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

ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

STRONG COMMUNITIES FOUNDATION OF ARIZONA INCORPORATED, *et al.*, Plaintiffs, v. YAVAPAI COUNTY, *et al.*, Defendants, ALLIANCE FOR RETIRED AMERICANS and VOTO LATINO, Intervenor-Defendants.	No. S1300CV202400175 **INTERVENOR-DEFENDANTS ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S REPLY IN SUPPORT OF MOTION TO DISMISS** (Assigned to the Hon. Tina Ainley)

INTRODUCTION

Plaintiffs' Complaint suffers from numerous fatal deficiencies, including a complete failure to allege any injury or identify any affected legal right stemming from the various election procedures they challenge. Instead, Plaintiffs invent novel "broad and forgiving" standing rules for "election-related lawsuits." Pls.' Opp'n to Intervenor-Defs.' Mot. to Dismiss at 1 ("Opp."). But Arizona law recognizes no such exemption from bedrock standing principles. Perhaps because they have suffered no harm, Plaintiffs attempt to shoehorn their claims into the more lenient vehicle of mandamus. But mandamus is available only when seeking to compel an official to perform nondiscretionary duties, not to force officials to carry out their duties in a particular manner, precisely as Plaintiffs do here for everything from demanding counties use precincts instead of voting centers, use only certain phone numbers to cure ballots, use specific continuous staffing measures to secure drop boxes, and more. Plaintiffs' Complaint thus fails from the get-go.

Plaintiffs' claims also fail as a matter of law. Plaintiffs repeatedly ask this Court to read into statute requirements which appear nowhere other than their Complaint, seeking to micromanage and remake Arizona's election procedures according to what Plaintiffs think the law should be. Because no number of amendments will cure the many factual and legal defects in Plaintiffs' Complaint, it should be dismissed in its entirety with prejudice.

ARGUMENT

I. Plaintiffs lack standing to bring any of their claims.

As set forth in Intervenors' Motion to Dismiss ("Mot."), Plaintiffs' lawsuit fails at the outset because they fail to identify any injury to any plaintiff, much less a "distinct and palpable injury" sufficient for standing. *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998) (en banc); Mot. at 2-6. Plaintiffs gloss over this dispositive issue, claiming they are exempt from traditional standing requirements "merely because they are registered voters." Opp. at 2. Not so. There is no "election-related lawsuit" exemption from standing under Arizona law, Plaintiffs fail to allege standing under the Declaratory Judgment Act, and their suit is

not appropriate for mandamus relief. Accordingly, Plaintiffs' Complaint should be dismissed for lack of standing.

A. Plaintiffs fail to meet Arizona's standing requirements, which do not recognize a broad exception for "election-related lawsuits."

Arizona's standing requirements are "rigorous" and require a distinct and palpable injury. *See* Mot. at 2 (quoting *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005)). Plaintiffs' claimed interest in "the lawful administration of Arizona's election processes"—no matter how much they insist such interest is "singular and palpable," Opp. at 6—is far too generalized to confer standing. Mot. at 4; *see also Sears*, 192 Ariz. at 70–71 ¶ 23 (declining to find standing where plaintiffs alleged a violation of law but failed to "show that they ha[d] been injured by the alleged . . . violation"). Plaintiffs allege no distinct and cognizable injury; they do not allege that they were or will be denied the right to vote, nor even explain how they stand to be affected by the challenged procedures. *See* Compl. ¶¶ 13–16. Instead, they allege only that they are voters who reside in Defendant counties. *Id.* Even if Plaintiffs had alleged any injuries stemming from purported violations of Arizona law, those purported injuries would be felt by every voter in Defendant counties. Such "[a]n 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.

Unable to identify any injury, Plaintiffs contend that Arizona's standing requirements are particularly relaxed for "election-related lawsuits." Opp. at 1–2. But none of the authorities Plaintiffs cite stand for the proposition that they possess standing "merely *because* they are registered voters." *Id*. at 2. For instance, Plaintiffs cannot avail themselves to Arizona's election contest statute, A.R.S. § 16–672, Opp. at 3, a narrow statutory scheme under which electors may "contest the election [results]" within five days of an election's certification. A.R.S. §§ 16–672(A), 16–673. Plaintiffs suggest the election contest statute stands for the broad principle that electors may always sue to remedy "misconduct" by county boards, Opp. at 3, but Plaintiffs ignore that even in the unique context of election contests (plainly not applicable here), "misconduct" is sufficient to state a claim only if it

"affect[s] the result" of the election. *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986) (quoting *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929)). Plaintiffs do not and cannot allege such harm for a *future* election and, of course, the time for filing an election contest to dispute conduct in the 2022 general election has now long passed. *See* A.R.S. § 16–673(A).[1]

