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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KARI LAKE, Contestant/Plaintiff, v. KATIE HOBBS, personally as Contestee and in her official capacity as the Secretary of State; et al., Defendants.	No. CV2022-095403 **ARIZONA SECRETARY OF STATE'S MOTION TO DISMISS COMPLAINT IN SPECIAL ACTION AND VERIFIED STATEMENT OF ELECTION CONTEST** (Assigned to Hon. Peter Thompson)

Introduction & Background

Plaintiff/Contestant Kari Lake asks this Court to overturn the results of the 2022 General Election, during which Arizonans chose Governor-Elect Katie Hobbs as their next Governor by a margin of more than 17,000 votes. Yet rather than respect Arizonans' will, Plaintiff sued to ask this Court to declare her the winner. But that relief is extreme, unfounded, and unavailable.

State and county election officials should be commended for their hard work, diligence, and integrity in administering the 2022 General Election. But like all elections that came before it and all elections that will follow it, this election was not perfect – after all, elections are administered by humans. But that is emphatically not a reason for this Court to thwart the people's will, which is precisely what Plaintiff wants this Court to do. Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986), presumptions that Plaintiff simply cannot overcome.

First, Plaintiff's allegation (Count I) that the Secretary committed "misconduct" by reporting election misinformation twice to social media platforms about two years ago is baseless. These alleged actions had nothing to do with the conduct of the 2022 General Election, and Plaintiff does not (and cannot) show that it impacted election results.

Second, Plaintiff's claims (Count II) that tabulator configurations are susceptible to "hacking," that a theoretical county official intentionally interfered with voting equipment, and that certain equipment was not properly certified under federal law must fail. There's no evidence of "hacking," no evidence of "intentional interference," and Maricopa County's election equipment that is required to be certified is properly certified. Plaintiff also fails to adequately allege that the results of the election were affected. Her assertions about the number of votes allegedly lost because the printer issue are based on the number of votes that would be required to change the election results, not an attempt to estimate votes actually affected.

Third, Plaintiff's contention (Count III) that certain early ballots were validated based on signatures outside the voters' "registration record[s]" is brought far too late and, in any case,

misreads the law.

Fourth, Plaintiff's claim about alleged ballot chain of custody violations in Maricopa County (Count IV) is speculative, and Plaintiff alleges insufficient facts beyond bald, unsupported allegations that any ballots were "lost" or "illegal ballots added."

Fifth**,** Plaintiff's claims (Counts V and VI) that the printer/tabulator issues in Maricopa County violated the equal protection and due process clauses of the Constitution fail absent adequate allegations of intentional conduct, allegations supporting a conclusion that the election was fundamentally unfair or that voters were deprived of the ability to vote, or any allegations about the inadequacy of post-deprivation remedies.

Sixth, Plaintiff's claim (Count VII) that mail-in ballots violate article VII, § 1 of the Arizona Constitution is meritless, and was rejected earlier this year by another trial court.

Seventh, Plaintiff's catch-all claim of an alleged "incorrect certification" (Count VIII) is not a standalone basis for an election contest, and thus fails to state a claim.

Finally, Plaintiff's attempt to declare that there may be an "inadequate remedy" such that she can receive declaratory relief (Count IX) and invocation of causes of action under 42 U.S.C. § 1983 (Count X) have no place in an election contest.

Argument

Plaintiff's election contest fails. But the Secretary recognizes that election contests are rare, and first provides the Court with some background.

To survive a motion to dismiss, an election contest must be based on well-pleaded facts, rather than on legal conclusions. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959) (election contest subject to dismissal if it fails to state a claim). "A complaint that states only legal conclusions, without any supporting factual allegations" is insufficient, *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417. 419 ¶ 7 (2008), and the Court may not accept as true "inferences or deductions that are not necessarily implied by well-pleaded

facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. at 386, 389 ¶ 4 (App. 2006).

"[E]lection contests are purely statutory, unknown to the common law, and are neither actions at law nor suits in equity, but are special proceedings." *Griffin*, 86 Ariz. at 169-70. They are thus the subject of legislative restriction because of a "strong public policy favoring stability and finality of election results." *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App. 2010) (cleaned up). And A.R.S. § 16-672(A) carefully circumscribes the valid grounds of a contest: (1) "misconduct" by election boards/canvassers; (2) the elected official was ineligible for the contested office; (3) the contested official gave a "bribe or reward" or "committed any other offense against the elective franchise"; (4) "illegal votes"; or (5) because of an "erroneous count of votes," the elected official didn't "receive the highest number of votes."

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

- Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore*, 148 Ariz. at 159;
- the "returns of the election officers are prima facie correct," *Hunt*, 19 Ariz. at 268; and
- courts apply a presumption of "good faith and honesty of the members of the election board" that controls absent "clear and satisfactory proof" to the contrary, *id.*

All told, to obtain relief in this case, Plaintiff must overcome all these presumptions and make either "a showing of fraud or . . . a showing that had proper procedures been used, the result would have been different." *Moore*, 148 Ariz. at 159; *see also see also See People ex rel. B.J.B. v. Ducey,* No. CV-21-0114-SA, 2021 WL 1997667, at *1 (Ariz. May 11, 2021) (collecting authority for the proposition that a plaintiff is required to prove that the outcome of the election would have been different). And with this background in mind, we turn to each of Plaintiff's deficient claims.

