

1 D. Andrew Gaona (028414)  
2 **COPPERSMITH BROCKELMAN PLC**  
3 2800 North Central Avenue, Suite 1900  
4 Phoenix, Arizona 85004  
5 T: (602) 381-5486  
6 agaona@cblawyers.com

7 Sambo (Bo) Dul (030313)  
8 **STATES UNITED DEMOCRACY CENTER**  
9 8205 South Priest Drive, #10312  
10 Tempe, Arizona 85284  
11 T: (480) 253-9651  
12 [bo@statesuniteddemocracy.org](mailto:bo@statesuniteddemocracy.org)

13 *Attorneys for Defendant*  
14 *Arizona Secretary of State Katie Hobbs*

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

17 MARK FINCHEM and JEFF ZINK, in their  
18 individual capacities,

19 Contestants/Plaintiffs,

20 v.

21 ADRIAN FONTES and RUBEN GALLEGRO,  
22 officeholders-elect; and KATIE HOBBS, in  
23 her official capacity as the Secretary of State;  
24 et al.,

25 Contestees/Defendants.

No. CV2022-053927

**ARIZONA SECRETARY OF  
STATE KATIE HOBBS' MOTION  
TO DISMISS PLAINTIFF'S FIRST  
AMENDED VERIFIED  
STATEMENT OF ELECTION  
CONTEST**

(Assigned to Hon. Melissa Iyer Julian)

26 **Introduction & Background**

In this "election contest," Plaintiff/Contestant Mark Finchem asks this Court to overturn the results of the 2022 General Election. In that election, based on the official statewide canvass, the people of Arizona chose Adrian Fontes as their next Secretary of State by a margin of 120,208 votes (almost 5 percentage points). This enormous, insurmountable margin is compelling evidence (1) of Arizonans' will and (2) that this election contest is little more than a publicity stunt. Yet rather than respect the will of the people, Plaintiff asks that the entire election be

1 “annulled,” and that the Court order a special election in just this one race to be “counted by  
2 hand” and without mail-in ballots as authorized by law. But that relief is extreme, unfounded,  
3 and unavailable. An election contest must rest on facts known to a plaintiff when a contest is  
4 filed, not wild speculation and conspiracy theories aimed at undermining the work of Arizona’s  
5 election officials; and election contests must rest on the law currently in effect, not the law as  
6 Plaintiff would prefer it to be. Yet that’s just what Plaintiff presents this Court – a medley of  
7 unfounded election conspiracy theories and policy preferences that cannot justify overturning an  
8 election. Arizona courts apply “all reasonable presumptions” in “favor [of] the validity of an  
9 election,” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986), presumptions that Plaintiff’s  
10 threadbare allegations cannot overcome.

11 **First**, Plaintiff’s contention that the Secretary engaged in “misconduct” or that “illegal  
12 votes” were counted because certain vote tabulation machines used in Arizona were not properly  
13 certified in accordance with federal and state law is demonstrably false. As the federal Elections  
14 Assistance Commission (“EAC”) recently confirmed, there is no problem with the certification  
15 of those machines, and even if there were, Plaintiff cannot prove that the machines counted any  
16 votes inaccurately. And beyond that, this claim is too little too late, as it was known to conspiracy  
17 theorists like Plaintiff long before the election, yet he didn’t bring it to court until after he  
18 decisively lost his election. It’s a textbook case for applying the equitable doctrine of laches.

19 **Second**, the Court should also swiftly reject Plaintiff’s allegation that the Secretary  
20 engaged in “misconduct” by (1) not recusing herself from her constitutional and statutory duties,  
21 (2) acting to compel other elections officials to comply with their own such duties, and (3)  
22 flagging election misinformation for a private entity. No provision of Arizona law required the  
23 Secretary to recuse herself, ensuring that county elections officials comply with the law was  
24 within the bounds of her duties, and her Office’s flagging misinformation that violated Twitter’s  
25 terms of service more than a year ago has nothing to do with the 2022 General Election.

26 **Third**, even if any of Plaintiff’s allegations actually constituted “misconduct” or resulted

1 in “illegal votes” (they do not), Plaintiff’s election contest fails because Plaintiff does not – and  
2 could not – adequately allege whether and how any of the alleged conduct impacted the result  
3 of the election. *Moore*, 148 Ariz. at 156 (requiring that plaintiff prove that alleged “illegal votes”  
4 were “sufficient to change the outcome of the election”); *Findley v. Sorenson*, 35 Ariz. 265, 269  
5 (1929) (“officers, or irregularities in directory matters, even though gross, if not fraudulent, will  
6 not void an election, unless they affect the result.”) (emphasis added). This is yet another  
7 independent ground requiring dismissal.

