David A. Warrington*
Gary Lawkowski*
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
703-574-1206
DWarrington@dhillonlaw.com
GLawkowski@dhillonlaw.com

**Pro hac vice forthcoming*

Timothy A La Sota, Ariz. Bar No. 020539
TIMOTHY A. LA SOTA, PLC
2198 East Camelback Road, Suite 305
Phoenix, Arizona 85016
(602) 515-2649
tim@timlasota.com

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
John D. "Jack" Wilenchik, #029353
admin@wb-law.com

Attorneys for Plaintiffs/Contestants

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, an individual; TED BOYD, an individual; ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee Plaintiffs/Contestants, v.	No. CV-2022-01468 **CONSOLODATED RESPONSE TO CONTESTEE/DEFENDANTS' MOTIONS TO DISMISS**

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the Secretary of State; LARRY NOBLE, in his official capacity as the Apache County Recorder; APACHE COUNTY BOARD OF SUPERVISORS, in their official capacity; DAVID W. STEVENS, in his official capacity as Cochise County Recorder; COCHISE COUNTY BOARD OF SUPERVISORS, in their official capacity; PATTY HANSEN, in her official capacity as the Coconino County Recorder; COCONINO COUNTY BOARD OF SUPERVISORS, in their official capacity; SADIE JO BINGHAM, in her official capacity as Gila County Recorder; GILA COUNTY BOARD OF SUPERVISORS, in their official capacity; WENDY JOHN, in her official capacity as Graham County Recorder; GRAHAM COUNTY BOARD OF SUPERVISORS, in their official capacity; SHARIE MILHEIRO, in her official capacity as Greenlee County Recorder; GREENLEE COUNTY BOARD OF SUPERVISORS, in their official capacity; RICHARD GARCIA, in his capacity as the La Paz County Recorder; LA PAZ COUNTY BOARD OF SUPERVISORS, in their official capacity; STEPHEN RICHER, in his official capacity as the Maricopa County Recorder; MARICOPA COUNTY BOARD OF SUPERVISORS, in their official capacity; KRISTI BLAIR, in her official capacity as the Mohave County Recorder; MOHAVE COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; NAVAJO COUNTY BOARD OF SUPERVISORS, in their official capacity; GABRIELLA CAZARES-KELLY, in her official capacity

as the Pima County Recorder; PIMA COUNTY BOARD OF SUPERVISORS, in their official capacity; DANA LEWIS, in her official capacity as the Pinal County Recorder; PINAL COUNTY BOARD OF SUPERVISORS, in their official capacity; SUZANNE SAINZ, in her official capacity as the Santa Cruz County Recorder; SANTA CRUZ COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHELLE M. BURCHILL, in her official capacity as the Yavapai County Recorder; YAVAPAI COUNTY BOARD OF SUPERVISORS, in their official capacity; RICHARD COLWELL, in his official capacity as the Yuma County Recorder; and YUMA COUNTY BOARD OF SUPERVISORS, in their official capacity,

Defendants.

Plaintiffs/Contestants ("Plaintiffs") seek to ensure that the results of the November 8, 2022 General Election accurately reflect the will of the people as expressed at the ballot box. The 2022 election for Attorney General is one of the closest elections for statewide office in Arizona history, with the two leading candidates separated by a mere 511 votes. In this context, even small mistakes can quickly become material to the outcome of the race. In their exertions to thwart an accurate and complete vote count, Defendant/Contestee ("Contestee") and Defendant Secretary of State Katie Hobbs ("Defendant") (collectively, "Defendants") construct their motions to dismiss on several consequential errors of law.

***First*,** the Secretary of State's "heads I win, tails you lose" approach to laches is meritless. Plaintiffs filed this action within the statutorily required 5-day window. If the legislature had wanted this time frame to be shorter, it could have made it shorter. It did not. Moreover, Plaintiffs in no way slept on their rights. To the contrary, two of the Plaintiffs *did* try to bring a similar contest earlier and have vigorously sought to expedite

proceedings in this case. Defendants opposed that earlier contest, claiming it was premature. Having done so and prevailed, it is absurd for Defendant to now claim that Contestants waited *too long* to bring this contest. It is noteworthy that is argument is so unavailing that Contestee Kris Mayes did not even make it.

