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ARIZONA SUPERIOR COURT

MOHAVE COUNTY

TED BOYD, et al.,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, et al.,

Defendants.

No. S8015CV202201468

DEFENDANT KRIS MAYES' MOTION TO DISMISS AND PRETRIAL BRIEF

ORAL ARGUMENT REQUESTED

(Assigned to the Hon. Lee F. Jantzen)

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Introduction

Plaintiffs seek from this Court what they could not get at the ballot box. They ask this Court to overturn Arizona's November 8, 2022 general election ("the Election") and declare Mr. Abraham Hamadeh the Arizona Attorney General-elect instead of Defendant Kris Mayes, who received the most votes. They allege that the Election was fraught with poll worker "misconduct," ballot duplication and electronic adjudication errors, and unlawful counting of ballots. But their claims are based on little more than speculation and conjecture.

Plaintiffs' claims also reveal a fundamental misunderstanding of Arizona's election laws. In bringing this election contest, Plaintiffs ignore that such a contest may be brought only by an Arizona "elector," which Plaintiff Republican National Committee ("the RNC") is, of course, not. A.R.S. § 16-672(A). Further, challenges to "alleged procedural violations of the election process"—precisely Count V—"must be brought *prior* to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) (emphasis added). Plaintiffs also seek multiple forms of relief that are not permitted in an election contest. And the fact that Plaintiffs are strictly limited to the narrow relief provided under the election contest statutes cannot be a surprise to either Plaintiffs or their attorneys, since that is exactly what Maricopa County Superior Court Judge Randall Warner told Mr. Hamadeh two weeks ago when he dismissed an earlier version of this lawsuit. [*See* Ex. A (Nov. 29, 2022 Minute Entry) at 3] Beyond these threshold issues, Plaintiffs' claims all fail to state a claim on which relief can be granted. Thus, this Court should dismiss Plaintiffs' meritless complaint with prejudice.

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Factual Background

This is the second time that two of the Plaintiffs have filed an election contest contesting the November 8, 2022 election for Arizona Attorney General. On November 22, Plaintiffs Abraham Hamadeh and the RNC filed an election contest in Maricopa County Superior Court

contesting the results of that election (No. 2022-015455). On November 29, the Court dismissed that suit without prejudice, finding it premature. [*See* Ex. A at 3]

Presumably believing that they would find a more friendly forum in Mohave County than in Maricopa County, after the Election was canvassed on December 5, Mr. Hamadeh and the RNC refiled their election contest in this Court on December 9, adding two electors from Mohave County as Plaintiffs. Their complaint is largely the same. They allege with few facts that the Election was "afflicted with certain errors and inaccuracies in the management of some polling place operations and in the processing and tabulation of ballots." [Compl. ¶ 2] Factually, these alleged issues can be placed into five buckets: (1) same day voting issues associated with voting center "check in" and "check out" procedures, (2) alleged errors in ballot duplication, (3) alleged errors in electronic adjudication, (4) alleged unlawful early ballot signature verification, and (5) alleged improper registration errors. Plaintiffs offer little support for their claims.

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Check-in, Check-out Procedures

Plaintiffs allege that, on Election Day, some ballot tabulation machines at various Maricopa County voting centers failed to properly process ballots. As even Plaintiffs admit, voters had multiple options that would have allowed their votes to be counted. [*Id.* ¶ 30] Some of those options, however, required poll workers to "check out" voters before they could "check in" again and vote at a different voting center or vote their early ballot. [*Id.* ¶ 31] Plaintiffs allege that some voters were not properly "checked out" of the voting centers, resulting in their votes not being counted. Specifically, they allege that (1) 126 of these voters voted uncounted provisional ballots; (2) 269 of these voters voted uncounted early ballots, (3) an unspecified number of voters were denied the right to cast a provisional ballot. [*Id*. ¶¶ 4, 34, 69, 70, 77]

Ballot Duplication

Next, based on "information and belief," Plaintiffs allege that an unspecified number of

damaged ballots were "erroneously transposed," which resulted in "the unlawful mistabulation of a ballot." [*Id.* ¶¶ 4, 85] In support, they cite a purported statistic from a different election (in 2020). [*Id.* ¶ 41] They allege no facts and cite no evidence of any issues from this election.