### 8 **Argument**

9 Plaintiff’s election contest fails, and the Court should quickly dismiss it. But the Secretary  
10 recognizes that election contests are rare, and first provides the Court with some background and  
11 fundamental principles underlying this dispute.

12 To survive a motion to dismiss, an election contest must be based on well-pleaded facts,  
13 rather than on legal conclusions. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006)  
14 (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin*, 86 Ariz. at  
15 169-70 (election contest subject to dismissal if it fails to state a claim upon which relief can be  
16 granted, assessed using the criteria applicable under Rule 12(b)(6)). “A complaint that states  
17 only legal conclusions, without any supporting factual allegations, does not satisfy Arizona’s  
18 notice pleading standard under Rule 8,” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417. 419 ¶ 7  
19 (2008), and the Court may not accept as true “inferences or deductions that are not necessarily  
20 implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such  
21 facts, or legal conclusions alleged as facts.” *Jeter*, 211 Ariz. at 389 ¶ 4.

22 “[E]lection contests are purely statutory, unknown to the common law, and are neither  
23 actions at law nor suits in equity, but are special proceedings.” *Griffin v. Buzard*, 86 Ariz. 166,  
24 168 (1959). They are thus the subject of deliberate legislative restriction because of a “strong  
25 public policy favoring stability and finality of election results.” *Ariz. City Sanitary Dist. v. Olson*,  
26 224 Ariz. 330, 334 ¶ 12 (App. 2010) (cleaned up). And A.R.S. § 16-672(A) carefully

1 circumscribes the valid grounds of a contest: (1) “misconduct” by election boards and  
2 canvassers; (2) the elected official was ineligible for the contested office; (3) the contested  
3 official gave a “bribe or reward” or “committed any other offense against the elective franchise”;  
4 (4) “illegal votes”; or (5) because of an “erroneous count of votes,” the elected official didn’t  
5 “receive the highest number of votes.” The Legislature also provided that the exclusive remedies  
6 in election contests are (1) judgment confirming the election; (2) judgment annulling and setting  
7 aside the election for the contested race; (3) a declaration that the certificate of election of the  
8 person whose office is contested is of no further legal force or effect and that a different person  
9 secured the highest number of legal votes and is elected. A.R.S. § 16-676(B), (C). The Court  
10 lacks jurisdiction to grant any other form of relief.

11 Plaintiff also must prove their entitlement to the extraordinary remedy of overturning  
12 election results against several important backstops:

- 13 • Arizona courts apply “all reasonable presumptions” in “favor [of] the validity of an  
14 election,” *Moore*, 148 Ariz. at 159;
- 15 • the “returns of the election officers are prima facie correct,” *Hunt v. Campbell*, 19 Ariz.  
16 254, 268 (1917); and
- 17 • courts apply a presumption of “good faith and honesty of the members of the election  
18 board” that must control unless there is “clear and satisfactory proof” to the contrary, *id.*

19 All told, to obtain relief in this case, Plaintiff must overcome all these presumptions and  
20 make either “a showing of fraud or . . . a showing that had proper procedures been used, the  
21 result would have been different.” *Moore*, 148 Ariz. at 159.

22 With this background in mind, we turn to each of Plaintiff’s deficient claims.

23 **I. Arizona’s Vote Tabulation Machines Are Properly Certified.**

24 Plaintiff’s first general grievance with the 2022 General Election was that certain,  
25 unspecified, vote tabulation machines were not properly certified under state and federal law.  
26 Plaintiff thus alleges that the Secretary engaged in “misconduct” by not ensuring the machines’

1 proper certification, and that all votes counted by those machines are “illegal votes” that must  
2 be voided. Not only should Plaintiff have brought this claim – one that has percolated among  
3 election conspiracy theorists on the internet for some time now – before the election, but it has  
4 no basis in fact or law. This component of Plaintiff’s contest must therefore be dismissed.

5 **A. Laches.**

6 To begin, the equitable doctrine of laches bars Plaintiff’s claims about vote tabulation  
7 machine certification. Laches “seeks to prevent dilatory conduct and will bar a claim if a party’s  
8 unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v.*  
9 *Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Plaintiff checks off all the boxes. Plaintiff waited far  
10 too long, his delay is unreasonable, and that delay causes significant prejudice to our elections  
11 system, the Courts, and above all, voters whom Plaintiff asks this Court to disenfranchise.

