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ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

STRONG COMMUNITIES FOUNDATION OF ARIZONA INCORPORATED, et al.,

Plaintiffs,

v.

YAVAPAI COUNTY, et al.,

Defendants,

ARIZONA ALLIANCE FOR RETIRED AMERICANS; and VOTO LATINO,

Intervenor-Defendants.

No. S1300CV202400175

INTERVENOR-DEFENDANTS ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Assigned to the Hon. Tina Ainley)

INTRODUCTION

Plaintiffs' motion for partial summary judgment on their drop box claim (Count XII) fails on every level. As a threshold matter, after failing to allege sufficient facts to support their standing to pursue this claim in their complaint, Plaintiffs fail to offer even the bare minimum evidence to support their standing, much less any evidence or cognizable explanation of any injury they suffer as a result of Defendants' actions. Plaintiffs also fail to show they possess a private right of action to enforce the statute that they claim Defendants are violating—A.R.S. § 16-1005(E), which is a criminal statute, not an election administration statute. Plaintiffs' claim also fails on the merits. As is true of their lawsuit as a whole, Plaintiffs' motion is a thinly veiled attempt to remake Arizona law to match Plaintiffs' preferred policies. In doing so, Plaintiffs ask the Court to ignore existing Arizona election administration statutes and the Elections Procedures Manual ("EPM"), as well as a recent judgment from a coordinate court of this division rejecting a similar claim.

Rather than engage with these authorities—all of which make clear that unmonitored drop boxes are lawful—Plaintiffs build their contrary claim on a single word in a penal provision, claiming that the word "staffed" in A.R.S. § 16-1005(E), a criminal statute prohibiting the establishment of unauthorized ballot collection sites "other than those established and staffed by election officials," requires that "at least two election officials are present at the [drop] box and positioned close enough to be able to view each person who deposits ballots into the box such that the election officials can observe conduct that might be unlawful ballot harvesting." *See* Compl. ¶ 231. Plaintiffs' theory—that A.R.S. § 16-1005(E), which is one provision in a list of misdemeanors and felonies related to ballot malfeasance, is actually an election administration mandate for continuous, physical monitoring by two election officials—is flat-out wrong. To the contrary, as Judge Napper found, Arizona law permits "the use of drop boxes that are not always monitored by election

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officials." Under Advisement Ruling & Order at 5–6, *Ariz. Free Enter. Club v. Fontes*, No. S1300-CV-2023-00872 (Yavapai Cnty. Sup. Ct. Apr. 25, 2024) (attached as Exhibit A).

BACKGROUND

Plaintiffs move for partial summary judgment solely on Count XII which relates to drop boxes. Plaintiffs' Complaint seeks "[a]n injunction and/or a writ of mandamus prohibiting the Defendants from providing ballot drop boxes that are not staffed all the time that the box is available for the deposit of ballots" as well as "[a]n injunction and/or a writ of mandamus stating that the Defendants may not collect, count, or open any ballots deposited into a drop box that is not staffed." Compl. at 42.

Plaintiffs' statement of facts in support of their motion for summary judgment establishes only that Yavapai County uses drop boxes that are not continuously physically monitored by election officials while they are available for ballot receipt. *See* Pls.' Statement of Facts ¶¶ 1–3. Plaintiffs' statement of facts does not, however, set forth any evidence establishing (1) any of Plaintiffs' identities, including their residence or status as registered voters, (2) that any Plaintiff intends to vote in future elections or even continue to reside in Yavapai, or (3) any harm that any Plaintiff has suffered or likely will suffer as a result of Yavapai County's use of unmonitored drop boxes. Similarly, in Plaintiffs' Complaint, nowhere do Plaintiffs allege that Yavapai County's election administration practices have harmed or likely will harm them. At most, as it relates to Count XII, Plaintiffs' Complaint alleges an "unreasonable risk that [unstaffed drop boxes] may be used to facilitate illegal ballot harvesting or other fraud." Compl. ¶ 142.