Electronic Adjudication

Plaintiffs make several allegations with respect to Electronic Adjudication, the process by which unclear ballots are evaluated. Plaintiffs allege that the hand count audit in a different race (the Governor's race) revealed one instance in which the Maricopa County Electronic Adjudication Board "incorrectly characterized the voter's ostensible intent." [*Id.* ¶ 49] From this, Plaintiffs speculate, on "information and belief," a "similar and proportionate rate of erroneous determinations afflict . . . all ballots that underwent electronic adjudication." [*Id.* ¶ 50] Plaintiffs also allege that the recount in Navajo County revealed two votes that "should have been sent to" Electronic Adjudication but were not; Plaintiffs do not allege the basis for referring those two votes for Electronic Adjudication or for which candidate those two votes were cast. [*Id.* ¶ 52]

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Ballot Verification

Plaintiffs also assert that the 2019 Elections Procedures Manual ("EPM")'s procedures violate Arizona law. They allege that A.R.S. § 16-550(A) requires election officials to compare the ballot envelope signature to "the signature of the elector on the elector's registration record." [*Id.* ¶ 54] Plaintiffs claim that, contrary to this mandate, the EPM allows election officials to use documents outside the "registration record" to verify signatures. [*Id.* ¶¶ 4, 55, 56] Plaintiffs waited to raise this challenge until three years after the EPM was finalized and approved.

Registration Errors

Finally, Plaintiffs allege, on "information and belief," that a "material number" of voters who presented at voting centers on Election Day were "told by election workers that they were not registered to vote" and therefore had to vote a provisional ballot. [*Id.* ¶ 58] Plaintiffs also

allege that 1,942 provisional votes in Maricopa County were not counted because they were cast by unregistered voters, and that a "material number" of those unregistered voters "had voted in past Arizona election[s] and had done nothing to invalidate their registration." [*Id*. ¶ 59]

Relief

Plaintiffs seek wide-ranging forms of relief. Among other things, they ask for an order requiring the Maricopa County Defendants to include certain individuals' votes in the canvass and also to allow certain individuals to vote again by provisional ballot. [Demand for Relief ¶¶ B, C] They also seek orders requiring the County Defendants to amend the canvass results to correct claimed errors and to throw out other individuals' early votes. [*Id.* ¶¶ D, E, G] Ultimately they ask this Court to reverse the results of this election and "requir[e] the Secretary of State to declare Contestant Abraham Hamadeh elected to the office of Arizona Attorney General." [*Id.* ¶ K] As explained below, however, Plaintiffs' complaint fails and no relief is warranted.

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Argument

In all cases, a plaintiff must allege sufficient *facts*, not conclusions, to support its asserted claim for relief. *Jeter v. Mayo Clinic Ariz*., 211 Ariz. 386, 389 ¶ 4 (App. 2005). Recitation of specific facts is even more critical in election contests because they are conducted on a highly accelerated basis, with discovery strictly limited to "inspection" of the ballots and a trial to be held no later than 15 days after the contest is filed. *See* A.R.S. § 16-676(A); A.R.S. § 16-677. Moreover, 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). Together, this demands that Plaintiffs allege, in their complaint, specific facts that entitle them to proceed with their contest. Permitting only threadbare allegations and speculation would transform election contests into fishing expeditions that cannot be concluded in 15 days.

In short, more than speculative and conclusory allegations must be required. But as

described below, that is all Plaintiffs have set out in their complaint here. Their complaint should be dismissed for that reason and many others as explained below.

I. The RNC lacks statutory authority to bring an election contest.

The RNC brought this election contest along with Mr. Hamadeh and two other electors. Even though election contests are "purely statutory and dependent upon statutory provisions for their conduct," the complaint cites no statute authorizing the RNC to bring an election contest. *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966). That's because no such statute exists.

Arizona allows "[a]ny elector of the state" to bring an election contest. A.R.S. § 16-672(A). It is "obvious," of course, that any "statement of contest must set forth specifically that the contestant is such elector." *Kitt v. Holbert*, 30 Ariz. 397, 400 (1926). But the RNC failed to do so. The complaint does not allege (and cannot allege) that the RNC is an Arizona elector. [*See* Compl. ¶ 11] Thus, this Court should dismiss the RNC. This is true regardless of whether the RNC has standing. *See, e.g.*, *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 ¶ 11 n.2 (2020) (holding that "standing" is a "prudential doctrine," which is "different from" whether a party possesses "statutory authority to take a particular action").

