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**Pro Hac Vice Application Forthcoming*
**Admitted *Pro Hac Vice*

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IN THE SUPERIOR COURT FOR 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; and DWIGHT KADAR, an individual,

Plaintiffs,

v.

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

Defendants.

No. S-1300-CV-202300202

INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

(Assigned to the Hon. John D. Napper)

INTRODUCTION

Intervenor-Defendant the Arizona Alliance for Retired Americans moves to dismiss Plaintiffs' Amended Complaint under Arizona Rule of Civil Procedure 12(b)(6).[1]

Under Arizona law, county recorders must compare the signature on the outside of a voter's early ballot envelope with signatures in that voter's "registration record." A.R.S. § 16-550(A). The Secretary of State's 2019 Election Procedures Manual ("EPM")—which has the force and effect of law—provides that a voter's "registration record" encompasses several signature-bearing voter forms, including "other official election documents . . . such as signature rosters or early ballot/PEVL request forms[.]" EPM at 68.[2] As the Secretary's Motion to Dismiss makes clear, his interpretation of "registration record" is more than reasonable—it is supported by the statute's plain language, the statute's legislative history, the purpose of Arizona election laws, and the Secretary's authority to interpret Arizona law. *See generally* Sec'y's Mot. to Dismiss. Yet Plaintiffs insist, without any legal basis, that the term "registration record" means only the voter's "registration form" and any future updates to that form, and ask the Court to force the Secretary to invalidate this longstanding EPM provision and interpret the law in accordance with Plaintiffs' (incorrect) interpretation. Am. Compl. ¶ 17. Plaintiffs' mere disagreement with the Secretary's interpretation of state law cannot sustain a mandamus claim. Nor has it caused Plaintiffs any actionable injury-in-fact to establish standing. This Court should accordingly dismiss the Amended Complaint.

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First, Plaintiffs fail to state a claim for mandamus relief in Count I. Mandamus relief is available only to compel the performance of a non-discretionary act. *See Sears v. Hull*, 192 Ariz. 65, 68 ¶ 11 (1998) ("[T]he requested relief in a mandamus action must be the performance of an act and such act must be non-discretionary."). But here, Plaintiffs fall short on at least two fronts. As a threshold matter, the EPM is adopted only after the Governor and the Attorney General approve it. *See* A.R.S. § 16-452(B). Plaintiffs named

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

[2] Sec'y Katie Hobbs, *2019 Elections Procedures Manual* 68 (2019), https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

neither of them as defendants, and so Plaintiffs cannot seek any relief that would alter the substance of the EPM; they are limited to requesting an injunction "prohibiting" the Secretary from enforcing this EPM provision and a declaratory judgment. In addition, the question of what constitutes the "registration record" under A.R.S. § 16-550(A) is one that the Secretary has the power under Arizona law to interpret. Plaintiffs have failed to establish that the Secretary has a non-discretionary duty to interpret and apply the law in accordance with their preferred policy preferences. But that is precisely what they ask the Court to order the Secretary to do.

Second, Plaintiffs lack standing to bring their remaining claims. Because their mandamus claim has no merit, they cannot move past the pleading stage by merely asserting a "beneficial interest" in the subject of this lawsuit. *See Sears*, 192 Ariz. at 68 ¶ 11 ("We need not decide whether the [plaintiffs] are 'beneficially interested' within the meaning of section 12–2021 because this action is not appropriate for mandamus."). Instead, they must meet Arizona's standing requirements. They fail to do so. Plaintiffs have not been injured in any palpable or personal way by the Secretary's interpretation of "registration record." They assert only generalized grievances that would apply to the public writ large, and thus cannot support standing. Their theory of harm—that the Secretary's guidance increases the likelihood of some unidentified future signatures being erroneously verified, thereby diluting "legitimate" signatures—is far too speculative to confer standing. Courts consistently hold that plaintiffs lack standing to assert generalized vote dilution claims like Plaintiffs' claims here.

This Court should dismiss Plaintiffs' Amended Complaint in full.

