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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation; RESTORING INTEGRITY AND TRUST IN ELECTIONS, a Virginia nonprofit corporation; REPUBLICAN PARTY OF ARIZONA, LLC, a statewide political party committee; and DWIGHT KADAR, an individual,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona.

Defendant.

Case No. S1300CV2023-00202

ARIZONA SECRETARY OF STATE ADRIAN FONTES' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT
(Assigned to Honorable John D. Napper)

(*Oral Argument Requested*)

Defendant Adrian Fontes, in his official capacity as the Arizona Secretary of State (the "Secretary"), moves to dismiss this action pursuant to Arizona Rule of Civil Procedure 12(b)(6).[1]

The issue before this Court's is relatively simple: Does the legislature's use of the expansive term registration "*record*" really mean the more restrictive (but unused) term registration "*form*" for purposes of verifying a signature on an early voted ballot. *See* A.R.S. § 16-550(A). The answer is "no" for several reasons.

First, words have meaning and the statutory language at issue is clear: the legislature meant to use the more expansive term "record", and in fact, amended A.R.S. § 15-550(A)

[1] Pursuant to Arizona Rules of Civil Procedure 12(j), a good faith consultation certificate that complies with Rule 7.1(h) accompanies this motion.

in 2019 to change the narrower term "form" to the broader term "record" – an action we cannot presume to have been futile and which supports the Secretary's interpretation of A.R.S. § 16-550(A).

Second, absent a specific definition from the legislature in A.R.S. § 16-550(A), we must give the word "record" its plain and ordinary meaning, which here comports with the Secretary's position that a voter's registration "record" is more expansive than a voter's registration "form". Indeed, the legislature has elected to use the narrower term "form" elsewhere when desired, reflecting that the legislature knows the terms "form" and "record" are in fact different. *Compare* A.R.S. § 16-550(A) to A.R.S. § 16-544(C).

Third, the more expansive interpretation of "record" comports with the purpose for our early voting statutes, which as Plaintiffs concede, is to make it generally very easy to vote. *See* Complaint ("Compl."), ¶ 13 ("Arizona law generally makes it very easy to vote." quoting *Brnovich v. Democratic Nat'l. Comm.*, 141 S.Ct. 2321, 2330 (2021)).

Fourth, the Secretary is empowered to prescribe what constitutes a registration record in the Election Procedures Manual (the "EPM"), and that determination is entitled to great deference. Indeed, "[o]nce adopted, the EPM has the force of law …." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020).

Accordingly, for the following reasons, this Court should dismiss this action with prejudice.

I. THE FACTS

Qualified voters casting early ballots in an Arizona election must execute an affidavit on the envelope in which the early ballot is returned. Compl., ¶ 1. A.R.S. § 16-550(A) states that, if the signature on the envelope is "inconsistent with the signature of the elector on the elector's registration *record*," the county recorder must contact the voter and attempt to ascertain whether the voter, in fact, personally completed and signed the early ballot affidavit. *Id*., ¶ 1 (quoting A.R.S. § 16-550(A) (emphasis added)).

Pursuant to the 2019 EPM – promulgated by the Secretary's predecessor and which the Governor and Attorney General approved – a county recorder can "consult additional

known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/[Permanent Early Voting List] request forms[]" when verifying an early ballot signature. EPM, Ch. 2, § VI(A)(1) at 68, *available at* https://tinyurl.com/EPMAZ (last visited Apr. 19, 2023); Compl., ¶ 3.

Plaintiffs concede that the term "registration record" for purposes of A.R.S. § 16-550(A) is undefined by statute. Compl. at ¶ 17. Even so, Plaintiffs believe that the Secretary's instructions via the EPM, and interpretation of the term registration "record" is too broad and should be limited to the voter's voter registration form. *See* Compl. at ¶¶ 4, 37-38, 40-43, 47-48.

To that end, Plaintiffs seek declaratory and injunctive relief against the Secretary, essentially requiring him to conclude that the term "record" as used in A.R.S. § 16-550(A) only encompasses a voter's voter registration form, and not the voter's broader registration record which could include polling place signature rosters or historical early ballot affidavits. *See* Compl., pp.12-13, ¶¶ A-C.