I. Reporting Election Misinformation to a Private Party Is Not Misconduct and Does Not Violate Constitutional Rights.

Plaintiff claims the Secretary of State's Office flagging for review certain social media posts amounts to "misconduct" and violates federal and state constitutional rights. [Stmt. ¶¶ 91-99; *see id*. ¶ 99] There was no misconduct, and no free speech rights have been violated.

Plaintiff cites as support two emails from November 2020 and January 2021 from the Secretary of State's office to a nonprofit organization, the Center for Internet Security ("CIS"). [Stmt. ¶¶ 94-95 & n.14 (*citing* Exhibits 2 & 4 of Olsen Decl.)] But this correspondence resoundingly proves that there was no impropriety, much less misconduct, on the part of the Secretary's Office. On November 6, 2020, the Secretary's Office emailed CIS linking to a post on a Facebook page, with the subject line: "Fake statement by Arizona Election Worker about fraud." *Id.* On January 7, 2021, the Secretary's Office emailed CIS, reporting a Twitter account—and two tweets in particular—for review. *Id.* The email stated the reason these tweets were being flagged: that they contained misinformation that would "further undermine confidence in the election institution in Arizona." *Id.* In neither email did the Secretary's Office state that CIS, Facebook, or Twitter should take any particular action as to the social media posts. CIS then forwarded the information to Facebook and Twitter. *Id.* As to the November 2020 email, a representative of Facebook responded to CIS's email flagging the Facebook post stating the platform is "looking into it." *Id.* It is unclear whether Facebook acted, and Plaintiff does not allege that it did. As for the January 2021 email, hours after CIS had emailed Twitter flagging the tweets, Twitter removed both tweets for violating its terms of service. *Id.*

These facts are undisputed from the very emails that Plaintiff cites, and they do not constitute misconduct or a violation of constitutional rights because the social media platforms made independent decisions to act (or not act) against the flagged tweets. *O'Handley v. Padilla* is directly on point here. There, after a complaint from the California Secretary of State's Office, Twitter labeled a user's election-related tweets as disputed and ultimately suspended his account,

based on Twitter's terms of service, which prohibit spreading election misinformation. 579 F. Supp. 3d 1163, 1175-76 (N.D. Cal. 2022). The Secretary of State's Office in *O'Handley*, like the Secretary of State's Office here, did not ask for any particular action in response to the social media posts, and instead simply asserted that the information in the posts was incorrect and flagged them for review. *Id.* at 1190-92. Based on these facts, the court in *O'Handley* held that Twitter's independent review and decision to take action against the account did not implicate state action and there was thus no violation of plaintiff's constitutional rights. *Id.* at 1189-92. The court dismissed plaintiff's claims with prejudice; this Court should do the same.[1]

Moreover, even if Plaintiff can show that flagging social media posts is misconduct (which she cannot), Plaintiff does not even attempt to allege – nor could Plaintiff show – whether and how this conduct, done about two years before the 2022 elections, affected the election results such that they must be set aside. This alone warrants dismissal.

II. Election Day Issues in Maricopa County Were Not Misconduct.

Plaintiff's Count II raises several claims related to election day activities in Maricopa County, including that ballot on demand printers were "uncertified" and susceptible to hacking. [Stmt. ¶¶ 141] Plaintiff also questions the alleged commingling of tabulated and non-tabulated ballots [¶¶ 76-79], long wait times at various vote centers [*id.* ¶¶ 80-84], and vaguely alleges that

[1] While *O'Handley* is particularly on point, other courts have rejected similar claims where, despite alleged state involvement in posts containing COVID-19 misinformation on Twitter and other platforms, the platforms made independent decisions to take action against the posts or 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); *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).

the election day printer issues may have been intentional and that the alleged lack of printer certification endangered the entire voting process [*id.* ¶¶ 100, 104]

A. Ballot-on-demand printers need not be certified.

Arizona counties use electronic equipment to tabulate votes, and they have done so for many decades. All electronic voting systems undergo federal and state testing and certification before being used in Arizona elections, counties perform logic and accuracy testing on all equipment before and after every election, and the Secretary separately performs logic and accuracy testing on a sample of each county's equipment before each election with a federal, statewide, or legislative race. *See, e.g.*, A.R.S. §§ 16-442, 16-449, 16-602; 2019 EPM at 76-82, 86-100, 235.

Under A.R.S. § 16-442(B), voting systems must comply with the Help America Vote Act of 2002 ("HAVA") and be approved by an accredited laboratory, known as a voting system testing laboratory ("VSTL"). *See also* 2019 EPM Ch. 4 § I. HAVA also establishes standards for electronic voting equipment under 52 U.S.C. § 21081, and the EAC has promulgated voluntary guidelines for voting systems under 52 U.S.C. § 21101. *See* 2005 Voluntary Voting System Guidelines ("VVSG").

HAVA defines a "voting system" for certification purposes to include the total combination of mechanical, electromechanical, or electronic equipment used to define ballots, cast and count votes, report or display election results, and maintain and produce any audit trail information. 52 U.S.C. § 21081(b)(1). Under Arizona law, certification is similarly required only for a "voting system or device," including "vote recording or tabulating machines or devices." A.R.S. § 16-442; *see also* 2019 EPM Ch. 4 § I ("A voting system consists of the electronic voting equipment (including central count equipment, precinct voting equipment, and accessible voting equipment) and election management system (EMS) used to tabulate ballots.). Neither the federal nor state certification process defines "voting system" or "voting equipment" to include separate systems like ballot-on-demand printers ("BODs") or electronic poll books.