BACKGROUND

Under A.R.S. § 16-452(A), the Secretary is required to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." Such rules "shall be prescribed in an official instructions and procedures manual," which shall also be "approved by the governor and

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the attorney general." *Id*. § 16-452(B). The most recent EPM approved by the Governor, Attorney General, and Secretary of State was published in 2019 and, as this Court held just last year, remains operative.

Arizona's election law requires county recorders, upon receipt of a voter's early ballot envelope, to compare the voter's signature on the early ballot envelope with other signatures from the voter in the voter's "registration record" prior to counting the ballot. A.R.S. § 16-550(A). The EPM thus requires county recorders to "compare the signature on the affidavit with the voter's signature in the voter's registration record," which the EPM states includes "the voter registration form" as well as "additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/PEVL request forms[.]" EPM at 68.

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Plaintiffs challenge how the EPM defines "registration record." They allege that the EPM's instruction violates Arizona law by extending the term "registration record" beyond the "document upon which an individual furnishes information required by federal and Arizona law to effectuate or amend her voter registration." Am. Compl. ¶ 17. Plaintiffs bring two claims: Count I, titled "[i]nvalidation of the EPM's Unlawful Definition of 'Registration Record,'" which appears to seek special action or mandamus relief. *Id.* at 9. Count II seeks a declaration that "any provision of the EPM that instructs county recorders to validate early ballot affidavit signatures by reference to documents—including without limitation polling place signature rosters and historical early ballot affidavits—that are not a 'registration record' within the meaning of A.R.S. § 16-550(A)—is inconsistent with A.R.S. § 16-550(A), and hence invalid and unenforceable." *Id.* at 11–13.

Plaintiffs filed their Special Action Complaint on March 6, 2023. On March 13 and 21, respectively, the Arizona Alliance for Retired Americans and Mi Familia Vota moved to intervene as defendants. On April 17, Plaintiffs amended their Complaint to add the Arizona Republican Party as a Plaintiff. The Secretary filed his Motion to Dismiss three days later, on April 20. This Court granted the motions to intervene on April 21, instructing the Intervenor-Defendants to avoid pleadings mirroring each other. Intervenor-Defendants

have so coordinated their briefings.

LEGAL STANDARD

Dismissal for failure to state a claim is appropriate where "as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶ 4 (1998)). "[C]ourts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Id*. at 356 ¶ 9. Aside from the complaint's allegations, courts may consider "public records regarding matters referenced in a complaint" (such as the EPM here) when adjudicating a motion to dismiss under Arizona Rule of Civil Procedure 12(b)(6). *Id*.

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While "the Arizona Constitution contains no express case or controversy requirement," Arizona courts still exercise "judicial restraint" and "impose a 'rigorous' standing requirement. In general, a party establishes standing by showing a personal, palpable injury." *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377 ¶¶ 9–10 (App. 2008) (citation omitted). Plaintiffs must also "establish a causal nexus between the defendant's conduct and their injury," *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 ¶ 23 (2020); and "show that their requested relief would alleviate their alleged injury." *Id*. at 406 ¶ 25.

ARGUMENT

This Court should dismiss Plaintiffs' Amended Complaint. Plaintiffs have not adequately pled a mandamus claim in Count I, and lack standing to bring their other claims.

I. Count I fails to meet the requirements for mandamus relief.

Count I, which is titled, "Invalidation of the EPM's Unlawful Definition of 'Registration Record,'" fails to meet the requirements for mandamus relief under A.R.S. § 12-2021. Mandamus relief, or its equivalent under the special action rules, is available only "to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears*, 192 Ariz. at 68 ¶ 11 (quoting *Bd. of Educ. v. Scottsdale Ed. Ass'n*, 109 Ariz.

342, 344 (1973)); *see also Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 ¶ 9 (App. 2007) (holding that a special action seeking mandamus relief "must also meet the general requirements for mandamus"); *accord* Ariz. R. P. Spec. Act. 1(a) ("[N]othing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition."). Moreover, "a mandamus action cannot be used to compel a government employee to perform a function in a particular way if the official is granted any discretion about how to perform it." *Yes on Prop. 200*, 215 Ariz. at 465 ¶ 12. "Thus, the requested relief in a mandamus action [1] must be the performance of an act and [2] such act must be non-discretionary." *Sears*, 192 Ariz. at 68 ¶ 11. Plaintiffs satisfy neither requirement.

