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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

KARI LAKE,

Plaintiff,

v.

KATIE HOBBS, *ET AL.*

Defendants.

No. CV2022-095403

**SECRETARY OF STATE ADRIAN FONTES’
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
BEFORE THE HON. PETER A. THOMPSON**

Adrian Fontes, in his official capacity as Arizona Secretary of State (the “Secretary”), asks this Court to dismiss Kari Lake’s remaining claim on remand, Count III, because Ms. Lake fails to state a claim upon which relief can be granted. Ariz. R. Civ. P. 12(b)(6).

Arizonans have been through enough. Enough baseless conspiracy theories recklessly strewn about to sow distrust in our most sacred of institutions. Enough divisive rhetoric. Enough perpetuation of the unsubstantiated narrative that dedicated public servants – our fellow Arizonans; friends and neighbors alike – purposefully and nefariously sabotaged our democracy. Katie Hobbs is our governor. Fair and square. We all know it. So does Ms. Lake. That she may not want to *believe* that reality is no substitute for *actual proof* that “votes were affected in sufficient numbers to alter the outcome of the election based on a competent mathematical basis to conclude that the outcome would plausibly have been different, not simply an untethered assertion of uncertainty.” Supreme Court Order (“Order”) at 4-5 (cleaned up).

1 The issue on remand is narrow and singular. This Court is to review Count III as
2 alleged and:

3 ... determine whether the claim that Maricopa County failed to comply with A.R.S.
4 § 16-550(A) fails to state a claim pursuant to Ariz. R. Civ. P. 12(b)(6) for reasons
5 other than laches, or, whether Petitioner can prove her claim as alleged pursuant to
6 A.R.S. § 16-672 and establish that “votes [were] affected ‘in sufficient numbers to
alter the outcome of the election’” based on a “competent mathematical basis to
conclude that the outcome would plausibly have been different, not simply an
untethered assertion of uncertainty.” (Opinion at ¶ 11.)

7 Order at 4-5.

8 Now is not the time to recast the Complaint as stating something anew, to conduct new
9 discovery, or to present new evidence beyond that identified in the Complaint. We must
10 consider the Complaint as pled, and as pled, it fails to state a claim.

11 Moreover, to the extent Ms. Lake takes issue with what the term “registration record”
12 means (and the Complaint is not clear at all in this regard), she fails to state a claim to the
13 extent she means to argue that the registration record is limited to the signature contained on a
14 voter’s original voter registration form.

15 Finally, the evidence Ms. Lake references in her Complaint (at ¶ 152 – a declaration
16 from someone unqualified to give “expert” testimony), and indeed, the evidence she presented
17 at trial, fails to clearly and convincingly prove that votes were affected in sufficient numbers to
18 alter the outcome of the election based on a competent mathematical basis to conclude that the
19 outcome would plausibly have been different, as opposed to simply an untethered assertion of
20 uncertainty.

21 Accordingly, this Court should dismiss Count III.

22 **I. THE FACTS**

23 This Court is well versed in the facts, so rather than recite them here, the Secretary will
24 point the Court to those facts that matter (or the lack thereof) throughout this memorandum.
25 Even so, it is worth noting that Count III is pled in the Complaint at ¶¶ 149 – 155.

1 **II. LEGAL ARGUMENT**

2 **A. THE LEGAL STANDARD OF REVIEW**

3 The standard of review in an election contest is worth repeating given the Complaint’s
4 failure to meet that standard in pleading Count III. “All reasonable presumptions must favor
5 the validity of an election.” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). The
6 “returns of the election officers are prima facie correct” and courts presume election officers
7 acted in good faith and honestly, absent “clear and satisfactory proof” to the contrary. *Hunt v.*
8 *Campbell*, 19 Ariz., 254, 268 (1917). When considering a motion to dismiss, the Court
9 assumes as true only “well-pled facts, not legal conclusions.” *Grand v. Nacchio*, 225 Ariz.
10 171, 175 n.1 (2010) (cleaned up). “[A] complaint that states only legal conclusions, without
11 any supporting factual allegations, does not satisfy Arizona’s notice pleading standard under
12 Rule 8.” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). Moreover, the Court
13 will “not accept as true allegations consisting of conclusions of law, inferences or deductions
14 that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported
15 conclusions from such facts, or legal conclusions alleged as facts.” *Jeter v. Mayo Clinic Ariz.*,
16 211 Ariz. 386, 389, ¶ 4 (App. 2005); *see also Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17
17 (2006) (assessing election contest under Rule 8); *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959
18 (election contest subject to dismissal for failure to state a claim).