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

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

A. Count I fails as a matter of law.

Plaintiffs allege that Maricopa County poll workers did not properly "check out" an unspecified number of voters who had "checked in" at a polling location and later sought to

"leave" and go to "a different polling location" or cast an "early ballot." [Compl. ¶¶ 65–68] According to Plaintiffs, at most, 395 of these voters may have cast a ballot that, on "information and belief," the Maricopa County Defendants did not tabulate. [*Id.* ¶¶ 69–70] As a result, Plaintiffs assert claims for "misconduct" under A.R.S. § 16-672(A)(1) and an alleged "erroneous count of votes" under A.R.S. § 16-672(A)(5). These allegations fail to state any claim for relief for two reasons.

First, Count I fails because Plaintiffs allege no facts showing that any "misconduct" occurred. A.R.S. § 16-672(A)(1). Misconduct does not include "honest mistakes or mere omissions." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Courts apply a presumption of "good faith and honesty" to election officials' conduct that will control unless an election contestant presents "clear and satisfactory proof" to overcome it. *Hunt*, 19 Ariz. at 268. Plaintiffs, however, allege nothing of the sort. They rely entirely on alleged speculative poll worker error, one tweet, and a legal conclusion. [Compl. ¶¶ 34, 35, 36, 73] But these factual allegations plead, at most, "honest mistakes" and "mere omissions." *Findley*, 35 Ariz. at 269. And this Court "do[es] not accept as true allegations consisting of conclusions of law." *Swift Transp. Co. of Ariz. L.L.C. v. Ariz. Dep't of Revenue*, 249 Ariz. 382, 385 ¶ 14 (App. 2020) (citation omitted).

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Beyond that, Count I fails because "all reasonable presumptions must favor the validity of an election" and, when a contestant fails to prove fraud, he carries the heavy burden of showing that any misconduct "may have affected the result of the election." *Moore*, 148 Ariz. at 159. Here, Plaintiffs admit that there was no "fraud, manipulation, or other intentional wrongdoing that would impugn the outcomes" of the election. [Compl. ¶ 1] And they allege no facts suggesting that any misconduct could have "altered the outcome or clouded the reliability of the results." *Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183, 186 ¶ 10 (App. 2005). Plaintiffs allege that Mr. Hamadeh and Ms. Mayes are separated by "511 votes." [Compl.

¶ 2] Yet even under the most liberal reading of Count I, it alleges that 395 voters did not have their votes counted. [*Id.* ¶¶ 69, 70] Even assuming that *all* 395 voters cast a ballot for Mr. Hamadeh—something that the complaint does not allege (cannot allege, and this Court couldn't credit)—he *still* would have received fewer votes than Ms. Mayes. *See Babnew v. Linneman*, 154 Ariz. 90, 94 (App. 1987) ("[O]ne cannot be allowed to testify as to the candidate for whom he would have voted for the purpose of increasing the votes for that candidate."). Thus, Count I cannot state a claim under A.R.S. § 16-672(A)(1).

Second, Count I fails to state a claim under A.R.S. § 16-672(A)(5) for an alleged "erroneous count of votes." Plaintiffs plead no facts showing that someone counted the votes wrong—such that an accurate count would reveal that Mr. Hamadeh "receive[d] the highest number of votes." A.R.S. § 16-672(A)(5). Plaintiffs instead allege that 395 voters did not have their votes counted at all supposedly based on "misconduct." But the misconduct allegations fail for the reasons above. And even if a contestant could bring a claim under A.R.S. § 16-672(A)(5) based on these allegations, Plaintiffs' claim would still fail because, even accepting their factual allegations as true, there is no scenario under which Mr. Hamadeh would have "receive[d] the highest number of votes", A.R.S. § 16-672(A)(5), had those votes been counted or that an accurate counting would have "altered the outcome" of the election, *Wenc*, 210 Ariz. at 186 ¶ 10.

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B. Count II fails as a matter of law.