***Second*,** Defendants' opposition to any discovery is contrary to the structure of the statute. Defendant suggests that Plaintiffs should not be able to do any additional fact finding because "that's simply not how election contests work." Defendant's Motion to Dismiss at 2. But this claim is simply not true. The law recognizes that there is information asymmetry between the government and any contestant and that additional fact finding may be necessary to correct this imbalance. To wit, the contest statute specifically provides that "either party may have the ballots inspected before preparing for trial," on the condition that the requesting party verify "he cannot properly prepare for trial without an inspection of the ballots." A.R.S. § 16-677(A)-(B). Taken together, the allegations in the Statement of Contest collectively "give the [Contestee] fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6 (2008). That is all that is required at this juncture. While Defendants are free to controvert evidence adduced at trial, they cannot short-circuit indispensable factfinding processes by misusing Rule 8 to test the sufficiency of the evidence. Simply put, "[t]he contestors are entitled to an opportunity to prove their charges." *Griffin v. Buzard*, 86 Ariz. 166, 173 (1959).

***Third*,** the Defendants rely on an illogically constricted conception of the remedies afforded by the election contest statutes. While every contest culminates in a judicial disposition of the election outcome, the Court must "hear and determine **all issues** arising in contested elections." A.R.S. § 16-676(B) [emphasis added]. Rectifying errors or omissions in the tabulation of ballots is a cognizable remedy secured by the election contest statutes and ensures that the recount is predicated on a full and accurate count. *See* A.R.S. § 16-667. Indeed, the judicial power to ultimately affirm or set aside an election necessarily encompasses an antecedent authority to calibrate the proper tally of votes. *See generally*

Grounds v. Lawe, 67 Ariz. 176, 184–85 (1948). In any event, the Statement of Contest requests alternative remedies in the form of mandamus.

Fourth, the Defendants Motions to Dismiss is replete with claims that Plaintiffs do not specific sufficient ballots at issue to make up the 511 vote current deficit. This is not so. Count I alleges 395 specific votes, and the Verified Statement of Contest alleges that 1,942 provisional ballots were rejected, a material number of which were because of an erroneous conclusion on the part of the Defendant Maricopa County that the voter was ineligible to vote. (Statement of Election Contest ¶¶ 59; 77).

I. Plaintiff's Claims are not Barred by Laches

Defendant Secretary of State (but not Contestee Kris Mayes) takes a Goldilocks approach to the filing of this election contest. When a similar contest was filed several weeks ago, it was too early. Now this contest—within the statutorily specified 5-day window—is supposedly too late. Necessarily there must be *some* time, not found in statute and known only to Defendants, that is just right. But this is not how the law works.

Under statute, a contest must be filed "within five days after the completion of the canvass of the election and the declaration of the result thereof by the secretary of state or the governor." A.R.S. § 16-673(A). The canvass was completed on December 5, 2022. This contest was filed on December 9, 2022. December 9 is within five days of December 5. Thus, this contest was timely filed.[1]

Defendant's argument for disregarding the statute of limitations is unavailing. First, the legislature, in setting a specific statute of limitations for election contests, has already considered the time-sensitive nature of an election contest claim and determined that five

[1] In support of her laches claim, Defendant claims that Plaintiffs waited until "the last possible moment" to file this contest. Defendant Motion to Dismiss at 5. Defendant is wrong. Because the five-day statutory period actually ran through Saturday, December 10, the deadline for filing a contest did not run until the following Monday, December 12, 2022—three days after Plaintiffs filed this contest. *See Burk v. Ducey*, No. CV-20-0349, 2021 WL 1380620 at *1 (2021) ("Notwithstanding the fact that the election contest statutes do not include intermediate Saturdays, Sundays and legal holidays, '[t]he court will continue to adhere to the rule that if the fifth day for filing an election appeal falls on a Saturday, Sunday, or state holiday, a notice of appeal will be deemed timely if filed on the next business day.'" (quoting *Bohart v. Hanna*, 213 Ariz 480, 482 ¶ 7 n.2 (2006)).

days sufficiently balances the competing interests. Second, the case Defendant cites, *Lubin v. Thomas*, 213 Ariz. 496 (2006), does not support the proposition that courts should just ignore the statute of limitations in election cases. *Lubin* (in dicta) discussed the failure to promptly *prosecute* a claim after it was timely filed. There is not (and cannot be) any argument that Plaintiffs have been dilatory in *prosecuting* their claims in this case. To wit, Plaintiffs have already filed a Petition to Inspect Ballots and Motion to Expedite Discovery and consented to a Motion to Expedite the initial status conference in this case.

Defendant laments that this contest is "near-identical" to the Plaintiffs' earlier contest. However, Defendant disregards that, in the interim, the original Plaintiffs hired different counsel, were joined by two additional elector-Plaintiffs, and filed the contest in a different court.