12 In deciding whether a plaintiff’s delay is unreasonable, a court should consider “the  
13 justification for the delay, the extent of the plaintiff’s advance knowledge of the basis for the  
14 challenge, and whether the plaintiff exercised diligence[.]” *Arizona Libertarian Party v. Reagan*,  
15 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). And here, Plaintiff knew or should  
16 have known of alleged issues with the certification of vote tabulation machines for months, and  
17 before the election. Courts uniformly reject challenges to election procedures like this brought  
18 only after an election.

19 Indeed, “[c]hallenges concerning alleged procedural violations of the election process  
20 must be brought prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9  
21 (2002) (citation omitted). Here, rather than seeking relief as to this alleged certification violation  
22 years or even months ago, Plaintiff waited until after the election (and after he decisively lost his  
23 race) to sue. But “by filing [his] complaint after the completed election,” Plaintiff “essentially  
24 ask [the Court] to overturn the will of the people, as expressed in the election.” *Sherman*, 202  
25 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiff’s attempt to “subvert the election process  
26 by intentionally delaying a request for remedial action to see first whether they will be successful

1 at the polls.” *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App.  
2 1997) (quotation omitted).

3 Plaintiff’s belated claim – brought after all votes have been counted – also causes  
4 significant prejudice to voters. Arizonans’ ballots were tabulated using the voting and tabulation  
5 systems at issue – they had no choice in the matter. Throwing their votes out after-the-fact now  
6 in service of Plaintiff’s baseless allegations would disenfranchise those voters and violate their  
7 due process rights.

8 Beyond that, “[t]he real prejudice caused by delay in election cases is to the quality of  
9 decision making in matters of great public importance,” and “[t]he effects of such delay extend  
10 far beyond the interests of the parties. Waiting until the last minute to raise these claims in an  
11 election contest ‘places the court in a position of having to steamroll through the delicate legal  
12 issues in order to meet the [applicable] deadline[s].’” *Sotomayor*, 199 Ariz. at 83 ¶ 9 (citation  
13 omitted). Late claims, such as Plaintiff’s, “deprive judges of the ability to fairly and reasonably  
14 process and consider the issues . . . leaving little time for . . . wise decision making.” *Id.*

15 In sum, Plaintiff’s delay in challenging the use of certain vote tabulation equipment  
16 prejudices county election officials, the Secretary, and above all else, Arizona voters. Laches  
17 thus precludes their “misconduct” and “illegal vote” claims based on this theory.

18 **B. Merits.**

19 Even if not barred by laches, Plaintiff’s frivolous arguments fail because the electronic  
20 voting systems used in Arizona for the 2022 General Election were properly certified.

21 **1. Arizona’s Established History of Using Electronic Voting Equipment.**

22 Arizona counties use electronic equipment to tabulate votes, and they have done so for  
23 many decades. All electronic voting systems undergo federal and state testing and certification  
24 before being used in Arizona elections. *See* A.R.S. §16-442. The Secretary has certified the  
25  
26

1 electronic voting system that was used in each county in the 2022 elections.<sup>1</sup>

2 Under A.R.S. § 16-442(B), electronic voting equipment must comply with the Help  
3 America Vote Act of 2002 (“HAVA”) and be approved by an accredited laboratory, known as a  
4 voting system testing laboratory (“VSTL”). *See also* 2019 EPM Ch. 4 § I. There are two VSTLs  
5 accredited by the U.S. Election Assistance Commission (“EAC”): (1) Pro V&V and (2) SLI  
6 Compliance, a Division of Gaming Laboratories International, LLC (“SLI”). HAVA also  
7 establishes standards for electronic voting equipment under 52 U.S.C. § 21081, and the EAC has  
8 promulgated voluntary guidelines for voting systems under 52 U.S.C. § 21101. *See* 2005  
9 Voluntary Voting System Guidelines (“VVSG”).<sup>2</sup>

10 **2. Pro V&V and SLI are properly accredited testing laboratories.**

11 Plaintiff’s argument that the Pro V&V certificate of accreditation should have been signed  
12 by the Commissioner and not the Executive Director and therefore is not properly accredited is  
13 demonstrably false. The EAC has a longstanding precedent, as evidenced by accreditation  
14 certificates going back to 2007, that permits the Executive Director to sign the certificate for a  
15 test laboratory.<sup>3</sup> Plaintiffs cannot point to any law that requires the Commissioner to sign the

16  
17 <sup>1</sup> *See* Ariz. Sec’y of State, *2022 Election Cycle / Voting Equipment*,  
18 [https://azsos.gov/sites/default/files/2022\\_Election\\_Cycle\\_Voting\\_Equipment\\_Aug.pdf](https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment_Aug.pdf).