Plaintiffs allege that Maricopa County poll workers denied an unspecified number of voters a provisional ballot. According to Plaintiffs, voters were denied a provisional ballot either because the voters (a) had "previously cast a ballot at another polling location earlier in the day," even though these voters had not actually cast a ballot, or (b) were "not registered to vote." [Compl. ¶¶ 77–80] Plaintiffs contend that this alleged denial of a provisional ballot constitutes "misconduct," A.R.S. § 16-672(A)(1), and an "erroneous count of votes," A.R.S. § 16-

672(A)(5). Once again, these threadbare allegations fall far short of stating any claim for relief. Plaintiffs' claim of "misconduct" under A.R.S. § 16-672(A)(1) fails for multiple reasons.

First, Plaintiffs allege no facts establishing that *anyone* engaged in "misconduct." A.R.S. § 16-672(A)(1). At best, and as alleged, any denial of provisional ballots or registration errors were "honest mistakes" and "mere omissions" in allegedly failing to provide a provisional ballot to unidentified voters. *Findley*, 35 Ariz. at 269.

Next, even assuming that pre-election conduct involving the administration of voter rolls could ever form the basis of a post-election statutory election contest, the conclusory suggestion that "County Defendants improperly administered their voter rolls" because some number of voters were not registered to vote is devoid of supporting factual allegations, let alone any facts amounting to "misconduct" under A.R.S. § 16-672(A)(1). [Compl. ¶ 4] This "legal conclusion[] alleged as fact[]" is not enough to overcome the absence of any specific facts that—accepted as true—establish any right to relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14 (citation omitted).

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Additionally, Plaintiffs allege nothing to suggest that the alleged denial of provisional ballots "may have affected the result of the election." *Moore*, 148 Ariz. at 159. The complaint identifies with no specificity at all who or how many individuals were denied a provisional ballot—much less the hundreds or thousands of voters that Mr. Hamadeh would need to identify for this alleged denial to have made a whit of difference in this election. [Compl. ¶ 2 (alleging that Ms. Mayes and Mr. Hamadeh are separated by "511 votes")]

Plaintiffs' claim for "erroneous count[ing]" under A.R.S. § 16-672(A)(5) fails for the same reason that it fails under Count I: Plaintiffs allege no facts demonstrating that anyone erroneously counted any votes—instead they allege that votes were not counted at all. But even if Plaintiffs had alleged facts showing that there had been some miscounting by someone, this claim would independently fail because Plaintiffs allege no facts showing that Mr. Hamadeh

would have "receive[d] the highest number of votes" had those votes been correctly counted. *Id.*

C. Count III fails as a matter of law.

Plaintiffs allege that the County Defendants "incorrectly transcribed" voter selections when they "transpose[d] the voter's indicated selections to a duplicate ballot[.]" [Compl. ¶¶ 84–85] As a result of this, they bring Count III based on an "erroneous count of votes." A.R.S. § 16-672(A)(5). But Count III—like all the other Counts—is devoid of any specificity, presenting bare allegations based only on "suspicion and conjecture." *Hunt*, 19 Ariz. at 264.

Count III fails for at least two reasons. First, Plaintiffs allege no facts showing that anyone "count[ed]" any votes incorrectly. A.R.S. § 16-672(A)(5). The complaint identifies zero (0) voters who selected Mr. Hamadeh but who had their vote wrongly counted for Ms. Mayes. Second, Plaintiffs allege no facts establishing that—had the votes been counted right—Mr. Hamadeh would "in fact [have] receive[d] the highest number of votes." *Id.* As the party seeking extraordinary relief to overturn an election, it's Plaintiffs who bear the burden to come forward with "well-pleaded facts" showing that they have the right to that relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14 (citation omitted). One looks in vain for any such facts in support of Count III.

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D. Count IV fails as a matter of law.

Count IV alleges claims for "illegal votes," A.R.S. § 16-672(A)(4), and an "erroneous count of votes," A.R.S. § 16-672(A)(5). As to "illegal votes," Plaintiffs allege the County Defendants caused an unspecified number of "illegal votes to be included in the canvassed returns" by tabulating votes that supposedly should have been "disqualified as invalid over-votes." [Compl. ¶ 92] As to the "erroneous count" claim, Plaintiffs allege the County Defendants "mischaracterize[ed]" voters' "manifested intent" as undervotes on an unspecified number of ballots. [*Id.*] These bald allegations fail to state any claim on which relief can be granted.

