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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

MARK FINCHEM,

Contestant/Plaintiff,

v.

ADRIAN FONTES, officeholders-elect; and
KATIE HOBBS in her official capacity as the
Secretary of State,

Contestees/Defendants

CASE No. CV2022-053927

SECRETARY OF STATE-ELECT
ADRIAN FONTES'
MOTION TO DISMISS

This is an election contest founded upon a flimsy tantrum of conspiracy theories and outright falsities in which Plaintiff Mark Finchem – *a twice sanctioned litigant who has maintained totally baseless lawsuits against his political rivals and a failed politician who roundly lost the 2022 General Election* – asks this Court to wholly disregard the People's will, overturn the 2022 General Election, and do it all over again in a manner he prefers. Indeed, this action is the latest in a series of ill-advised and baseless attacks on the integrity of Arizona's election processes and the officials who oversee our elections. To use a turn of phrase: "Enough is enough." The People of Arizona have spoken, rejected Plaintiff's firebrand of divisive and dangerous rhetoric, and elected Adrian Fontes in order to preserve our democracy for future generations.

Accordingly, for the following reasons, Secretary of State-Elect Adrian Fontes moves to dismiss this action and requests an award of attorneys' fees and costs pursuant to A.R.S.

§ 12-349 (after separate briefing).¹ Specifically, dismissal is warranted because (1) Plaintiff fails to state a claim against Secretary of State-Elect Fontes, (2) even if presumed true, none of the allegations against Secretary Hobbs amount to “misconduct” sufficient to sustain an election challenge, and (3) while there was no illegality in the 2022 General Election, Plaintiff’s procedural objections related to tabulation certificates do not warrant casting aside millions of votes and starting anew, especially when he has declined to timely name indispensable parties necessary to adjudicate whether the issues at bar justify a new election in every county in Arizona – *i.e.*, every county and their election officials responsible for actually conducting a new election and tabulating votes.

I. THE LAW GOVERNING ELECTION CHALLENGES GENERALLY AND PLAINTIFFS’ CLAIMS

In Arizona:

A. Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the following grounds:

1. For misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election.
2. That the person whose right to the office is contested was not at the time of the election eligible to the office.
3. That the person whose right is contested, or any person acting for him, has given to an elector, inspector, judge or clerk of election, a bribe or reward, or has offered such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise.
4. On account of illegal votes.
5. That by reason of erroneous count of votes the person declared elected or the initiative or referred measure, or proposal to amend the constitution, or other question or proposal submitted, which has been declared carried, did not in fact receive the highest number of votes for the office or a sufficient number of votes

¹ This request is made to preserve the right to seek attorneys’ fees and costs in light of the case law requiring that a fee request must be made in the first filing responsive to a Complaint. Secretary of State-Elect Fontes will file a sperate motion upon the disposition of this Motion to Dismiss.

1 to carry the measure, amendment, question or proposal.

2 A.R.S. § 16-672. Public officials acting in the election context are presumed to have acted
3 in good faith. *See Hunt v. Campbell*, 19 Ariz. 254, 264 (1917) (holding that “no court ...
4 is permitted to found its judgment upon mere suspicion and conjecture of wrongdoing, but,
5 unless there be satisfactory evidence to the contrary, to look upon the acts of public officials
6 with a presumption of their rectitude and good faith.”).

7 The contestant of an election has the burden of proving any illegality. *See Findley v.*
8 *Sorenson*, 35 Ariz. 265, 271–72 (1929) (“the burden of proof is on contestant to show
9 illegality”). And since Arizona was a Territory, the law has maintained that mere election
10 irregularities that cannot be shown to have affected an election’s outcome cannot justify
11 overturning an election. *See Territory v. Bd. of Sup’rs of Mohave Cnty.*, 2 Ariz. 248, 253
12 (1887); *see also Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183, 186, ¶ 10
13 (App. 2005) (If a statute does not “expressly provide that noncompliance invalidates the
14 vote,” then Arizona courts “will not set aside an election unless the effect of the
15 noncompliance altered the outcome or clouded the reliability of the results.”).

16 Plaintiff alleges violations of A.R.S. § 16-672(A)(1) and (4): election misconduct and
17 illegal votes. As for Count Ones, alleging election misconduct, Plaintiff alleges that
18 misconduct sufficient to ignore the Peoples’ will and redo an entire lection exists because:
19 (1) Secretary Hobbs chose to do her duty as Secretary of State while running for Governor
20 – an issue that could have been raised years ago, or at minimum when she declared her
21 candidacy for Governor; (2) Secretary Hobbs, consistent with her duties in that office, took
22 legitimate steps to ensure that other election officials fulfilled their statutory duty to certify
23 election results; and (3) Secretary Hobbs or her representative convinced Twitter® to
24 remove false or misleading Twitter® posts. Amended Complaint (“AC”), at ¶¶ 64-79.

25 As for Count Two, alleging illegal votes, Plaintiff alleges that all votes cast are illegal
26 votes because the wrong person signed a certificate of accreditation for the laboratories that
27 tabulated the votes. AC, ¶¶ 80-88. Plaintiff concludes that these “issues” – which are at
28 most procedural and should have been addressed before the election if merited – mean

1 “[t]he election *likely* favored Plaintiff had the illegal voting not been cast, changing the
2 election’s outcome in favor of Plaintiff.” *Id.* at ¶ 84.