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LEGAL STANDARD

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *Tilley v. Delci*, 220 Ariz. 233, 236 ¶ 7 (App. 2009). In deciding a motion for summary judgment, the Court considers those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits" "which are brought to the court's attention by the parties." *Tilley*, 220 Ariz. at 236–37 ¶ 10 (citing

Choisser v. State ex rel. Herman, 12 Ariz. App. 259, 261 (1970)); *see also* Ariz. R. Civ. P. 56(c)(3), (5)–(6). A court must view the evidence in a light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7 (1998); *Orme School v. Reeves*, 166 Ariz. 301, 309–10 (1990).

"A court does not need to decide whether the moving party has satisfied its ultimate burden of persuasion on the summary judgment motion unless it first finds the moving party has discharged its initial burden of production." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116 ¶ 18 (App. 2008), as amended (Jan. 23, 2008) (citation and quotation marks omitted). To meet its "initial burden of production," a plaintiff must submit "undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 293 ¶ 20 (App. 2010).

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ARGUMENT

I. Plaintiffs lack standing.

Plaintiffs lack standing to pursue Count XII, both because they have failed to put forward sufficient evidence to demonstrate they will be injured by unmonitored drop boxes, and because Plaintiffs lack a private right of action to enforce a criminal provision.

A. Plaintiffs offer no evidence sufficient to establish an injury.

As Intervenor-Defendants explained in their motion to dismiss, all of Plaintiffs' claims, including Count XII, fail because Plaintiffs did not allege sufficient facts to establish standing for any of their claims. *See* Intervenor-Defendants' Mot. to Dismiss ("MTD") at 2–7. Now, Plaintiffs have also failed to offer any evidence of injury establishing their standing. This failure to meet their initial burden of production precludes summary judgment on Count XII. Standing is a threshold question that must be resolved before reaching the merits. *See Sears v. Hull*, 192 Ariz. 65, 68 ¶ 9 (1998). To have standing, a plaintiff must show "a distinct and palpable injury giving [it] a personal stake in the controversy's outcome." *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 ¶ 8 (App. 2008) (citation omitted).

The initial question presented by Plaintiffs' motion, therefore, is "whether [Plaintiffs] presented sufficient undisputed admissible evidence to establish [their] entitlement to judgment." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213 ¶ 17 (App. 2012). The answer is indisputably no—Plaintiffs ignore Arizona's "rigorous standing requirement" altogether. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). Indeed, Plaintiffs failed to introduce any evidence at all to establish that they are even Arizona voters, that any of them live in Yavapai County, or that they intend to vote in future elections—the bare minimum necessary to establish standing here, even setting aside their separate failure to provide evidence showing how unmonitored drop boxes were likely to harm them. *See Burks v. City of Maricopa*, No. 2 CA-CV 2017-0177, 2018 WL 3455691, at *4 (Ariz. App. July 16, 2018) (affirming denial of summary judgment where the plaintiff "has not provided any evidence of any particular injury to her, except the general allegations in her complaint" (cleaned up)).

Even if Plaintiffs *had* submitted evidence establishing Plaintiffs' identities as registered voters of Yavapai County, however, they still fall short of establishing standing for Count XII because they have not shown that unmonitored drop boxes are likely to cause them any injury at all, much less a "distinct and palpable" injury. *Paulsen*, 220 Ariz. at 406 ¶ 8. As Intervenor-Defendants explained in their Motion to Dismiss, Plaintiffs failed to allege any injury in the Complaint arising from Yavapai County's election administration. *See* MTD at 2–6. At most, as it relates to Plaintiffs' drop box claim, Plaintiffs hypothesize that unmonitored drop boxes "may be used to facilitate illegal ballot harvesting or other fraud." Compl. ¶ 142. But courts may not "speculate about hypothetical facts" about future harm "that might entitle the plaintiff to relief," *Cullen v. Auto Owners Ins. Co*., 218 Ariz. 417, 420 ¶ 14 (2008) (citation omitted), and a speculative, conclusory allegation that an unknown third party may someday use an unmonitored drop box to commit fraud is insufficient to establish the kind of "distinct and palpable" injury necessary for standing.