First, Count IV fails to state a claim on the grounds of "illegal votes" under A.R.S. § 16-

672(A)(4). Plaintiffs must allege facts showing that (1) "illegal votes were cast" in the election and (2) those illegal votes were "sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Accepting their factual allegations as true, Plaintiffs allege that one (and only one) over-vote was improperly tabulated in the election *for the Governor's Office*. [Compl. ¶ 49] The complaint alleges no facts establishing that any over-voter was improperly tabulated in the election for the Attorney General's Office. But even were the Court to assume that the single alleged illegal vote that Mr. Hamadeh identified also affected the election, it would make no difference because Mr. Hamadeh admitted that he's behind by "511 votes." [*Id.* ¶ 2]

Second, Count IV also fails to state a claim based on the "erroneous count of votes" under A.R.S. § 16-672(A)(5). As with Count III, Plaintiffs allege no facts establishing that any votes were "count[ed]" wrong. A.R.S. § 16-672(A)(5). The complaint identifies zero (0) votes where the County Defendants supposedly "mischaracteriz[ed]" the "manifested intent" of the voter as an undervote. [*See* Compl. ¶ 92] Rather, Plaintiffs allege that Maricopa County reported 50,246 total undervotes in the Attorney General's race. [*Id*. ¶ 47] This fact is unsurprising. It is both expected and common knowledge that there will be voters who choose to vote in some races on the ballot but not in others. Nothing can be inferred from this reality. Plaintiffs also allege that the recount in Navajo County has revealed two votes that allegedly should have been referred to Electronic Adjudication but were not because the tabulators on Election Day were allegedly not "functioning or set up entirely properly" and "failed to flag ballots for adjudication that might not contain a valid vote for the Attorney General race." [*Id.* ¶ 52] This, again, fails to allege that those two votes were "erroneous[ly] count[ed]." In all events, these factual allegations fail to establish that Mr. Hamadeh would have "receive[d] the highest number of votes", A.R.S. § 16-672(A)(5), had those votes been counted or that an accurate counting would have "altered the outcome" of the election, *Wenc*, 210 Ariz. at 186 ¶ 10.

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In short, Plaintiffs fail to identify any "erroneous[ly] count[ed]" votes in the election for the Attorney General's Office. Necessarily, then, Plaintiffs also fail to allege any facts showing that—had any such votes been counted right—Mr. Hamadeh would "in fact [have] receive[d] the highest number of votes." A.R.S. § 16-672(A)(5). Plaintiffs allege only "conclusions"—but conclusions cannot state a claim for relief. *Swift Transp.*, 249 Ariz. at 385 ¶ 14.

E. Count V fails as a matter of law.

Finally, Plaintiffs' Count V based on "illegal votes" under A.R.S. § 16-672(A)(4) is also inadequately pled. Plaintiffs allege that the EPM authorizes County Recorders to verify voters' signatures on the affidavits accompanying early ballots using documents outside the voters' "registration record" in violation of A.R.S. § 16-550(A). [Compl. ¶¶ 54, 55, 56, 91, 92] From that premise, Plaintiffs claim that an unspecified number of "illegal votes" were tabulated in the election. [*Id.* ¶¶ 90, 92] Plaintiffs' claim fails for multiple reasons.

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To start, Plaintiffs already asserted this same claim in their first election contest. Shortly after that, they filed papers with the Court agreeing to dismiss the claim and to bring it prospectively only. Plaintiffs are estopped from raising this claim to overturn the election now. *See, e.g.*, *Martin v. Wood*, 71 Ariz. 457, 459 (1951) ("[A] party who has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent proceeding involving the same parties and questions." (citation omitted)).

On the merits, Plaintiffs' suggestion that the EPM violates A.R.S. § 16-550(A) is wrong. Arizona law provides that election officials "shall" compare the signature on the ballot envelope with the "signature of the elector on the elector's registration record." A.R.S. § 16-550(A). Unsurprisingly, the EPM provides identical guidance. It counsels that election officials compare the ballot envelope signature with the "voter's signature in the voter's registration record." [EPM

at 68][1] It then goes on to provide examples of documents within the "registration record" that contain signatures. These documents might include, for example, the "voter registration form," the "signature roster," or the "early ballot/PEVL request forms." [*Id.*]

While lacking in specifics, and against the clear text of both the statute and the EPM, the complaint nonetheless seems to complain (¶¶ 54, 55, 98, 99) that certain of the exemplar documents identified by the EPM are not part of the "registration record." [*See* EPM at 68]