3 **II. ARGUMENT**

4 **A. PLAINTIFF FAILS TO STATE A CLAIM AGAINST SECRETARY OF STATE-ELECT** 5 **FONTES**

6 A complaint must be a “short and plain statement of the claim showing that the pleader
7 is entitled to relief.” Ariz. R. Civ. P 8(a)(2). The term “short” means “‘little length’ or ‘not
8 lengthy or drawn out.’” *Anserv Ins. Servs., Inc. v. Albrecht*, 192 Ariz. 48, 49, ¶ 6 (1998)
9 (citing Merriam Webster’s Collegiate Dictionary 1084 (10th ed. 1996)). The Arizona
10 Supreme Court has held that a 269-page complaint was “not ‘short’ by any stretch of the
11 word.” *Id.* And a complaint’s length “and the inclusion of unnecessary material . . . alone
12 [is] enough to justify dismissal.” *Id.* at ¶ 7.

13 Moreover, when construing a pleading, a Court will not “accept as true allegations
14 consisting of conclusions of law, inferences or deductions that are not necessarily implied
15 by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts,
16 or legal conclusions alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4
17 (App. 2005). Indeed, “[e]ven under liberal notice pleading rules, a plaintiff’s obligation to
18 provide the grounds of his entitlement to relief requires more than labels and conclusions,
19 and a formulaic recitation of the elements of a cause of action will not do.” *Dube v. Likins*,
20 216 Ariz. 406, 424, ¶ 14 (App. 2007) (internal quotations, brackets, and citation omitted).

21 The Complaint is a 197 page combination of flimsy allegations and questionable
22 exhibits, some from so-called “experts” whose expertise is non-existent and based largely
23 on speculation and hearsay. See AC, Ex. F at “Reported by Ann Richardson” (page 81 of
24 the AC PDF) (alleging in report not signed under oath that “[m]y feeling (and only a feeling)
25 was that [some voters] were paid voters for the Governor’s race because they did not care
26 about any other state race or the federal race”).² None of the allegations made in this action

27 _____
28 ² The pleading’s sloppiness is compounded by pages 108 through 197 of the AC in PDF
form appearing to be a second set of the same exhibits already attached to the pleading.

1 concern acts or omissions attributed to Secretary-Elect Fontes and he cannot provide or
2 effectuate any of the relief Plaintiff seeks. AC at ¶¶ 11-51 (alleged misconduct only
3 directed at Hobbs), 63-75 (same). Accordingly, he should be dismissed from this action.

4 **B. NONE OF PLAINTIFF’S ALLEGATIONS CONSTITUTE MISCONDUCT UNDER**
5 **A.R.S. § 16-672(A)(1)**

6 Count One of the Complaint alleges three categories of misconduct against Secretary
7 Hobbs. The first category consists of allegations that Secretary Hobbs did not recuse herself
8 from her office or cease from performing her duties as Secretary of State while also running
9 for Governor. AC, ¶¶ 15-20, 41, 65-66. The second category consists of allegations that
10 Secretary Hobbs’ office and legal counsel were “threatening” the Boards of Supervisors for
11 Cochise County and Mohave County (or, more accurately, she asked them to do their jobs).
12 *Id.* at ¶¶ 26-40. The third type consists of allegations that Secretary Hobbs got Plaintiff’s
13 Twitter account suspended in October 2022 (no, that is not a joke). AC, ¶¶ 42-51. These
14 allegations fail to state a claims under A.R.S. § 16-672(A)(1). These allegations fail to state
15 a claims under A.R.S. § 16-672(A)(1).

16 First, Arizona law does not require Secretary Hobbs to recuse herself from performing
17 her duties as Secretary of State during an election just because she is also a candidate in
18 that election. The amended complaint does not cite any authority to the contrary other than
19 A.R.S. § 38-503. *See* AC, ¶ 65. But this statute does not apply. Under A.R.S. § 38-503(A):

20 Any public officer . . . of a public agency who has[] . . . a substantial interest in
21 any **contract, sale, purchase or service to such public agency** shall make known
22 that interest in the official records of such public agency and shall refrain from
voting upon or otherwise participating in any manner as an officer . . . in such
contract, sale or purchase.

23 (emphasis added). Under A.R.S. § 38-503(B):

24 Any public officer . . . who has[] . . . a **substantial interest** in any decision of a
25 public agency shall make known such interest in the official records of such
26 public agency and shall refrain from participating in any manner as an officer or
employee in such decision.

27 (emphasis added). A “substantial interest” necessarily involves some economic benefit.
28 *See* A.R.S. § 38-502(11) (“substantial interest” means any nonspeculative pecuniary or

1 proprietary interest, either direct or indirect, other than a remote interest.”); *Shephard v.*
2 *Platt*, 177 Ariz. 63, 65 (App. 1993) (“[p]ecuniary means money and proprietary means
3 ownership.”). And Arizona explicitly rejects the proposition that elected offices are
4 proprietary. *Mecham v. Gordon*, 156 Ariz. 297, 302 (1988) (“[P]ublic offices are public . .
5 . trusts, and the nature of the relation of a public officer to the public is inconsistent with
6 either a property or a contract right. Every public office is created in the interest and for
7 the benefit of the people, and belongs to them. The right, it has been said, is not the right
8 of the incumbent to the place, but of the people to the officer . . .”). Accordingly, this
9 statute plainly does not require Secretary Hobbs to recuse herself merely because she was
10 also running for Governor and there are no facts alleged nor law cited remotely suggesting
11 otherwise.

12 Second, the amended complaint alleges that Secretary Hobbs “refused to recuse
13 herself on November 4, 2022.” AC at ¶ 20 n.3. But this *pre-dates* the 2022 General
14 Election, and such pre-election matters are not actionable under A.R.S. § 16-672(A)(1).
15 See A.R.S. § 16-642 (election canvass occurs “not less than six days nor more than twenty
16 days following the election”), *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL
17 3297254, at *3 (Ariz. App. July 22, 2019) (mem. decision), *available at*
18 <https://tinyurl.com/mr3vryj9>, citing *Canvass*, Black’s Law Dictionary (11th ed. 2019)
19 (defines “canvass” as “[t]he counting of votes and certifying of results”).