The cases Plaintiffs rely on for their invented election exemption involved specific statutory bases for standing, none of which apply here. Although Plaintiffs assert that *Archer v. Board of Supervisors of Pima County*, 166 Ariz. 106, 107 (1990) (en banc) stands for the proposition that electors may generally sue to "uphold the integrity of the . . . process," Opp. at 2 (alteration in original), the elector in *Archer* had standing under Arizona's election contest statute, A.R.S. §16–672, which, as explained above, does not apply here. Similarly, Plaintiffs claim *Slayton v. Shumway*, 166 Ariz. 87, 88 (1990) (en banc), stands for the principle that "citizen[s]" and "registered voter[s]" generally possess standing to bring "election-related complaints," Opp. at 2, but the plaintiff in *Slayton* had standing because his suit arose under A.R.S. § 19-122(C), which provides that "[a]ny person may contest the validity of an initiative or referendum," and also does not apply here. These statutes—which *do* permit electors to bring election-related complaints in specific circumstances—confirms that Arizona does not permit any "registered voter[]" to bring an "election-related complaint[]" to challenge election procedures *generally*. Opp. at 2. In the absence of such statutory authorization, the usual "rigorous" standing rules apply, which Plaintiffs fail to meet.

Plaintiffs' allegations stand in stark contrast to cases in which voters have "allege[d] facts showing disadvantage to themselves as individuals" and thus "have standing to sue." Opp. at 3 (quotation omitted). In *McComb v. Superior Court*, 189 Ariz. 518 (App. 1997), which Plaintiffs repeatedly rely on, *see* Opp. at 2, 5, the plaintiffs challenged a redistricting

[1] Although Plaintiffs complain that Intervenors fail to provide "any limiting principle" for when "a plaintiff can sue" to "correct prior election mismanagement or unlawful administration," Opp. 4–5, Arizona's election contest statute, A.R.S. § 16–672, is that limiting principle. Such suits must be resolved swiftly after an election's certification because Arizona has a "strong public policy favoring stability and finality of election results." *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) (en banc).

scheme that prohibited plaintiff-electors from voting in certain elections. *See id.* at 522 & n.2. *McComb*'s recognition that standing was "obvious" in that case, Opp. at 5, because those voters would be "disenfranchised in future elections," *McComb*, 189 Ariz. at 522 & n.2, only underscores the lack of any comparable injury here.

Finally, although Plaintiffs suggest that this Court may "waive" the standing requirement, Opp. at 5 n.1, the Supreme Court has cautioned that "[t]he paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception." *Fernandez*, 210 Ariz. at 140 ¶ 6. That Plaintiffs' complaint fails to identify any past, present, or future injury demonstrates this is not an "exceptional circumstance[]" warranting waiver. *Id*. (quoting *Sears*, 192 Ariz. at 71 ¶ 25).

At bottom, Plaintiffs' theory of standing would permit any voter to sue at any time to challenge any application of any election law, without any injury or any affected legal right. It is Plaintiffs—not Intervenors—that fail to "provide any limiting principle." Opp. at 5. Finding Plaintiffs possess standing here would eviscerate Arizona's "rigorous standing requirement," *Fernandez*, 210 Ariz. at 140 ¶ 6, and open the floodgates to anyone similarly dissatisfied with a county's election practices. The Court should decline to do so.

B. Plaintiffs are not entitled to declaratory relief.

Plaintiffs fare no better under the Declaratory Judgment Act ("DJA") because that statute does not "create standing where standing [does] not otherwise exist." *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980). As with usual standing requirements, Plaintiffs are entitled to a declaratory judgment only if their "rights, status or other legal relations are affected by a statute," A.R.S. § 12-1832. Although Plaintiffs proclaim they "easily meet that standard," Opp. at 7, they do not allege that any of their legal rights have been affected, only that they are voters who live in Defendant counties. *See generally* Compl.; *see also Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88 ¶¶ 31, 33 (App. 2023) (denying plaintiffs declaratory relief under they DJA where the complaint alleged an official "acted in excess of legal authority" but did not allege "that plaintiffs' rights, status, or other relations are affected by" the challenged law (cleaned up)).

The cases Plaintiffs cite to support their standing under the DJA only confirm that Plaintiffs lack the personal interest required for declaratory relief. *See* Opp. at 7. In *Arizona School Boards Association, Inc. v. State*, 252 Ariz. 219, 225 ¶ 20 (2022), the Court held plaintiffs had standing to challenge a law that would prohibit mask mandates and COVID-19 vaccine requirements, thereby endangering plaintiffs' personal health. In *Pena v. Fullinwider*, 124 Ariz. 42, 44 (1979) (en banc), the Court held plaintiffs had standing to challenge an amendment that would eliminate labeling rules for commodity sales, impeding plaintiff-consumers' ability to compare the costs of different items. Plaintiffs allege no comparable effect from Defendants' election practices, only that they wish to "ensur[e] that Arizona's elections are free, fair, and lawfully administered," Opp. at 6 (quoting Compl. ¶ 13). But Plaintiffs cannot satisfy standing "by merely asserting an interest" in a government policy, as this would "eviscerate[e] the standing requirement." *Ariz. Sch. Bds. Ass'n, Inc.*, 252 Ariz. at 224 ¶ 18.[2]

Finally, although Plaintiffs also assert their claims are "ripe for judicial determination," Opp. at 6, declaratory relief is not available for issues which "may or may not arise in the future." *Lake Havasu Resort, Inc. v. Com. Loan Ins.*, 139 Ariz. 369, 377 (App. 1983); *Moore v. Bolin*, 70 Ariz. 354, 356 (1950) ("No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question."). Plaintiffs' claims, however, allege wholly speculative harms, *see* Mot. at 5–6, which precludes the DJA as a basis for relief.