Indeed, Plaintiffs offer no evidence whatsoever of election fraud related to unmonitored drop boxes. Instead, they point only to the testimony of a lone legislator who,

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in 2011, stated he supported S.B. 1412, which criminalized various acts of ballot interference, because he personally believed that "we have had for years and years and years, decades really, a lot of voter fraud … and this bill will address that." Pls.' Mot. for Summ. J. at 4 ("Mot.") (quoting Senator Don Shooter). Although Intervenor-Defendants do not oppose this Court taking judicial notice of these legislative materials and the fact that Senator Shooter made this statement, it does not establish any likely injury to Plaintiffs that can support their standing to pursue this claim in this case. For one, Senator Shooter's statement was not about the use of unmonitored drop boxes. S.B. 1412 was a wide-ranging bill imposing criminal penalties on various behaviors, from offering compensation for ballots, to selling ballots, to misrepresenting oneself as an election official, to collecting ballots without submitting those ballots, and more. *See* S.B. 1412, 50th Leg., 1st Reg. Sess. (Ariz. 2011). Moreover, Senator Shooter did not explain the basis for his belief that fraud had occurred, specify what fraud he believed had occurred, or point to any evidence to support that belief. Perhaps even more importantly, Arizona has now been using unmonitored drop boxes for decades. If such boxes were truly a breeding ground for abuse and fraud, surely Plaintiffs could muster at least a single example of misconduct.

Plaintiffs' claim of fraud involving unmonitored drop boxes is also speculative because Arizona uses a wide variety of measures to ensure ballot security, from using tamper-evident envelopes and ballot tracking, *see* A.R.S. §§ 16-545(B)(2), 16-550(F), to employing a robust signature verification process before ballots can be counted, *see id.* § 16-550(A). In other words, even assuming an unknown third party *wanted* to use an unmanned drop box to submit fraudulent ballots, there are a host of measures that would prevent such misconduct. For that reason, Plaintiffs' vague claims of harm from unmonitored drop boxes are doubly speculative and insufficient to confer standing. *See Cullen*, 218 Ariz. at 420 ¶ 14. Moreover, Plaintiffs' claim of harm is a classic generalized grievance, "shared alike by all or a large class of citizens generally," and "not sufficient to confer standing." *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88, 88 ¶ 11 (App. 2023) (quoting *Sears*, 192 Ariz. at 69 ¶ 16); *see also Burks*, 2018 WL

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3455691, at *4 (affirming denial of summary judgment because the plaintiff "failed to establish an injury that is peculiar to her or at least more substantial than that suffered by the community at large").

Finally, as Intervenor-Defendants explained in their Motion to Dismiss, Plaintiffs cannot evade standing requirements by merely incanting mandamus relief. *See* MTD at 6–7. It is well established that mandamus cannot be used to "restrain a public official from doing an act." *Sears*, 192 Ariz. at 68 ¶ 11 (quotation omitted). But that is precisely what Plaintiffs seek here—"a writ of mandamus prohibiting the Defendants from providing ballot drop boxes that are not staffed all the time that the box is available for the deposit of ballots" and "a writ of mandamus stating that the Defendants may not collect, count, or open any ballots deposited into a drop box that is not staffed." Compl. at 42. In other words, Plaintiffs' Complaint does not seek relief compelling Yavapai to continuously monitor drop boxes—likely because there is no statute requiring them to do just that—and instead only seeks to prohibit them from acting in certain ways, which cannot be restricted through mandamus. *See Sears*, 192 Ariz. at 68 ¶ 11.

Mandamus is also inappropriate for Plaintiffs' drop box claim because it "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). As explained below, the Arizona Legislature has delegated to the Secretary discretion in fashioning rules for the return of early ballots, and the Secretary has not required that counties use continuously monitored drop boxes. *See infra* at II.A. For that reason, too, Plaintiffs' Count XII is not a proper mandamus claim, and Plaintiffs therefore cannot avail themselves to its comparatively relaxed standing standard.

Because Plaintiffs fail to demonstrate any injury sufficient to confer standing, this Court should deny their motion for summary judgment without reaching the merits. *See Sears*, 192 Ariz. at 68 ¶ 9; *Thruston*, 218 Ariz. at 116 ¶ 18.

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B. Plaintiffs lack a private right of action to enforce A.R.S. Section 16-1005(E).

Plaintiffs separately lack standing on Count XII because they seek to enforce a criminal provision, A.R.S. § 16-1005(E), but lack a private right of action to do so. "The general rule is that no private cause of action should be inferred based on a criminal statute where there is no indication whatsoever that the legislature intended to protect any special group by creating a private cause of action by a member of that group." *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 294 (App. 1994) (cleaned up); *see also Warne v. Kenney*, No. 1 CA-CV 18-0374, 2019 WL 1467981, at *2 (Ariz. App. Apr. 2, 2019) (applying same principle).