20 Third, Plaintiff ironically alleges that Secretary Hobbs’ misconduct includes her office
21 telling public officials to just follow the law.³ See, e.g., AC, ¶¶ 27 n.5 (November 23, 2022
22 letter to Mohave County Board of Supervisors that “provide[s] information about the
23 statutory requirement to certify the County’s 2022 General Election Results.”), 28
24 (November 28, 2022 email to Mohave County Board of Supervisors that failing to certify

25
26 ³ This is ironic because “just follow the law” was Plaintiff’s campaign slogan throughout
27 his campaign. See <https://voteфинchem.com/about/> (last accessed Dec. 12, 2022).
28 Apparently this means follow the law *unless* it is unfavorable, in which case just make
things up and hope for the best. Fortunately none of us here have the luxury of ruling by
fiat and we must, indeed, follow the law. And that law, as explained herein, compels
dismissal of this action.

1 election results is unlawful and could result in legal fees, costs, and sanctions), 33 (alleging
2 the Mohave County Board of Supervisors certified the election “under duress” merely
3 because they were informed that not following the law could incur criminal liability), 39
4 n.7 (alleging as misconduct referring some Cochise County Board of Supervisors members
5 to the Arizona Attorney General’s Office and Cochise County Attorney for potential crimes
6 due to those members’ defiance of Arizona law), 67 (alleging that “[i]nitiating court actions
7 to compel the county Boards to certify” the election is misconduct), 75 (alleging that
8 notifying attorneys of potential sanctionable conduct counts as “threatening and
9 intimidating county officials”). Secretary Hobbs had every right, and indeed it was her
10 sworn duty, to ensure the Supervisors in Cochise County and Mohave County complied
11 with the law and did their jobs. An elected official during her sworn duty simply is not
12 election misconduct. More importantly, Plaintiffs cite nothing compelling a contrary result.

13 Fourth, Plaintiff alleges that Secretary Hobbs committed misconduct by informing
14 Twitter® that his account was spreading lies that the Voter Registration System is owned
15 and operated by villainous foreign agents. AC, ¶¶ 42-51. But the AC alleges this
16 correspondence occurred before the election. *Id.* at ¶¶ 42 n.8 (alleged January 7, 2022
17 emails), 46 (alleged October 31, 2022 Twitter® account suspension). Therefore, this
18 purported misconduct is not actionable under A.R.S. § 16-672(A)(1) because it all pre-dates
19 the election. *Williams*, 2019 WL 3297254, at *3.

20 **C. NONE OF PLAINTIFF’S ALLEGATIONS CONSTITUTE ILLEGALITY UNDER**
21 **A.R.S. § 16-672(A)(4)**

22 Count Two of the Complaint alleges that millions of votes cast are illegal because the
23 laboratories used to certify the tabulation equipment used in each county were not
24 accredited due to their certificates not being signed by a specific individual. This argument
25 fails for multiple reasons. First, Plaintiff’s highly technical “someone else needed to sign
26 the certificate” argument cannot overcome the law, which states that such irregularities
27 cannot invalidate an election. Second, it is an untimely procedural argument that has been
28 waived. Third, because Plaintiff seeks a new election and is complaining of tabulation

1 issues, every county and their election officials are indispensable parties to this action. But
2 Plaintiff failed to timely name them, thus, this action necessarily fails.

3 **1. ARIZONA LAW SQUARELY REJECTS PLAINTIFF’S ARGUMENT**

4 The law is clear that something as inconsequential as the wrong signatory on a lab
5 certification will not upend an entire election:

6 No list, tally, certificates or endorsement returned from any precinct shall be set
7 aside or rejected for want of form, or for not being strictly in accordance with
8 the explicit provisions of this title, if they can be clearly understood, nor shall
9 any declaration of result, commission or certificate be withheld or denied by
reason of any defect or informality in making the returns of the election in any
precinct, if the facts which the returns should disclose can be definitely
ascertained.

10 A.R.S. § 16-644. In other words, Arizona does not throw out elections when the alleged
11 defect is form over substance (*i.e.*, a different agent of the same agency signed a
12 certification form available to Plaintiff over a year ago). *Contra* AC, ¶ 59 (conclusory
13 assertion that signature issue is not form over substance). Plaintiff makes no allegations
14 that the returns, certificates, or endorsements that any vote made cannot be definitely
15 ascertained. To the contrary, Plaintiff argues the votes cast can be ascertained, since he is
16 seeking a declaration that he somehow won the 2020 General and claims to be able to prove
17 as much with the ballots already cast. *See* AC at p. 14, ¶ D. This claim is patently meritless,
18 sanctionable, and should be dismissed with prejudice.

19 **2. PLAINTIFF’S ARGUMENT IS UNTIMELY**

20 At bottom, Count Two is an untimely challenge “concerning alleged *procedural*
21 violations of the election process” which “*must* be brought prior to the actual
22 election.” *Sherman v. City of Tempe*, 202 Ariz. 339, ¶ 9 (2002) (emphasis added); *see*
23 *also* *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) (“[P]rocedures leading up to an election
24 cannot be questioned after the people have voted.”); *Kerby v. Griffin*, 48 Ariz. 434, 444
25 (1936) (“[I]f parties allow an election to proceed in violation of the law which prescribes
26 the manner in which it shall be held, they may not, after the people have voted, then
27 question the procedure.”).