I. ARGUMENT

A. THE APPLICABLE LEGAL STANDARD

When considering a motion to dismiss, the Court assumes as true only "well-pled facts, not legal conclusions." *Grand v. Nacchio*, 225 Ariz. 171, 175 n.1 (2010) (cleaned up). "[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). Moreover, the Court will "not accept as true allegations consisting of conclusions of law, 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. 386, 389, ¶ 4 (App. 2005).

B. THE LEGISLATURE MEANT SOMETHING MORE EXPANSIVE THAN JUST A "FORM" TO COMPRISE A VOTER'S "REGISTRATION RECORD"

"Statutes shall be liberally construed to effect their objects and to promote justice."

A.R.S. § 1-211. "When the language of a statute is clear and unambiguous, a court should not look beyond the language, but rather simply apply it without using other means of construction, assuming that the legislature has said what it means." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 6 (App. 2008) (cleaned up). "Where a statute is silent on an issue, [the Court] will not read into it . . . nor will [the Court] inflate, stretch or extend the statute to matters not falling within its expressed provisions." *Ponderosa Fire Dist. v. Coconino Cnty.*, 235 Ariz. 597, 604, ¶ 30 (App. 2014) (cleaned up). Moreover, "we must assume that the legislature intended different consequences to flow from the use of different language." *P.F.W., Inc. v. Superior Court*, 139 Ariz. 31, 34 (App. 1984).

The statute at issue in this action is A.R.S. § 16-550(A). *Before* August 26, 2019, A.R.S. § 16-550(A) *used to state*:

> Upon receipt of the envelope containing the early ballot and the completed affidavit, the county recorder or other election officer in charge of elections shall compare the signatures thereon with the signature of the *elector on his registration* ***form***. ….

Laws 2019, Ch. 39, § 2 (emphasis added).[2] At some point, the legislature decided it was time to make a change. So as of August 26, 2019, A.R.S. § 16-550(A) states:

> [O]n receipt of the envelope containing the early ballot and the ballot affidavit, the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on the *elector's registration* ***record***. ….

(Emphasis added).

The legislature's decision to revise the law from the narrow term "form" to the more expansive term "record" is as telling as it is dispositive of Plaintiffs' claims. We will explain why.

First, "it is presumed when a legislature alters the language of a statute that it intended to create a change in the existing law." *State v. Kozlowski*, 143 Ariz. 137, 138 (App. 1984). Clearly the legislature understood the words "form" and "record" mean

[2] For the Court's convenience, a copy of this statute, reflecting its prior language, is attached as **Exhibit A**.

different things, because the legislature decided to replace the former with the latter in 2019. So, we cannot interpret the legislature's use of the term "record" to only encompass the former term "form" because doing so would render the legislature's express change a futile act, and "[t]here is a strong presumption that legislatures do not create statutes containing provisions which are redundant, void, inert and trivial." *Kozlowski*, 143 Ariz. at 138.

Second, although the words "form" and "record" are not defined in A.R.S. § 16-550(A), we know that "[w]ords and phrases" used in a statute, but not otherwise defined, "shall be construed according to the common and approved use of the language." A.R.S. § 1-213. And "[b]y declining to define a statutory term, the legislature generally intends to give the ordinary meaning to the word." *Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 408, ¶ 18 (App. 2001).

Even as *formerly used* in the context of A.R.S. § 16-550(A), a "form" is clearly and ordinarily understood to be encompassed as part of a "record". Compare *Form*, https://www.merriam-webster.com/dictionary/form (defining the noun as "a printed or typed document with blank spaces for insertion of required or requested information") (last visited Apr. 19, 2023) with *Record*, https://www.merriam-webster.com/dictionary/record (defining the noun as "something that records" or "a collection of related items of information (as in a database) treated as a unit") (last visited Apr. 19, 2023). Indeed, whenever the legislature has wanted to distinguish between the narrower term "form" and the broader term "record", the legislature has done so. For example, in A.R.S. § 16-544(C), the legislature stated:

> On receipt of a request to be included on the active early voting list, the county recorder or other officer in charge of elections *shall compare the signature on the request form with the voter's signature on the* ***voter's registration form*** and, if the request is from the voter, shall mark the voter's registration ***file*** as an active early ballot request.