Plaintiff incorrectly conflates Maricopa's BODs—which do not require certification—with tabulation and voting equipment. BODs are not part of any electronic voting system used in Arizona as defined under HAVA or Arizona's requirements, and therefore, do not require testing or certification under HAVA or A.R.S. § 16-442. The Secretary properly certified the electronic voting system that was used in each county in the 2022 elections. And, every county, including Maricopa, successfully passed logic and accuracy testing on their tabulation and voting equipment for the 2022 General Election, which confirmed that the voting systems and election programs were properly configured and performing accurately. Plaintiff's claim that BODs were not properly certified and that tabulation equipment was "illegally configured" is baseless and should be dismissed on that ground alone. And even if there were a question about BOD certification (there is not), Plaintiff cannot carry her burden to show that any certification lapse led to any actual errors. *Moore*, 148 Ariz. at 159 (requiring "a showing of fraud or . . . a showing that had proper procedures been used, the result would have been different"). This is a separate ground on which Plaintiff's challenge must fail.

B. Susceptibility to "hacking."

Relatedly, Plaintiff also alleges (citing the Parikh declaration), that there was somehow actionable misconduct or illegal votes because of her belief that the BOD printers were "susceptible to hacking." [Stmt. ¶ 141] She does not allege that BOD printers (or any other voting related equipment, for that matter) were actually hacked, or actually resulted in any illegal votes. This kind of rank speculation devoid of even an allegation of actual problems or the number of affected ballots cannot sustain an election contest.

C. Lines at vote centers and alleged "commingling" of ballots.

Next, Plaintiff alleges that there was either "misconduct" or "illegal votes" cast resulting from long lines at certain vote centers in Maricopa County, and further, because – as the County has acknowledged – there were several instances of ballots placed into "Door 3" for tabulation at central count being found in bags of ballots tabulated at a vote center. As to lines, Plaintiff

vaguely alleges that voter turnout was suppressed with no actual proof of voter suppression (or even a suggestion of how many voters weren't able to vote). [Stmt. ¶ 84] And as for commingled ballots, Plaintiff vaguely alleges that it "could have easily resulted" in Door 3 ballots not being properly counted or double-counted [*id.* ¶ 77], but provides no sufficient allegations that this actually occurred, or that it occurred in numbers sufficient to change the result of the gubernatorial race.

As noted above, the Court may not accept as true "inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts" in a statement of election contest. *Jeter*, 211 Ariz. at 389 ¶ 4. And merely declaring that there was some amount of alleged "voter suppression" or that Door 3 ballots "could easily" have gone uncounted or were double-counted is insufficient to sustain an election contest.

D. No evidence of intentional acts.

Plaintiff alleges that there was intentional inference with tabulators that caused election day issues in Maricopa County, and that this would constitute "misconduct" under the election contest statutes if it occurred. The only cited evidence for this remarkable accusation is the declaration of a so-called "expert" who somehow concludes that various procedural violations can "only be characterized" as intentional. That expert declares that "given the required standards and procedures involved with the election process, an unintentional widespread failure of this magnitude occurring could not arise absent intentional misconduct." [Stmt. ¶ 104, citing Parikh Decl. ¶ 7] The "expert" makes these wild conclusions without having inspected any of the machines at issue.

This bare-bones allegation cannot be enough to survive a motion to dismiss. Again, the Court cannot accept as true "inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts," *Jeter*, 211 Ariz. at 389 ¶ 4, and that Plaintiff found an "expert"

willing to sign a declaration that makes wild guesses about alleged intentional acts of unidentified persons does not make the logical leap that Plaintiff asks the Court to take any less unreasonable.

E. Inadequate allegations that the result of the election was affected.

To state a valid election contest based on any misconduct other than fraud, a contestant must allege facts sufficient to show that "the result would have been different." *Moore*, 148 Ariz. at 159. Plaintiff has not alleged facts to support the number of votes allegedly lost as a result of the issue. The numbers she cites apparently come from the Baris Declaration, which assumes its own conclusion as its calculations are based on the percentage of votes that would have been necessary to affect the election, not an estimate of the actual number of votes lost. [Baris Decl. at 10 (indicating that a change as small as 2.5% "would have altered the outcome of the gubernatorial election" and applying that figure to subsequent calculations)] Thus, Baris' analysis does not support a conclusion that tens of thousands of votes were suppressed. It doesn't reflect the the suppression of even one vote because his exit poll only interviewed people who had voted successfully. Any attempt to extrapolate the number of votes lost from the incidence of self-reported issues among successful voters is pure speculation, and therefore Count II fails to state cognizable election contest claims.

III. Plaintiff's Early Ballot Signature Verification Claims Are Barred by Laches and Legally Baseless.

Plaintiff also contends (Count III) – based solely "on information and belief" – that there were an unidentified number of "illegal votes" cast because "a material number of early ballots" were validated by county recorders across the state based on a signature match from something other than a voter's "registration record." [Stmt. ¶ 151] This claim apparently rests on Plaintiff's presumption that a voter's "registration record" is narrowly limited to a voter's registration form, and further on the idea that any provision of the 2019 Election Procedures Manual that authorizes

early ballot validation based on other signature exemplars is unenforceable. [*Id.* ¶¶ 98-99] Count III fails for multiple, independent reasons.