28 Plaintiff complains that the laboratories used to verify the tabulation of votes in

1 Arizona (especially Maricopa County) were not properly accredited because the Chair of
2 the Commission did not sign the laboratories' Accreditation Certificate. *See* AC, at ¶ 87.
3 Assuming this argument is correct, it is clearly a procedural argument that should and could
4 have been raised *before* the 2022 General Election. Indeed, information regarding the
5 laboratories, including their accreditation certificates, has been publicly available for a long
6 time. *See* <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl> .
7 There is no allegation Plaintiff did not know of these labs or could not access this
8 information before the 2022 General Election. Afterall, Plaintiff's so-called "expert" on
9 this issue, Michal Shafer, did his analysis in **2020**. *See* AC at Ex. D, p.6 ("Shortly after the
10 202 election, I was asked to compare the accreditation of the test laboratories of Pro V&V
11 and SLI Compliance, a Division of Gaming Laboratories International, LLC."). So, if
12 Plaintiff wanted to raise this issue, he had all the information necessary to do so prior to the
13 actual election. This inconsequential procedural quibble is untimely and must be dismissed.
14 *See Williams*, 2019 WL 3297254, at *3; AC, *id.* at ¶¶ 52-59, 76-84.

15 **3. COUNT TWO FAILS BECAUSE PROCEDURAL IRREGULARITIES DO NOT**
16 **WARRANT A NEW ELECTION AND THERE ARE NO ALLEGATIONS**
17 **SUFFICIENT TO SHOW HOW ANY ALLEGED IRREGULARITY AFFECTED**
18 **THE OUTCOME OF THE 2022 GENERAL ELECTION**

18 Elections will not be held invalid for mere irregularities unless it can be shown that
19 the result has been affected by such irregularity. *See Territory v. Board of Sup'rs of Mohave*
20 *County*, 2 Ariz. 248 (1887). "[H]onest mistakes or mere omissions on the part of the
21 election officers, or irregularities in directory matters, even though gross, if not fraudulent,
22 will not void an election, unless they affect the result, or at least render it uncertain."
23 *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Without fraud, a party is required to show
24 the misconduct "affected the result of the election." *Moore v. City of Page*, 148 Ariz. 151,
25 159 (App. 1986). And where an election is contested on the ground of illegal voting, the
26 contestant has the burden of showing that sufficient illegal votes were cast to change the
27 result. *See Morgan v. Board of Sup'rs*, 67 Ariz. 133 (1948).

28 In our case, at most, Count Two hinges on the concept that the wrong person signed a

1 certificate. This is a procedural error, that alone, cannot sustain an election challenge.
2 Moreover, there are no well pled allegations or appended evidence reflecting exactly how
3 this irregularity affected the outcome of the election. *See, e.g.*, AC, Ex. F (alleged reports,
4 none of which are signed under oath under Arizona Rule of Civil Procedure 80(c), that
5 some people had a “feeling” that something was wrong). The closest thing to an allegation
6 in this regard is the conclusion that there was a loss of 60,000 votes. *See* AC at ¶ 83. But
7 this allegation is insufficient. Putting aside the reality that this allegation is *not* to have
8 occurred *because of* the so-called “certification signature” issue, a loss of 60,000 votes
9 would not affect the outcome of the election for Plaintiff anyway. The total number of
10 votes separating Plaintiff from Secretary of State-Elect Fontes is 120,208. *See*
11 <https://tinyurl.com/maawpx4a> (Secretary of State Official Canvass) (last accessed Dec.
12 13, 2022).⁴ So whether you deduct 60,000 votes from Secretary of State-Elect Fontes, give
13 60,000 votes to Plaintiff, or do both – ***Plaintiff still loses the 2022 General Election.*** So
14 Plaintiff cannot meet his burden of showing that sufficient illegal votes were cast to change
15 the result.⁵ *See Morgan*, 67 Ariz. 133.

16 Finally, and of note, Plaintiff does not claim any fraud occurred. As such, at worst,
17 there Plaintiff complains about mistakes or mere omissions. And these, without more,
18 including proof they actually affected the outcome, are not enough to sustain an election
19 challenge. *See Findley*, 35 Ariz. at 269.

20 **4. COUNT TWO FAILS BECAUSE THE LAW DOES NOT MANDATE THAT WHEN**
21 **A LABORATORY ACCREDITATION CERTIFICATION CERTIFICATE NOT**

22 ⁴ The total votes for Plaintiff were 1,200,411. The total number of votes for Secretary of
23 State-Elect Fontes were 1,320,619. *See* AC at ¶ 12. The difference is therefore 120,208.

24 ⁵ We are aware of paragraph 74 in the amended complaint. This allegation is nonsensical
25 and not well pled, and thus, cannot be taken as true for purposes of a motion to dismiss.
26 Zero explanation is provided for the 201,232 calculation anywhere in the amendment
27 complaint or its exhibits. It is not even clear what “201,232 votes would have gone to
28 Finchem[]” even means. Does it mean that Finchem would have beat Fontes that
amount? Does it mean that 201,232 votes that went to Fontes actually went to
Finchem? Does it mean that 201,232 votes for Fontes are illegal? How does this tie in with
the allegation of 60,000 missing votes? Nobody knows. Plaintiff cannot throw out an
election with numbers that lack any factual explanation and are impossible to make sense
of.

1 **SIGNED BY SOMEONE IN PARTICULAR ALL VOTES MUST BE CAST ASIDE AS**
2 **ILLEGAL**

3 Electronic voting equipment must comply with the Help America Vote Act of 2002
4 (the “HAVA”), and be approved by a Voting System Test Laboratory (“VSTL”. *See* A.R.S.
5 § 16-442(B); 2019 Elections Procedure Manual, Ch. 4 § 1. The HAVA requires that the
6 US Elections Assistance Commission (the “EAC”) provide for the accreditation and
7 revocation of accreditation of independent, non-federal laboratories qualified to test voting
8 systems to Federal standards. *See* 42 U.S.C. §15371(b). Generally, the EAC considers for
9 accreditation those laboratories evaluated and recommend by the National Institute of
10 Standards and Technology (NIST) pursuant to the HAVA. There are two VSTLs
11 accredited by the U.S. Election Assistance Commission (“EAC”): (1) Pro V&V; and (2)
12 SLI Compliance, a Division of Gaming Laboratories International, LLC (“SLI
13 Compliance”).

