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15 **ARIZONA SUPERIOR COURT**
16 **MARICOPA COUNTY**

17 KARI LAKE,

18 Contestant/Plaintiff,

19 v.

20 KATIE HOBBS, personally as Contestee and
21 in her official capacity as the Secretary of
22 State; et al.,

23 Defendants.

No. CV2022-095403

**ARIZONA SECRETARY OF
STATE'S REPLY IN SUPPORT OF
MOTION TO DISMISS
COMPLAINT IN SPECIAL
ACTION AND VERIFIED
STATEMENT OF ELECTION
CONTEST**

(Assigned to Hon. Peter Thompson)

1 **Introduction**

2 Plaintiff’s Statement and its thousands of pages of exhibits try to convince this Court that
3 quantity means more than quality, that speculation and wild assertions by so-called “experts” are
4 enough to plead an election contest in Arizona, and that a contestant can simply declare an
5 election result “uncertain” and proceed to trial. But that simply isn’t the law.

6 This Court must evaluate the Statement against the backdrop of several underlying
7 principles that, applied together, require its dismissal. The Court:

- 8 • Must apply “all reasonable presumptions” in “favor [of] the validity of [the] election,”
9 *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986);
- 10 • Must apply a presumption of “good faith and honesty of the members of the election
11 board,” *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917);
- 12 • May not accept “inferences . . . that are not necessarily implied by well-pleaded facts,
13 unreasonable inferences or unsupported conclusions from such facts, or legal conclusions
14 alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. at 386, 389 ¶ 4 (App. 2006);
- 15 • May not “speculate about hypothetical facts that might entitle the plaintiff to relief.”
16 *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008); and
- 17 • May not consider “public rumor” or “evidence about which a mere theory, suspicion, or
18 conjecture may be maintained.” *Hunt*, 19 Ariz. at 263-64.

19 Through this lens, and for the reasons set forth in the Secretary’s Motion to Dismiss, the Court
20 should dismiss this case.

21 **Argument**

22 **I. Reporting Election Misinformation to a Private Party Is Not Misconduct and Does**
23 **Not Violate Constitutional Rights.**

24 For Count I, Plaintiff continues to insist that the Secretary’s Office twice flagging social
25 media posts for review should somehow nullify the election results. But Plaintiff makes no effort
26 to grapple with or respond to the many cases the Secretary cites holding that state officials’

1 flagging of social media posts for independent review by social media platforms does not amount
2 to state action such that federal or state constitutional rights are implicated. Plaintiff in fact seems
3 to have dropped the First Amendment arguments altogether, despite Count I of her Complaint
4 relying heavily on alleged constitutional violations. *See* Resp. at 19 (“[m]isconduct . . . does not
5 require that Plaintiff have a First Amendment claim against Defendants”).

6 In any case, these actions do not otherwise constitute misconduct. A recent decision
7 dismissing an election contest raising allegations of misconduct based on similar actions makes
8 this clear. *See Finchem v. Fontes*, CV2022053927, at 12 (Maricopa Cnty. Super. Ct. Dec. 16,
9 2022) (holding that flagging social media posts cannot be construed as misconduct, including
10 because they do not relate to the Secretary’s participation in the 2022 canvass and because a
11 social media platform is not an “elected official,” so its “independent decision” to act “cannot
12 create a valid basis for an election challenge”) (**Exhibit A**).

13 Even if there were misconduct here (there is not), Plaintiff never alleges that these actions,
14 two years before the 2022 General Election, impacted any votes, and certainly not enough votes
15 for relief under the standards of an election contest. Allegations made for the first time in her
16 response brief that Plaintiff “will be introducing expert testimony” that these actions would affect
17 sufficient voters [Resp. at 21 (emphasis added)], are both too little (being entirely speculative)
18 and too late. Since Plaintiff never alleged in her Complaint that voters in 2022 were influenced
19 (at all) by the Secretary’s Office’s actions—raising this for the first time and in a conclusory
20 manner in her response—she has not sufficiently pled her claim, and it must be dismissed.