Although Plaintiffs bear the burden to establish their standing, Plaintiffs offer no evidence that the Legislature intended to grant a private right of action to them (or anyone) when it enacted A.R.S. § 16-1005(E). To the extent the Legislature did intend to confer a private right of action under A.R.S. § 16-1005, which criminalizes multiple forms of ballot malfeasance, at most it would be to only the victim whose ballot was unknowingly taken from them under A.R.S. § 16-1005(H), not to any Arizona citizen who takes issue with how Arizona election officials manage drop boxes in general. For this reason, too, Plaintiffs lack standing for Count XII, and this Court should deny their motion.

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II. Plaintiffs' claim fails on the merits as a matter of law.

Plaintiffs' motion should also be denied for the simple reason that drop boxes—including those without continuous monitoring—are perfectly legal in Arizona. Plaintiffs' motion ignores the applicable statutes and the operative EPM provisions regulating the collection of ballots through drop boxes. In short, Arizona law delegates to the Secretary of State the authority to establish the means for early voting, including drop boxes. *See* A.R.S. § 16-452(A). The Secretary has exercised his authority in the 2023 EPM, which explicitly permits drop boxes that are not physically monitored.[1] Remarkably, Plaintiffs also ignore

[1] 2023 Elections Procedures Manual at 71–74, ARIZ. SEC'Y OF STATE (Dec. 2023) ("2023 EPM"), available at https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_112024.pdf.

Judge Napper's recent decision rejecting a virtually identical claim about the legality of unmonitored ballot drop boxes. *See* Ex. A at 5–6.

Instead of engaging with controlling statutory authority, the operative EPM, and on-point case law, Plaintiffs rest their argument on a single, inapplicable *penal* provision. *See* A.R.S. § 16-1005(E) (prohibiting people or entities from mispresenting their authority to collect voted ballots). Even if the sole provision Plaintiffs rely on applied to Defendants or any of the issues in this case, that statute cannot be read to impose Plaintiffs' desired continuous two-person physical monitoring requirement on all drop boxes. Plaintiffs are therefore not entitled to judgment as a matter of law.

A. Neither Arizona's early voting statutes nor the 2023 EPM require drop boxes to be continuously monitored by two election officials.

Arizona law permits the use of secure ballot drop boxes without constant physical monitoring by election officials. To the extent Plaintiffs believe it would be better policy to have 24/7 in-person monitoring for drop boxes, Plaintiffs' efforts to change Arizona law "are more appropriately directed to the legislative and executive branches of the state government"—not this Court. *Sears*, 192 Ariz. at 69 ¶ 16 n.6 (citation omitted).

As it stands, however, the Legislature "expressly delegated to the Secretary the authority to promulgate rules and instructions for early voting." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 15 (2020) (citing A.R.S. § 16-452(A)). Specifically, Arizona law requires the Secretary of State 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.

A.R.S. § 16-452(A) (emphasis added). Arizona law also requires that early ballots be "delivered or mailed to the county recorder." *Id.* § 16-548(A). Consistent with this delegation of authority and statutory requirements, the Secretary established rules authorizing and governing drop boxes in the 2023 EPM. *See* 2023 EPM at 71–74 (providing rules and procedures for the security of all drop boxes, including instructions that drop

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boxes shall be secured to prevent moving, tampering, or unauthorized removal of the physical boxes or the ballots inside). These rules provide for the "maximum degree of correctness," "uniformity," and "efficiency" for "collecting" ballots submitted via drop box during "early voting." A.R.S. § 16-452(A). *Nowhere* does Arizona law require that election officials "be continuously present" at each drop box as Plaintiffs contend, *see* Pls.' Statement of Facts ¶ 3, much less that they be watched by "at least two election officials" who are "positioned close enough to be able to view each person who deposits ballots into the box." Compl. ¶ 231.

