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ARIZONA SUPERIOR COURT

MOHAVE COUNTY

JEANNE KENTCH, an individual; TED BOYD, and individual; 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. S8015CV2022-01468

ARIZONA SECRETARY OF STATE KATIE HOBBS' MOTION TO DISMISS STATEMENT OF ELECTION CONTEST

(Oral Argument Requested)

(Assigned to Hon. Lee F. Jantzen)

Introduction & Background

In this "election contest," Plaintiffs/Contestants ask this Court to overturn the results of the 2022 General Election. In that election, based on the official statewide canvass, the people of Arizona chose Kris Mayes as their next Attorney General by a narrow margin of 511 votes. As required by Arizona law, that race is currently the subject of an automatic statewide recount, with a hearing to announce the recount results set for December 22. Plaintiffs now ask this Court to halt that process and declare Plaintiff Abraham Hamadeh the winner of that race. But that relief 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.

State and county election officials should be commended for their hard work, diligence, and integrity in administering the 2022 General Election. However, 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, this entire lawsuit should be dismissed under the equitable doctrine of laches. Plaintiffs Hamadeh and the Republican National Committee originally filed this lawsuit in Maricopa on November 22, and it was dismissed without prejudice because it was premature. Yet they waited until just hours before the statutory deadline to re-file essentially the same lawsuit (but in a different county), and in so doing, injected unnecessary delay into the process when they clearly knew their intentions all along. This alone is reason to dismiss their Statement.

Second, Plaintiffs' allegations related to election day issues in Maricopa County (Count I) fail from the get-go because they do not establish "misconduct" or an "erroneous count of

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votes" and because they allege that the maximum universe of potentially affected voters is 395, 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 and therefore fail as a matter of law. Beyond that, Plaintiffs' requested relief – that an unknown number of voters be allowed to cast provisional ballots weeks after election day – is not authorized by law.

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 because it was brought far too late, it fails as a matter of law, 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 Court shouldn't reward Plaintiffs' attempted fishing expedition or tolerate their scattershot approach to this litigation.

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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 v. Buzard*, 86 Ariz. 166, 169-70 (1959) (election contest subject to dismissal if it fails to state a claim upon which relief can be granted). "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." implied by well-pleaded facts" and "unreasonable inferences or unsupported conclusions," *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

"[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*, 86 Ariz. at 168. 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.

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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 v. Campbell*, 19 Ariz. 254, 268 (1917); 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. Plaintiffs' Entire Case is Barred by Laches.

This is not the first go-around with these precise claims in an election contest – Plaintiffs Hamadeh and the RNC filed a near-identical complaint in Maricopa County on November 22 [*see* **Exhibit 1**], which was dismissed several days later because it was premature under the election contest statutes, *Hamadeh v. Mayes*, No. CV2022-015455 (Maricopa Cnty. Super. Ct., Nov. 29, 2022 Order) [attached as **Exhibit 2**]. Plaintiffs could have re-filed this action as early as 11:00 AM on December 5 once the statewide canvass was certified, yet laid in wait until just before the courthouse closed on December 9 to do so. These facts cry out for the application of the equitable doctrine of laches, as Plaintiffs clearly knew of their cause of action well before its filing and have prejudiced all involved by waiting. And as Plaintiffs themselves noted in the Maricopa County action, "[b]ecause finality in elections is paramount to an orderly transfer of power, election contests must be initiated, litigated and concluded with all deliberate speed," Plaintiffs who tarry risk discovering that their claims have dissipated in the passage of time, and unnecessary delay "would perversely penalize the Contestants for acting promptly, undermine the expedited statutory timetables for bringing and resolving election contests, and jeopardize a timely transfer of power in January." [**Exhibit 3** (excerpt from Plaintiffs' 11/28/22 Response to Motion to Dismiss, p. 4)]

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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). And it can be applied even if a case is technically filed within a statute of limitations set by the Legislature for an election challenge. *See, e.g.*, *Lubin v. Thomas*, 213 Ariz. 496, 498 ¶¶ 9-11 (2006) (noting that "merely complying with the time limits . . . for filing a notice of appeal may be insufficient if the appellant does not also promptly prosecute the appeal").

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). Plaintiff's delay here is completely unreasonable; they filed a near-identical complaint weeks ago, but didn't re-file until the last possible moment. And the result of their delay will cause prejudice to all parties by likely delaying the announcement of the results of the recount, pushing a potential evidentiary hearing to just before or just after a state holiday, further delaying the issuance of a certificate of election for this race, and threatening the ability of the newly elected official to take office on January 2, 2023 as required by the Arizona Constitution. The Court should dismiss their Statement.

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

Even if not barred entirely by laches, Plaintiffs' contest fails. 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. ¶¶ 68-71] They allege that "at least 126 of those voters" submitted provisional ballots that weren't counted, that at least 269

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.* ¶¶ 69-72] 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.* ¶ 73]

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.[1] 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, "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 395, which is insufficient to show that the "result would have been different." This is true even if the Court assumes that all 395 of these unidentified and unknown voters would have cast a ballot for Hamadeh. And the Court simply cannot make such a sweeping

[1] Plaintiffs allege no facts supporting an "erroneous count," or miscount of votes, as to Count I.

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and dangerous assumption, nor should the Court indulge any speculation from Plaintiffs about how allegedly impacted voters would have voted.[2] The Court should dismiss this Count.

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

Next, Counts 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.