C. The beneficial interest standard for mandamus actions does not apply here.

Plaintiffs alternatively attempt to shoehorn their claims into a mandamus action, arguing "double leniency on standing" from mandamus's "beneficial interest" standard.

[2] Plaintiffs also wrongly suggest that so long as a defendant *could* implement requested relief, a claim is justiciable under the DJA. Opp. at 6. Not so. Plaintiffs' theory would allow anyone to sue a public officer solely because that officer implements a challenged law—despite suffering no injury or possessing no affected right under that law. As such, concluding that Plaintiffs' claims are proper for declaratory relief "would inevitably open the door to multiple actions asserting all manner of claims against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). The DJA requires more.

Opp. at 2–3, 7–12. But Plaintiffs cannot avail themselves to the lesser standing showing required in mandamus actions because mandamus only lies if a plaintiff "seeks to compel a public official to perform a *non-discretionary duty* imposed by law." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 11 ("*AZPIA*") (emphasis added) (quotation omitted).

Plaintiffs, however, do not seek to compel Defendants to carry out any nondiscretionary duties; instead, Plaintiffs seek to impose their policy preferences for how county officials administer elections. But "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 v. Napolitano*, 215 Ariz. 458, 465 ¶ 12 (App. 2007) (emphasis added); *see also Blankenbaker v. Marks*, 231 Ariz. 575, 577 ¶ 7 (App. 2013) (confirming mandamus cannot be used to compel an official "to exercise [] discretion in any particular manner" (citation omitted)). Rather, mandamus applies only where the law requires a government official to carry out a specific duty in a specific way.[3]

Plaintiffs assume that mandamus relief is appropriate if a statute uses the word "shall," Opp. at 8 & n.2, and ignore that a statute may impose a duty upon an officer but nevertheless permit the officer discretion in performing that duty, making mandamus relief inappropriate. Arizona law, for example, does require election officials to conduct signature matching, *see, e.g.*, A.R.S. § 16-550(A) (a "county recorder . . . shall compare the signature[s]"), but it does not require signature matching to be done in any particular way, *see id.* (requiring the officer simply to be "satisfied that the signatures correspond"); *see also* A.R.S. § 16-552(B) (permitting counting of ballot if signature "is found to be sufficient"). The same is true of counties' curing efforts for mismatched signatures, *see* A.R.S. § 16-550(A), which requires that counties "shall make reasonable efforts to contact

[3] In determining whether Plaintiffs possess a "beneficial interest" to seek mandamus relief, it is true that the Court must examine whether Arizona law requires the duties Plaintiffs allege. This is not a "circular conflation of standing with the merits,' Opp. at 9, but an inherent, logical requirement of mandamus actions. Plaintiffs' suggestion otherwise would require the Court to assume standing and proceed to the merits, but standing is a threshold question that must be resolved before reaching the merits. *See Sears*, 192 Ariz. at 68 ¶ 9. Plaintiffs' assumption that they benefit from the mandamus standard anytime they allege Defendants have failed to perform a duty, moreover, is a legal conclusion that this Court cannot accept as true. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

the voter," but do not specify what those efforts must be. In other words, while Defendants must conduct signature matching, curing procedures, and a host of other election responsibilities, the law is silent as to *how* these duties are carried out, and thus mandamus is unavailable. Indeed, just last week, the Honorable Judge Napper of this Court held that plaintiffs seeking to impose a similar physical monitoring requirement for drop boxes that Plaintiffs seek here did *not* have standing to challenge those procedures because the manner in which officials use drop boxes is discretionary. *See* Under Advisement Ruling & Order at 5-6, *Arizona Free Enterprise Club v. Fontes*, No. S1300-CV-2023-00872 (Yavapai Cnty. Sup. Ct. Apr. 25, 2024) (attached as Exhibit 1). And critically, Plaintiffs repeatedly concede that Defendants do carry out the duties imposed by law—*e.g.*, conducting signature matching, Compl. ¶¶ 80–81, 91, 99, contacting voters to cure their ballots, *id*. ¶¶ 127–133, 221, 226, maintaining chain of custody procedures, *id*. ¶¶ 42–45, engaging in ballot reconciliation, *id*. ¶¶ 54–55, and so on—just not in the manner Plaintiffs prefer, making mandamus relief inappropriate.[4]