21 **II. Election Day Issues in Maricopa County Were Not Misconduct, and Did Not Lead**
22 **to Any Illegal Votes.**

23 Plaintiff’s Count II raises several claims related to election day activities in Maricopa
24 County, including that ballot on demand printers were “uncertified” and susceptible to hacking.
25 [Stmnt. ¶¶ 141] Plaintiff also questions the alleged commingling of tabulated and non-tabulated
26 ballots [¶¶ 76-79], long wait times at various vote centers [*id.* ¶¶ 80-84], and vaguely alleges that

1 the election day printer issues may have been intentional and that the alleged lack of printer
2 certification endangered the entire voting process [*id.* ¶¶ 100, 104] The Secretary [Motion at 5-
3 9] went through each of these allegations to point out that they cannot support a valid election
4 contest. Plaintiff’s attempt to salvage these claims fails.

5 **A. The burden is on Plaintiff to show that alleged misconduct or illegal votes**
6 **affected the outcome of the election.**

7 Before discussing the specifics of Plaintiff’s various claims, the standard by which they
8 all must be evaluated requires clarification. Plaintiff [at 24-25] cites *Hunt v. Campbell*, 19 Ariz.
9 254 (1917) for her proposition that “electoral manipulations with unquantifiable impacts on an
10 election are not immune from review,” and argues that *Hunt* “define[s] the type of widespread
11 interference with an election” that allows a court to invalidate the election without requiring a
12 contestant to “quantify the affected votes.” Plaintiff is wrong.

13 To be sure, the Supreme Court in *Hunt* cited a treatise that distinguished “between
14 particular illegal votes the effect of which may be proven and exactly computed and fraudulent
15 combinations, coercion, and intimidation,” and acknowledged that in dealing with those latter
16 serious claims (which Plaintiff does not plead here), where the effect “can never be precisely
17 estimated” there may be rare cases when “the entire vote so affected must be rejected.” 19 Ariz.
18 at 265-66 (emphasis added). But Plaintiff ignores the facts of *Hunt* and the instructions given to
19 the trial court:

20 [I]f the asserted fraud exists at all, it consists in the election officers fraudulently
21 changing specific ballots which were marked and voted for contestee to appear as
22 if marked and voted for contestant and counting them as voted for contestant. It is
23 apparent that, if the proofs adduced are sufficient to justify the trial court in finding
24 that such ballots were so fraudulently changed and counted, the identical proof that
would sustain it must necessarily and with reasonable precision compute the extent
of the fraud perpetrated.

25 *Id.* at 266. In other words, even with fraud (not alleged here), the Arizona Supreme Court made
26 clear that it would require “proof” with “reasonable precision” of the fraud.

1 It's telling that Plaintiff cannot identify a single case following *Hunt* when a court
2 invalidated an entire election based on the “unquantifiable” impact of election irregularities like
3 those Plaintiff identifies here. There is no such case, which is hardly surprising because
4 contestants “bear [the] burden of proof to show quantifiable harm with regard to all [their]
5 claims.” *Moore v. City of Page*, 148 Ariz. 151, 165 (App. 1986). Beyond that, post-*Hunt*, the
6 Arizona Supreme Court refused to allow irregularities in a voting precinct to “invalidate the
7 entire election” or even “the entire vote of the precinct” affected by the irregularity. *See Grounds*
8 *v. Lawe*, 67 Ariz. 176, 184 (1948). And even the cases Plaintiff cites don't support her amorphous
9 claims. *Findley v. Sorensen* identified 89 specific votes at issue in an election with a margin of
10 49 votes. 35 Ariz. 265, 270 (1929). Similarly, *Miller v. Picacho Elementary Sch. Dist. No. 33*
11 identified 41 specific votes at issue in an election with a margin of 14 votes. 179 Ariz. 178, 178
12 (1994). Those cases are a far cry from Plaintiff's speculative allegations.¹

13 Plaintiff's claims of an “unquantifiable impact” cannot be justified. Simply put, it will
14 always be “impossible to compute the wrong,” *Hunt*, 19 Ariz. at 266, when a contestant fails to
15 provide anything but speculation and conjecture.

