purposes of determining the applicable signature cure deadline: (i) the PPE is considered a federal election; and (ii) for counties that operate under a four-day workweek, only days on which the applicable county office is open for business are considered "business days."~~

If the early ballot affidavit is not signed, the County Recorder shall make reasonable and meaningful attempts to contact the voter via mail, phone, text message, and/or email, to notify the voter the affidavit was not signed and explain to the voter how they may cure the missing signature or cast a replacement ballot before 7:00 p.m. on Election Day. The County Recorder shall attempt to contact the voter as soon as practicable using any contact information available in the voter's record and any other source reasonably available to the County Recorder. Neither replacement ballots nor provisional ballots can be issued after 7:00 p.m. on Election Day.

~~All early ballots, including ballots by mail and those cast in person at an on-site early voting location, emergency voting center, or through a special election board must be signature verified by the County Recorder. However, because voters who cast an early ballot in person at an on-site~~

Commented [A34]: *See* A.R.S. § 16-407.03. The proposed regulations exceed the scope of the Secretary's statutory authorization or contravene an election statute's purpose, and therefore cannot be approved. *See Leach v. Hobbs*, 483 P.3d 194, 198 ¶ 21 (Ariz. 2021) ("[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law."); *McKenna v. Soto*, 481 P.3d 695, 699 (2021).

Exhibit 3

Exhibit 3

SUPERIOR COURT, STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

MARK BRNOVICH, in his official capacity as Arizona Attorney General; Yavapai County Republican Committee, an unincorporated association; and Demitra Manjoros, First Vice Chair of the Yavapai County Republican Committee and registered voter in Yavapai County, Plaintiffs vs. KATIE HOBBS, in her official capacity as Arizona Secretary of State, Defendant.	**Case No.** P1300CV202200269 **UNDER ADVISEMENT RULING AND ORDER RE: SPECIAL ACTION AND SUMMARY JUDGMENT**

HONORABLE JOHN NAPPER	**BY:** Felicia L. Slaton, Judicial Assistant
DIVISION 2	**DATE:** June 17, 2022

The Court has received and reviewed the Complaint for Special Action Relief filed by the Arizona Attorney General ("AG"), the Application for Order to Show Cause and the attached exhibits, the Answer filed by the Arizona Secretary of State ("Secretary"), the Response to Plaintiff's Application for Order to Show Cause, and the attached exhibits. The Court has also reviewed the filing from the Arizona Governor. The Court has also reviewed the supplemental briefs filed by the parties. The Court has also reviewed all of the summary judgment pleadings initiated by the Secretary. The Court also held oral arguments on these pleadings.

The Court accepts special action jurisdiction. The Court finds the Secretary properly exercised her discretion when timely presenting a draft 2022 Elections Procedures Manual ("EMP") to the AG and Governor. The draft certainly required editing and revision. However, the Court finds the draft was constructed in compliance with the Secretary's duties contained A.R.S. §16-452. Accordingly, the Court denies the relief sought in the Complaint for Special Action.

Based on the findings outlined above, the Secretary's Motion for Summary Judgment is denied.

Facts and Procedural History

Arizona statute requires an EMP to be constructed and implemented "not later than December 31 of each odd-numbered year immediately preceding the general election." *A.R.S. §16-452(B)*. The process begins with the Secretary submitting the manual, "to the governor and the attorney general not later than October 1 of the year before each general election." *Id.* The manual "shall be approved by the governor and attorney general" before "its issuance." *Id.*

On October 1, 2021, the Secretary submitted an EMP to the AG and the Governor. This was done after consulting election officials statewide. After receiving and reviewing the draft, the AG sent a letter to the Secretary with a significant number of proposed revisions to the draft. These revisions included striking large sections of the draft and inserting additional materials. In nearly each instance, the AG's objection was not outlined with specificity. He simply stated, "this proposed regulation exceeds the scope of the Secretary's statutory authorization or contravenes an election statute's purpose, and therefore cannot be approved." He further stated, "The proposed regulation is also arbitrary and capricious." The AG failed to explain how he had reached these conclusions.

After receiving the AG's proposed edits, the Secretary attempted to address the concerns raised by the AG. She sent letters and offered to meet. The purpose was to begin discussions and negotiations to produce an EMP that was acceptable to the Secretary, the AG, and the Governor. This type of negotiation occurred in 2019, the last time an EMP was produced and implanted. For reasons not meriting discussion here, these negotiations did not occur in 2021. Based on the divide between the AG and Secretary, the Governor found himself stymied with nothing to approve. No other efforts were made before December 31 to finalize an elections manual for the 2022 election cycle.

On April 21, 2022, the AG and the Yavapai County Republican Party filed their Complaint for Special Action Relief. The Complaint asked the Court to order the Secretary to produce a legally compliant EMP. He argued the Secretary failed to properly exercise her discretion when she produced a draft EMP which, from his perspective, did not reflect the current state of the law. The redlined version of the draft EMP was attached as an exhibit to the Complaint. It was identical to the one he previously sent to the Secretary.

After an oral argument on an Order to Show Cause, the Court ordered further briefing to allow the AG additional time to provide explanations for his objections to the draft. At the Order to Show Cause hearing, the Secretary raised several defenses which were denied by the Court. The Court also joined the Governor as a necessary party. The Court set another argument to address the issues raised in the Complaint and a subsequently filed Motion for Summary Judgment filed by the Secretary.

The Court heard oral arguments on all of the issues and took them under advisement.