(Emphasis added). Conversely, in A.R.S. § 16-550(A), which is implicated after a voter is already on the early voting list, the legislature references the broader "record", which includes the entire record for the duration of the voter's registration history. *See* A.R.S. § 16-550(A); EPM, Ch. 2, § VI(A)(1) at 68.

Third, the more expansive interpretation of "record" comports with the legislature's desire to, as Plaintiffs concede, make it generally *very easy* to vote. *See* Compl., ¶ 13 ("Arizona law generally makes it very easy to vote." (quoting *Brnovich*., 141 S.Ct. at 2330)). Narrowly construing the term "record" to only include the prior used *but now discarded* term "form", and limiting that record *only* to a voter registration form, runs contrary to very easy voting.

For example, it is no stretch to surmise that by giving the county recorders a single means to check the accuracy of a signature (a registration form), those whose signature have changed slightly over time (as they do) are left to hope they are in a position to receive the county recorder's communication and respond. This necessarily adds another layer or hurdle to easy voting.

Courts, however, are constrained to interpret statutes in a manner that preserves the meaning of other parts of that statute (here, making voting very easy). *See One Hundred Eighteen Members of Blue Sky Mobile Home Owners Ass'n v. Murdock*, 140 Ariz. 417, 419 (App. 1984) (holding "statutory provisions must be considered in the context of the entire statute and consideration must be given to all of the statute's provisions so as to arrive at the legislative intent manifested by the entire act."); *Spirlong v. Browne*, 236 Ariz. 146, 149, ¶ 9 (App. 2014) (holding that "if the statutory language is not clear, we may consider other factors, including the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." (internal quotations and citation omitted)). Interpreting "record" to be more expansive as the Secretary has done merely perpetuates the apparent legislative desire to make voting generally very easy. *See* Compl. ¶ 13. After all, "[s]tatutes shall be *liberally construed* to effect their objects and to promote justice." A.R.S. § 1-211 (emphasis added). And the Secretary's interpretation of A.R.S. § 16-550(A) does just that.

Moreover, the Secretary's construction just makes sense. The term "record" is broader than a specific "form." A form can be a record of something. But so can other documents that may not be a "form" (*e.g.*, signature affidavits on early ballots from prior

elections). Thus, while a federal form or state form is "*an* official public record of the registration of the elector[,]" A.R.S. § 16-161 (emphasis added), those forms are *not the only* official record of the registration of the elector. More importantly, neither A.R.S. § 16-550(A) nor A.R.S. § 16-161 mandate such a narrow reading (or else why revise § 16-550(A) in 2019). Thus, Plaintiffs' restrained interpretation of the term "record" in this context cannot carry the day.

Fifth, if one accepts that the term "record" is ambiguous in the context of A.R.S. § 16-550(A), then that ambiguity necessarily equips the Secretary – Arizona's chief election officer – with the discretion to determine what constitutes a registration record. And his "interpretation of applicable statutes and regulations is entitled to great weight." *Ariz. Cannabis Nurses Ass'n v. Ariz. Dep't of Health Services*, 242 Ariz. 62, 65–66, ¶ 8 (App. 2017) (internal quotations and citation omitted); *see also Scottsdale Healthcare Inc. v. AHCCCS*, 206 Ariz. 1, 8 ¶ 27 (2003) (same); *Ariz. Water Co. v. Ariz. Dep't Water Resources*, 208 Ariz. 147, 154 ¶ 30 (2004) (when the legislature "has not spoken" on an issue, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' In such cases, 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (cleaned up)). Moreover, 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.

The Secretary is empowered to promulgate the EPM, and at least in the current EPM, the Secretary determined that the term "record" encompasses more than just the "form" an elector uses to register to vote. This interpretation is reasonable and entirely consistent with the law.