To the contrary, the 2023 EPM—which has the force of law, *see Fontes*, 250 Ariz. at 63 ¶ 16—explicitly contemplates that some ballot drop boxes will not be continuously monitored. *See* 2023 EPM at 71 (differentiating between those drop-boxes that are "within the view and monitoring" of County or election workers and those that are not); *id*. at 72 (differentiating between drop boxes that are "within the sight of election officials at all times" and those that are not). But all drop boxes, of course, are required to be secured in some fashion, including (1) securely fastened to prevent moving to tampering, (2) secured by a lock openable only by election officials, (3) having a slot that is not large enough for ballots to be removed, among other security measures. *See id*. at 71–74.

Although Plaintiffs do not acknowledge it, just earlier this year Judge Napper rejected a highly similar claim to Plaintiffs' Count XII. In *Arizona Free Enterprise*, which challenged the legality of the 2023 EPM's use of unmonitored drop boxes, Judge Napper explicitly held that Arizona law permits "the use of drop boxes that are not always monitored by election officials," Ex. A at 5, and that "the EPM clearly does not require a drop-box to be . . . monitored at all times." *Id*. Judge Napper found that it is within the discretion of the Secretary and county officials to determine how to utilize drop boxes, as Arizona law does not mandate whether or how drop boxes should be monitored by elections officials. *See id.* at 5–6. Judge Napper's decision should, at a minimum, be "considered highly persuasive" because it is not "clearly erroneous" and "conditions have [not] changed

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so as to render the prior decision inapplicable." *State v. Healer*, 246 Ariz. 441, 445 ¶ 9 (App. 2019) (quotation omitted).

Had the Legislature wanted to require continuous monitoring of drop boxes by election officials, it knows precisely how to do so, and has imposed similar requirements for other election administration processes. *See, e.g.*, A.RS. §§ 16-564(B) (requiring "two members of the election board" to accompany a locked ballot box moved in an emergency), 16-562(A) (requiring that "neither the ballot boxes nor the voting booths [shall be] hidden from view"), 16-564(A) (requiring polling place ballot boxes to be set up "in the presence of the persons assembled at the polling place"), 16-566(A) (requiring voting booths to be set up "in clear view of the election officers"), 16-570(B) (requiring voting machines to be placed "in full view of all election officers and observers at the polling place"). The Legislature's choice to omit such requirements from drop boxes strongly suggests an intentional determination that this Court should not override. *See Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249–50, ¶ 8 (App. 2006) ("[W]e assume that when the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language."). Again, should Plaintiffs disagree with this choice, they should take that up with the Legislature—not this Court. *See Sears*, 192 Ariz. at 69 ¶ 16 n.6.

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B. A.R.S. Section 16-1005(E) does not require drop boxes to be continuously monitored by two election officials.

Ignoring the applicable statutes described above, the operative EPM, and Judge Napper's ruling entirely, Plaintiffs instead zero in on a single criminal provision of Arizona law which they say prohibits drop boxes that are not continuously monitored by two elections officials. Not only is it implausible that the Legislature hid an enormous change in election procedures in a criminal statute, but it is also far from clear that A.R.S. § 16-1005(E) even applies to ballot drop boxes in the first place. And even if it did, the plain language of the statute simply does not require continuous monitoring by two elections officials—a requirement that Plaintiffs make up out of whole cloth.

1. A.R.S. Section 16-1005(E) is not meant to regulate election officials' administrative procedures.

As explained, the Legislature set forth procedures for early voting in Title 16, Chapter 4 ("Conduct of Elections") as implemented by the Election Procedures Manual. *See supra* at II.A. Plaintiffs would instead have this Court ignore all of that and hold that the Legislature in fact overrode those election procedures in Title 16, Chapter 7 ("Penal Provisions"), which set out various misdemeanors and felonies in the voting process relating to counterfeiting ballots, intimidating voters, destroying ballots, and similar conduct. But the Legislature does not "hide elephants in mouseholes." *Carter Oil Co. v. Ariz. Dep't of Revenue*, 248 Ariz. 339, 345 ¶ 19 (App. 2020) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Yet that is exactly what Plaintiffs invite the Court to find, in insisting that 16-1005(E) contains a secret, silent requirement for election officials to engage in 24/7 continuous in-person monitoring of drop boxes in a statute that otherwise primarily regulates the unlawful buying and selling of ballots. This argument is simply untenable.