Application of Law

Jurisdiction

Any person, "who previously could institute an application for a writ of mandamus, prohibition, or certiorari may institute proceedings for a special action." *Ariz. R. P. Spec. Act. 2(a)(1)*. The AG meets this definition. *A.R.S. §12-2021*. The Secretary is a properly named defendant as she is the officer against whom relief is sought. *Ariz. R. P. Spec. Act. 2(a)(1)*. A question to be answered in a special action is, "whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion." *Ariz. R. P. Spec. Act. 3(a)*.

Special action jurisdiction is discretionary. *State Compensation Fund of Arizona v. Fink*, 224 Ariz. 611, 612 ¶4 (App. 2010). Accepting jurisdiction is appropriate in cases involving questions of first impression. *Callan v. Bernini*, 213 Ariz. 257, 258 ¶4 (App. 2006). Further, special action jurisdiction is more likely to be accepted when the issues are matters of law and not fact. *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 594 ¶16 (App. 2007).

The only issue before the Court is whether the Secretary abused her discretion when she submitted the draft EMP for review by the AG and the Governor. Contrary to the concerns raised by the Secretary, this is an issue of pure law and does not require the Court to engage in a line-by-line rewrite of the draft. Further, whether a secretary fails to exercise her discretion by producing a draft EMP that predominately complies with *A.R.S. §16-452* is an issue of first impression. Relying on the factors outlined above, the Court finds special action jurisdiction is appropriate.

Duties of the Secretary

Pursuant to A.R.S. §16-452, the Secretary is required to produce a draft manual. *A.R.S. §16-452(A)*. The purpose of the manual is to prescribe rules for "early voting and voting, and of producing, distributing, collecting, counting, tabulating, and storing ballots." *Id.* The purpose of these rules is, "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency." *Id.* The secretary is to "prescribe these rules" after consultation with "each county board of supervisors or other officer in charge of elections." *Id.*

There is no dispute that the Secretary met and consulted with each county board of supervisors or other officers in charge of elections. The draft EMP was produced after this consultation and with input from each of these officers. The manual she produced also represents her policy decisions on issues related to early voting and voting, and of producing, distributing, collecting, counting, tabulating, and storing ballots. The draft also represents her beliefs that these policy preferences achieve correctness, impartiality, uniformity and efficiency. It is important to note, the draft EMP was supported by an overwhelming majority of the Arizona elections officials. The AG has not produced any evidence to the contrary.

Nonetheless, the AG argues this Court should order the Secretary submit a "legally compliant" draft EMP. He argues the current draft fails to comply with current Arizona election law. Therefore, the Court should mandate the preparation of a second draft.

A writ a mandamus lies when a party seeks to require the performance of, "a ministerial act which the law specially imposes as a duty resulting from that office." *State Board of Technical Registration v. Bauer*, 84 Ariz. 237, 239 (1958). A ministerial act allows a public officer, "only one course of action on an admitted state of facts." *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995). Assuming the preparation of a draft EMP is a ministerial act, which it is not, the Secretary certainly completed that act.

Ordinarily, "mandamus is not available if the act of the public officer is discretionary." *Sensing v. Harris*, 217 Ariz. 261, 263 ¶6 (App. 2007). However, in some circumstances, "mandamus may be used to compel a public officer to perform a discretionary act, but not to exercise that discretion in a particular manner." *Blankenbaker v. Marks*, 231 Ariz. 575, 577 ¶7 (App. 2013). Again, the record is clear, the Secretary exercised her discretion in producing the draft EMP. There is no evidence in the record suggesting she put together the draft in bad faith or without consulting elections officials from around the state.

The Court agrees with the AG that the draft omitted or misconstrued portions of statutes. There are other instances where the draft suggests certain actions are mandatory and not discretionary. The draft also includes best practice recommendations without clearly describing them as such. The Court's preliminary findings are on the record and are not necessary to repeat in this ruling. However, in a document totaling 296 pages, these deficiencies were limited. A majority of the document complies with the dictates of the EMP in Arizona law.

It is worth repeating, the Secretary's duty is to produce an EMP for the approval of the AG and the Governor. The Secretary's initial EMP submission is not finalized until it receives this approval. Historically, these three actors have worked together to prepare and finalize an agreed upon EMP. The statute builds in ample time and opportunity to iron out any and all disputes (from October 1st to December 31st). This did not happen in 2021. The parties' failure to properly work with one another to improve the Secretary's initial draft of the EMP does not mean she failed to perform a ministerial or discretionary act requiring a mandate from the Court.

The AG is rightfully concerned about the failure of the parties to comply with the timing of *A.R.S. §16-452*. The EMP was supposed to be finalized and approved by December 31, 2021. At this point in the game, there is no mechanism for the Court to assist the parties in constructing an EMP which complies with A.R.S. §16-452 within the timelines of the statute. The Complaint was filed far too late for this to occur without disrupting elections that have already begun. It is for another Court on another day to determine whether this is a proper role for the Courts.

The failure to produce a new EMP does not leave Arizonans without guidance. The 2019 manual was properly submitted and approved by the Governor and the AG. Election officials are following the 2019 EMP while adhering to any changes occurring since its submission. As the last approved EMP, it currently remains the EMP for Arizona elections.

IT IS THEREFORE ORDERED, accepting special action jurisdiction and denying the requested relief.

IT IS FURTHER ORDERED, the Secretary's Motion for Summary Judgment is **denied**.

IT IS FUTHER ORDERED, all requests for attorneys' fees are **denied**.

IT IS FURTHER ORDERED, the Secretary shall file a form of judgment consistent with this Order within five (5) days.

DATED: eSigned by Napper,John 06/17/2022 16:32:58 34OKUg1O

HON. JOHN NAPPER
Judge of the Superior Court, Division 2

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