But why not? "[W]e give the words their ordinary meaning, unless the context suggests a different one." *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 244 ¶ 21 (2020). By providing that the ballot envelope signature can be verified by comparison to the voter's "registration record," the Legislature plainly chose something different, and broader, than the "registration form" alone. *See, e.g.*, *United States v. Yung*, 37 F.4th 70, 79 (3d Cir. 2022) ("[W]here Congress uses different words, we read those words to have different meanings."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (describing the presumption of consistent usage). The "record" of a voter's registration encompasses the entire "documentary account" of the registrant's ability to vote. *Record*, Black's Law Dictionary (11th ed. 2019).

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

[1] Ariz. Sec'y of State, *2019 Elections Procedures Manual* (Dec. 2019), https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

instead. *See* A.R.S. § 16-550(A). In the end, there is no support, textual or otherwise, for the illogical claim that "registration records" would not include the examples listed in the EPM.

Moreover, even if Plaintiffs could ground an "illegal votes" claim on their challenge to the EPM's procedures, Count V would still fail because Plaintiffs' allege no facts establishing that any illegal votes were actually cast and that they would have been "sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Count V identifies zero (0) votes that were supposedly illegally tabulated on this ground—much less the hundreds or thousands of votes that Mr. Hamadeh would need to identify to show that these votes made any difference. [Compl. ¶ 2 (acknowledging that Ms. Mayes and Mr. Hamadeh are separated by "511 votes")]

III. Count V is also too late.

Because Count V is based on Plaintiffs' procedural challenge to the EPM, it cannot be raised after the election. Alleged procedural violations "*must* be challenged before the election is held." *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). And Plaintiffs' challenge to the process by which County Recorders verify voters' signatures is precisely the type of challenge "concerning alleged procedural violations of the election process [that] must be brought prior to the actual election." *Sherman*, 202 Ariz. at 342 ¶ 9. Having waited three years since the EPM was finalized and approved to allege these "defects" in its procedures, Plaintiffs violated their "duty . . . to act promptly" before this election to assert their challenge and therefore "waived" it. *Abbey v. Green*, 28 Ariz. 53, 68 (1925); *see also Zajac v. City of Casa Grande*, 209 Ariz. 357, 360 ¶ 14 (2004) (collecting cases to the same effect). This challenge "should have been—and could have been—addressed before the vote," and so Plaintiffs can't raise it now. *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *3 ¶ 14 (Ariz. Ct. App. July 22, 2019).

Count V also fails for another reason: Even if election contestants could theoretically allege procedural violations after an election (they can't), laches would bar Plaintiffs from

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asserting this claim because they unreasonably delayed in bringing it to the detriment of Kris Mayes, Arizona's election officials, and every Arizona voter who voted in this election.

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

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

Here, Plaintiffs took the "gamble" that courts have repeatedly cautioned against. *Hendon*, 710 F.2d at 182 (citation omitted). The EPM was approved three years ago; until now, Plaintiffs have said nothing. "[T]ime is of the essence" in election matters, and Plaintiffs' challenge to the EPM's procedures is untimely by any measure. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998).

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Plaintiffs' unreasonable delay is more significant given the extreme prejudice that their claim would impose on Kris Mayes, Arizona's election officials, and Arizona voters. Election officials would be prejudiced because there's no way to connect an early ballot that's been removed from its envelope and placed in the ballot box with its accompanying affidavit. That's why A.R.S. § 16-552(D) requires challenges to early ballots to be made before the ballot is placed in the ballot box. Beyond that, Kris Mayes and Arizona voters would be prejudiced because Plaintiffs seek to disenfranchise voters after voting has concluded. They seek an order "reducing the tabulated returns of early ballots to exclude early ballots" that they claim were unlawfully cast. [Compl. ¶ 102] This relief would cause "havoc." *Soules*, 849 F.2d at 1180; *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (recognizing that "interference with an election after voting has begun is unprecedented"). Were such relief granted, it would also violate Arizona voters' due process and equal protection rights.[2]

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

Even if Plaintiffs' claims were viable, they could not recover their requested relief. Election contests are "purely statutory." *Fish*, 2 Ariz. App. at 605. So Plaintiffs may recover only relief that is "specifically set forth by statute." *Id.* at 606.[3]