16 **B. Ballot-on-demand printers need not be certified.**

17 As the Secretary detailed at length [Motion at 6-7], Plaintiff's claim that there was
18 “misconduct” or that “illegal votes” were cast because Maricopa County's ballot-on-demand
19 printers (“BODs”) were not “certified” under state and federal law is meritless because BODs

20 ¹ A group of plaintiffs, including Plaintiff's campaign, sued on election day and asked this Court
21 to keep the polls open for three additional hours based on the election days issues in Maricopa
22 County. Judge Tim Ryan denied their request, citing the fact that the plaintiffs didn't “have any
23 evidence that any voter was precluded from their right to vote.” *Republican Nat'l Committee v.*
24 *Sellers, et al.* CV2022-014827 (Maricopa Cnty. Super. Ct.); Robert Anglen, *Judge rejects*
25 *emergency GOP lawsuit to extend voting hours in Maricopa County, Ariz. Republic* (Nov. 8,
26 2022), available at <https://www.azcentral.com/story/news/politics/elections/2022/11/08/judge-rejects-emergency-republican-lawsuit-to-extend-maricopa-county-poll-hours/8307974001/>. If
these allegations weren't enough to keep the polls open on election day, they certainly aren't
enough to overturn the election.

1 do not have to be certified. Plaintiff's Response says nothing about this issue, and thus concedes
2 the Court should dismiss this component of Count II.

3 **C. Susceptibility to hacking.**

4 Relatedly, and as the Secretary pointed out [Motion at 7], Plaintiff's allegation that there
5 was somehow "misconduct" or "illegal votes" because BOD printers were "susceptible to
6 hacking" fails because Plaintiff doesn't allege that BOD printers were actually hacked, or
7 actually caused any illegal votes. Plaintiff's Response says nothing about this issue, and thus
8 concedes the Court should dismiss this component of Count II.

9 **D. Lines at vote centers and alleged "commingling" of ballots.**

10 Next, the Secretary [at 7-8] identified the speculative nature of Plaintiff's allegations that
11 there was either "misconduct" or "illegal votes" resulting from long lines at certain vote centers
12 in Maricopa County, and because – as the County has acknowledged – there were several
13 instances of ballots placed into "Door 3" for tabulation at central count being found in bags of
14 ballots tabulated at a vote center. But Plaintiff has no support for her claim of "voter
15 suppression," nor can Plaintiff do anything but speculate wildly that Door 3 ballots were either
16 not counted or double counted. As detailed above [*see* Section I.A, *supra*], merely declaring that
17 there was some amount of alleged "voter suppression" or that Door 3 ballots "could easily" have
18 gone uncounted or were double-counted cannot sustain an election contest.

19 **E. No evidence of intentional acts as pleaded in the Statement.**

20 Plaintiff incorrectly accuses the Secretary of claiming that intent must be pled "with
21 particularity." But the Secretary's motion makes no such assertion. Instead, the Secretary argued
22 [at 8-9] that Plaintiff's allegations fail to meet the minimum requirements for factual allegations,
23 which requires more than "inferences or deductions that are not necessarily implied by well-
24 pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal
25 conclusions alleged as facts." *Jeter*, 211 Ariz. at 389 ¶ 4. Plaintiff and Mr. Parikh do not identify
26 what electronic or mechanical issue was at the root of the Maricopa County tabulation issue, let

1 alone which humans were involved. Their assertions simply declare that an unidentified someone
2 did an unidentified something—intentionally—that caused the issues to occur. The host of issues
3 that Mr. Parikh purports to identify (without coherently explaining how any of those potential
4 issues could have caused the particular malfunction that occurred, or how they would have led
5 to difficulties county-wide) simply does not give rise to a reasonable inference that the issues
6 were caused by intentional conduct, and is merely detailed speculation.

7 Moreover, the firehose of accusations about allegedly intentional conduct in Plaintiff's
8 Response includes actions that could not have contributed to the issues Maricopa County voters
9 encountered, including allegations about commingling of ballots and improper actions in past
10 elections. [Resp. at 8.] And, to the extent Plaintiff's Response suggests that the alleged failures
11 of a wide range of people to adhere to published protocols—including Troubleshooters who were
12 (unsurprisingly) unable to respond to calls for assistance within the designated timeframe and
13 poll workers who allegedly failed to follow the correct procedures or gave voters incorrect
14 information [Resp. at 9-10]—suggests that all of those people intended to prevent voters from
15 voting, such allegations did not appear in Plaintiff's original election contest and cannot be added
16 now. *See Burk v. Ducey*, 2021 WL 1380620, at *2 (Ariz. Supreme Ct. Jan. 6, 2021) (2021).