This case is therefore strikingly different from *AZPIA*, where the court ordered mandamus relief because the recorder failed to perform his nondiscretionary duty to provide specific ballot instructions. *AZPIA*, 250 Ariz. at 61 ¶ 3. There, the Arizona Elections Procedures Manual ("EPM"), which carries the force of law, specified that a particular instruction must accompany mail ballots. *Id.* Because the recorder failed to carry out his nondiscretionary duty to provide the instruction required by the EPM and included a different instruction instead, mandamus was appropriate. *Id.* Plaintiffs' reliance on *Arizonans for Second Chances, Rehabilitation, & Public Safety v. Hobbs*, 249 Ariz. 396, 405 (2020) ("*ASCRPS*"), Opp. at 3, 11, is similarly misplaced. *ASCRPS* arose under A.R.S. § 19-122(A), which specifically authorizes mandamus actions to compel the Secretary of

[4] The only claims for which Plaintiffs have alleged that Defendants fail to complete a non-discretionary duty is for Counts VIII and IX, which allege that Defendants do not conduct signature matching at all for certain ballots. These claims should still be dismissed, however, because Plaintiffs' allegations are wholly speculative so these claims are not ripe. *See supra* at 5; Mot. at 14.

State to carry out her constitutional duty to accept and file petitions. *See ASCRPS*, 249 Ariz. at 405, ¶¶ 2, 22.

Because there is no nondiscretionary duty that Plaintiffs allege the county Defendants have violated (at least not one that is not wholly speculative, *see supra* at 7 n.4), *Sears*' "distinct and palpable injury" requirement applies. 192 Ariz. at 69 ¶ 16.; *see AZPIA*, 250 Ariz. at 62 ¶ 10 (recognizing *Sears* applies outside of mandamus actions). Accordingly, Plaintiffs' failure to identify any such injury or any affected right dooms their complaint.

II. Plaintiffs fail to state a claim for relief for Counts I-IX; XI-XII.

In addition to lacking standing, which precludes all of Plaintiffs' claims, Plaintiffs also fail to state a claim for each of their state-law based claims (Counts I-IX; XI-XII).

Count I (Chain of Custody Procedures). Count I fails to state a claim because it identifies no governing law that requires election officials to precisely count the number of early ballots at every stage of the ballot processing, rather than to maintain records of the chain of custody of ballots generally. *See* Mot. 8–9. Intervenors do not dispute that chain of custody records are required at all stages of the process, but Plaintiffs' opposition confirms its only authority for its preferred interpretation of "chain of custody records" is not Arizona law, but the "best practices" of the Election Assistance Commission (EAC), a federal agency. Pls. Opp'n to Maricopa Defs.' Mot. for J. on the Pleadings at 2 ("MJP Opp."). Although Plaintiffs declare these best practices "binding," *id*. at 2, the fact that Arizona requires its "machines or devices" to comply with the Help America Vote Act ("HAVA"), A.R.S. § 16-442(B), a federal statute which itself established the EAC, does not mean that Arizona is statutorily obligated to follow each of the EAC's "best practices" unrelated to machines and devices. Such reasoning would require Arizona to follow the "best practices" of a federal agency on virtually all of its election procedures, a highly implausible outcome given the decentralized nature of elections in the United States. "[L]egislatures do not hide elephants in mouseholes," *Carter Oil Co., Inc. v. Ariz. Dep't of Revenue*, 248 Ariz. 339, 345 ¶ 19 (App. 2020) (cleaned up), and the Arizona Legislature did not adopt all the EAC's

"best practices" into Arizona law when it adopted the discrete requirement that voting machines comply with HAVA.

Count II (Reconciliation Procedures). Count II fails because nothing in Arizona law requires reconciliation procedures occur at voting locations. Mot. at 9–10. A.R.S. Sections 16-602(A) and 16-608(A) contain two procedural requirements for reconciliation: that they happen "[a]fter the close of the polls," and that the results be delivered to "the central counting place or other receiving station." Plaintiffs' attempt to manufacture a third requirement, that reconciliation occur in the first instance at voting locations, by deriving yet *another* silent requirement—that all acts of an election judge or board be performed at a voting location, *see* MJP Opp. at 5—only underscores the weakness of their claim.

Counts III and IV (Provision of Ballots at Vote Centers). Counts III and IV fail because Plaintiffs do not sufficiently allege that "any" voter was not provided with an "appropriate ballot for that voter" or not "allowed" to vote under Section 16-411(B)(4). Mot. at 10–12. Voters are "allowed" to vote even if they must wait in a line to do so (particularly in a vote center model, which gives voters the freedom to vote at *any* vote center if the one nearest them has a long line). And in the context of the statute, the "appropriate ballot *for that voter*" simply requires officials to provide the voter with a ballot appropriate *to them—i.e.,* a ballot with the correct races and issues for that voter. This is not a "maximalist" reading of the statute, MJP Opp. at 6; it is a straightforward one, confirmed by the EPM's application of this statute. *See* EPM at 126 (explaining an "appropriate ballot" under A.R.S. § 16-411 is a ballot with the "correct ballot style").