When the original Plaintiffs sought to file a challenge earlier, Defendant claimed it was too soon. Now, after waiting for the triggering event identified by the court in that case, Defendant claims it is too late. As the Supreme Court has said in another context, "[t]his 'heads I win, tails you lose' approach cannot be correct." *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

Moreover, laches requires not merely an unreasonable delay—and four days from the completion of the canvass is manifestly not unreasonable, as the legislature determined when it specified a five-day window in which to bring an election challenge—but also a showing of prejudice caused by the delay. *See, e.g., Rash v. Town of Mammoth*, 315 P.3d 1234, 1240 (Ariz. App., 2d. Div. 2013) (holding that parties asserting laches defense bear burden of establishing both unreasonableness of delay and resulting prejudice).

Here, Defendants offer no proof of any prejudice resulting from any unreasonable delay by Plaintiffs. Rather, they offer only speculation about the possible effects that an election contest may have. But the Arizona legislature specifically authorized election contests and in doing so laid out a procedural timeline for them which balanced any legitimate concerns about delay against the need to get the results of the election right. This Court should reject Defendants' invitation to restrike that balance. As it is, the Plaintiffs

were awaiting a response from Maricopa County to a public records request that was due in on Tuesday night and in fact arrived then.

Plaintiffs filed this case well within the short window allowed by the legislature. It is timely and their claims are not barred by laches.

II. The Question of the RNC's Standing Is Superfluous

Contestee argues that the Republican National Committee lacks standing to pursue an election contest. *See* Contestee Motion to Dismiss at 5. But when, as here, multiple plaintiffs seek non-monetary relief, courts "consider only whether at least one named plaintiff satisfies the standing requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Because it is undisputed that Contestants Abraham Hamadeh, Jeanne Kentch, and Ted Boyd have standing under A.R.S. § 16-672(A), the question of the Republican National Committee's standing is superfluous. *See Poder in Action v. City of Phoenix*, 506 F. Supp. 3d 725, 728 (D. Ariz. 2020) ("[I]t is unnecessary to address the standing of each plaintiff in a multi-plaintiff case, at least where all plaintiffs seek the same form of relief, so long as one of the plaintiffs has standing.").

Moreover, the Republican National Committee has associational standing because its members include qualified electors of the State of Arizona. *See generally Calif. Trucking Ass'n. v. Bonta*, 996 F.3d 644, 652 & n.7 (9th Cir. 2021) (explaining associational standing, and adding that "[s]o long as standing can be shown for one plaintiff, we need not consider the standing of the other plaintiffs"); *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1085–86 (D. Ariz. 2020), *vacated on other grounds*, 18 F.4th 1179 (Mem) (9th Cir. 2021) (finding that political party had associational standing in voting rights context).

Finally, the Republican National Committee inarguably has standing to pursue the mandamus remedies pleaded in the Statement. *Cf. Arizonans for Second Chances, Rehabilitation & Public Safety v. Hobbs*, 249 Ariz. 396 (2020).

III. The Election Contest Statutes Authorize This Court to Order the Complete and Correct Tabulation of Lawful Votes, and the Plaintiffs Have Pleaded Alternative Claims for Mandamus Remedies

The Court is empowered by statute to furnish any and all of the remedies requested in the Statement of Election Contest. In struggling to avert any judicial inquiry into the administration of the election, Defendants argue that the Plaintiffs have failed to allege that a dispositive number of votes are in dispute, and that the Court is powerless to do anything other than either affirm or set aside the result of the election. This contention conjoins a disregard of the pleaded facts with a distortion of controlling law. The Statement easily clears the permissive pleading standard imposed by Rule 8. Before addressing in more detail the factual attributes of each claim, however, it is important to deconstruct the Defendants' textually unsustainable and logically unsound theory of election contest remedies. Further, even assuming *arguendo* that Defendants' misconstruction of the relevant statutes were correct, the Statement has alternatively invoked this Court's special action jurisdiction to afford mandamus relief.

A. The Court Can and Should Adjust the Tally as Necessary to Secure an Accurate Vote Count

The notion that the Court can do nothing other than reflexively affirm or annul a discrete election outcome is irreconcilable with the governing statutes. Defendants are correct that election contests are "purely statutory" and that every election contest must culminate in a final disposition of the outcome (subject to a subsequent recount). *See* A.R.S. § 16-676(B). But Defendants then amble into myopic misreadings of the statutory text, such as positing that the Court cannot order the tabulation or exclusion of particular subsets of disputed ballots. *See* Contestee Motion to Dismiss at 15–16. To the contrary, the Court not only can but must "hear and determine all issues arising in contested elections." A.R.S. § 16-676(B). While its "judgment" must include a determination confirming or annulling the election, *id.*, the Court also must formulate findings and orders in furtherance of its judgment.