19 **B. THERE IS NEITHER THE RIGHT TO, NOR A NEED FOR, A NEW TRIAL NEARLY 7**
20 **MONTHS AFTER THE 2022 GENERAL ELECTION**

21 If the Supreme Court wanted to require a new trial or additional expanded discovery on
22 remand, then the Supreme Court would have done so by *specifically directing* this Court to
23 permit additional expanded discovery and conduct a new trial. But the Supreme Court made
24 no such direction. This makes sense, “[b]ecause not every case in which error is discovered on
25 appeal needs to be remanded for an entirely new trial” *Anderson v. Contes*, 212 Ariz. 122,
26 125, ¶ 10 (App. 2006); A.R.S. § 12–2103(A) (2003) (“The supreme court ... may remand the
27 action to the court below with directions to render such judgment or order, or may direct that a
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1 new trial or other proceedings be had, as justice may require....”); *Bogard v. Cannon & Wendt*
2 *Elec. Co.*, 221 Ariz. 325, 334 (App. 2009) (“On remand, a trial court must ‘strictly follow’ the
3 mandate of an appellate decision. (citations omitted)). “In non-jury cases, our appellate courts
4 have frequently exercised this authority by reversing or vacating a judgment and remanding for
5 further proceedings that do not require complete retrial of an issue but are more limited in
6 focus, such as the presentation of additional evidence, amendment of findings based on the
7 record, and application of the correct legal standard based on the evidence already received.”
8 *Anderson*, 212 Ariz. at 125, ¶ 10.

9 The Supreme Courts asked this Court to:

10 ... determine whether the claim that Maricopa County failed to comply with
11 A.R.S. § 16-550(A) fails to state a claim pursuant to Ariz. R. Civ. P. 12(b)(6) for
12 reasons other than laches, or, whether Petitioner can prove her claim as alleged
13 pursuant to A.R.S. § 16-672 and establish that “votes [were] affected ‘in sufficient
14 numbers to alter the outcome of the election’” based on a “competent
15 mathematical basis to conclude that the outcome would plausibly have been
16 different, not simply an untethered assertion of uncertainty.” (Opinion ¶ 11.)

17 Order at 4-5. The Supreme Court did not remand this narrow issue, nearly 7 months after the
18 2022 General Election, for the purpose of conducting a new expanded trial, with new expanded
19 discovery and the presentation of evidence apart from that cited in the Complaint as
20 supposedly supporting Count II of Ms. Lake’s contest. Thus, this Court is not necessarily
21 required to conduct a trial on remand or weigh new or additional evidence.

22 Nor should this Court do so, for several reasons. First, Ms. Lake fails to state a claim
23 for relief for all the reasons stated herein and in the Defendants’ various briefs.

24 Second, the claim on remand is based on conclusory “information and belief” which
25 cannot clearly and convincingly prove that votes were affected in sufficient numbers to alter
26 the outcome of the election based on a competent mathematical basis to conclude that the
27 outcome would plausibly have been different. Specifically, the claim on remand is that
28 Maricopa County failed to comply with A.R.S. § 16-550(A):

Upon information and belief, a material number of early ballots cast in the
November 8, 2022 general election were transmitted in envelopes containing an
affidavit signature that the Maricopa County Recorder or his designee determined
did not match the signature in the putative voter’s “registration record.” The

1 Maricopa County Recorder nevertheless accepted a material number of these early
ballots for processing and tabulation.

2 Compl. at ¶ 151 (emphasis added). However, there are no concrete allegations for this Court to
3 assume as true which would be sufficient to allow this claim to survive dismissal. Indeed, an
4 election contest must be verified as true by the contestor. *See* A.R.S. § 16-673(B). And such a
5 requirement means that the party seeking relief must provide more than allegations based on
6 mere conclusory information and belief. In this regard, *Wahl v. Crosby*, 18 Ariz. 251 (1916), is
7 instructive.

8 In *Wahl*, a party sought a writ of mandamus to compel a court to set a case for trial. *Id.*
9 Like A.R.S. § 16-673(B), the mandamus statute then in effect required that the writ filed “shall
10 be verified by the oath of the plaintiff, his agent or attorney.” *Id.* at 252. The Supreme Court
11 rejected the writ for several reasons, one of which being that the instrument was verified upon
12 information and belief – which “is not a sufficient verification under the statute.” *Id.*

13 Here, too, Ms. Lake’s allegations are verified “upon information and belief.” Complaint
14 at ¶ 152. And just as in *Wahl*, such a verification “is not a sufficient verification under [a]
15 statute” requiring a verified statement. *Wahl*, 18 Ariz. at 252; Compl., at 70 (Ms. Lake
16 asserting “I know the allegations of the Verified Special Action Complaint to be true, *except*
17 *the matters therein on information and belief, which I believe to be true.*” (emphasis added)).
18 As such, Ms. Lake’s claim is “simply an untethered assertion of uncertainty” that cannot
19 survive dismissal. Order at 4-5 (cleaned up).