A. Laches.

To begin, the equitable doctrine of laches bars Count III. Laches "seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Plaintiff waited years to challenge this practice and provision of the EPM, that delay is unreasonable, and that delay causes significant prejudice to our elections system, the Courts, and above all, voters whom Plaintiff asks this Court to disenfranchise.

In deciding whether a plaintiff's delay is unreasonable, a court should consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence[.]" *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). And here, Plaintiff knew or should have known of this practice since at least 2019, when the EPM was approved by the Secretary, Governor, and Attorney General and thus obtained the force and effect of law. Courts uniformly reject challenges to election procedures like this brought only after an election.

Indeed, "[c]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) (citation omitted). Here, rather than seeking relief as to this alleged conflict between the statute and EPM years or even months ago, Plaintiff waited until after the election (and after she lost her race) to sue. But "by filing [her] complaint after the completed election," Plaintiff "essentially ask[s] [the Court] to overturn the will of the people, as expressed in the election." *Sherman*, 202 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiff's attempt to "subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful at the polls." *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (quotation omitted).

Plaintiff's belated claim – brought after all votes have been counted – also causes significant prejudice to voters. Many Arizonans' early ballots were validated and tabulated based on the challenged EPM provision, and throwing their votes out after-the-fact in service of Plaintiff's unsupported claim would disenfranchise those voters. And while Arizona law generally requires early voters whose signatures cannot be verified receive notice and an opportunity to "cure" those signatures, A.R.S. § 16-550(A) . *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (finding claims barred by laches and considering fairness to the parties, the court, "election officials, and the voters of Arizona"). This would treat similarly situated voters differently and violate both the equal protection and due process rights of voters who would not receive the benefit of the statutory cure period.

In sum, Plaintiff's delay in challenging this EPM provision prejudices county election officials, the Secretary, and above all else, Arizona voters. Laches bars this claim.

B. Merits.

Even if not barred by laches, Plaintiff's Count III claims and her challenge to the EPM provision about early ballot signature verification are legally baseless. "A party attacking the validity of an administrative regulation has a heavy burden." *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 24 (App. 1994). An agency's rulemaking powers "are measured and limited by the statute creating them," *Caldwell v. Arizona State Bd. of Dental Examiners*, 137 Ariz. 396, 398 (App. 1983), and courts will not invalidate a regulation "unless its provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate." *Watahomigie*, 181 Ariz. at 25. Plaintiff fails to carry her heavy burden.

1. Plaintiff's interpretation of A.R.S. § 16-550 contradicts the statute's text and legislative history.

A.R.S. § 16-550(A) requires the county recorder to compare the signature on early ballot affidavits with the signature in the voter's "registration record." Consistent with this requirement, the 2019 EPM, at page 68, specifies that, besides the voter's registration form, the

county recorder "should also consult additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/PEVL request forms," when conducting early ballot signature verification. Plaintiff's erroneous argument that this EPM provision conflicts with A.R.S. § 16-550(A) assumes – contrary to the plain text and legislative history of that statute – that the statutory reference to a voter's "registration record" is narrowly limited to the registration form or some other singular document.

Nothing in the plain text of A.R.S. § 16-550(A) limits the county recorder's review to the voter registration form; nor does A.R.S. § 16-550(A) or any other law prohibit county recorders from consulting other official documents in the voter's registration record when verifying early ballot affidavit signatures. Indeed, if, as Plaintiff insists, the Legislature wanted to restrict the county recorder's review to the registration form alone, it knows how to do so because that's exactly what the law said before the Legislature explicitly amended it. Before 2019, A.R.S. § 16-550(A) required the county recorder to compare the signature on early ballot affidavits to "the signature of the elector on his registration form." But in 2019, the Legislature amended A.R.S. § 16-550(A) to replace the reference to "the signature of the elector on his registration form" with today's construction referencing "the elector's registration record." S.B. 1054, 54th Leg., 1st Reg. Sess. (Ariz. 2019). Here, the Legislature acted to expressly expand the county recorder's review from just the "registration form" to documents in the "registration record." The Court should reject Plaintiff's baseless effort to render meaningless this legislative act.

2. Plaintiff's interpretation would lead to absurd results.

As the state's Chief Election Officer, the Secretary must maintain the statewide voter registration database, which contains the voter registration record of all Arizona voters. See A.R.S. § 16-142; EPM, Ch. 1(IV)(A). These registration records in the voter registration database often include not just the voter's registration form, but also other – more recent – documents associated with the voter's registration and voting activity, such as the signature

roster or electronic poll book signatures, early ballot request forms, active early voting list request forms, and early ballot affidavits from prior elections. That a voter's registration record includes other documents beyond the registration form is apparent from the Legislature's usage of the term "registration record" in other parts of Title 16. *See, e.g.*, A.R.S. § 16-153(A) (allowing certain voters to protect from public disclosure their personal identifying information, "including any of that person's documents and voting precinct number contained in that person's voter registration record" (emphasis added)); A.R.S. § 16-168(F) (protecting "the records containing a voter's signature" within a voter's registration record (emphasis added).