19 <sup>2</sup> EAC Voluntary Voting System Guidelines, <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>.

20 <sup>3</sup> *See, e.g.*, EAC Certificate of Accreditation, Wyle Laboratories, Inc.,  
21 [https://www.eac.gov/sites/default/files/eac\\_assets/1/1/Wyle%20Laboratories%20Accrediatation%20Certificate.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/1/Wyle%20Laboratories%20Accrediatation%20Certificate.pdf);  
22 EAC Certificate of Accreditation, CIBER, Inc. (Oct. 4, 2007),  
23 [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/CIBER\\_Accreditation\\_Certificate.jpg](https://www.eac.gov/sites/default/files/eac_assets/1/6/CIBER_Accreditation_Certificate.jpg)  
24 (Oct. 7, 2008); EAC Certificate of Accreditation, SLI Compliance, Division of Gaming  
25 Laboratories International (Jan. 10, 2018), LLC,  
26 [https://www.eac.gov/sites/default/files/voting\\_system\\_test\\_lab/files/SLI\\_Compliance\\_Certificate\\_of\\_Accreditation011018.pdf](https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Certificate_of_Accreditation011018.pdf);  
EAC Certificate of Accreditation, SLI Compliance, Division of  
Gaming Laboratories International, LLC (Nov. 15, 2022),  
[https://www.eac.gov/sites/default/files/voting\\_system\\_test\\_lab/files/SLI%20Accreditation%20Certificate%20VVSG%202.0%202022%20signed%20v3\\_0.pdf](https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI%20Accreditation%20Certificate%20VVSG%202.0%202022%20signed%20v3_0.pdf)

1 certificate instead of the Executive Director. That the EAC Executive Director signed the  
2 certificate of accreditation for Pro V&V does not render the accreditation invalid. Instead, the  
3 EAC has publicly confirmed that both Pro V&V and SLI are properly accredited and have  
4 retained their accreditation during testing any election equipment currently in use in Arizona.<sup>4</sup>

5 **3. ES&S equipment is properly certified.**

6 Plaintiff points to similar conspiracy theories specifically attacking the Election Systems  
7 and Software (“ES&S”), EVS 6.0.4.0 voting system, but point to no plausible support for their  
8 claims. This voting system was tested and certified under the VVSG in 2019. U.S. Election  
9 Assistance Comm’n, ES&S EVS 6.0.4.0, <https://www.eac.gov/voting-equipment/evs-6040>. SLI  
10 Compliance (“SLI”), the federal lab that tested the equipment, was properly accredited  
11 throughout the relevant period.

12 On May 3, 2019, EAC certified ES&S’s EVS 6.0.4.0 voting system. Throughout the  
13 relevant time period – from application approval of ES&S’s EVS 6.0.4.0 and designation of SLI  
14 as the lead testing laboratory on October 15, 2018, throughout SLI’s testing of the voting system,  
15 and to the EAC’s certification of the system on May 3, 2019 – SLI maintained its accreditation,  
16 as indisputably evidenced by the dates on its Certificate of Accreditation.<sup>5</sup>

17 And even if any part of SLI’s testing of EVS 6.0.4.0 occurred between January 10, 2021  
18 and February 1, 2021, that fact would not have “voided” the testing and certification of the voting  
19 system because SLI’s accreditation was never revoked and never expired. Under HAVA, EAC  
20 accreditation of a VSTL cannot be revoked unless the EAC Commissioners vote to revoke the  
21 accreditation. 52 U.S.C. § 20971(c)(2) (“The accreditation of a laboratory for purposes of this

22 \_\_\_\_\_  
23 <sup>4</sup> See U.S. Election Assistance Commission Memorandum,  
24 [https://www.eac.gov/sites/default/files/voting\\_system\\_test\\_lab/files/VSTL%20Certificates%20and%20Accreditation\\_0.pdf](https://www.eac.gov/sites/default/files/voting_system_test_lab/files/VSTL%20Certificates%20and%20Accreditation_0.pdf)

25 <sup>5</sup> ES&S’s EVS 6.0.4.0 was also reviewed and tested by Arizona’s Equipment Certification and  
26 Advisory Committee. It was conditionally certified by the state on November 5, 2019 and finally  
certified on February 24, 2020.