Counts V and VI (Race Discrimination). Plaintiffs' allegations for Count V and VI fail to state violations of the Free and Equal Elections Clause or Suffrage Clause. Mot. at 12–13. For Count V, Plaintiffs allege that the locations of voting centers make it "more difficult for Whites and Native Americans" to vote. Compl. ¶ 72. Even if true, that would not rise to a violation of the Free and Equal Elections Clause, which ensures that voters are "not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will." *Chavez v. Brewer*, 222 Ariz.

309, 319 ¶ 33 (App. 2009). In context, "any other influence that would deter the voter from exercising free will" must mean something akin to intimidation or threat of violence; it cannot mean *any* factor that might make it marginally more difficult to vote, particularly in this context, when Arizona's vote center model *increases* flexibility for voters.

Count VI also fails because the Suffrage Clause requires an action to have been taken "on account of race," Ariz. Const. art. XX, par. 7, and *nothing* in Plaintiffs' complaint alleges that Maricopa distributed vote center locations on account of race. To the contrary, the complaint itself supplies the neutral, non-discriminatory reason for the location of vote centers: to accommodate the demand in dense "urban areas." Compl. ¶ 68.

Count VII (Use of Software in Signature Review). Count VII fails because Arizona law does not prohibit the assistance of software in signature matching. Mot. at 13–14. Plaintiffs suggest that because Section 16-550(A) permits only the "county recorder or other officer in charge" to conduct signature matching, and because that individual is "a human," software cannot be used in signature matching. MJP Opp. at 10, But Plaintiffs' selectively literal interpretation would prohibit anyone besides the recorder, including election staff, from performing signature matching, an absurd outcome and inconsistent reading of the statute. As Plaintiffs themselves argue, courts interpret statutes to avoid such absurd results. *See id*. at 16 (citing *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992)).

Counts VIII and IX (Signature Verification Policies). Plaintiffs' claims that Defendants will fail to conduct signature matching "on information and belief" alone, Compl. ¶¶ 108, 114, 194, 202, remains blindly speculative and insufficient to state a plausible claim. *See* Mot. at 14. Although Plaintiffs fault Maricopa for not putting forward "documentation" proving they will conduct signature matching, MJP Opp. at 12, to survive a motion to dismiss, it is *Plaintiffs'* burden to put forward sufficient allegations to state a claim; not Defendants' burden to disprove Plaintiffs' allegations.

Count XI (Procedures for Curing Ballots). Count XI fails because it invents new curing requirements wholly absent from Arizona law. *See* Mot. at 14–15. The statutory requirement that counties "shall make reasonable efforts to contact a voter" to confirm or

correct their signature, A.R.S. § 16-550(A), would be violated if—as not pled here—the county began rejecting voters' ballots without making reasonable efforts to contact that voter. But Plaintiffs allege no such thing—only that Maricopa's "reasonable efforts" are not the practices Plaintiffs would prefer. Opp. at 13–14. More is required to state a viable claim.

Count XII (Drop Boxes).[5] Count XII also fails because nothing in Arizona law requires that drop boxes be continuously monitored by election officials. Mot. at 15–16. Just last week, Judge Napper rejected a nearly identical claim, holding that Arizona law permits "the use of drop boxes that are not always monitored by election officials," Ex. 1 at 5, which necessarily rejects Plaintiffs' contention that "ballot drop boxes require the continuous presence of election officials." Pls.' Notice of Supp. Authority at 2. As a prior decision from a coordinate court, that well-reasoned opinion is "considered highly persuasive and binding" because it is not "clearly erroneous" and "conditions have [not] changed so as to render the prior decision inapplicable." *State v. Healer*, 246 Ariz. 441, 445 ¶ 9 (App. 2019) (quotation omitted).

In any event, Plaintiffs' lengthy parsing of A.R.S § 16-1005(E) misses the point: Even if this criminal provision applied to official drop boxes—a dubious proposition—there is no basis to conclude that a drop box is only "staffed" if it has "at least two election officials [] present at the box and positioned close enough to be able to view each person who deposits ballots into the box." Compl. ¶ 231. That specific requirement, which Plaintiffs invented out of whole cloth, is entirely absent from Arizona law. And as Plaintiffs concede, "[t]his Court should not read into the statute language the Legislature chose not to include." Opp. at 16. The Court should adhere to Judge Napper's recent holding and dismiss this claim.

CONCLUSION

Intervenors request this Court dismiss Plaintiffs' claims with prejudice.

[5] Plaintiffs contend that Intervenors "concede[d]" that drop boxes are "ballot drop off sites" within the meaning of A.R.S § 16-1005(E). Opp. at 14. Not so. Because other Defendants had adequately addressed that argument, as Plaintiffs note, Intervenors declined to separately address it.

RESPECTFULLY SUBMITTED this 29th day of April, 2024.