Indeed, for long-time registered voters, the registration form in the voter's record may be decades old, and their signature may degrade or change over time, as reflected in more recent official documents in the registration record. Plaintiff's insistence that officials may only consult the registration form – and not any other official documents in the voter's registration record – both defies the plain text and legislative history of A.R.S. § 16-550(A) and would lead to absurd results. Counties would have to reject early ballots based on signature comparison to an outdated exemplar while ignoring more recent signatures available in the voter's registration record. Further, Plaintiff's argument would absurdly lead to some voters being required to cure their signature for every early ballot they cast or face disenfranchisement because the county, according to Plaintiff, must always compare the voter's early ballot affidavit signature to their decades-old registration form, despite knowing that the voter's signature has changed based on more recent documents in the registration record. The Court should reject Plaintiff's erroneous and nonsensical reading of the law. *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293, 297 ¶ 11 (App. 2017) (courts "will not interpret a statute in a manner that would lead to an absurd result.").

C. Speculation.

Even if Plaintiff's claims in Count III were not barred by laches (they are) and even if those claims had any basis in law (they do not), Count III also fails because it is based entirely on speculation. As with "misconduct" and "erroneous count of votes," a contest based on "illegal

votes" requires the contestant to prove (1) that illegal votes were cast and (2) that those illegal votes "were sufficient to change the outcome of the election." *Moore*, 148 Ariz. at 156. Plaintiff doesn't – and obviously can't – allege a single plausible fact to support this claim. This fundamental failure independently dooms these claims.

Beyond that, however, Plaintiff provides no principled way for the Court to even consider this claim and the remedy Plaintiff seeks. Plaintiff cavalierly asks this Court to proportionally reduce the tabulated returns of early ballots to exclude early ballots validated in alleged violation of the law. [Stmt. ¶ 155] But she doesn't allege how many early ballots were validated using a signature exemplar on something other than a voter registration form, and she could never prove what that number is because the counties do not track which signature exemplar was used to verify a particular ballot. And this should go without saying, but it would be impracticable for counties to re-do early ballot signature verification at this stage. Granting Plaintiff's request would therefore require the Court to: (1) guess how many early ballots would have been rejected had counties applied Plaintiff's absurd interpretation of A.R.S. § 16-550(A); and then (2) guess how these voters would have voted in the Governor's race to "proportionally reduce" the vote totals. The Court should reject Plaintiff's request to apply conjecture upon conjecture to overturn the election result.

IV. Speculative Chain of Custody Issues Cannot Invalidate Ballots.

In Count IV, Plaintiff alleges that there were breaches of the chain of custody of ballots because an alleged "whistleblower" supposedly observed certain batches of ballots arrived without proper chain of custody forms, and that Runbeck printed 9,530 duplicate ballots "with no chain of custody." [Stmt. ¶¶ 158-61] She claims that this alone entitles her to "an order either setting aside the election or proportionally reducing the tabulated returns of early ballots" by some unidentified number. [*Id.* ¶ 162]

Even if some unknown number of ballots were not accompanied at all times by appropriate chain of custody documentation, that does not mean there was actionable

misconduct, there is no evidence or reasonable inference that any "legal ballots [were] lost or illegal ballots . . . added" [Stmt. ¶ 113, 161], much less enough to change the results of the election, and it is not a ground on which to invalidate an entire election and disenfranchise millions of Arizonans.

V. Election Day Issues in Maricopa County Did Not Violate the Constitution or Change the Result of the Election.

Counts V and VI assert as grounds for contesting the election that the printer/tabulator issues in Maricopa County resulted in the violation of equal protection and due process rights under the Fourteenth Amendment to the U.S. Constitution. These claims fail.

A. Plaintiff Has Not Alleged the Required Intentional Conduct.

The Complaint acknowledges that its due process and equal protection claims both require intentional conduct. [Stmt. ¶¶ 145 ("If the intentional actor was a Maricopa County election official . . . that official misconduct also would constitute an Equal Protection and Due Process violation."); 164 & 169 ("Assuming *arguendo* that a state actor caused the tabulator problems" in alleging equal protection and due process violations)]. *See also Fares Pawn, LLC v. Indiana Dep't of Fin. Institutions*, 755 F.3d 839, 846 (7th Cir. 2014) ("Negligent or accidental differential treatment does not count."); *Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005) (due process violation requires "an intentional act on the part of the government or its officials"). But as discussed above in Section II.D, Plaintiff has not alleged what the underlying electronic or mechanical cause of the issues were, let alone identify which humans were involved or any facts suggesting their intentions. These claims therefore fail.

B. Plaintiff Has Not Alleged the Discriminatory Intent Required to Support an Equal Protection Claim.

An equal protection violation requires not only intentional conduct, but also an actual intent to discriminate. *See Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022). Such intent cannot "be inferred from the action itself." *Snowden*, 321 U.S. at 8. Disparate impact only gives

rise to an inference of discriminatory intent where "a clear pattern, *unexplainable on grounds other than* [intentional discrimination], emerges from the effect of the state action." *Arlington Heights*, 429 U.S. at 266 (emphasis added).

In this case there is no "pattern" of state action that suggests discriminatory animus. Instead, the facts alleged in Plaintiff's Complaint suggest that the reason that the printer/tabulator issue allegedly disproportionately affected Republican voters is because the problems arose on election day, when more Republican voters went to the polls. [Stmt. ¶ 63 (alleging that three times as many election day voters in Maricopa County voted for Plaintiff as her opponent)[2]] These facts are far from a "clear pattern, unexplainable on grounds other than" an intent to discriminate, and therefore fail to support an inference of discriminatory intent, particularly where there are no allegations to even support a conclusion of intentional conduct.