1 section may not be revoked unless the revocation is approved by a vote of the Commission.”).  
2 The Commission accredited SLI on February 28, 2007, and, since then, the Commission has not  
3 revoked SLI’s accreditation, which Plaintiff cannot contest. Nothing in federal or state law says  
4 a VSTL loses its accreditation if the EAC does not formally issue a new “certificate” every two  
5 years.

6 The EAC has directly addressed this false allegation, clarifying that SLI “remained in  
7 good standing with the requirements of [the EAC’s] program and retained their accreditation,”  
8 that the “lack of generating a new certificate does not indicate that [SLI was] out of compliance,”  
9 and that “[a]ll certifications during this period remain valid as does the lab accreditation.” *See*  
10 *EAC, VSTL Certificates and Accreditation*, July 22, 2021;<sup>6</sup> *see also* EAC Memorandum, *SLI*  
11 *Compliance EAC VSTL Accreditation*, Jan. 27, 2021 (“Due to the outstanding circumstances  
12 posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended  
13 period. While this process continues, SLI retains its EAC VSTL accreditation.”).<sup>7</sup>

14 In sum, there was a valid certificate of accreditation for SLI throughout the testing and  
15 certification process for EVS 6.0.4.0, the voting system Plaintiff highlights. And even if the  
16 slight gap in the dates on SLI’s certificates of accreditation covered any relevant time period,  
17 Plaintiff can point to nothing in federal or state law that invalidated SLI’s EAC VSTL  
18 accreditation for that reason. Arizona law requires that electronic voting systems comply with  
19 HAVA and be approved by an accredited VSTL. All voting equipment used in Arizona,  
20 including the EVS 6.0.4.0, complies with those requirements, and Plaintiffs cannot plausibly  
21 argue otherwise.

22  
23 \_\_\_\_\_  
24 <sup>6</sup> [https://www.eac.gov/sites/default/files/voting\\_system\\_test\\_lab/files/VSTL%20Certificates%20and%20Accreditation\\_0.pdf](https://www.eac.gov/sites/default/files/voting_system_test_lab/files/VSTL%20Certificates%20and%20Accreditation_0.pdf)

25 <sup>7</sup>  
26 [https://www.eac.gov/sites/default/files/voting\\_system\\_test\\_lab/files/SLI\\_Compliance\\_Accreditation\\_Renewal\\_delay\\_memo012721.pdf](https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Accreditation_Renewal_delay_memo012721.pdf).

1           **C. Speculation.**

2           Even if Plaintiff’s claims about vote equipment certification had even a shred of truth  
3 (and they don’t) and the Secretary somehow committed “misconduct” related to that equipment  
4 (which she didn’t), Plaintiff nowhere alleges how this would change the results of the election  
5 as to the races at issue. Nor could Plaintiff possibly prove that, particularly given the massive  
6 margins of victory in his race. This is a necessary – and here, missing – element of Plaintiff’s  
7 election contest because he doesn’t allege that any Defendant or other person committed fraud.  
8 *See Moore*, 148 Ariz. at 159 (requiring “a showing of fraud or . . . a showing that had proper  
9 procedures been used, the result would have been different”). Dismissal is thus required.

10       **II. The Secretary’s Actions Before and After the 2022 General Election Were Not**  
11       **“Misconduct.”**

12           Beyond Plaintiff’s wild and baseless allegations about voting equipment certification, he  
13 also alleged that the Secretary committed actionable “misconduct” by (1) not recusing herself  
14 when no statute required her to, (2) taking appropriate legal and other action to hold other  
15 elections officials to their constitutional and statutory duties, and (3) identifying election  
16 disinformation on social media. This is not “misconduct” by any stretch of the imagination, but  
17 rather the actions of a public official fulfilling her own duties, ensuring that all Arizonans’ votes  
18 are counted, and identifying false information that undermined confidence in Arizona’s safe and  
19 secure elections systems and dedicated elections officials. That Plaintiff calls any of this  
20 behavior “misconduct” should tell the Court and the public all they need to know about this  
21 baseless litigation.

22           **A. The Secretary did not have to recuse herself.**

23           Plaintiff claims that the Secretary “had an ethical duty to recuse herself” and that her  
24 failure to do so is some “form of self-dealing.” [Stmt. ¶ 70; *see also id.* ¶¶ 19-24] But Plaintiff  
25 cites no authority, and they are plainly wrong that the Secretary had to recuse herself from  
26 election-related duties just because of her candidacy.