Arizona's election contest statutes authorize limited forms of relief. When a contestant fails to meet his burden of proof, the Court must enter an order "confirming . . . the election." A.R.S. § 16-676(B). When a contestant succeeds, on the other hand, the Court may enter an

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[2] In response to the motion to dismiss their first election contest, Plaintiffs relied on the Supreme Court's decision in *Arizona Public Integrity Alliance v. Fontes*. There, the Court rejected a laches defense, but in that case, the County was "able to meet the deadlines for early ballots," and so it "suffered no prejudice" from the plaintiffs' delay. 250 Ariz. 58, 65 ¶ 30 (2020). That is not the case here, for the reasons set out above.

[3] For the same reason, to the extent that the complaint purports to bring claims based on other statutes and constitutional provisions, those statutes and provisions do not provide grounds for the requested relief. [*See, e.g.*, Count I (citing Arizona constitutional provisions)]

order "annulling and setting aside the election." *Id.* And when "it appears that a person other than the contestee has the highest number of legal votes," the Court must "declare that person elected and that the certificate of election of the person whose office is contested is of no further legal force or effect." A.R.S. § 16-676(C). That's all that the election contest statutes authorize.

To begin, much of Plaintiffs' relief requests fall far outside the bounds of these limited remedies. Most plainly, under Count II, Plaintiffs request an order "requiring the Maricopa County Defendants to afford to all individuals who were refused a provisional ballot a reasonable opportunity to cast in the November 8, 2022 general election a provisional ballot, which must be duly processed and included in the canvass in conformance with applicable law." [Compl. ¶ 82; Demand for Relief ¶ C] The complaint fails to cite anything that would allow Plaintiffs to recover this relief. Further, under Count I, Plaintiffs seek an order "requiring the Maricopa County Defendants to tabulate for inclusion in the canvass all provisional ballots and early ballots submitted by qualified electors who had 'checked in' at a vote center but did not cast a regular ballot in the November 8, 2022 general election." [Compl. ¶ 74; Demand for Relief ¶ B] The complaint cites no part of the election contest statute that would authorize this relief. Many more of the relief requests suffer from the same defect. [*See, e.g.*, Compl. ¶¶ 88, 95; Demand for Relief ¶¶ D, E, F,[4] H, I, K] Thus, even had Plaintiffs stated a claim (they have not) this Court could not grant most of their requested relief. *See, e.g.*, *People ex rel. B.J.B. v. Ducey*, No. CV-21-0114-

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[4] Plaintiffs seek an "order requiring the County Defendants to make available for physical inspection all ballots containing an undervote in the contest for Arizona Attorney General" and an order requiring the County Defendants to "duly process and tabulate all ballots wherein a mark was made indicating the voter intent to cast a vote in said contest, and to amend the canvass results for the office of Arizona Attorney General accordingly." [Demand for Relief ¶ F] To the extent that the first part of this request seeks an inspection of ballots under A.R.S. § 16-677, Kris Mayes objects because the complaint fails to state any claim on which relief can be granted. An election contestant, like any other plaintiff, has no "absolute right" to discovery, including a "ballot inspection." *Bergstrom v. McEwen*, 960 N.W.2d 556, 565 (Minn. 2021) (citation omitted). At any rate, the second part of this request fails because no statute authorizes it.

SA, 2021 WL 1997667, at *2 (Ariz. May 11, 2021) (dismissing electors' petition because there was "no legal basis for the relief requested"). This Court should dismiss these relief requests. [Compl. ¶¶ 74, 82, 88, 95; Demand for Relief ¶¶ A,[5] B, C, D, E, F, H, I, K]

Plaintiffs' request for mandamus relief does not help them. As the Court already held in dismissing this case the first time, mandamus relief is "available only where there is no adequate legal remedy." [Ex. A at 2] Here, Plaintiffs have an adequate remedy because "the election contest statute provides the remedy and process for challenging an election." [*Id.* (citing *Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978) (rejecting a request for "mandamus" relief when the "gravamen" of the complaint was an election contest)][6]

Attorneys' Fees Notice

Kris Mayes requests an attorneys' fees award under A.R.S. § 12-349(A)(1) because Plaintiffs brought claims with no justification.