In this vein, Defendants' arguments disintegrates under the glare of common sense. The power to affirm or annul the outcome of an election necessarily and intrinsically presupposes a subsidiary authority to make orders regarding the disposition of particular

ballots. After all, how is the Court to know whether to affirm or set aside an election result unless and until the contested ballots—such as the provisional and early ballots at issue in Count I, or the potentially erroneous ballot duplications and adjudications alleged in Counts III and IV—have been properly tabulated? For this reason, courts in election contests routinely make "determin[ations]," A.R.S. § 16-676(B), concerning the treatment of particular votes and the recalibration of the vote tally. *See, e.g.*, *Huggins v. Superior Court in and for the Cty. of Navajo*, 163 Ariz. 348, 353–54 (1990) (entering judgment in favor of contestee after ordering modification of vote tallies to discount illegal votes); *Babnew*, 154 Ariz. at 94 (reaffirming trial court's adjustment of one candidate's vote total after excluding particular ballots); *Hunt v. Campbell*, 19 Ariz. 254, 284–97 (1917) (meticulously examining various types of ballot markings to identify valid votes).

This point is crucial. Election contests exist not simply to declare a discrete outcome, but to ensure that the final vote tabulation undergirding it is full, fair, and lawful in all respects. *See Harless v. Lockwood*, 85 Ariz. 97, 101 (1958) ("[T]he very purpose of [election contests] is to aid in securing 'the purity of elections and guard against abuses of the elective franchise.'"). The governing statutes of course permit (if not require) this Court to fashion remedies necessary to "determine all issues," A.R.S. § 16-676(B), in the contest and to ascertain a lawful and proper final vote count.

B. In the Alternative, the Court Can Grant Mandamus Relief

Even if the Plaintiffs' requested relief were not available under the election contest statutes, it is amenable to mandamus remedies. Plaintiffs purposefully invoked this Court's special action jurisdiction, *see* Statement of Contest ¶ 6, and requested a writ of mandamus as an alternative remedy with respect to each of their claims, *id.* ¶¶ 74, 82, 88, 95, 102. Plaintiffs likewise joined the Secretary and county officials as defendants precisely so that any mandamus remedies could be fully effectuated.

Defendants cannot have it both ways. Plaintiffs have expressly alleged violations of constitutional and statutory provisions governing the rights of voters and the conduct of elections. For the reasons discussed in this Response, those claims are cognizable and

redressable under the election contest statutes. If they are not, however, then Plaintiffs would necessarily lack any plain, speedy and adequate remedy at law—which, in turn, would engender a right to mandamus relief. *See Ariz. Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62, ¶¶ 11–12 (2020) (allowing mandamus claims to remedy violations of election administration statutes).

IV. Each Claim in the Statement Adequately Pleads Each *Prima Facie* Element

"Motions to dismiss for failure to state a claim are not favored," *Logan v. Forever Living Products Int'l, Inc.*, 203 Ariz. 191, 193, ¶ 7 (2002)—and for good reason. The Arizona Supreme Court has rebuffed the more stringent "plausibility" pleading standard adopted by the federal courts, *see generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Instead, Arizona retains the traditional "notice pleading" rubric, which requires only that a complaint "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen*, 218 Ariz. at 419, ¶ 6 (citation omitted). Under this framework, "[d]ismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law, plaintiffs would not be entitled to relief under ***any*** interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012) (citation omitted; emphasis added)); *see also Ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983).

In derogation of this purposefully lenient pleading standard, Defendants seek to convert Rule 12(b)(6) motions into a trial on the pleadings. The Court should not indulge that procedural sleight of hand. Discovery and trial may or may not bear out the Statement's factual allegations. But as the Arizona Supreme Court recognized in rejecting a similar gambit to prematurely terminate an election contest at the pleadings stage:

> [T]here are certain well established rules to guide us: (1) in determining sufficiency of complaint (in this instance statement of contest) on a motion to dismiss, the allegations must be treated as true, and whether they are susceptible of proof at the trial does not concern us at this time, (2) all intendments lie in favor of the pleading and not against it,; and (3), a motion to dismiss an action should never be granted unless the relief sought could not be sustained under any possible theory.