1 A.R.S. §§ 38-501 to 38-511 govern conflicts of interest for state officers and other  
2 government officials and employees. *See* A.R.S. § 38-501 (application of conflict-of-interest  
3 statutes). The primary focus of Arizona’s conflict-of-interest statutes is preventing an official  
4 from obtaining improper financial benefits because of their position in government.<sup>8</sup> The law  
5 also requires public officials to recuse only when the official has a “substantial interest” in the  
6 decision, as defined by statute. A.R.S. § 38-503(B). An interest is “substantial” only if it is (1)  
7 “pecuniary or proprietary,” (2) “nonspeculative,” and not among the “remote” interests excluded  
8 by statute. *Id.* § 38-502(11). Even if the Secretary’s interest in winning an election qualifies as a  
9 pecuniary interest, it fails the other two requirements.

10 First, any alleged effect on votes or the election outcome resulting from any of her  
11 decisions is too speculative to qualify. Under Arizona Supreme Court precedent, a potential  
12 “los[s] of . . . votes” flowing from a decision is too speculative to require recusal. *Hughes v.*  
13 *Jorgenson*, 203 Ariz. 71, 74 (2002). Second, and independently dispositive, the Secretary’s  
14 interest as a candidate in her decisions about election administration is remote because it is “no  
15 greater than the interest” of the many other candidates affected by those decisions. *See* A.R.S. §  
16 38-502(10)(j) (defining as “remote” an interest shared by a class of persons consisting of ten or  
17 more people); *see also* *Shepherd v. Platt*, 177 Ariz. 63 (App. 1993) (applying the “Rule of 10”  
18 and rejecting an argument that two members of the Apache County Board of Supervisors, who  
19 were also members of the Navajo Nation and served as members or employees of the Navajo  
20 Tribal Council, had a conflict of interest over County expenditures on the Navajo Reservation).  
21 The Secretary’s exercise of her election administration and oversight duties, including as to  
22

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23 <sup>8</sup> *See, e.g.,* A.R.S. § 38-504(C) (“A public officer or employee shall not use or attempt to use the  
24 officer’s or employee’s official position to secure any valuable thing or valuable benefit for the  
25 officer or employee that would not ordinarily accrue to the officer or employee in the  
26 performance of the officer’s or employee’s official duties if the thing or benefit is of such  
character as to manifest a substantial and improper influence on the officer or employee with  
respect to the officer's or employee’s duties.”).

1 equipment certification and combatting misinformation, will impact all candidates in an election.  
2 For both these reasons, being a candidate on the ballot does not require the Secretary to recuse  
3 from her election-related responsibilities.

4 Further undermining the case for recusal is that it conflicts with Arizona’s decision to  
5 assign the duty to “prescribe rules” and fulfill elections tasks to an elected official, not an  
6 appointed one. A.R.S. § 16-452(A). Plaintiff’s argument would turn a job requirement (election  
7 to office) into a reason for disqualification from one of the most important and visible aspects of  
8 the job. *See Ariz. Farmworkers Union v. Ag. Empl. Relations Bd.*, 158 Ariz. 411, 413 (App.  
9 1988) (cautioning against turning “the interest of [an official] that qualifies him” for a position  
10 into a basis for recusal). And Plaintiff’s logic would not stop with Secretaries of State. Arizona  
11 law entrusts elections duties to many elected officials, including County Recorders and members  
12 of County Boards of Supervisors across the 15 counties – who, unlike the Secretary, issue and  
13 count ballots. *See, e.g.*, A.R.S. §§ 16-131, 645, 646 (prescribing duties for county recorders and  
14 county boards of supervisors). To require all these officials to recuse every time they are a  
15 candidate on the ballot would effectively shorten their legal terms of office. This incompatibility  
16 with Arizona’s choice to entrust elected officials with election administration duties reaffirms  
17 that the Secretary had no duty to recuse.

18 It is thus little surprise that Plaintiff fails to identify even one prior Secretary of State who  
19 recused simply because she was a candidate on the ballot. This omission is remarkable. If  
20 Arizona law required Secretaries of State and County Recorders and Supervisors to recuse from  
21 election duties whenever they are on the ballot, one would expect examples to pour forth. Just  
22 like Secretary Hobbs, sitting Secretaries of State and county officials with election-related duties  
23 can and have stood for re-election and run for other offices while continuing to fulfill their  
24 election administration duties consistent with Arizona’s well-developed and long-standing  
25 election laws and procedures. The dearth of recusals speaks volumes. *See Ariz. Newspapers*  
26 *Ass’n v. Superior Ct.*, 143 Ariz. 560, 563 (1985) (giving weight to settled practice under statute).