14 In order to meet its statutory requirements under the HAVA, the EAC developed its
15 Voting System Test Laboratory Accreditation Program (the “Program”). The Program’s
16 procedural requirements are set forth in the “proposed information collection” section of
17 the EAC Voting System Test Laboratory Accreditation Program Manual (the “Manual”).
18 *See* VOTING SYSTEM TEST LABORATORY PROGRAM MANUAL VERSION 2.0 (May 31, 2015),
19 available at <https://tinyurl.com/2p8czse8>. Section 3 of the Manual provides the
20 “Accreditation Process” for “***Applicant Laboratories***”. *See id.* at Section 3.1 (emphasis
21 added). Section 3.6 of the Manual states that “upon a vote of the EAC Commissioners to
22 accredit a laboratory, the Testing and Certification Program Director shall inform the
23 laboratory of the decision, ***issue a Certificate of Accreditation*** and post information
24 regarding the laboratory on the EAC Web site.” *Id.* at 3.6 (emphasis added).

25 Plaintiff correctly states that under Section 3.6.1 of the Manual, the Certificate of
26 Accreditation for a VSTL “shall be signed by the Chair of the Commission.” However,
27 neither the EAC’s Manual, nor the HAVA, nor any provision of Arizona law state that votes
28 should not be counted and are “illegal” if tabulated by an accredited laboratory if that

1 laboratory has an accreditation certificate signed by the EAC's Director or Interim Director,
2 instead of the Chair of the Commission. *Id.* As such, Plaintiff's illegality argument simply
3 lacks legal support.

4 Moreover, the facts alleged simply do not support a conclusion of illegality sufficient
5 to discard the People's will and upsend our entire election process in Arizona. There are
6 no plausibly pled allegations (let alone evidence) that the signature on a specific Certificate
7 of Accreditation for a VSTL would have changed the outcome of the 2022 General
8 Election. Nor does Plaintiff plead exactly **how** that change would have come to pass and
9 its precise effect on the ultimate results. If anything, all available evidence demonstrates
10 that Pro V&V⁶ and SLI Compliance⁷ held valid accreditations, and were in good standing,
11 during the 2022 General Election. *See Voting System Test Laboratories (VSTL)*, U.S.
12 ELECTION ASSISTANCE COMM'N, <https://tinyurl.com/y6refy3a> (last visited December 13,
13 2022). Indeed, on July 22, 2021, the EAC issued (and posted to its website), a VSTL
14 Certificates and Accreditation Memo, which stated:

15 _____
16 ⁶ With regards to Pro V&V, that lab was originally accredited by the EAC on February 24,
17 2015. *See PRO & V&V*, U.S. ELECTION ASSISTANCE COMM'N
18 <https://tinyurl.com/3bbt7pms>. As stated on its website, "the EAC has never voted to revoke
19 the accreditation of Pro V&V" and that Pro V&V has undergone continuing accreditation
20 assessments and had a new accreditation certificate issued on February 1, 2022." *See id.*
21 Further, on January 27, 2021, the EAC Voting System Testing and Certification Director,
Jerome Lovato, issued a letter stating that "Pro V&V has completed all requirements to
remain in good standing with the EAC's Testing and Certification program per section 3.8
of the Voting System Test Laboratory Manual, version 2.0." Ex. B (Memo dated
1/27/2021). On February 1, 2021, the EAC issued Pro V&V a Certificate of Accreditation
signed by the Executive Director of the EAC. *See* Ex. C (Certificate dated 2/1/2021).

22 ⁷ With regards to SLI Compliance, that lab was originally accredited by the EAC on
23 February 28, 2007. *SLI COMPLIANCE, A DIVISION OF GAMING LABORATORIES*
24 *INTERNATIONAL, LLC*, U.S. ELECTION ASSISTANCE COMM'N,
25 <https://tinyurl.com/259jhu4t>. As stated on its website, "the EAC has never voted to revoke
26 the accreditation of SLI Compliance" and that SLI Compliance has undergone continuing
27 accreditation assessments and had a new accreditation certificate issued on February 1,
28 2022." *See id.* On January 27, 2021, the EAC Voting System Testing and Certification
Director, Jerome Lovato, issued a letter stating that SLI Compliance "has completed all
requirements to remain in good standing with the EAC's Testing and Certification program
per section 3.8 of the Voting System Test Laboratory Manual, version 2.0." Ex. D (Memo
dated 1/27/2021). On February 1, 2021, the EAC issued SLI Compliance a Certificate of
Accreditation signed by the Executive Director of EAC. Ex. E. And, on November 15,
2022, SLI Compliance received another, updated Certification of Accreditation signed by
the Interim Executive Director of the EAC. Ex. F.

1 “Due to administrative error during 2017-2019, the EAC did not issue an
2 updated certificate to Pro V&V causing confusion with some people concerning
3 their good standing status. Even though the EAC failed to reissue the certificate,
4 Pro V&V’s audit was completed in 2018 and again in early 2021 as the
5 scheduled audit of Pro V&V in 2020 was postponed due to COVID-19 travel
6 restrictions. Despite the challenges outlined above, throughout this period, ***Pro
V&V and SLI Compliance remained in good standing with the requirements
of our program and retained their accreditation.*** In addition, the EAC has
placed appropriate procedures and qualified staff to oversee this aspect of the
program ensuring the continued quality monitoring of the Testing and
Certification program is robust and in place.”