20 Third, Ms. Lake’s statement that “the invalid signature envelopes established in the
21 Busch and Parikh declarations demonstrate that Maricopa County’s elections suffered from
22 [an] outcome-derivative number of illegal votes from mail-in ballots in 2020 and 2022” also
23 cannot save this claim from dismissal. Compl. at ¶ 152. Her statement fails to articulate a
24 *precise* number of “votes were affected in sufficient numbers to alter the outcome of the
25 election based on a competent mathematical basis to conclude that the outcome would
26 plausibly have been different” Order at 4-5 (cleaned up). And in any event, Ms. Lake’s
27 conclusory assertion about an “outcome-derivative number” is not assumed as true. *Jeter*, 211
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1 Ariz. at 389, ¶ 4. So this Court need go no further to resolve this issue in light of the Supreme
2 Court’s clear mandate that Count III cannot be an untethered assertion of uncertainty.

3 Even so, the Busch and Parikh declarations simply fall short of stating a claim. The
4 Busch declaration tries to extrapolate from the 2020 General Election that “20,176 alleged
5 voters who voted in the 2022 election, were the same alleged voters from 2020 whose ballots
6 failed signature verification standards.” Busch Declaration at ¶ 21 (emphasis added).
7 Whatever happened in 2020 has no relevance to the 2022 General Election, and Ms. Busch
8 fails to articulate a competent mathematical (or empirical) basis to conclude the 2022 General
9 Election would have been affected so as to plausibly alter the outcome of the general election.
10 Moreover, Ms. Busch fails to identify her qualifications for opining on signature comparison or
11 verification matters, or how exactly she was qualified to do such comparisons with regard to
12 the “records” she supposedly reviewed. So Ms. Busch cannot testify as a fact witness or as an
13 “expert” on this issue. See Ariz. R. Evid 701 (lay witness can only testify on matters rationally
14 based on perception, helpful to determining a fact issue, and “not based on scientific, technical,
15 or other specialized knowledge within the scope of Rule 702”); 702 (expert must be “qualified
16 as an expert by knowledge, skill, experience, training, or education”).

17 The Parikh declaration fares no better. His entire conclusion is based on his review of
18 unspecified affidavits, statements, documents, and news articles (much of which are hearsay
19 that cannot be used if he is a lay witness). Parikh Declaration at ¶ 6. A proper expert witness
20 is required to disclose the matters upon which they have relied to form an opinion. But Mr.
21 Parikh does nothing more than baldly assure us he relied on something while failing to state
22 how he is qualified to engage in a signature comparison analysis or explain how what he relied
23 on is something experts on whatever he claims to have expertise commonly rely on. This
24 cannot suffice to allow Mr. Parikh to testify about the lone issue on remand, let alone sustain a
25 claim, especially in an election contest seeking to thwart the People’s will.

26 But regardless, the substance of Mr. Parikh’s declaration still falls short. All he opines
27 on are alleged *voting system certification deficiencies* this Court already rejected, and which
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1 have no meaningful relevance to the narrow claim on remand: whether Maricopa County
2 officials accepted and processed early ballots deemed not to have proper signatures. Mr.
3 Parikh offers nothing related to the signature comparison and validation issue, let alone
4 articulate a *precise* number of “votes [were] affected in sufficient numbers to alter the outcome
5 of the election based on a competent mathematical basis to conclude that the outcome would
6 plausibly have been different” Order at 4-5 (cleaned up).¹

7 There is no reason to entertain the claim on remand a moment more. Ms. Lake has
8 failed to state a claim “that votes [were] affected in sufficient numbers to alter the outcome of
9 the election based on a competent mathematical basis to conclude that the outcome would
10 plausibly have been different” Order at 4-5 (cleaned up). Instead, her claim as pled is
11 “simply an untethered assertion of uncertainty.” *Id.* Dismissal is warranted.

12 **C. IF MS. LAKE IS CLAIMING THAT ELECTION OFFICERS VIOLATED A.R.S. § 16-**
13 **550(A) BY CONSIDERING ITEMS IN THE “REGISTRATION RECORD” OTHER**
14 **THAN A VOTER’S REGISTRATION *FORM*, THEN COUNT III FAILS AS A MATTER**
OF LAW

15 Ms. Lake appears to take issue with what the term “registration record” means for
16 purposes of A.R.S. § 16-550(A). If Ms. Lake thinks that comparison of a ballot envelope
17 signature is limited to the voter’s signature on their voter registration form, then Ms. Lake is
18 wrong. We will explain why.