17 **F. Inadequate allegations that the result of the election was affected.**

18 Plaintiff does not acknowledge that the Secretary's Motion [at 9] identified a fatal defect
19 in "expert" Richard Baris' analysis [*see* Statement ¶ 141]. Although Mr. Baris' polling identified
20 many voters who described difficulties voting, it did not identify a single voter who could not
21 vote. Indeed, as Maricopa County noted, the thousands of pages of "evidence" Plaintiff
22 submitted referred to just three voters who claimed that they did not vote, and even those voters
23 did not suggest that they would have been prevented from voting had they continued to try.
24 [County Mtn. at 2] This is inadequate to state a claim for an election contest, and as noted above
25 [Section II.A, *supra*] cannot undo an election with where Plaintiff expressly disclaims any claim
26 of fraud [*see* Response at 6-7].

1 **III. Plaintiff’s Early Ballot Signature Verification Claims as Pleaded Cannot Proceed,**
2 **and Their Other Signature Verification Claims Do Not Show Misconduct.**

3 In Count III, Plaintiff alleges that there were an unidentified number of “illegal votes”
4 cast because “a material number of early ballots” were validated by county recorders across the
5 state based on a signature match from something other than a voter’s “registration record.” [Stmt.
6 ¶ 151] The Secretary’s Motion detailed [at 9-14] why this claim is both barred by laches and
7 meritless. Plaintiff’s Response doesn’t mention anything about Count III as pleaded or respond
8 to the Secretary’s arguments, and thus concedes that the Court should dismiss that claim.

9 **IV. Plaintiff’s Allegations about Signature Verification “Irregularities” Fail.**

10 Though unconnected to any counts in Plaintiff’s Complaint, Plaintiff points to a series of
11 standalone factual allegations related to alleged irregularities in the early ballot affidavit
12 signature verification process in Maricopa County. Plaintiff’s Response focuses on: (1) a
13 “signature audit” conducted by the We the People Alliance (“WPAA”) of early ballots cast in
14 the 2020 election [at 16-17], and (2) three election workers’ declarations that concluded there
15 should have been a higher rejection rate for early ballots based on signature matching [at 14-15].
16 Even if true, Plaintiff failed to adequately allege misconduct by election officials.

17 To begin, WPAA’s “signature audit” of ballots cast in the 2020 election says nothing
18 about ballots cast in the 2022 election. And Plaintiff’s assertion [at 17] that it is “shocking” that
19 “tens of thousands of voters with improper signatures were discovered to have voted again” in
20 2022 is absurd. That WPAA, a citizen group unconnected to election officials, may have believed
21 that a voter’s 2020 early ballot affidavit signature doesn’t match the signature in their registration
22 record doesn’t invalidate that voter’s registration or render that voter ineligible to vote. Indeed,
23 even if Maricopa County concluded there was a signature mismatch, the only consequence is the
24 early ballot isn’t counted. *See* A.R.S. § 16-550. The voter can vote in future elections.

25 The law also tasks county officials with conducting signature verification, *see* A.R.S. §
26 16-550, and even Plaintiff’s own allegations necessarily admit that Maricopa County conducted

1 signature verification, involving multiple layers of review, on early ballots cast in the 2022
2 election. That three election workers and WPAA believe the county should have found more
3 “mismatches” and should have rejected more early ballots on that basis is irrelevant. No law
4 requires a minimum or Plaintiff’s desired rejection rate. In any event, a disagreement with the
5 county’s determination that an early ballot affidavit signature matches the voter’s signature in
6 their registration record is not even a valid basis for challenging early ballots.² Such
7 disagreement cannot support a claim of misconduct in an election contest or justify
8 disenfranchising early voters with no notice or opportunity to respond.