7
8 Ex. A (Memo dated 7/22/2021) (emphasis added). The Memo further provided: “All
9 certifications during this period remain valid as does the lab accreditation.” *See id.* These
10 facts, conveniently omitted from the amended complaint yet easily ascertainable, wholly
11 undermine Count Two.

12 As demonstrated by ample publicly available information, the EAC clearly considered
13 both Pro V&V and SLI Compliance to be accredited laboratories in good standing prior to
14 and during the 2022 election. The signatures on the labs’ accreditation certificates did not
15 negate that good standing, let alone invalidate every vote cast in Arizona. Count II should
16 be dismissed with prejudice.

17 **5. THE ALLEGATIONS OF ILLEGALITY ARE NOT RELATED TO THE CANVASS**
18 **– THE ONLY MATTER RELATED TO WHICH SECRETARY HOBBS CAN BE**
19 **SUED**

20 Plaintiffs allege misconduct in violation of A.R.S. § 16-672(A)(1). That provision
21 applies to “misconduct on the part of election boards or any members thereof in any of the
22 counties of the state, or on the part of any officer making or participating in a canvass for a
23 state election.” A.R.S. § 16-672(A)(1). Secretary Hobbs is not part, or a member, of an
24 election board. So any allegations in the Complaint related to Secretary Hobbs, to state a
25 claim, must at minimum relate to her participation ***in the canvass***. None do.

26 “A canvass necessarily occurs after an election.” *Williams*, No. 2 CA-CV 2018-0200,
27 2019 WL 3297254, at *3 (citing *Canvass*, Black’s Law Dictionary (11th ed. 2019) (defines
28 “canvass” as “[t]he counting of votes and certifying of results”); A.R.S. § 16-642 (election

1 canvass occurs “not less than six days nor more than twenty days following the election”)).
2 In our case, misconduct attributed to Secretary Hobbs allegedly occurred *before* the
3 election, and thus, is not actionable. For example, the Complaint alleges that emails
4 surfacing on December 3, 2022 purportedly show that Secretary Hobbs helped flag various
5 Twitter accounts. But these emails were allegedly sent in 2020 and 2021, before the
6 election. Another example is the allegation concerning Mr. Finchem’s Twitter® account
7 suspension, which occurred on October 31, 2022, also before the election. Additionally,
8 all the allegations related to the certification of the laboratories involved occurred in 2021
9 – well before the election. And Secretary Hobbs’ refusing to recuse herself from her duties
10 as Secretary of State “on November 4, 2022” also pre-date the election and her actions
11 related to any canvass. In short: none of this alleged misconduct is related to the canvass
12 and Count Two fails.

13 **6. PLAINTIFF’S ALLEGATIONS OF ILLEGALITY IMPLICATE THE ACTIONS OF**
14 **UNNAMED INDISPENSABLE NON-PARTIES (EVERY COUNTY ELECTION**
15 **OFFICIAL AND BOARD OF SUPERVISORS) WHO WERE NOT TIMELY SUED,**
 RENDERING THIS ACTION DOOMED FROM THE OUTSET

16 An election contest must be filed within 5 days after completion of the canvass and
17 declaration of the results by the Secretary of State. A.R.S. § 16-673(A). Not after. *See*
18 *Williams*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *5 (“Time requirements for
19 filing an election contest are strictly construed.”) (mem. decision) (citing *Hunsaker v. Deal*,
20 135 Ariz. 616, 617 (App. 1983)). And a failure to name a proper party cannot be cured in
21 an election contest by amending the pleadings, because doing so would nullify the timing
22 requirements for an election contest. As for whether a party is indispensable, “[t]he test
23 of indispensability in Arizona is whether the absent person's interest in the controversy is
24 such that no final judgment or decree could be entered” *Int’l Bhd. of Elec. Workers,*
25 *Local Union 640 v. Kayetan*, 119 Ariz. 508, 510 (App. 1978) quoting *Town of Gila Bend*
26 *v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971).

27 Plaintiffs argue that an alleged failure to monitor certification laboratories and
28 electronic tabulation systems resulted in “a myriad” of unidentified “problems with

1 identifying who[sic] votes were actually cast”, left “a minimum of 60,000 votes ...
2 missing”, and thus rendered the entire election illegal. *See* AC at ¶¶ 81, 83. But such
3 assertions are unrelated to canvassing and relate to matters uniquely controlled by Arizona
4 counties vis-à-vis their own election officials. As such, every county and their election
5 officials are indispensable parties to this action given that Plaintiff is attempting to seek
6 relief setting aside the election results and requiring an entirely new election, and no final
7 judgment or decree forcing them to do so can be entered without their participation, as they
8 have a right to be heard. *See id.* at 14-15, ¶¶ C, E; *see also Int'l Bhd. of Elec. Workers,*
9 *Local Union 640*, 119 Ariz. at 510; Ariz. R. Civ. P. 19. Seeking such relief necessarily
10 implicates and impacts the rights of every county and failing to join them would promote a
11 grave injustice given that each county is responsible for conducting elections within that
12 county. Under our facts, these unnamed parties could not be more indispensable. *See* Ariz.
13 R. Civ. P. 19. Indeed, one cannot convincingly argue that the counties’ rights and duties
14 are not implicated in connection with an effort to seek the extraordinary relief of setting
15 aside an election and holding an entirely new one.