COPPERSMITH BROCKELMAN PLC

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EXHIBIT 1

SUPERIOR COURT, STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation, and MARY KAY RUWETTE, individually, Plaintiffs, vs. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant, ARIZONA ALLIANCE OF RETIRED AMERICANS; and MI FAMILIA VOTA, Intervenors-Defendants.	**Case No.** S1300CV202300872 S1300CV202300202 **UNDER ADVISEMENT RULING AND ORDER**
ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation; RESTORING INTEGRITY AND TRUST IN ELECTIONS, a Virginia nonprofit corporation; and DWIGHT KADAR, an individual, Plaintiffs, vs. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	

HONORABLE JOHN NAPPER	**BY:** Felicia L. Slaton, Judicial Assistant
DIVISION 2	**DATE:** April 25, 2024

The Court has received and reviewed the parties' cross-*Motions for Summary Judgment*, *Motions to Dismiss*, the *Responses*, and the *Replies*. The Court also held oral arguments and reviewed supplemental pleadings and evidentiary submissions. The Court has reviewed the files in both cause numbers. In both cases, the Court finds the 2023 Elections Procedures Manual complies with Arizona law. Accordingly, the Plaintiffs' *Motions for Summary Judgment* are **denied**, and the Defendants' *Motions for Summary Judgment* are **granted**.

Facts and Procedural History

The Arizona Legislature is responsible for passing laws controlling elections. *Ariz. Const. Art.VII §1, Moore v. Harper,* 143 S. Ct. 2065, 2090 (2023). Conducting elections is a complicated process and the Legislature has required the Secretary of State (the elections officer for the State)("Secretary"), to draft an election procedures manual ("EPM"). *A.R.S. § 16-452(A)*. The purpose of this manual is 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." *Id.* Once signed by the Governor, the Attorney General, and the Secretary, the EPM is binding and violating its requirements is a criminal offense. *A.R.S. §16-452(C).* However, any section of the EPM which violates an election statute does "not have the force of law." *Leibsohn v. Hobbs*, 254 Ariz. 1, ¶22 (2022).

The issues before the court are: (1) did the Legislature intend for a prior ballot envelope to be a part of a voter's registration record pursuant to A.R.S. §16-550 and §16-550.01 (Cause # P1300CV202300202); and (2) does the use of unmonitored drop-boxes to collect early ballots violate Arizona law. (Cause # P1300CV202200872)

Application of Law

Registration Record

This part of the litigation involves how early ballots are verified based on the definition of the phrase "registration record" in A.R.S. §16-550 and §16-550.01. In a prior ruling on a Motion to Dismiss, the Court found the signature on a previous ballot envelope did not meet the definition of a registration record in A.R.S. §16-550. Since this ruling, a new EPM has been adopted and the Arizona Legislature has relied on the new EPM when reenacting and amending the relevant statute. As explained below, based on these changes, the Court finds the Legislature intends for a previous ballot envelope to be included in a voter's registration record.

Verification

In order to have his/her early vote counted, a voter must fill out their ballot and place it in a pre-printed envelope. *A.R.S. §16-547(A)*. The outside of this envelope contains an affidavit indicating the voter is: (1) registered to vote in the county; (2) has not voted and will not vote anywhere else; and (3) personally filled out the ballot within the envelope. *Id.* The voter signs the envelope attesting to these facts under penalty of perjury. *Id.*

When the early ballot is received by the county recorder, they then go about trying to determine if the signature on the envelope is the signature of the registered voter. *A.R.S. § 16-550(A)*. This is done by comparing the ballot envelope to the signature "on the elector's registration record." If the two signatures are clearly consistent, then the vote is counted. *A.R.S. §16-550.01(B).* If the two signatures are not consistent, the voter is notified and given the opportunity to confirm the signature. *Id.*

The current EPM allows a county recorder to compare the signature on the current voter envelope to the signature on the envelope from prior early votes. The signature from the prior early vote envelopes being a part of the "registration record." Meaning, the 2023 EPM includes in the definition of "registration record" the previous act of early voting.

Legislative Reenactment

When this litigation began, the 2019 EPM remained in effect. The 2019 EPM did not include this method for verifying a signature. However, the parties do not dispute the Secretary told recorders that a prior verified vote was a proper tool for comparison. The 2023 EPM formally adopts this process and includes "prior early ballot affidavits" as part of the registration record. *Ariz. Sec. State. 2023 Elec. Pro. Man. VI.(A)(1)*.

As mentioned above, the Legislature recently amended several elections statutes. These include changes to A.R.S. §16-550 and the addition of A.R.S. §16-550.01. These statutory amendments came after the 2023 EPM was implemented. The amendments rely heavily on the text from the 2023 EPM. In some places the statutes outright adopt language directly from the 2023 EPM. The new statutes also use the phrase "registration record" multiple times.

The Legislature had every opportunity to eliminate "prior early ballot affidavits" as a comparison tool but chose not to do so. Nothing in these amendments suggests the Legislature found the EPM's working definition of registration record was improper. The Legislature also chose not to provide a definition of registration record in the amended or newly enacted statutes.