9 **V. Speculative Chain of Custody Issues Cannot Invalidate an Election.**

10 Count IV alleges that there were breaches of the chain of custody of ballots because an
11 alleged “whistleblower” supposedly observed certain batches of ballots arrived without proper
12 chain of custody forms, and that Runbeck printed 9,530 duplicate ballots “with no chain of
13 custody.” [Stmt. ¶¶ 158-61] As the Secretary argued in her Motion [at 14-15], even if some
14 unknown number of ballots were not accompanied at all times by appropriate chain of custody
15 documentation, that does not mean there was actionable misconduct, there is no evidence or
16 reasonable inference that any “legal ballots [were] lost or illegal ballots . . . added” [Stmt. ¶ 113,
17 161], much less enough to change the results of the election, and it is not a ground on which to
18 invalidate an entire election and disenfranchise millions of Arizonans.

19 Plaintiff first responds by arguing [at 17-18] that “chain of custody violations are not
20 ministerial.” This red herring changes nothing. Whether the statute requiring the maintenance of
21 chain of custody documentation is “ministerial” fails to support the bald allegations that there
22 was any “misconduct,” or that these alleged issues had any impact on the election results.

23
24
25 ² See *McEwen v. Sainz*, No. CV-22-163 (Santa Cruz Cty. Sup Ct.), Aug. 22, 2022 Minute Entry
26 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”) (**Exhibit B**).

1 Plaintiff next contends that this claim is sufficiently pleaded because the Arizona
2 Attorney General “publicly castigated” Maricopa County for allegedly failing to maintain proper
3 chain of custody documentation during the 2020 General Election for “100,000-200,000”
4 ballots.³ Even if true, however, the fact that some chain of custody forms from 2020 may not
5 have been completely filled out by election officials does not mean the ballots at issue from the
6 2020 General Election were invalid, much less ballots from a different election entirely. It cannot
7 be that an administrative issue in one election in a jurisdiction gives rise to a reasonable inference
8 of misconduct or illegal votes in future elections. Every election would always be subject to
9 contest if that were so. Adopting Plaintiff’s argument would thus set a dangerous precedent.

10 Next, Plaintiff points [at 18] to “eyewitnesses” who say that Maricopa County failed to
11 maintain chain of custody documentation “for over 300,000 ballots.” Even if this allegation is
12 true, it’s unreasonable to infer “misconduct” from that simple fact, and the chain of custody
13 documentation statute doesn’t require the invalidation of ballots found to not have such
14 documentation. *See* A.R.S. § 16-621(E). To overturn an election on this basis with no plausible
15 evidence of wrongdoing would be inequitable and unfair to Arizona voters. *See, e.g., Findley*,
16 35 Ariz. at 270 (decrying the “sacrifice of substance to form” when construing election statutes).

17 **VI. Election Day Issues in Maricopa County Did Not Violate the Constitution or**
18 **Change the Result of the Election.**

19 As to Counts V and VI, Plaintiff’s apparent assertion that stating a viable equal protection
20 or due process claim requires no more than alleging “government action that is [arbitrary],
21 irrational, or not reasonably related” to a legitimate state purpose [Resp. at 26], is not only legally
22 incorrect, but also fails to address many points raised in Section V of the Secretary’s Motion.

23 _____
24 ³ Plaintiff also conveniently omits any mention of Maricopa County’s response to the Attorney
25 General’s misleading claim, which pointed out that the claims were vastly overstated and ignored
26 that the documentation issues did not impact “the integrity of the ballots.” *See* May 4, 2022
Letter from the Maricopa County Board of Supervisors and Maricopa County Recorder to
Attorney General Mark Brnovich, *available at* <https://t.co/maDY1kHd4D>.

1 Plaintiff has not shown how her allegations (1) rise to the level of “fundamental unfairness,” (2)
2 establish that any voters were actually deprived of the right to vote (versus simply being
3 subjected to unexpected delay and inconvenience), (3) allege the inadequacy of postdeprivation
4 remedies to support her claim of a procedural due process violation, or (4) explain how Mr.
5 Baris’ exit poll interviews with Arizonans who successfully voted support his baseless assertions
6 about how many votes Plaintiff allegedly lost. [Mtn. at 15-18] Plaintiff thus concedes those
7 points.