16 Plaintiff, however, elected not to name these indispensable parties and it is too late to
17 do so now. In fact, this issue was addressed in *Williams*, in which the Arizona Court of
18 Appeals held that a complaint’s failure to name indispensable parties was fatal and the
19 amended pleading was untimely under the five-day statutory time limit. *Williams*, No. 2
20 CA-CV 2018-0200, 2019 WL 3297254, at *5 (mem. decision) (citing *Donaghey v. Ariz.*
21 *Att’y Gen.*, 120 Ariz. 93, 95 (1978)). The outcome here should be no different and this
22 action must be dismissed.

23 **D. A.R.S. § 16-676 DOES NOT AFFORD PLAINTIFF MUCH OF THE RELIEF HE**
24 **SEEKS**

25 Plaintiff seeks a panoply of relief in this action, ranging from annulment of the
26 election, a paper ballot revote, a special master-supervised hand-counted state-wide special
27 election, and a referral to the Attorney General for Secretary Hobbs alleged impartiality.
28 *See* AC at 18-19. Some of these remedies are not available to Plaintiff.

1 An election contest is a creature of statute, and the relief available to a party is dictated
2 by the statutes authorizing the contest. *See Griffin*, 86 Ariz. at 168 (holding “the settled
3 rule in this state is that election contests are purely statutory” (internal quotations omitted)).
4 And the Court must interpret unambiguous statutes as written, which includes not inferring
5 the existence of remedies not otherwise expressly provided. *See Lewis v. Debord*, 238 Ariz.
6 28, 31–32 ¶ 11 (2015) (“It is not the function of the courts to rewrite statutes.” (quoting
7 *Orca Commc’ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 182 ¶ 11 (2014))); *In re Martin*
8 *M.*, 223 Ariz. 244, 246, ¶ 7 (App. 2009) (“It is a universal rule that courts will not enlarge,
9 stretch, expand, or extend a statute to matters not falling within its express provisions.”
10 (internal citation and quotations omitted)); *Kyle v. Daniels*, 198 Ariz. 304, 306, ¶ 7 (2000)
11 (“We cannot amend a statute judicially”).

12 In an election contest, the remedies a Court can provide are narrow. *See* A.R.S. § 16-
13 676(B), (C). This means that apart from the narrow relief of being declared the winner of
14 their respective races, or requiring a new election under existing Arizona law, no other
15 remedies are available in this action. *See id.* Had the Legislature wanted to afford
16 additional remedies, it could have done so. But the Legislature has not so acted. Thus, the
17 remedies requested in Plaintiff’s Demand For Relief at paragraphs B, E, F, and G are
18 unavailable in an election contest.

19 **E. SECRETARY HOBBS’ ARGUMENTS**

20 Secretary Hobbs made her own arguments in support of dismissal. Rather than restate
21 them again here, for purpose of judicial economy, Secretary of State-Elect Fontes
22 incorporates those arguments herein by reference.

23 **III. CONCLUSION**

24 Our democracy is sacrosanct. One of its cornerstones is full and fair voting rights for
25 all, as dictated by the People, for the People. But Plaintiff seeks to eviscerate the People’s
26 will, turn our lawful election processes and procedures on their head, and then dictate what
27 those processes and procedures should be in a “take it or leave it” manner. What Plaintiff
28 seeks is not democracy, but a dictatorship that places his will and whim above the law as

1 made by the People our elected representatives swear to serve. This Court cannot allow
2 such a travesty come to pass when Plaintiff has failed to articulate anything remotely
3 constituting misconduct or illegal voting that somehow effected the 2022 General Election.

4 The Court should dismiss this action with prejudice, award Defendants their costs,
5 and either set a briefing schedule on attorneys' fees and sanctions or award them if the
6 Court believes the record already justifies doing so.

7 RESPECTFULLY SUBMITTED: December 13, 2022

8 SHERMAN & HOWARD L.L.C.

9 By/s/Craig A. Morgan

10 Craig A. Morgan

11 Shayna Stuart

12 Jake T. Rapp

Attorneys for Secretary of State-Elect Adrian
Fontes

13 COPY of the foregoing filed via Turbo
14 Court and sent via email and U.S. Mail on
December 13, 2022 to:

15 Judge Melissa Julian

16 E-Mail: Jorge.Aguirre@JBAZMC.Maricopa.Gov

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27
28 /s/ Ella Meshke

Exhibit A

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Exhibit A



U.S. ELECTION ASSISTANCE COMMISSION
633 3rd St. NW, Suite 200
Washington, DC 20001

The Voting System Test Laboratory (VSTL) accreditation program is an essential component of the EAC's Voting System Testing and Certification Program. The EAC has made National Institute of Standards and Technology's (NIST) [National Voluntary Laboratory Accreditation Program \(NVLAP\)](#) accreditation a requirement as part of its VSTL accreditation program. NVLAP accreditation is **the primary means by which the EAC ensures that each VSTL meets and continues to meet the technical requirements** of the EAC program. It sets the standards for each VSTL's technical, physical and personnel resources, as well as its testing, management, and quality assurance policies and protocols. NVLAP reviews VSTLs one year after their initial accreditation and biennially thereafter.

The EAC takes additional steps to ensure that laboratory policies are in place regarding compliance management and issues like conflict of interest, record maintenance, and financial stability. It also ensures that the VSTL is willing and capable to work with EAC in its Testing and Certification Program. This is performed by regularly working closely with the labs and performing audits biannually and generating certificates. ¹The VSTL accreditation does not get revoked unless the commission votes to revoke accreditation; and by that same token, EAC generated certificates or lack thereof do not determine the validity of a VSTL's accreditation status.