The Legislature is presumed "to know how an administrative department interprets the statutes it is responsible to administer." *State, ex rel., Arizona Dept. Revenue v. Short*, 192 Ariz. 322, 325 ¶14 (App. 1998). In a different context, the Arizona Supreme Court has held courts can infer that the legislature approves of another body's definition of a statute when there, "is some reason to believe that the legislature has considered and declined to reject that interpretation." *Lowing v. Allstate Ins. Co.*,176 Ariz. 101, 106 (1993). More directly, when the, "legislature re-enacts a statute after uniform construction by the officers required to act under it, the presumption is that the legislature knew of such construction and adopted it in re-enacting the statute." *Jenny v. Arizona Express, Inc.*, 89 Ariz. 343, 346 (1961) (*see also*, *Mummert v. Thunderbird Lanes*, Inc, 107 Ariz. 244 (1971).

This is exactly what has happened here. The Arizona Legislature tasked the Secretary of State, the Attorney General and the Governor with constructing the EPM. When they did so in 2023, they included prior ballot envelopes in the working definition of "registration record." There can be little doubt the Legislature was aware of this definition because they included much of the language from the EPM into this new legislation, including the phrase registration record.

This Court may or may not have been correct about the definition of registration record when it ruled on the previous Motion to Dismiss. However, its prior reasoning is no longer sound based on the Legislature's adoption of the definition of registration record from the 2023 EPM when reenacting A.R.S. §16-550(A) and enacting of A.R.S. §16-550.01. Regardless of the prior ruling of this Court, it is now presumed from these legislative changes that the Legislature intended to adopt the EPM's use of prior ballot envelopes to verify signatures.

Off the Rolls

This reading of registration record also complies with Arizona statute in other ways. Intervenor *Mi Familia Vota* points out: a person that requests to vote by early ballot must actually do so or they will be removed from the early voting rolls. *A.R.S. §16-544(H)(4)*. This failure to early vote could ultimately cause a

voter to be dropped from the voting rolls altogether. Meaning, the act of early voting keeps an individual registered to vote in future elections. In Arizona, early voting is simultaneously registering.

Plaintiffs acknowledge the failure to early vote across time can result in a person no longer being able to vote. They argue this path to being off the rolls is so byzantine that it could not have been on the Legislature's mind when they used the phrase "registration record." However, there is no factual record before the Court substantiating this argument. Even though somewhat convoluted, in the system constructed by the Legislature, the act of early voting operates to ensure a voter remains registered.

While not conclusive of legislative intent, this voting/registration paradigm is consistent with the Legislature adopting the 2023 EPM's use of prior ballot envelopes to verify signatures as registration records. Courts are to "harmonize and give effect" to all provisions of a statutory scheme. *Marsh v. Atkins*, 256 Ariz. 233, ¶14 (App. 2023). Including prior ballot envelopes in the definition of registration accomplishes this goal.

Database Argument

The Secretary argues signatures on prior ballot envelopes are registration records because they are kept in a database containing other records related to voters and elections. This database must be kept pursuant to federal statute. The Court is not compelled by this argument. Where or how something is stored does not define the item. Whether or not a record is a "registration record" can only be determined by the content of its character, as defined by the Legislature, and not by the company it keeps.

Conclusion

The Court finds the Legislature intended to adopt the 2023 EPM's use of prior voting envelopes in the definition of registration record when it reenacted A.R.S. §16-550 and adopted A.R.S. §16-550.01. Using this definition also harmonizes other portions of the Arizona elections statutes. Accordingly, the Plaintiffs' *Motion for Summary Judgment* is **denied**. The cross-*Motions for Summary Judgment* are **granted**.

Drop Boxes

Staffed vs. Monitored

When this litigation began, the 2019 EPM was also still in effect. The prior version of the EPM allowed for "unstaffed drop-boxes." The Plaintiffs objected to this portion of the EPM arguing unstaffed drop boxes were not allowed by Arizona statute. The direction of this litigation was also impacted by the enactment of the 2023 EPM and the Legislature amending several voting statutes.

The 2023 EPM creates a process for counties to use drop boxes for the collection of early ballots. *2023 Elections Procedures Manual II(I) pg. 71*. A county recorder may opt to use drop-boxes and the location of the drop-boxes must be approved by the board of supervisors for the county. *Id*. Any county choosing to utilize drop-boxes must comply with the EPM's drop-box requirements. *Id.*

The EPM requires that, "a ballot drop-box shall be located in a secure location such as inside or in front of a federal, state, local or tribal government building." *Id.* At issue here are drop-boxes that are placed outside government buildings. As to these drop-boxes, the EMP states, "A drop-box staffed by elections officials may be placed outdoors and shall be securely fastened in a manner to prevent moving or tampering." *Id.* at II(I)(1)(a).

The section of the EPM matches A.R.S. §16-1005(E) which states, "a person or entity that knowingly solicits the collection of voted or unvoted" that is found "to be serving as a ballot drop off site, other than those established and staffed by certain election officials" is guilty of a class 5 felony. The text of the 2023 EPM does not deviate from Arizona statute.