First, the relief that Plaintiffs request is not the *performance* of an act but the *prohibition* of one. Plaintiffs do not ask this Court to compel the Secretary to do anything. Rather, they seek to enjoin the Secretary from "enforcing or implementing" the challenged regulations in the EPM. *See* Am. Compl. at 12.[3] In other words, Plaintiffs "seek not to compel the [Secretary] to perform an act specifically imposed as a duty but rather to prevent the [Secretary] from acting. Hence, [Plaintiffs] actually seek injunctive relief, which is not available through an action for mandamus or any other form of special action." *Sears*, 192 Ariz. at 69 ¶ 12.

Second, the Secretary has discretion within his statutory authority to prescribe rules on the "procedures for early voting and voting" as well as "tabulating and storing ballots"—particularly when, as here, he is filling out the contours of a term the statute leaves undefined. A.R.S. § 16-452(A); *see also* Sec'y's Mot. to Dismiss at 7-8.[4] Plaintiffs'

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[3] To the extent that Plaintiffs seek to change the EPM to reflect a different interpretation of Arizona law, they cannot do so through this action. The EPM is adopted only after the Governor and the Attorney General approve it, and Plaintiffs named neither of them as Defendants here. *See, e.g.*, Order Re: Joinder of Governor as Necessary Party, *Brnovich v. Hobbs*, No. P1300CV202200269 (Ariz. Sup. Ct. May 10, 2022) (holding that "the Governor, by statute, is a necessary party").

[4] The Secretary's *only* relevant nondiscretionary duty stems from A.R.S. § 16-452, which lays out the Secretary's duty to promulgate the EPM. *See* Am. Compl. at 12. But former Secretary Hobbs complied with her duties under that statute by promulgating an EPM in

Amended Complaint reveals that they object to the *manner*, not the *fact*, of the Secretary's action, since they claim the Secretary has failed to implement the signature certification process *in a way* that is consistent with their view of "registration record." Am. Compl. ¶¶ 41–42, 51. Indeed, Plaintiffs admit that the statutory term "registration record" is not defined by statute, and that the legislature has authorized—indeed, *required*—the Secretary to promulgate an EPM that advises county officials on how to comply with Arizona election law. *Id.* ¶¶ 17, 25. This is exactly the type of relief that "is not available through an action for mandamus or any other form of special action." *Sears*, 192 Ariz. at 69 ¶ 12. Mandamus "cannot be used to require that [ ] discretion be exercised in a particular manner." *Sensing v. Harris*, 217 Ariz. 261, 264 ¶ 11 (App. 2007) (quoting *Miceli v. Indus. Comm'n*, 135 Ariz. 71, 73 (1983)) (holding mandamus relief against police chief was inappropriate where "the Chief has no discretion regarding whether to enforce the Ordinance, but the details of enforcement are within his discretion," *id.* at 264–65 ¶ 11).

Plaintiffs' mere disagreement with how the Secretary exercises his discretion in defining terms in the EPM that are undefined in the Arizona election statutes cannot form the basis of mandamus relief. Indeed, the Arizona Court of Appeals has explicitly rejected this type of theory as a sufficient basis for a special action or mandamus relief. In *Yes on Prop. 200*, the Court of Appeals dismissed plaintiffs' special action claims against the Attorney General for issuing an advisory opinion they disagreed with, rejecting plaintiffs' argument that the advisory opinion was "so deficient that it amounts to a complete failure of the Attorney General to comply with the obligation to issue an opinion," and questioning whether such a deficiency is even possible. 215 Ariz. at 465 ¶ 17. The Court reasoned that because the Attorney General had statutory discretion to interpret the law, compelling him to adopt a different interpretation would mean "courts would effectively become direct legal advisors to the government," which "would be an inappropriate usurpation by the courts of

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2019 and drafting an EPM in 2021. *See* Under Advisement Ruling & Order Re: Special Action & Summary Judgment at 3–4, *Brnovich*, No. P1300CV202200269 (Ariz. Sup. Ct. June 17, 2022). In any event, a claim based on a failure to perform this nondiscretionary duty is not timely. *See* Mot. to Dismiss of Mi Familia Vota ("MFV").