Contrary to Plaintiffs' understanding, *see* Mot. at 11, Intervenor-Defendants do not dispute that the provisions of A.R.S. § 16-1005 *could* apply to election officials, were election officials to engage in prohibited conduct. For example, if an election official agreed to receive compensation for unvoted ballots, that official could violate A.R.S. § 16-1005(D), just as any private person would violate the statute for the same conduct. But it is implausible that a statute that is otherwise meant to criminalize acts that *interfere* with ballots getting to the proper election officials was also meant to criminalize those election officials carrying out their administrative duties to ensure voters are able to return their ballots for tabulation. This Court should not entertain Plaintiffs' convoluted interpretation of A.R.S. § 16-1005(E) to override clear election procedures set out in statute and the EPM.

2. A.R.S. Section 16-1005(E) does not apply to official ballot drop boxes.

Plaintiffs' argument about A.R.S. § 16-1005(E) rests on several additional tenuous assumptions, starting with the claim that "ballot drop off sites" has the same meaning as physical drop boxes. As Plaintiffs acknowledge, the term "ballot drop off site" is not defined

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in statute, *see* Mot. at 7, and although Plaintiffs assume that "drop boxes" and "ballot drop off sites" are "interchangeable terms," *id*. at 8, Arizona's official EPM plainly distinguishes between the two. Specifically, Chapter 2, Section I, sub-section I, titled "Ballot Drop-Off Locations and Drop Boxes," continually refers to each as different kinds of places for ballot receipt. *See*, *e.g*., 2023 EPM at 71 ("A ballot drop-off location or drop-box shall be located in a secure location"). If drop boxes were themselves "ballot drop-off locations" or sites, this language in the EPM would be meaningless surplusage. But a "cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). Moreover, the EPM also has several provisions that specifically refer to drop boxes, but not ballot-drop off locations. *See* 2023 EPM at 71–74. Arizona law thus plainly views drop boxes and ballot-drop off locations to be different.

Plaintiffs are similarly wrong to suggest that if a drop box does not qualify as a ballot-drop-off site under A.R.S. § 16-1005(E), then it would be legal for any private party to establish an unofficial drop box. *See* Mot. at 8. That is untrue; other provisions of A.R.S. § 16-1005 criminalize "collect[ing] voted or unvoted early ballots from another person" unless the ballot belongs to a family or household member. A.R.S. §§ 16-1005(H), (I)(2); *see also id.* § 16-547(E) (noting that early ballot instructions shall make clear that: "A person may only handle or return their own ballot or the ballot of family members, household members or persons for whom they are a caregiver. It is unlawful under § 16-1005 to handle or return the ballot of any other person."). It is also a misdemeanor to violate the EPM, *see id.* § 16-452(C), which prescribes strict rules for the use of drop boxes to collect early ballots, *see* 2023 EPM at 71–74—rules that would be violated if a private person created an "unofficial" drop box for the collection of early ballots. For all of these reasons, Plaintiffs are wrong to assume that A.R.S. § 16-1005(E) must be read to encompass drop boxes.

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3. Plaintiffs do not show "staffed" means "continuously monitored by two elections officials."

Even if a ballot drop box could be properly understood to be synonymous with a "ballot drop off site" within the meaning of A.R.S. § 16-1005(E), Plaintiffs have not shown that the requirement for such sites to be "established and staffed" by elections officials means that such a site requires the "continuous presence of election officials," Mot. at 3, let alone that "staffed" means "at least two election officials are present at the box and positioned close enough to be able to view each person who deposits ballots into the box such that the election officials can observe conduct that might be unlawful ballot harvesting." *See* Compl. ¶ 231.

Like "ballot drop-off site," no provision of Arizona's election code defines the word "staffed." As Plaintiffs acknowledge, the dictionary definition of "staffed" is "[t]o provide . . . with staff." Mot. at 5–6; Mot. for Summ. J. Ex. 4 at 1. Even using this definition, official drop boxes are "staffed" because they are "provide[d] with staff" when election officials collect ballots from them and otherwise attend to them. Mot. at 6 (citing Ex. 4). The EPM confirms this reading: A ballot drop box would be "established and staffed" by election officials if they create and secure the drop box and regularly retrieve and collect ballots from it. *See* 2023 EPM at 71–73 (requiring elections officials to take certain measures when employing drop boxes). Moreover, this interpretation of "staffed" is consistent with Judge Napper's, who similarly refused to equate "staffed" with the word "monitored." *See* Ex. A at 5–6.