Due to administrative error during 2017-2019, the EAC did not issue an updated certificate to Pro V&V causing confusion with some people concerning their good standing status. Even though the EAC failed to reissue the certificate, Pro V&V's audit was completed in 2018 and again in early 2021 as the scheduled audit of Pro V&V in 2020 was postponed due to COVID-19 travel restrictions. Despite the challenges outlined above, throughout this period, Pro V&V and SLI Compliance remained in good standing with the requirements of our program and retained their accreditation. **In addition, the EAC has placed appropriate procedures and qualified staff to oversee this aspect of the program ensuring the continued quality monitoring of the Testing and Certification program is robust and in place.**

The Testing and Certification program has been fully staffed since May 2019, and we are confident that the integrity of the labs and our voting system certification program has remained strong throughout. The lack of generating a new certificate does not indicate that the labs were out of compliance. All certifications during this period remain valid as does the lab accreditation. The quality of our labs' work is closely monitored during certification campaigns. [Both Pro V&V and SLI Compliance are NAVLAP accredited laboratories](#) that are assessed against the management and technical requirements published in the International Standard, ISO/IEC 17025:2017.

¹ Pro V&V was accredited by the EAC on February 24, 2015, and SLI Compliance was accredited by the EAC on February 28, 2007. Federal law provides that EAC accreditation of a voting system test **laboratory cannot be revoked unless the EAC Commissioners vote to revoke the accreditation**: "The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission." 52 U.S. Code § 20971(c)(2). The EAC has never voted to revoke the accreditation of Pro V&V. Pro V&V has undergone continuing accreditation assessments and had new accreditation certificate issued on February 1, 2021.

Exhibit B

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Exhibit B



U.S. ELECTION ASSISTANCE COMMISSION
633 3rd St. NW, Suite 200
Washington, DC 20001

FROM: Jerome Lovato, Voting System Testing and Certification Director

SUBJECT: Pro V&V EAC VSTL Accreditation

DATE: 1/27/2021

Pro V&V has completed all requirements to remain in good standing with the EAC's Testing and Certification program per section 3.8 of the Voting System Test Laboratory Manual, version 2.0:

Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

Due to the outstanding circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended period. While this process continues, Pro V&V retains its EAC VSTL accreditation.

Exhibit C

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Exhibit C



United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc. **Huntsville, Alabama**

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 and 2015 Voluntary Voting Systems Guidelines (VVSG 1.0 & 1.1) under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Original Accreditation Issued on: 2/24/2015

*Accreditation remains effective until revoked
by a vote of the EAC pursuant to 52 U.S.C. §
20971(c)(2).*

Mona Harrington

Date: 2/1/21

Mona Harrington
Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

Exhibit D

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Exhibit D



U.S. ELECTION ASSISTANCE COMMISSION
633 3rd St. NW, Suite 200
Washington, DC 20001

FROM: Jerome Lovato, Voting System Testing and Certification Director

SUBJECT: SLI Compliance EAC VSTL Accreditation

DATE: 1/27/2021

SLI Compliance, a division of Gaming Laboratories International, LLC (SLI) has completed all requirements to remain in good standing with the EAC's Testing and Certification program per section 3.8 of the Voting System Test Laboratory Manual, version 2.0:

Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

Due to the outstanding circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended period. While this process continues, SLI retains its EAC VSTL accreditation.

Exhibit E

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Exhibit E



United States Election Assistance Commission

Certificate of Accreditation

SLI Compliance **Division of Gaming Laboratories International, LLC** **Wheat Ridge, Colorado**

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 and 2015 Voluntary Voting Systems Guidelines (VVSG 1.0 & 1.1) under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. SLI Compliance is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Original Accreditation Issued on: 2/28/2007

*Accreditation remains effective until revoked
by a vote of the EAC pursuant to 52 U.S.C. §
20971(c)(2).*

Mona Harrington

Date: 2/1/21

Mona Harrington
Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **0701**

Exhibit F

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Exhibit F



United States Election Assistance Commission

Certificate of Accreditation

SLI Compliance

Division of Gaming Laboratories International, LLC

Wheat Ridge, Colorado

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the Voluntary Voting Systems Guidelines VVSG 1.0, 1.1 & 2.0 under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. SLI Compliance is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Original Accreditation Issued on: 2/24/2015

*Accreditation remains effective until revoked
by a vote of the EAC pursuant to 52 U.S.C. §
20971(c)(2).*

Date: 11/15/22

Interim Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **0701**

Meshke, Ella

From: TurboCourt Customer Service <CustomerService@TurboCourt.com>
Sent: Tuesday, December 13, 2022 4:35 PM
To: efiling; Meshke, Ella
Subject: AZTurboCourt E-Filing Courtesy Notification

EXTERNAL EMAIL WARNING: Do not click links or open UNKNOWN attachments.

PLEASE DO NOT REPLY TO THIS EMAIL.

A party in this case requested that you receive an AZTurboCourt Courtesy Notification.

AZTurboCourt Form Set #7485026 has been DELIVERED to Maricopa County.

You will be notified when these documents have been processed by the court.

Here are the filing details:

Case Number: CV2022053927 (Note: If this filing is for case initiation, you will receive a separate notification when the case # is assigned.)

Case Title: Finchem, Et.Al. Vs. Fontes, Et.Al.

Filed By: Craig A Morgan

AZTurboCourt Form Set: #7485026

Keyword/Matter #: 2231-010000.000

Delivery Date and Time: Dec 13, 2022 4:34 PM MST

Forms:

Attached Documents:

Motion to Dismiss: Secretary of State-Elect Adrian Fontes' Motion to Dismiss

Exhibit/Attachment (Supporting): Exhibit A

Exhibit/Attachment (Supporting): Exhibit B

Exhibit/Attachment (Supporting): Exhibit C

Exhibit/Attachment (Supporting): Exhibit D

Exhibit/Attachment (Supporting): Exhibit E

Exhibit/Attachment (Supporting): Exhibit F