For example, in 2019, A.R.S. § 16-550(A) was expressly revised to replace "form" with "record". And Arizona law permits voters to update their registration information at an emergency voting location, and to that end, permits the Secretary to proscribe rules in the EPM for doing so. *See* A.R.S. § 16-246(G) ("…the county recorder or other officer in charge of elections may allow a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual* adopted pursuant to § 16-452." (emphasis added)). Indeed, other statutes clearly recognize that a voter can update registration information in the manner the Secretary prescribes in the EPM. *See* A.R.S. §§ 16-542(A) ("Notwithstanding § 16-579, subsection A, paragraph 2, at any on-site early voting location or other early voting location the county recorder or other officer in charge of elections may provide for a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)); 16-542(E) ("… at any on-site early voting location the county recorder or other officer in charge of elections may provide for a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)); 16-542(I) ("… the county recorder or other officer in charge of elections may allow a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)). So the Secretary's interpretation of the term "record" as more expansive than just a form used to register to vote can be harmonized with the legislative mandate empowering the Secretary to create the EPM. *See Watahomigie*, 181 Ariz. at 25; A.R.S. § 16-542(A) (permitting creation of EPM to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting ….").

Accordingly, (1) the Secretary's interpretation of "record", and corresponding EPM regulation, are entitled to great weight and deference, (2) the legislature clearly contemplated the Secretary would create instructions and procedures for updating voter

information via the EPM, (3) the Secretary's determination of what constitutes a "registration record" is reasonable and lawful, and (4) that determination should not be judicially annulled.

II. CONCLUSION

Had the legislature wanted to restrict the voter's registration "record" to a voter's registration "form" for purposes of A.R.S. § 16-550(A), then the legislature would have left the statute as it was in 2019. But the legislature chose differently and deliberately replaced the narrow term "form" with the broader different term "record". Words have meaning. And the word "record" as used in A.R.S. § 16-550(A) does not have the meaning Plaintiffs desire. Thus, for the foregoing reasons, this Court should dismiss this case with prejudice and award the Secretary any costs he may expend in defense of this action.

RESPECTFULLY SUBMITTED: April 20, 2023.

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GOOD FAITH CONSULTATION CERTIFICATE

The Secretary's counsel and Plaintiffs' counsel spoke via telephone on April 19, 2023, regarding, among other things, whether there may be a way to resolve the issues among these parties and which give rise to this Motion. After that consultation, which was very professional and cordial, it remains undersigned counsel's belief that this Motion is necessary.

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Exhibit A

Exhibit A

Arizona Revised Statutes Annotated
Title 16. Elections and Electors (Refs & Annos)
Chapter 4. Conduct of Elections (Refs & Annos)
Article 8. Early Voting (Refs & Annos)

This section has been updated. Click here for the updated version.

A.R.S. § 16-550

§ 16-550. Receipt of voter's ballot

Effective: September 19, 2007 to August 26, 2019

A. Upon receipt of the envelope containing the early ballot and the completed affidavit, the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on his registration form. If satisfied that the signatures correspond, the recorder or other officer in charge of elections shall hold them unopened in accordance with the rules of the secretary of state.

B. The recorder or other officer in charge of elections shall thereafter safely keep the affidavits and early ballots in his office until delivered pursuant to § 16-551 and tallying of ballots shall not begin any earlier than seven days before election day.

C. The county recorder shall send a list of all voters who were issued early ballots to the election board of the precinct in which the voter is registered.

Credits
Added by Laws 1979, Ch. 209, § 3, eff. Jan. 1, 1980. Amended by Laws 1991, Ch. 310, § 24, eff. Jan. 1, 1992; Laws 1997, 2nd S.S., Ch. 5, § 28; Laws 2007, Ch. 295, § 1.

A. R. S. § 16-550, AZ ST § 16-550
Current through legislation effective April 6, 2023 of the First Regular Session of the Fifty-Sixth Legislature (2023)

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