Conclusion

Plaintiffs ask this Court to overturn the will of Arizona's voters. But the RNC has no business in this contest, all of Plaintiffs' claims fail to state any claim on which relief can be granted, Count V comes far too late, and Plaintiffs seek forms of relief that they could never recover. As a result, this Court should dismiss the complaint with prejudice and award fees.

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[5] Plaintiffs seek an "order abating the recount of votes cast in the November 8, 2022 General Election for the Office of Attorney General." [Demand for Relief ¶ A] The Court hearing the recount has already denied this request.

[6] Further, Plaintiffs are not allowed to recover wide-ranging relief based on A.R.S. § 16-676(B), which provides simply that the "court shall continue in session to hear and determine all issues arising in contested elections." This provision does not in any way bear on the relief available in an election contest, which is outlined in other statutory provisions. Allowing Plaintiffs to request any form of relief that they want under the general language that requires this Court to "determine" issues in this election contest would render those specific remedies meaningless, violating the "cardinal principle of statutory interpretation" that requires courts to "give meaning, if possible, to every word and every provision so that no word or provision is rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019).

Dated: December 13, 2022

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Exhibit A

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Clerk of the Superior Court
*** Filed ***
NOV 29 2022 11:20a.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-015455

11/29/2022

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
A. Meza
Deputy

ABRAHAM HAMADEH, et al.

TIMOTHY A LASOTA

v.

KRIS MAYES, et al.

DANIEL C BARR

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COCHISE COUNTY BOARD OF SUPERVISORS
NO ADDRESS ON RECORD
GREENLEE COUNTY BOARD OF SUPERVISORS
NO ADDRESS ON RECORD
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KIMBERLY HUNLEY
KORY A LANGHOFER
SAMBO DUL
CELESTE MARIE ROBERTSON
MARK D BYRNES
JEFFERSON R DALTON
CEPHAS A PERKINS
RYAN N DOOLEY
KAREN HARTMAN-TELLEZ
RYAN ESPLIN
JASON MOORE
DANIEL JURKOWITZ
CRAIG C CAMERON
COLLEEN CONNOR
WILLIAM J KEREKES
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE WARNER

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-015455 11/29/2022

MINUTE ENTRY

Under advisement are two motions to dismiss this election contest, and Plaintiffs' response. The Court concludes that this matter is premature under the election contest statute, and therefore dismisses it without prejudice to the filing of an election contest after the canvass and declaration of election results have occurred.

Plaintiff Hamadeh is the Republican Party candidate for Attorney General. He and the Republican National Committee filed this election contest on November 22, 2022, challenging the election of the Democratic Party candidate for Attorney General, Defendant Mayes.

Arizona law allows any elector of the State to file an election contest "of any person declared elected to a state office." A.R.S. § 16-672(A). The contest must be filed "within five days after completion of the canvass of the election and declaration of the result thereof by the secretary of state or by the governor." A.R.S. § 16-673(A). Under these statutes there can be no election contest until after the canvass and declaration of results because, until then, no one is "declared elected." It is undisputed that the canvass and declaration of results for the November 2022 election have not occurred.

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Plaintiffs argue that the result of the election is now known, and the declaration of results is just a ministerial act. But an election contest is a statutory remedy, and the Court is required to follow the statutes' requirements.

Plaintiffs also argue that this lawsuit is, in addition to an election contest, a special action in the nature of mandamus. Special action relief, however, is available only where there is no adequate legal remedy. Here the election contest statute provides the remedy and process for challenging an election. *See Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978) (a mandamus action could not be brought when the "gravamen" of the complaint was that the election was improperly conducted).

For these reasons, Plaintiffs' lawsuit is premature. That does not mean Plaintiffs must wait to file suit until after a recount, which everyone agrees will be needed for this race. Rather, A.R.S. § 16-667 contemplates that an election contest might be filed despite a pending recount, and directs that "upon the initiation of such a contest, a proceeding begun under this article shall abate."

Based on this ruling, it is unnecessary to decide the remaining issues raised in the motions to dismiss.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-015455 11/29/2022

IT IS ORDERED granting Defendant Kris Mayes' Motion To Dismiss and Arizona Secretary Of State Katie Hobbs' Motion To Dismiss Statement Of Election Contest. This matter is dismissed without prejudice.

JUDGE OF THE SUPERIOR COURT

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