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responsibility assigned to the Attorney General and . . . a violation of the separation of powers." *Id.* ¶¶ 15–16. The same principle applies here: the Secretary interpreted "registration record" in the course of his official duties, and special action relief is inappropriate.

Arizona Pub. Integrity All. v. Fontes, 250 Ariz. 58, 62–63 (2020) ("*APIA*"), which Plaintiffs rely on in their Amended Complaint, is inapt. *See* Am. Compl. ¶¶ 42–43. There, the Court granted mandamus relief to block the then-Maricopa County Recorder from issuing an additional instruction alongside mail-in ballots that provided supplemental guidance about overvotes. The Court held that "[t]he legislature has expressly delegated to *the Secretary* the authority to promulgate rules and instructions for early voting" through A.R.S. § 16-452. *APIA*, 250 Ariz. at 62 (emphasis added). Because the Maricopa County Recorder "is not empowered to promulgate rules regarding instructions for early voting, nor does he have the authority to change or supplant the EPM's prescribed instructions," his supplemental instruction had no legal basis and the Court enjoined the Maricopa County Recorder from issuing the instruction. *Id.* at 63, 65. Moreover, the Maricopa County Recorder "ha[d] a non-discretionary duty to provide" the instruction authorized by the Secretary in the 2019 EPM. *Id.* at 61.

In contrast, the Defendant in this case—the Secretary—has explicit statutory authority to promulgate rules governing voting procedures, including the ways in which ballots are counted. *See id.* at 62. And the Secretary has discretion to determine what those rules will say. Plaintiffs cannot seek mandamus relief against the Secretary to challenge how the Secretary has decided to exercise his discretion to fulfill his legally-prescribed duties. *See Yes on Prop. 200*, 215 Ariz. at 465 ¶ 12 (holding that special action seeking mandamus relief "cannot be used to compel a government employee to perform a function in a particular way if the official is granted any discretion about how to perform it."). The relief sought by Plaintiffs thus falls outside the proper scope of mandamus relief and their mandamus claim must be dismissed on that basis.

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II. Plaintiffs lack standing for their other claims.

Although the Arizona Constitution does not have a case or controversy requirement, Arizona courts apply the doctrines of standing and ripeness "as a matter of sound judicial policy." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279 ¶ 35 (2019); *see also Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 22 (2003) ("Although we are not bound by federal jurisprudence on the matter of standing, we have previously found federal case law instructive."). The same is true for declaratory judgments, which "will be granted only when there is a justiciable issue to be decided." *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986); *see also Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980) (refusing to interpret Declaratory Judgments Act "to create standing where standing did not otherwise exist"); *Lake Havasu Resort, Inc. v. Com. Loan Ins. Corp.*, 139 Ariz. 369, 377 (App. 1983) ("Declaratory relief will be based on an existing state of facts, not those which may or may not arise in the future.").

Because Plaintiffs' mandamus claim has no merit, they cannot take advantage of the more relaxed standing requirements that apply to mandamus actions. Instead, to establish standing, Plaintiffs must satisfy three elements: (1) they must allege a distinct and palpable injury; an allegation of "generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing," *Sears*, 192 Ariz. at 69 ¶ 16; (2) they must "establish a causal nexus between the defendant's conduct and their injury," *Arizonans for Second Chances, Rehab., & Pub. Safety*, 249 Ariz. at 405 ¶ 23; and (3) they "must show that their requested relief would alleviate their alleged injury." *Id*. at 406 ¶ 25. Plaintiffs fail to meet these requirements, so their remaining claims should be dismissed.