C. Plaintiff's Due Process Allegations Are Inadequate in Other Respects.

1. Allegations Fail to Support "Fundamental Unfairness" of Election.

Voters can have their substantive due process rights violated during an election only if the election is "conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998. The threshold for "fundamental unfairness" is high. "In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998); *see also Shannon*, 394 F.3d at 96 ("[a] voting machine malfunction is the paradigmatic example of a 'garden variety' election dispute that is not cognizable as a due process violation, even if the malfunction is alleged to have affected the result of the election," and that such issues "differ[] significantly from purposeful state conduct directed at disenfranchising a class or group of citizens").

[2] Plaintiff cites election-day exit polling to allege that the issues were more prevalent in more Republican-leaning areas in the county, but the declaration cited for this allegation entirely fails to set forth the underlying facts for those conclusions. [Stmt. ¶ 143]

Plaintiff has not alleged that the election day issues were caused by a deliberate policy decision by a governmental body. *Cf. Ury v. Santee*, 303 F. Supp. 119, 123-24 & 126 (N.D. Ill. 1969) (due process violation arose from creation of election precincts "grossly unequal in number of registered voters" and the failure to establish and staff facilities adequate to the needs of those precincts). Plaintiff also has not alleged an outright denial of the right to vote. That in-person voting proved harder than expected, and that some voters may have been discouraged from voting altogether, does not automatically equate to denial of the right to vote. *See Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975); *see also D'Amico v. Mullen*, 351 A.2d 101, 103 (1976) (holding in an election contest case that the fact that prospective voters may have been "discouraged by the long lines" and may have left without voting was not equivalent to alleging that they "would have been denied the right to exercise their franchise had they awaited their turn at the polls").

Here, although many voters faced unexpected inconveniences on Election Day, those inconveniences did not rise to the level of denying them the right to vote. Plaintiff does not—and cannot—allege that any voter who waited in line was ultimately unable to vote. She also does not—and cannot—allege that waiting in line at a voting center suffering from a tabulator malfunction was the only way for voters to cast their ballots on November 8, because there were several other options available to them: inserting a completed ballot in Door 3 for later tabulation, checking out of the voting center and voting at a different voting center, casting a provisional ballot at a different location, or completing and dropping off an early ballot if the voter had one. Thus, Plaintiff's allegations fail to describe the "fundamental unfairness" required to support a substantive due process claim. *Bennett*, 140 F.3d at 1226.

2. Plaintiff Has Not Alleged Deprivation of the Right to Vote or Inadequate Postdeprivation Remedies.

"A procedural due process claim has two elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections."

Miranda v. City of Casa Grande, 15 F.4th 1219, 1224 (9th Cir. 2021) (citation and quotations omitted). When the alleged deprivation arises from a random and unauthorized act by a governmental actor—an act that, by its nature, renders predeprivation procedures impracticable—the procedural due process requirement may be satisfied with an adequate postdeprivation remedy. *Id.* at 1226. Plaintiff has failed to allege either required element.

First, as described above in Section V.C.1, the facts alleged here do not establish that voters were deprived of the right to vote. Moreover, Plaintiff's failure to allege the lack of an adequate postdeprivation remedy is also fatal to her claim. *Pilgrim v. Littlefield*, 92 F.3d 413, 417 (6th Cir. 1996). As shown by this election contest, Arizona provides a postdeprivation process that allows voters to raise errors or misconduct in the election process after the fact. *See Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 467 (2d Cir. 2006) (candidate removed from ballot afforded adequate postdeprivation remedy through the availability of proceeding allowing aggrieved candidates to contest ballot designations).

D. Plaintiff Has Not Adequately Alleged that the Printer/Tabulator Issues Changed the Results of the Election.

Stating a valid election contest claim requires alleging that "the result would have been different." *Moore*, 148 Ariz. at 159. As explained in Section II.E, Plaintiff has not alleged facts to support the number of votes allegedly lost because of the issue, and therefore Counts V and VI fail to state cognizable election contest claims.

VI. Mail-In Ballots Comply with Art. VII, § 1.

Next, Count VII alleges that mail-in ballots cast under A.R.S. § 16-547 "do not satisfy the ballot-secrecy requirements of Arizona's Constitution" and that "[a]ll absentee ballots cast in the 2022 general election are illegal votes." [Stmt. ¶ 174] Plaintiff acknowledges that the Arizona Republican Party raised a similar challenge earlier this year and that matter is pending in the court of appeals [*id.* ¶ 175], yet fails to acknowledge that the trial court (Judge Lee Jantzen) dismissed the party's claim with prejudice because the Arizona Constitution does not prohibit

mail-in voting. [*See Ariz. Republican Party v. Hobbs, et al*., No. CV-2022-00594 (Mohave Cnty. Super. Ct), June 6, 2022 Order (attached as **Exhibit 1**)]

First, and just like Plaintiff's claim about early ballot verification procedures (Count III, *see* Section III(A), *supra*), this is a challenge to a more-than-thirty-year old statute and election procedure that Plaintiff didn't bring until after the election and after she lost. The Court should thus dismiss it on laches grounds alone.