The issue before the Court is: what is the definition of the word "staffed" as used in the EPM and Arizona statute. The Arizona code states, "in order to be valid and counted, the ballot affidavit must be delivered to the office of the county recorder or other officer in charge of elections or may be deposited at any polling place in the county not later than 7:00 p.m. on election day." *A.R.S. §16-547(D)*. From this, Plaintiffs argue "staffed" must mean the ballot must be delivered to a drop-box which is monitored by an officer in charge of elections. Plaintiffs appear to be arguing "staffed" and "monitored" are equivalents.

While not defining the term "staffed," the EPM does not require that staffed drop-boxes always be monitored by an election worker. For instance, the EPM mandates that a fire suppression device be placed inside all ballot drop-boxes, "that are placed outdoors or not within the sight of elections officials." *2023 Elections Procedures Manual Sec. I(5) pp. 7.* Therefore, the definition of staffed in the EPM clearly does not require a drop-box to be indoors or be monitored at all times.

The Arizona Legislature recently amended A.R.S. §16-547(D). This amendment occurred after the creation of the 2023 EPM. As outlined above, the Legislature is presumed to be aware of the EPM's use of staffed but unmonitored drop-boxes. *State, ex rel., Arizona Dept. Revenue v. Short*, 192 Ariz. 322, 325 ¶14 (App. 1998). Further, the reenactment of A.R.S. §16-547(D) without providing an alternative definition for deliver or staffed, indicates the Legislature was adopting the use of these types of drop-boxes for the delivery of ballots. *Jenny v. Arizona Express, Inc.*, 89 Ariz. 343, 346 (1961) (*see also*, *Mummert v. Thunderbird Lanes*, Inc, 107 Ariz. 244 (1971).) The leaving of item for another to pick up later is also consistent with the dictionary definition of deliver. (*See*, *Merriam Dictionary* https://www.merriam-webster.com/Dictionary/Deliver, searched 4/23/2024 "to take and hand over to or leave for another.").

The Legislature has delegated to the Secretary the responsibility to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting," including the "collecting of ballots." *A.R.S. §16-452(A)*. In this instance, the Secretary has included as a method for collecting ballots the use of drop-boxes that are not always monitored by elections officials. After the reenactment of the A.R.S. §16-547(D), the use of these drop-boxes to collect ballots is well within the discretion of the Secretary.

Standing

The 2019 EPM contained a definition of "unstaffed" drop-box and outlined the requirements for their use. Plaintiffs argued these drop-boxes violated the text of Arizona statute. Therefore, the Plaintiffs sought to force the Secretary to perform the non-discretionary act of following Arizona law. A writ of mandamus may be an appropriate tool in these circumstances. *State Board of Technical Registration v. Bauer*, 84 Ariz. 237, 239 (1958).

The 2019 EPM is no longer in effect and the 2023 EPM no longer uses unstaffed drop-boxes. The 2023 EPM requires all drop-boxes to be staffed. The 2023 EPM does not require the staffed drop-boxes to always be monitored. As outlined above, the Legislature was aware of the use of this type of drop-box when it reenacted A.R.S. §16-457(D). At a very minimum, the reenactment of this statute indicates the legislative intent that the

use of these drop-boxes is well within the discretion of the Secretary. While mandamus is a tool to require a government official to, "compel a public officer to perform a discretionary act" it cannot be used to require the official "to exercise that discretion in a particular manner." *Blankenbaker v. Marks*, 231 Ariz. 575, 577 ¶7 (App. 2013).

The Secretary, the Attorney General and the Governor exercised their discretion in the defining of drop-boxes in the 2023 EPM. The Legislature adopted this defintion when it reenacted and amended the statute at issue. Accordingly, Plaintiffs do not have standing to require the Secretary to exercise his discretion in a particular manner. *Blankenbaker*, at ¶ 7.

Conclusion

It is within the Secretary's discretion to allow counties to choose to use drop-boxes. The Legislature has not required that these drop-boxes always be monitored. The decision to use staffed but unmonitored drop-boxes is within the discretion of the Secretary. Accordingly, the Plaintiffs' *Motion for Summary Judgment* is **denied**. The cross-*Motions for Summary Judgment* are **granted**.

IT IS THEREFORE ORDERED, in Cause # P1300CV202300202, the Plaintiffs' *Motion for Summary Judgment* is **denied**.

IT IS FURTHER ORDERED, in Cause # P1300CV202300202, the Defendant and Intervenors' *Cross-Motion for Summary Judgment* is **granted**.

IT IS FURTHER ORDEREED, in Cause # P1300CV202200872, the Plaintiffs' *Motion for Summary Judgment* is **denied**.

IT IS FURTHER ORDEREED, Cause # P1300CV202200872, the Defendants' *Motion for Summary Judgment and Intervenors' Motion to Dismiss* are **granted**.

IT IS FUTHER ORDERED, Defendants are to file a form of Judgment with the Court within 10 days of this Order. The Judgment shall contain the appropriate language from Rule 54 of the Arizona Rules of Civil Procedure.

DATED this 25th day of April, 2024.

eSigned by NAPPER, JOHN 04/25/2024 13:23:35 II8T1OaJ

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