Griffin, 86 Ariz. at 169–70. Emphasizing that "this election contest is not a criminal action against contestee and the high degree of proof required to convict is not essential," *id.* at 173, the court permitted the claims to proceed.

The Statement alleges that the number of ballots in dispute implicates 511 or more votes. *See* ¶ 21. That is all that is required. It further delineates—with more specificity than Rule 8 demands—particular categories of ballots that, collectively or in some combination, easily may prove dispositive of this exceedingly close contest.

Implicitly subverting the forgiving Rule 12(b)(6) inquiry into a test of evidentiary sufficiency, Defendants essentially gripe that the Statement does not supply direct evidence that Mr. Hamadeh will net 511 or more votes through these proceedings. But "[u]nder Arizona's notice pleading rules, 'it is not necessary to allege the evidentiary details of plaintiff's claim for relief.'" *Verduzco v. Am. Valet*, 240 Ariz. 221, 225, ¶ 9 (App. 2016). Plaintiffs need not produce evidence of anything at this juncture—nor can they, given that their ability to obtain discovery into key facets of their claims is dependent on the prosecution of this very proceeding. *See* A.R.S. § 16-677 (permitting access to ballots to prepare for trial in an election contest). By identifying particular subsets of uncounted or erroneously counted ballots—specifically, provisional and early ballots disqualified because of poll worker error, ballot duplications and electronic adjudications that inarguably were afflicted with some errors, and early ballots verified through extra-statutory means—that collectively implicate a dispositive number of votes, the Plaintiffs have discharged Rule 8's "minimal," *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, ¶ 15 (App. 2005), pleading obligation. They accordingly are "entitled to an opportunity to prove their charges." *Griffin*, 86 Ariz. at 173.

A. Count I: Wrongfully Disqualified Provisional and Early Ballots

Count I alleges that "at least" 395 provisional and early ballots may have been unlawfully excluded from tabulation because of systemic poll worker error. *See* Statement ¶¶ 34, 69, 70. This malfeasance constituted "misconduct," A.R.S. § 16-672(A)(1), and induced an "erroneous count of votes," *id.* § 16-672(A)(5).

1. "Misconduct"

"Misconduct" within the meaning of Section 16-6672(A)(1) need not entail fraud or willful wrongdoing. *See Miller v. Pichaco Elem. Sch. Dist.*, 179 Ariz. 178, 180 (1994) (setting aside election because of improper distribution of early ballots, emphasizing that "a showing of fraud is not a necessary condition to invalidate absentee balloting"); *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986) (claims concerning "the inclusion of misleading or irrelevant material on the ballot and in the notices of election, constitute a sufficient allegation of offenses against the elective franchise" under the election contest statutes). The Statement alleges that the Chairman of the Maricopa County Board of Supervisors disseminated incorrect information concerning the necessity of "checking out" of a polling location in order to cast a valid ballot elsewhere, and that numerous poll workers across Maricopa County failed to properly "check out" voters, which caused subsequently cast provisional or early ballots to be wrongfully canceled. *See* Statement ¶¶ 33–38. These allegations state a valid claim of "misconduct."

Defendants seemingly acknowledge this reality, but contend that the Statement does not allege that these pervasive errors "affected the result of the election." Contestee Motion to Dismiss at 6-7; *see also* Defendant Motion to Dismiss at 2. Preliminarily, Defendants misstate the law. Misconduct not consisting of fraud or intentional wrongdoing is actionable if it "affect[s] the result, ***or at least render[s] it uncertain***." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929) [emphasis added]. More to the point, the Statement does, in fact, allege the materiality of these mistakes. It expressly posits that "at least" 395 votes—representing 77% of the margin separating the candidates—were wrongfully excluded from the tally. *See* Statement ¶ 69, 70.

Further, these unlawful disqualifications, when compounded with other mistabulations set forth in the Statement, were expressly alleged to be material. *Id.* ¶ 21. On this latter point, the Defendants' position appears to be that multiple variants of misconduct or errors elude any remedy under the election contest statutes, as long as each category of misconduct or mistake—standing alone and in isolation—did not independently

implicate enough votes to alter the election outcome. This odd theory is as logically tortuous as it is textually unsupported. In short, the Statement has adequately alleged that "misconduct" in the form of extensive poll worker error caused the unlawful exclusion of "at least" a number of ballots that is sufficient to "render [the election for Arizona Attorney General] uncertain." *Findley*, 35 Ariz. at 269.