Plaintiff's claim also fails on the merits. "Our state constitution, unlike the federal constitution, does not grant power, but instead limits the exercise and scope of legislative authority." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013) (emphasis added). That means courts don't look "to the constitution to determine whether the legislature is authorized to act"—the Legislature has full power to act unless the Constitution says otherwise. *Id.* (cleaned up). And as Judge Jantzen held, Article VII, Section 1 of the Arizona Constitution does not prohibit voting by mail. That provision provides that "[a]ll elections by the people shall be by ballot, or by such other method as may be prescribed by law; [p]rovided, that secrecy in voting shall be preserved." It ensures the right to a secret ballot, but leaves the precise methods of voting to the Legislature. The Legislature exercised that power by adopting early voting laws that preserve secrecy in voting, which include detailed procedures ensuring the secrecy of early ballots and preventing fraud and coercion. *E.g.*, A.R.S. § 16-545(B)(2) (early ballot envelopes must conceal the ballot and be tamper-evident when sealed); A.R.S. § 16-548(A) (requiring voters to conceal their votes and fold their voted early ballot so it cannot be seen); A.R.S. § 16-552(F) (requiring election officials to remove voted ballot from envelope without unfolding or reviewing it); A.R.S. §§ 16-1005, 16-1012, 16-1013 (criminalizing various conduct relating to early ballots and voter intimidation).

Plaintiff alleges no facts to support her facial constitutional claim against this comprehensive statutory scheme, to say nothing of carrying her heavy burden of establishing "that no set of circumstances exists under which" early ballots can be secret. *State v. Arevalo*,

249 Ariz. 370, 373 ¶ 9 (2020) ("If 'there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional.'") Count VII must thus be dismissed on the merits.

VII. Incorrect Certification.

Plaintiff's Count VIII contains no new factual allegations, and is little more than a "catch-all" intended, apparently, to be inclusive of all the counts before it. [Stmt. ¶ 178] But the counts above must rise or fall on their own (either individually or collectively), rendering this Count duplicative and subject to dismissal.

VIII. Inadequate Remedy & Plaintiff's Alternative Federal Claims.

Finally, in Counts IX and X, Plaintiff tries to invoke this Court's jurisdiction under either the Uniform Declaratory Judgment Act (Count IX) or 42 U.S.C. § 1983 to provide alternative relief in this election contest must fail. "[E]lection contests are purely statutory, unknown to the common law, and are neither actions at law nor suits in equity, but are special proceedings." *Griffin*, 86 Ariz. at 169-70. For that reason, Arizona courts reject attempts to use other legal and equitable mechanisms to achieve the same ends as an election contest when the "gravamen" of the complaint is an election contest. *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978). If Plaintiff wants to seek prospective declaratory or § 1983 relief, that's her prerogative. She cannot, however, raise these standalone claims here.

Conclusion

Arizona's "strong public policy favoring stability and finality of election results," *Ariz. City Sanitary Dist*, 224 Ariz. at 334 ¶ 12, means that the judiciary must be wary of interfering with presumptively valid election results. The burden on an election contestant is thus exceedingly high, and here, is a burden that Plaintiff failed to meet. For all the reasons discussed above, the Court should dismiss Plaintiff's "election contest" with prejudice. The Secretary further reserves her right to seek an award of fees against Plaintiff and her counsel under Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349.

RESPECTFULLY SUBMITTED this 15th day of December, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
D. Andrew Gaona

STATES UNITED DEMOCRACY CENTER
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Exhibit 1

Exhibit 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION 4 ***DL**
DATE: JUNE 6, 2022

COURT ORDER/NOTICE/RULING

ARIZONA REPUBLICAN PARTY,
et al., et ux.,
Plaintiffs,

vs. **CV-2022-00594**

KATIE HOBBS, et al., et ux.,
Defendants.

Plaintiffs Arizona Republican Party and Kelli Ward, as Chairman of Arizona Republican Party, and as a resident of Mohave County (hereinafter Plaintiffs) filed a request for an Order to Show Cause and Verified Complaint alleging Arizona's no-excuse mail-in ballot system violates the Arizona Constitution. Plaintiffs also filed a Motion for Preliminary Injunction asking the Court to stop the use of no-excuse mail-in ballots in the November 2022 General Election. The Court heard arguments from Plaintiffs and multiple parties opposed on Friday, June 3, 2022.

Defendants include Secretary of State Katie Hobbs (hereinafter Defendant Secretary of State), each of Arizona's counties by each of the County Recorders (hereinafter Defendant Counties), and the State of Arizona itself (the State reached a stipulation with the Plaintiffs to abide by whatever this Court rules or any appellate court might rule in the future). The Court, by motion, allowed the Arizona Democratic Party ("ADP"), the Democratic National Committee ("DNC") and a couple of Democratic Party election committees (the DSCC and the DCCC) to intervene (hereinafter Intervenor-Defendants).

The Court has reviewed Plaintiffs' Application for Order to Show Cause, Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' Verified Complaint, Defendant Secretary of State's Response to Motion for Preliminary Injunction, Intervenor-Defendants' Response to Plaintiffs' Application for Order to Show Cause, Maricopa County's (on behalf of multiple defendant counties) Response In Opposition to Plaintiffs' Application for Order to Show Cause. The Court has also reviewed Plaintiffs' Reply in Support of their Application to Show Cause.

The Court has reviewed the attachments to all the above listed pleadings, the

evidence admitted at the oral arguments, the applicable statutes and rules, as well as case law and the arguments made by counsel during the hearing.

First, the Court made a record during the hearing that Plaintiff does have standing to bring this challenge under the Arizona Declaratory Judgment Act. If the voting law is unconstitutional, the Plaintiff would have to continue to participate in an unconstitutional system. The Court also found that *laches* does not apply. It isn't dilatory to bring this case to the Superior Court in late May of an election year. The Court also found the *Purcell* doctrine does not apply. *Purcell* is a case in which a federal court enjoined a state election late in the election process. That is not what is being sought here and it does not apply. This case can be decided on the merits based on the information the Court has received.