Plaintiffs lack a "palpable" and "personal" injury sufficient to sustain their claims for relief in this action. *Bennett*, 206 Ariz. at 524 ¶ 16. Plaintiffs make only generalized claims of harm, such as that the Secretary's interpretation of the EPM "increases . . . the risk of erroneous signature verifications," Am. Compl. ¶ 30, "erodes the utility of signature matching as an identity verification mechanism," *id.* ¶ 32, and "degrades the integrity of the signature verification protocol specified by the legislature," *id.* ¶ 34. Even assuming all

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these things to be true, all are generalized claims of harm "shared alike by all or a large class of citizens," and thus are "generally [] not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16; *cf. State v. Super. Ct.*, 131 P.2d 943, 947 (Wash. 1942) ("It is also a well recognized principle that public wrongs or neglect or breach of public duty cannot be redressed in a suit in the name of an individual or individuals whose interest in the right asserted does not differ from that of the public generally, or who suffers injury in common with the public generally.").

Plaintiffs' only purported particularized interest appears to derive from their concern that "legitimate" votes will be diluted by erroneously verified "illegitimate" votes. *See* Am. Compl. ¶¶ 30–34. Plaintiffs' allegations reveal that this purported theory of harm is based on pure speculation. *See, e.g.*, *id.* ¶ 31 (claiming that "there is always a chance" that a reviewer mistakenly approves a signature that does not come from the registrant, "there is some chance—even a small chance—that an added signature might not have come from the registrant," and that reviewers make only "a probabilistic determination that the affiant and the registrant are *likely enough* the same person"); *id*. ¶ 34 (claiming that using more signature comparators is a "continuous dilution of the pool of signature specimens [that] increases the probability of a false positive" when comparing some *future* signature to the expanded registration record). Such speculation is insufficient for purposes of declaratory relief. *See Land Dep't v. O'Toole*, 154 Ariz. 43, 47 (App. 1987) ("[D]eclaratory relief should be based on an existing state of facts, not those which may or may not arise in the future.").

Beyond that, "vote dilution is a very specific claim that involves votes being weighed differently and cannot be used generally to allege voter fraud." *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020). Although some litigants have sought to expand the term to apply to the type of speculative harm that Plaintiffs allege here, "[c]ourts have consistently found that a plaintiff lacks standing where he claims that his vote will be diluted by unlawful or invalid ballots." *Wood v. Raffensperger*, No. 1:20-cv-5155-TCB, 2020 WL 7706833, at *3 (N.D. Ga. Dec. 28, 2020) (collecting cases). Thus, even if there were some

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basis for believing that the Secretary's interpretation of "registration record" could increase the risk of vote dilution—and there is not—it still would not be enough to demonstrate standing.

Nor do the organizational plaintiffs have an injury sufficient to confer standing. Plaintiffs do not allege any facts establishing that their organizational or membership interests have been impaired: they merely claim they have a broad interest in fair elections and election integrity (and presumably *because* the Secretary's guidance is wrong, they suffer an injury to that interest). *See* Am. Compl. ¶¶ 8–10 (asserting missions to "advance a pro-growth, limited government agenda in Arizona that includes enhancing and safeguarding election security," "protect the rule of law in the qualifications for, process and administration of, and tabulation of voting in the United States," and "protect[] the procedural integrity of Arizona elections"). This cannot establish a justiciable controversy under Arizona law. *See O'Toole*, 154 Ariz. at 47 ("For a justiciable controversy to exist, a complaint must assert a legal relationship, status or right in which the party has a definite interest *and an assertion of the denial of it by the other party.*").[5]

Plaintiffs are simply trying to manufacture an injury out of the fact that they disagree with the EPM. But if Plaintiffs can claim an injury solely because they disagree with an agency's interpretation of a law, then standing doctrine would be a dead letter; any party in the state could create standing simply by calling a given act illegal and thus offensive to their purported interest in protecting the integrity of the law. *See, e.g.*, *Cullen v. Auto–Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008) ("[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard[.]").

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[5] Plaintiffs appear to concede that organizational plaintiffs Arizona Free Enterprise Club and Restoring Integrity and Trust in Elections do not have standing to pursue a declaratory judgment action, referring only to the individual Plaintiff and the Arizona Republican Party in their claim for declaratory judgment relief. *See* Am. Compl. ¶ 50; *see generally id.* ¶¶ 45–51. But neither have satisfied standing, for the reasons discussed.

CONCLUSION

For all these reasons, the Court should dismiss Plaintiffs' Amended Complaint.

RESPECTFULLY SUBMITTED this 22nd day of May, 2023.

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