2. "Erroneous Count of Votes"

In the alternative, the Statement contends that the disqualification of these provisional and early ballots resulted in an "erroneous count of votes." A.R.S. § 16-672(A)(5). On this score, Defendants manage to muster only an anemic response that that the wrongful discarding of ballots alleged to be lawful and valid somehow did ***not*** render the final tally "erroneous." This feat of semantic gymnastics is as difficult to reconcile with the statutory text as it is with common sense. A vote count that excludes ballots that, as a matter of law, should have been tallied is definitionally "erroneous."

B. Count II: Wrongful Denial of Provisional Ballots

Count II alleges that, as result of poll worker error, certain voters whose eligibility apparently was uncertain were denied a provisional ballot—a dereliction that violated Arizona law because poll workers had a nondiscretionary statutory duty to issue a provisional ballot to every voter willing to affirm his or her eligibility. *See* A.R.S. § 16-584; *see also* 52 U.S.C. § 21082(a). The Statement further alleges that this malfeasance affected a material number of votes. *See* Statement ¶¶ 29(c), 73. The Plaintiffs were unable to plead a specific number of affected voters (because Maricopa County has, to date, declined to provide that information to them), but are not required to do so in this procedural posture. *See Verduzco*, 240 Ariz. at 225, ¶ 12 (holding in Rule 12(b)(6) context that the plaintiffs "were not required to allege more detail" about the relevant underlying actions, noting "the limited record on a motion to dismiss for failure to state a claim, which does not include disclosures, discovery or other external evidence"). Because "enough is stated [in the Statement of Election Contest] which would entitle the plaintiff[s] to relief upon some theory ***to be developed at trial***," *Hancock v. Bisnar*, 212 Ariz. 344, 348, ¶ 16 (2006)

[emphasis added], Count II is adequately pleaded.

Finally, even assuming *arguendo* that, as Defendants contend, the election contest statutes do not afford relief tailored to this disenfranchising practice, the absence of a statutory remedy would permit mandamus relief—which is precisely why the Plaintiffs have sought a mandamus writ in the alternative. *See* Statement ¶ 74.

C. Counts III & IV: Ballot Duplication and Electronic Adjudication Errors

Ballot duplication and/or adjudication processes in Maricopa County in connection with the 2020 presidential election were afflicted with an error rate of at least 0.37% and perhaps as high as 0.55%, which equated to as many as 150 votes countywide. *See Ward v. Jackson*, 2020 WL 8617817, *2 (Ariz. Dec. 8, 2020).[2] The recurrence of a substantially similar error rate statewide easily would—and certainly when aggregated with other categories of ballots identified in the Statement of Contest—be material to or dispositive of the Attorney General race. *See* Statement ¶¶ 87, 94. Because these allegations "if true, might entitle [Plaintiffs] to relief," *Chavez v. Brewer*, 222 Ariz. 309, 320, ¶ 34 (App. 2009), Counts III and IV plead cognizable claims.

Defendants retort that the Statement is deficient because it does not identify any particular erroneously duplicated or adjudicated votes in the Attorney General race or specify the allocation of these votes between the two candidates. This specious reasoning, though, inverts both the burden of pleading standard and the factfinding process. A plaintiff is entitled to pursue his claims "unless the relief sought could not be sustained under ***any*** possible theory." *Griffin*, 86 Ariz. at 169–70; *see also Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 50, ¶ 7 (App. 2001) (dismissal is appropriate "only if the plaintiff would not be entitled to relief under ***any*** set of facts pleaded in the complaint that are susceptible of proof") [emphases added].

The correct disposition of these ballots can be determined only through discovery and trial. Perhaps these ballots will (alone or in conjunction with other subsets of contested

[2] Further, at least one observer of tabulation processes in this election has reported potential errors in the electronic adjudications of particular ballots. *See* Statement ¶ 51.

votes) produce a victory for Mr. Hamadeh; perhaps not. But because there is at least ***some*** "set of facts susceptible of proof," *Pickrell*, 136 Ariz. at 594, under which Mr. Hamadeh would prevail, Counts III and IV are valid.

Defendants' carping that the Statement does not identify specific affected ballots assumes a particularly disingenuous cast because Defendants know that ballots and ballot images are strictly off-limits to public viewing or inspection. *See* A.R.S. §§ 16-624, 16-625. Access to these ballots is attainable only by means of a court order, which necessarily entails the initiation of litigation. *See generally* A.R.S. § 16-677. Precisely because the relevant facts can be developed only within the confines of civil discovery, Rule 8 demands that cases be "tried on the proofs rather than the pleadings." *Belan Loan Inv'rs, LLC v. Bradley*, 231 Ariz. 448, 455, ¶ 18 (App. 2012).