It is important to note what this case is not about allegations of fraud in the voting process. It is not about politics. It is not even about whether the parties believe mail-in voting is appropriate. It is about one thing: Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting?

A party seeking a preliminary injunction has the burden of showing 1) a strong likelihood of success on the merits; 2) the possibility of irreparable harm; 3) that the balance of hardships tips in the favor of the seeking party; and that 4) public policy favors the injunction. *Shoen v. Shoen,* 167 Ariz. 58 (App. 1990).

Plaintiffs do not meet the first element. There is not a likelihood of success on the merits. This action is asserting laws written and passed by the Arizona legislature to be in violation of the Arizona Constitution. This is an extremely high burden for any party to meet. Arizona legislative acts will only be struck down if clearly prohibited by the Arizona Constitution. *Earhart v. Frohmiller*, 65 Ariz. 221 (1947). The legislature does need not be expressly granted authority to act when it would otherwise be entitled to do so. *Montgomery v. Mathis*, 231 Ariz. 103 (App. 2012). There is nothing in the Arizona Constitution which expressly prohibits the legislature from authoring new voting laws, including "no-excuse" mail-in ballots.

The Arizona Constitution states in Article 7, Section 1 "all elections by the people shall be by ballot, **or by such other method as may be prescribed by law**; provided, that **secrecy in voting shall be preserved**." (emphasis added). This language does not prohibit mail-in ballots yet does allow new laws concerning voting to be passed as long as secrecy in voting is preserved.

The Arizona Constitution was adopted in 1912. In the Constitution, the framers adopted the Australian Ballot System for elections. Voters, who went to a polling place, were handed a ballot, filled it out in a private booth and folded it, and turned it back in; exactly the same way voters do today if they go to their polling place on election day.

Mail-in voting began in Arizona in 1918, only six years after the Arizona Constitution was adopted. These new laws were created by the Arizona Legislature to

allow people that could not get to the polls, mostly military people, an opportunity to vote. These laws mandated the mail-in voter keep his ballot private, so the legislature had the right to write election laws in 1918 that maintained secrecy, and they did so.

No-excuse mail-in voting was approved by the Arizona legislature in 1991 and became effective on January 1, 1992. This process is codified in A.R.S. §§ 16-541, *et seq*. This change in law was approved by the legislature and signed by the Governor.

The statutes allowing no-excuse mail-in voting set forth procedural safeguards to prevent ballot tampering and, more importantly, to the question before this Court to maintain secrecy in voting. *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178 (1994). (In *Miller*, ballots were removed from a school district's budget override election because the no-excuse mail-in voting rules were not strictly followed as 41 ballots were hand delivered to voters instead of mailed). The Supreme Court's reference to A.R.S. §16-545(B)(2) in *Miller* is dicta in that case, but it reflects an understanding of the legislative process. In this case, where the Plaintiffs specifically argue the legislature is not complying with the Constitution's mandate to preserve secrecy in voting, then it is much more important. The statutes are clear.

A.R.S. §16-545(B)(2) ensures that the ballot return envelopes are of a type that **does not reveal** the voter's selections or political party affiliation and that is **tamper evident when properly sealed**. (emphasis added).

A.R.S. § 16-548(A) provides the early voter shall make and sign the affidavit and **shall then mark his ballot in such a manner that his vote cannot be seen**. The early voter **shall fold the ballot**, if a paper ballot, so as **to conceal the vote and deposit the voted ballot in the envelope** provided for that purpose, which shall be **securely sealed and, together with the affidavit**, delivered or mailed to the county recorder or other officer in charge of elections of the political subdivision in which the elector is registered or deposited by the voter or the voter's agent at any polling place in the county. (emphasis added).

Secrecy in voting being preserved is as an element of the no-excuse mail-in ballot voting statutes approved in Arizona in 1991.

Plaintiffs also allege the no-excuse mail-in voting statutes are in violation of the Arizona Constitution "as applied." In the Verified Complaint, and in a series of exhibits the Court admitted at the hearing over objection of opposing parties, Plaintiffs show examples of bad actors violating no-excuse mail-in voting laws. These examples are concerning but they do not address the issue before the Court: the constitutionality of the statutes in question. Furthermore, they do not show a pattern of conduct so egregious as to undermine the entire system of no-excuse mail-in voting as provided by the Arizona legislature. Enforcement mechanisms exist within the statutes to punish those that do not abide by the statutes.

Defendants for the past thirty years have applied the laws of Arizona as written. The laws are far from perfect and nobody anticipated thirty years ago that approximately 90 percent of Arizona voters would vote by mail-in ballot during a pandemic, but these laws are NOT in violation of the Arizona Constitution. They are not inapposite of the intentions of the framers of the Constitution who emphasized the right to suffrage for Arizona citizens and that the voters' ballots be secret. The laws passed by the Arizona legislature in 1991 further those goals.

It is the only question before the Court: Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting? The answer is no.

IT IS ORDERED denying the relief requested in the Plaintiffs' Application for an Order to Show Cause and denying Plaintiffs' Motion for a Preliminary Injunction.

Any party wishing to appeal this ruling shall provide a written order consistent with this ruling that contains Rule 54(c) language and a signature line for the Court.

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