1           **B. The Secretary’s demands that Arizona election officials comply with the law**  
2           **was not misconduct.**

3           It was also not actionable “misconduct” under the election contest statutes for the  
4 Secretary to take certain steps – including sending demand letters, filing a special action,  
5 pointing out the potential applicability of criminal statutes, and having her lawyer threaten  
6 sanctions against an action that had no merit [Stmt. ¶¶ 29-43] – after the election to compel  
7 county officials to complete their nondiscretionary statutory and constitutional duty to canvass  
8 the results of the election. “Misconduct” is not whatever Plaintiff says or believes it is; instead,  
9 the Arizona Supreme Court has said that under the rubric of “misconduct,” even “honest  
10 mistakes or mere omissions on the part of the election officers, or irregularities in directory  
11 matters, even though gross, if not fraudulent, will not void an election, unless they affect the  
12 result, or at least render it uncertain. *Findley*, 35 Ariz. at 269 (emphasis added). Not only does  
13 misconduct not include a public official taking appropriate and reasonable steps to ensure that  
14 they can carry out their own duties, but by the time the Secretary did all these things, all votes  
15 had been cast and tabulated. The Secretary fulfilled her duties by compelling the Cochise County  
16 Board of Supervisors to certify their canvass as required by law, and making a criminal referral  
17 where it was clearly appropriate: against officials who refused to follow the law. Any claim of  
18 “misconduct” on these grounds is baseless.

19           **C. The Secretary’s office reporting election misinformation on a social media**  
20           **platform was not misconduct.**

21           Plaintiff next claims it was “misconduct” for the Secretary of State’s Office to flag for  
22 review two tweets from an individual’s Twitter account. [Stmt. ¶¶ 42-45] There is no misconduct  
23 by the Secretary or her Office here.

24           Plaintiff cites as support a series of emails from January 2021, included as an exhibit in a  
25 separate litigation. [*Id.* ¶ 42 & n.8 (citing *Missouri v. Biden*, Case No: 3:22-cv-01213-TAD-  
26 KDM, Document 71-8 Filed 08/31/22, pages 45-46 of 111 PageID #: 2793-2794)] But this

1 correspondence resoundingly proves that there was no impropriety, much less misconduct, on  
2 the part of the Secretary’s Office. On January 7, 2021, the Secretary’s Office emailed a nonprofit  
3 organization, the Center for Internet Security (“CIS”), reporting a Twitter account—and two  
4 tweets in particular—for review. *Id.* The email stated the reason these tweets were being flagged:  
5 that they contained misinformation that would “further undermine confidence in the election  
6 institution in Arizona.” *Id.* The Secretary’s Office did not state that CIS or Twitter should take  
7 any particular action as to the tweets or the Twitter account. CIS then forwarded the information  
8 to Twitter. Hours later, after Twitter reviewed the information, the platform decided to remove  
9 both tweets for violating the terms of service. *Id.*

10 These facts are undisputed from the very emails that Plaintiff cites, and they do not  
11 constitute misconduct because Twitter made an independent decision to act against the flagged  
12 tweets. *O’Handley v. Padilla* is directly on point here. In that case, after a complaint from the  
13 California Secretary of State’s Office, Twitter labeled a user’s election-related tweets as disputed  
14 and ultimately suspended his account, based on Twitter’s terms of service, which prohibit  
15 spreading election misinformation. 579 F. Supp. 3d 1163, 1175-76 (N.D. Cal. 2022). The  
16 Secretary of State’s Office in *O’Handley*, like the Secretary of State’s Office here, did not ask  
17 for any particular action in response to the tweets, and instead simply asserted that the  
18 information in the tweets was incorrect and flagged them for review. *Id.* at 1190-92. Based on  
19 these facts, the court in *O’Handley* held that Twitter’s independent review and decision to take  
20 action against the account did not implicate state action and there was thus no violation of  
21 plaintiff’s constitutional rights. *Id.* at 1189-92. The court dismissed plaintiff’s claims with  
22 prejudice, *id.* at 1192. This Court should do the same.<sup>9</sup>

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23 <sup>9</sup> While *O’Handley* is particularly on point, other courts have rejected similar claims where,  
24 despite alleged state involvement in posts containing COVID-19 misinformation on Twitter and  
25 other platforms, the platforms made independent decisions to take action against the posts or  
26 accounts. *See Huber v. Biden*, Case No. 21-cv-06580, 2022 WL 827248 (N.D. Cal. Mar. 18,  
2022); *Hart v. Facebook Inc.*, Case No. 22-cv-00737-CRB, 2022 WL 1427507 (May 5, 2022);