If Defendants' position is truly that all ballot duplication and adjudications conduced statewide were flawless and accurate in every material respect, they should assert that position in their respective Answers and discovery will test the parties' respective positions. But because there is some set of facts susceptible of proof that sustains the Statement's allegations, the motion to dismiss Counts III and IV must be denied.

D. Count V: Improper Signature Verifications

1. Count V Is Timely and Not Barred by Laches

Claims bearing directly on the processing and disposition of particular ballots may be adjudicated in an election contest. Rejecting an argument (cast as an estoppel theory) that a contestant could not pursue an election contest based on votes cast by ineligible individuals and the inclusion of improper material on the ballot, the Court of Appeals concluded that the challenge could proceed. The court explained that "if estoppel were a defense in an election contest, the statutory provision allowing a contest after an election would be nugatory." *Moore*, 148 Ariz. at 155. Evaluating precedents finding claims arising out of pre-election procedures to be estopped or time-barred, the court responded that the case law "does not hold that prior knowledge of irregularities estops the contestor from raising them in an election contest; it merely states that if a person waits until after an

election to file a challenge, the election will not be invalidated unless the contestor shows that the result was affected by the irregularities." *Id.* at 156.

For exactly this reason, courts have adjudicated election contests predicated on alleged improprieties or malfeasance that was at least arguably susceptible to discovery prior to the election. *See, e.g.*, *Griffin*, 86 Ariz. at 173 (contest challenging the nomination of an alleged "sham" candidate was not untimely, even though the relevant facts were "well known" prior to the election); *Miller*, 179 Ariz. at 180 (annulling election because of improper early ballot distributions); *Reyes v. Cuming*, 191 Ariz. 91 (App. 1997) (same result where County Recorder systematically failed to conduct signature verification of early ballot affidavits). Just two years ago, the Arizona Supreme Court spurned a laches defense to a last-minute challenge to the lawfulness of certain ballot instructions formulated by the County Recorder, adding pointedly that "Plaintiffs' delay does not excuse the County from its duty to comply with the law." *Ariz. Public Integrity All.*, 250 Ariz. at 65, ¶ 30.

In sum, claims—such as Count V—that are intertwined with the processing and tabulation of particular ballots may be presented in an election contest.

2. Early Ballot Envelopes and Requests Are Not "Registration Records"

The signature presented on an early ballot affidavit, *see* A.R.S. § 16-547, is the fulcrum on which the integrity of the ballot pivots; it is the only means by which the County Recorder can verify that the person casting the ballot is, in fact, a duly qualified elector. For this reason, the Legislature has directed that the Recorder must compare the signature to that found in the putative voter's "registration record." A.R.S. § 16-550(A). An incongruence is fatal to the ballot's validity, unless timely cured by the voter. *Id.* In a testament to the centrality of the signature verification regime, courts have not hesitated to set aside elections in their entirety when the Recorder systemically failed to examine early ballot affidavit signatures in the manner required by statute. *See Reyes*, 191 Ariz. at 94.

The Statement alleges that certain early ballot affidavit signatures did not match the signature on file in the "registration record," but were verified by means of a comparison to a document other than the voter's "registration record," such as an early ballot envelope in

a prior election or an early ballot request form. *See* Statement ¶¶ 53-57. These ballots were improperly processed and tabulated because those materials are not a "registration record." A voter "registration" is a statutory term of art imbued with a definite and fixed meaning. It refers to a discrete document containing certain specific items of information and certifications by the voter. *See* A.R.S. § 16-121.01 (defining a "registration"). Because early ballot request forms and early ballot envelopes lack most or all of these attributes and are not mechanisms for registering to vote, they are not a "registration record."[3]

Additionally, the broader statutory context belies the notion that early ballot requests and envelopes are "registration records." *See generally Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017) (when construing a statutory provision, courts should "consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved"). Upon receiving a written early ballot request, the Recorder must "compar[e]" the information contained on it "to the voter registration information on file," A.R.S. § 16-542(A), which is conceptually and textually inconsistent with the argument that the request is itself a "registration record." Similarly, an early ballot envelope is the item to which the actual "registration record" is compared; it hence is necessarily extrinsic to the "registration record."