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

- In Count II, Plaintiffs allege that "[u]pon information and belief, a material number of voters" were "required to vote a provisional ballot" after being "told by election workers that they were not registered to vote," that Maricopa County denied "certain voters" their right to cast a provisional ballot at all, 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. ¶¶ 77, 80-82]
- 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.* ¶ 85] 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 0.41% in duplication. [*Id.* ¶ 41]
- In Count IV, Plaintiffs allege that "[u]pon information and belief, the counties' Electronic Adjudication Boards have incorrectly recorded a material number of voters selections in

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[2] 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 because "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." *Babnew v. Linneman*, 154 Ariz. 90, 93 (App. 1987) (quotation omitted).

the race for Arizona Attorney General," including by erroneously tabulating over-votes and designating certain votes as undervotes. [*Id.* ¶¶ 91-93] The only alleged facts anywhere in Plaintiffs' Statement that could even remotely relate to this claim are that (1) the statutory hand count audit of the Governor's race in Maricopa County revealed a single electronic adjudication error [*Id.* ¶ 49], (2) an unidentified "observer" of the adjudication process in an unidentified county "reported" issues with "electronic adjudication equipment" capturing certain voters' marks [*id.* ¶ 51], (3) that two ballots re-tabulated in Navajo County were identified that "should have been sent to adjudication [¶ 52], and (4) unidentified counties counted "undervotes" if "an unclear mark fills less than 14% of the oval." From these reed-thin facts, Plaintiffs allege that "[u]pon information and belief, votes included on improperly adjudicated ballots are material to, and potentially dispositive of" the race for Attorney General [*id.* ¶ 94].

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. 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, with no support, 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

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from electronic adjudication errors affecting the race for Attorney General because of isolated instances of alleged adjudication issues in a different race altogether and unidentified other races, or because of alleged tabulator settings that are within the county's administrative discretion. (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; instead, 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 a court may grant, A.R.S. § 16-676 also serves to limit a 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). And it is no answer for Plaintiffs to claim that they are entitled to a writ of mandamus in the alternative; the election contest statutes provide the exclusive list of remedies in such an action, and the Court lacks jurisdiction to go beyond that statute. *See, e.g.*, *Donaghey v. Attorney General*, 120 Ariz. 93 (1978).

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 (or has ever done). 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

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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 improperly 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. ¶ 98] 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.* ¶¶ 98-99] 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.* ¶ 101] 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.* ¶ 102] Count V fails for multiple, independent reasons.[3]

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[3] The Secretary notes that this claim was raised in the Maricopa County case (*see* **Exhibit 1**, Count V), and that Plaintiffs voluntarily dismissed it without prejudice after reviewing arguments essentially identical to that which follows. During a hearing held on November 28, Plaintiffs' former counsel indicated that it was being dismissed so that it could be brought seeking only "prospective" relief (*i.e.*, for future elections). Why it's brought again here thus defies all explanation.

A. Laches.

To begin, the equitable doctrine of laches bars Count V. 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.

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.[4] 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," 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

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

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requires early voters whose signatures cannot be verified receive notice and an opportunity to "cure" those signatures, A.R.S. § 16-550(A), 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").[5] This would treat similarly situated voters differently and 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.*

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[5] Count V, which seeks to invalidate an unspecified number of early ballots 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). In any event, 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 4**).

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. 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

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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 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).

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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.").

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C. Speculation.

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.

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. ¶ 101] 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) speculate how many early ballots would have been rejected had counties applied Plaintiffs' absurd interpretation of A.R.S. § 16-550(A); and then (2) speculate 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.

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

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As the Secretary notes throughout the Motion, Plaintiffs' election contest is little more than a claim in search of a factual basis. Plaintiffs may attempt to evade dismissal by arguing that they should be afforded an opportunity to conduct discovery before the motions are heard. A plaintiff may not, however, use an invalid pleading as a springboard for discovery. *See Lakewood Cmty. Ass'n v. Orozco*, No. 1 CA-CV 19-0194, 2020 WL 950225, at *1 (Ariz. Ct. App. Feb. 27, 2020) (holding that "[a] motion to dismiss under Rule 12(b)(6) tests the allegations of a pleading by assuming the truth of the well-pleaded facts in the complaint before the parties engage in discovery" and "[t]hus, no discovery was necessary or appropriate" before a trial court rules on such a motion) (emphasis added).

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. *Bergstrom v. McEwen,* 960 N.W.2d 556 (Minn. 2021). The court held the candidate's 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.

Minnesota is not alone – the highest courts of many other states agree. *See, e.g., Zahray v. Emricson*, 182 N.E.2d 756, 757-58 (Ill. 1962) (election contest "cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge"); *McClendon v. McKeown*, 323 S.W.2d 542, 545 (Ark. 1959) (court shouldn't allow ballot inspection and a recount based on the mere allegation "'that after said cancellation and retabulation, the Petitioner verily believes that he will have received more votes[.]'"); *Cruse v. Richards*, 37 P.2d 382, 383–84 (Colo. 1934) ("In a contest proceeding it is always necessary to allege facts which will enable the court to determine that a different result would follow in the vote by reason of such alleged facts. . . . Courts cannot properly embark on a mere fishing expedition by opening up ballot boxes when there is an utter lack of specific allegations as to the distribution of the votes."); *Gollmar's Election, Case of*, 175 A. 510, 513 (Pa. 1934) ("The pleadings before us would seem only an effort to place the situation in such a light as to justify a voyage of exploration into a large number of ballot boxes, in the hope of an ultimate discovery. Such is not province of a contest[.]").

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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 13th day of December, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
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