1 Plaintiff next complains that Finchem’s Twitter account was temporarily suspended on  
2 October 31, 2022 and asserts that “[o]n information and belief the suspension was directly caused  
3 by Hobbs’ illicit censoring of her constituents in concert with Twitter (as pled herein).” [Stmt. ¶  
4 46; *see also id.* ¶ 50 (claiming “Fontes and Secretary Hobbs . . . caused his Twitter account to  
5 be suspended”). But Plaintiff points to zero evidence that the Secretary (or the Secretary and  
6 Adrian Fontes, as Plaintiff’s theories evolve) were involved in any way in Finchem’s temporary  
7 Twitter suspension. This kind of rank speculation with no support must lead to dismissal. *See*  
8 *Jeter*, 211 Ariz. at 389 ¶ 4 (courts may not accept as true “inferences or deductions that are not  
9 necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions  
10 from such facts, or legal conclusions alleged as facts”).

11 **III. Plaintiff Fails to Show That Any Alleged Misconduct in the Secretary’s Actions**  
12 **Changed Election Results.**

13 Finally, even if Plaintiff established that the Secretary committed actionable  
14 “misconduct” because certain vote tabulation machines used in Arizona were not properly  
15 certified or by (1) not recusing when recusal was not required, (2) taking legal action to compel  
16 elections officials to satisfy their duties, (3) flagging tweets as potentially violating Twitter  
17 policies, or somehow being involved in Mr. Finchem’s brief Twitter removal (and he did not),  
18 his claims would still fail because he did not allege – and cannot establish – whether or how any  
19 of these things would have changed the result of the election for Secretary of State such that it  
20 must be set aside. This deficiency also warrants dismissal. *Findley*, 35 Ariz. at 269 (misconduct  
21 will not support an election contest absent proof that it “affect[s] the result.”) (emphasis added).

22 **Conclusion**

23 Arizona has a “strong public policy favoring stability and finality of election results,”  
24 *Ariz. City Sanitary Dist*, 224 Ariz. at 334 ¶ 12, which means that the judiciary must be wary of

25 \_\_\_\_\_  
26 *Informed Consent Action Network v. YouTube LLC*, 582 F. Supp. 3d 712 (N.D. Cal. 2022);  
*Children’s Health Def. v. Facebook*, 546 F. Supp. 3d 909 (N.D. Cal. 2021).

1 interfering with presumptively valid election results. The burden on an election contestant is thus  
2 exceedingly high, and here, is a burden that Plaintiff failed to meet. For all the reasons discussed  
3 above, the Court should dismiss Plaintiff’s “election contest” with prejudice, and without leave  
4 to amend. The Secretary further reserves her right to seek an award of fees against Plaintiff and  
5 his counsel under Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349.

6 Respectfully submitted this 13th day of December, 2022.

7 **COPPERSMITH BROCKELMAN PLC**

8 By /s/ D. Andrew Gaona

9 D. Andrew Gaona

10 **STATES UNITED DEMOCRACY CENTER**

11 Sambo (Bo) Dul

12 *Attorneys for Defendant Arizona Secretary of State  
Katie Hobbs*

13 ORIGINAL efiled and served via electronic  
14 means this 13th day of December, 2022, upon:

15 Honorable Melissa Julian  
16 Maricopa County Superior Court  
c/o [Jorge.Aguirre@JBAZMO.Maricopa.Gov](mailto:Jorge.Aguirre@JBAZMO.Maricopa.Gov)

17 Daniel J. McCauley, III.  
[dan@mlo-az.com](mailto:dan@mlo-az.com)  
18 McCauley Law Offices, P.C.  
6638 E. Ashler Hills Dr.  
19 Cave Creek, Arizona 85331-6638  
*Attorneys for Contestants/Plaintiff*

20 Craig A. Morgan  
[cmorgan@shermanhoward.com](mailto:cmorgan@shermanhoward.com)  
21 Shayna Stuart  
[sstuart@shermanhoward.com](mailto:sstuart@shermanhoward.com)  
22 Jake Tyler Rapp  
[jrapp@shermanhoward.com](mailto:jrapp@shermanhoward.com)  
23 Sherman & Howard L.L.C.  
24 2555 East Camelback Road, Suite 1050  
Phoenix, Arizona 85016  
25 *Attorneys for Contestee/Defendant Adrian Fontes*

26 /s/ Diana Hanson