8 The only points Plaintiff addresses are (1) the previously discussed absence of allegations
9 supporting a reasonable conclusion of intentional conduct and (2) whether she has alleged facts
10 giving rise to an inference of discriminatory intent. The very language Plaintiff quotes to support
11 her discriminatory intent argument—the same language the Secretary quoted in her Motion—
12 explains why such an inference cannot be made here: there is no “clear pattern, unexplainable
13 on [other] grounds” on which to base such an inference. *Vill. of Arlington Heights v. Metro.*
14 *Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). [Secretary’s Mtn. at 16; Resp. at 28]. Disparate
15 impact only implies discriminatory intent if it results from a pattern of intentional acts. For
16 instance, the fact that a randomly drawn jury venire might happen not to include members of a
17 particular race does not give rise to the same inference of discriminatory animus as a prosecutor’s
18 repeated decisions to strike jurors of that race. *Compare Snowden v. Hughes*, 321 U.S. 1, 8 (1944)
19 (mere absence of jurors of a given race does not give rise to an inference of discriminatory
20 animus) with *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (“a ‘pattern’ of strikes against black
21 jurors included in the particular venire might give rise to an inference of discrimination”). In this
22 case, all the available facts reflect that the reason the BOD issues had a disparate impact is that
23 they occurred on a day when the voter pool skewed Republican. Plaintiff cannot use that
24 disparate impact to bootstrap an allegation that, because the issues disproportionately affected
25 Republicans, they must have been caused intentionally, with the intent to harm Republicans.
26 Plaintiff’s Counts V and VI should be dismissed.

1 **VII. Mail-In Ballots Comply with Art. VII, § 1 of the Arizona Constitution.**

2 Count VII alleges that mail-in ballots cast under A.R.S. § 16-547 “do not satisfy the
3 ballot-secrecy requirements of Arizona’s Constitution.” [Stmt. ¶ 174] But this claim is both
4 barred by laches and meritless. [Motion at 18-20] Plaintiff’s Response doesn’t mention this count
5 or respond to the Secretary’s arguments, and she thus concedes that it should be dismissed.

6 **VIII. An “Incorrect Certification” is Not a Standalone Election Contest Claim.**

7 Plaintiff’s Count VIII contains no new factual allegations, and is little more than a “catch-
8 all” of all the prior counts. [See Motion at 20] Again, Plaintiff’s Response doesn’t mention this
9 count or respond to the Secretary’s arguments, and she thus concedes that it should be dismissed.

10 **IX. Inadequate Remedy & Plaintiff’s Alternative Federal Claims.**

11 Finally, in Counts IX and X, Plaintiff tries to invoke this Court’s jurisdiction under either
12 the Uniform Declaratory Judgment Act (“UDJA”) or 42 U.S.C. § 1983 to provide alternative
13 relief in this election contest must fail. As the Secretary’s Motion [at 20] discusses, Arizona
14 courts reject attempts to use other legal and equitable mechanisms to achieve the same ends as
15 an election contest when the “gravamen” of the complaint is an election contest.

16 Plaintiff says [at 28-32] that the Court can consider both claims in an election contest
17 despite the lack of express statutory authorization, citing cases saying that the UDJA is
18 “remedial” and “construed liberally,” and declaring that the Supremacy Clause of the United
19 States Constitution somehow requires this Court to hear Plaintiffs’ § 1983 claim. But Arizona
20 has had an election contest statute on the books for more than a century, and Plaintiff doesn’t
21 cite a single decision in which a court considered some other alternative claim or remedy. In
22 fact, the only authority is to the contrary. *Donaghey v. Att’y Gen.*, 120 Ariz. 93, 95 (1978). That’s
23 for good reason – as all acknowledge, “election contests are purely statutory,” *Griffin*, 86 Ariz.
24 at 169-70, meaning that the Court cannot entertain claims outside the statute itself.

25 **Conclusion**

26 As detailed in the Secretary’s Motion and above, the Court should dismiss this action.

1
2 RESPECTFULLY SUBMITTED this 18th day of December, 2022.

3 **COPPERSMITH BROCKELMAN PLC**

4 By /s/ D. Andrew Gaona

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6 **STATES UNITED DEMOCRACY CENTER**

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