Finally, the EPM cannot license what the controlling statute prohibits. While ***valid*** EPM provisions carry the force of law, *see* A.R.S. § 16-452, any dispute implicating the validity or enforceability of an EPM rule is reviewed *de novo* and without deference. *See Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 561, ¶ 28 (2018) (statutory provisions categorically "prohibit[] courts from deferring to agencies' interpretations of law"). For the reasons outlined above, an early ballot request form or early ballot envelope is not a "registration record" and cannot be utilized for signature verification determinations. *See* A.R.S. § 16-550(A). To the extent the EPM purports to dictate otherwise, it is *ultra vires*

[3] The Contestee fixates on the Legislature's use of the term "registration record" rather than "registration form." But the defect in signature comparisons that rely on early ballot requests or envelopes is that those materials are not "*registration*" documents; any purported distinction between "forms" and "records" is immaterial.

and not enforceable. *See Leibsohn v. Hobbs*, 254 Ariz. 1, ¶ 22 (2022) (reiterating that "an EPM regulation that contradicts statutory requirements does not have the force of law. Further, it is this Court's role, not the Secretary's to interpret [a statute]'s meaning").

V. **Contestee's Request for Sanctions Is Itself Frivolous and Abusive**

It is incumbent upon all parties to speak and act responsibly and with restraint in the realm of post-election litigation. As the Plaintiffs took pains to point out in the opening paragraphs of their Statement, they are not alleging fraud or willful wrongdoing in this election, or impugning the motives of any public official. But no election is perfect, and even the most well-meaning election administrators and poll workers are not infallible or immune from inevitable human error. When two candidates are separated by barely 500 votes out of more than 2.5 million cast, the accumulation of even innocent mistakes begets substantial and credible questions concerning the accuracy of the final count.

With these considerations in mind, Plaintiffs filed a carefully crafted Statement of Election Contest that was (a) initiated promptly, (b) narrowly tailored to focus on several discrete categories of ballots, and (c) devoid of any hyperbolic charges, partisan rancor, or inflammatory insinuations. It hence is regrettable that the Contestee once again gratuitously seeks to escalate what should be a legitimate debate on important questions of law into a demand that the Court ***sanction*** the Plaintiffs for asking the Court to ensure that the pre-recount tally in the closest election for statewide office in Arizona history is complete, lawful and accurate in all respects.

The Legislature devised election contest remedies more than a century ago because electors have the right to independent judicial consideration of even unintentional errors or improprieties that may render the announced results even somewhat "uncertain." *Findley*, 35 Ariz. at 269. That the Contestee—who aspires to an office charged with serving all Arizonans—would deploy sanctions threats to chill political opponents from responsibly exercising rights secured to them by law is troubling.

The good faith and meritorious grounds for the Plaintiffs' claims are set forth at length above and will not be reiterated here. Moreover, it bears noting that Plaintiffs claims

are in many respects substantively similar to those raised previously in the November 22 contest. To wit, Contestee herself characterizes them as "largely the same." Contestee Motion to Dismiss at 2. The November 22 contest was dismissed *without* prejudice. A dismissal without prejudice is irreconcilable with Contestee's argument that Plaintiffs' claims are groundless and not made in good faith.

The Court hence should deny the Contestee's fee-shifting request. If sanctions are to be the newest weapon in the political arsenal, however, their application must be reciprocal and even-handed. Accordingly, if the Court is inclined to open the door to sanctions requests, the Plaintiffs reserve the right to cross-move for fees pursuant to A.R.S. § 12-349(A)(1), (2) and/or (3), on the grounds that:

1. The Defendant's argument that Plaintiff's contest is barred by laches lacks substantial justification and is contradicted by A.R.S. § 16-673(A).
2. There is no substantial justification for the Contestee's apparent position that the Republican National Committee lacks standing to pursue the alternative mandamus remedies sought in the Statement of Contest.
3. The Contestee's sanctions claim itself is, upon information and belief, brought primarily for purposes of harassment.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Dismiss.

RESPECTFULLY SUBMITTED this 14th day of December, 2022.

By: /s/ Timothy A. La Sota

Timothy A La Sota, SBN # 020539
TIMOTHY A. LA SOTA, PLC
2198 East Camelback Road, Suite 305
Phoenix, Arizona 85016

David A. Warrington*
Gary Lawkowski*
DHILLON LAW GROUP, INC.

2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314

**Pro hac vice forthcoming*

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
John D. "Jack" Wilenchik, #029353
admin@wb-law.com

Attorneys for Plaintiffs/Contestants