Even though the 2023 EPM plainly does not require constant physical monitoring of drop boxes by election officials, *see supra* at II.A, Plaintiffs look to the 2019 EPM, which is no longer in force, to support their preferred interpretation of the word "staffed." Mot. at 7. But even the 2019 EPM[2] provided for the use of drop boxes that were not always in view of election officials. *See* 2019 EPM at 60. For that reason, even if the 2019 EPM (which

[2] 2019 Election Procedures Manual, ARIZ. SEC'Y OF STATE (Dec. 2019) ("2019 EPM"), available at https://apps.azsos.gov/election/files/epm/2019_elections_procedures_manual_approved.pdf.

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again, no longer has the force of law) were relevant, it confirms that unmonitored drop boxes have long been permitted in Arizona.[3]

In light of the Legislature's decision not to require physical monitoring of drop boxes and its authorization of the Secretary to establish procedures for early voting and collecting ballots, including through unmonitored drop boxes, *see supra* at II.A, this Court may not invent its own requirements not clearly set out in statute. *See, e.g., Town of Scottsdale v. State ex rel. Pickrell*, 98 Ariz. 382, 386 (1965) ("It is a basic principle that courts will not read into a statute something which is not within the manifest intention of the legislature as indicated by the statute itself.").

4. The legislative history of A.R.S. Section 16-1005(E) does not support Plaintiffs' reading of the statute.

Plaintiffs' reliance on legislative history to support their preferred definition of "staffed," Mot. at 3–5, does not provide the clarity that Plaintiffs claim it does. Although Plaintiffs assume A.R.S. § 16-1005(E) "presupposes" the continuous presence of election officials because an earlier version of the statute required anyone delivering more than ten ballots to show identification in another provision of the statute (A.R.S. § 16-1005(H)), that provision was eliminated the year after it was introduced, *see* H.B. 2033, 50th Leg., 2nd Reg. Sess. (Ariz. 2012), and sheds very little light on what was intended by the Legislature in passing A.R.S. § 16-1005(E).

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To the extent the legislative history of A.R.S. § 16-1005(E) is useful at all, it confirms that the provision is meant to criminalize those who misrepresent their authority to collect voted ballots. *See* MTD at 16. Although Plaintiffs attempt to dissect A.R.S. § 16-1005(E) to claim it applies both to misrepresenting one's authority to collect ballots *and* to

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[3] Plaintiffs also attempt to rely on nonbinding guidance from the U.S. Election Assistance Commission ("EAC"), a federal agency created by the Help America Vote Act (HAVA), for what it means for a drop box to be "staffed." Mot. at 6. Although Arizona incorporates HAVA's technical standards for voting machines and tabulating equipment, *see* A.R.S. § 16-442, HAVA itself does not regulate drop boxes, and Plaintiffs do not argue that it does. The EAC's nonbinding guidance is simply not authoritative whatsoever in what the word "staffed" means when used in A.R.S. § 16-1005(E).

providing "unstaffed" drop boxes, the final legislative summary for this provision explained that A.R.S. § 16-1005(E) would "[m]ake[] it a class 5 felony for a person or entity to knowingly solicit the collection of voted or unvoted ballots by misrepresenting itself as election official, or official ballot repository." Arizona House Bill Summary, S.B. 1412, 50th Leg., 1st Reg. Sess (Apr. 26, 2011). In other words, A.R.S. § 16-1005(E) is aimed at criminalizing unauthorized attempts to interfere with voted ballots, not penalizing election officials' own use of ballot drop-off sites.

CONCLUSION

For these reasons, Plaintiffs' motion for partial summary judgment on Count XII should be denied.

RESPECTFULLY SUBMITTED this 18th day of November, 2024.

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Exhibit A

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FILED
DONNA McQUALITY
CLERK, SUPERIOR COURT
04/25/2024 1:24PM
BY: BCHAMBERLAIN
DEPUTY

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. ____ 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.	**Case No.** S1300CV202300872 S1300CV202300202 **UNDER ADVISEMENT RULING AND ORDER**

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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)

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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).

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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**.

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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

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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 Il8T1OaJ

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