19 “Statutes shall be liberally construed to effect their objects and to promote justice.”
20 A.R.S. § 1-211. “When the language of a statute is clear and unambiguous, a court should not
21 look beyond the language, but rather simply apply it without using other means of
22 construction, assuming that the legislature has said what it means.” *City of Tucson v. Clear*
23 *Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 6 (App. 2008) (cleaned up). “Where a statute is
24 silent on an issue, [the Court] will not read into it . . . nor will [the Court] inflate, stretch or
25 extend the statute to matters not falling within its expressed provisions.” *Ponderosa Fire Dist.*

26
27 ¹ The lack of a *precise* number of votes being adequately pled is emphasized by Ms. Lake on
28 remand trying to pursue new discovery. She does not have any evidence compliant with the
mandate to move forward, hence her hope to expand these proceedings.

1 *v. Coconino Cnty.*, 235 Ariz. 597, 604, ¶ 30 (App. 2014) (cleaned up). Moreover, “we must
2 assume that the legislature intended different consequences to flow from the use of different
3 language.” *P.F.W., Inc. v. Superior Court*, 139 Ariz. 31, 34 (App. 1984).

4 The statute at issue in Count III is A.R.S. § 16-550(A). *Before* August 26, 2019, A.R.S.
5 § 16-550(A) *used to state*:

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

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

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

14 (Emphasis added).

15 The legislature’s decision to revise the law from the narrow term “form” to the more
16 expansive term “record” is as telling as it is dispositive of Ms. Lake’s claim. First, “it is
17 presumed when a legislature alters the language of a statute that it intended to create a change
18 in the existing law.” *State v. Kozlowski*, 143 Ariz. 137, 138 (App. 1984). Clearly the
19 legislature understood the words “form” and “record” mean different things, because the
20 legislature decided to replace the former with the latter in 2019. So, we cannot interpret the
21 legislature’s use of the term “record” to only encompass the former term “form” because doing
22 so would render the legislature’s express change a futile act, and “[t]here is a strong
23 presumption that legislatures do not create statutes containing provisions which are redundant,
24 void, inert and trivial.” *Kozlowski*, 143 Ariz. at 138.

25 Second, although the words “form” and “record” are not defined in A.R.S. § 16-550(A),
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27 ² For the Court’s convenience, a copy of this statute, reflecting its prior language, is attached as
28 **Exhibit A**.

1 we know that “[w]ords and phrases” used in a statute, but not otherwise defined, “shall be
2 construed according to the common and approved use of the language.” A.R.S. § 1-213. And
3 “[b]y declining to define a statutory term, the legislature generally intends to give the ordinary
4 meaning to the word.” *Circle K Stores, Inc. v. Apache Cnty.*, 199 Ariz. 402, 408, ¶ 18 (App.
5 2001).

6 Even as *formerly used* in the context of A.R.S. § 16-550(A), a “form” is clearly and
7 ordinarily understood to be encompassed as part of a “record”. Compare *Form*,
8 <https://www.merriam-webster.com/dictionary/form> (defining the noun as “a printed or typed
9 document with blank spaces for insertion of required or requested information”) (last visited
10 May 8, 2023) with *Record*, <https://www.merriam-webster.com/dictionary/record> (defining the
11 noun as “something that records” or “a collection of related items of information (as in a
12 database) treated as a unit”) (last visited May 8, 2023). Indeed, whenever the legislature has
13 wanted to distinguish between the narrower term “form” and the broader term “record”, the
14 legislature has done so. For example, in A.R.S. § 16-544(C), the legislature stated:

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

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

22 Third, the more expansive interpretation of “record” comports with the legislature’s
23 desire to make it generally *very easy* to vote. *See Brnovich v. Democratic Nat’l. Comm.*, 141
24 S.Ct. 2321, 2330 (2021). Narrowly construing the term “record” to only include the prior used
25 *but now discarded* term “form”, and limiting that record *only* to a voter registration form, runs
26 contrary to very easy voting. For example, it is no stretch to surmise that by giving the county
27 recorders a single means to check the accuracy of a signature (a registration form), those whose
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1 signature have changed slightly over time (as they do) are left to hope they are in a position to
2 receive the county recorder’s communication and respond. This necessarily adds another layer
3 or hurdle to easy voting.

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

17 Fourth, the Secretary’s construction just makes sense. The term “record” is broader
18 than a specific “form.” A form can be a record of something. But so can other documents that
19 may not be a “form” (*e.g.*, signature affidavits on early ballots from prior elections). Thus,
20 while a federal form or state form is “*an* official public record of the registration of the
21 elector[.]” A.R.S. § 16-161 (emphasis added), those forms are *not the only* official record of
22 the registration of the elector. More importantly, neither A.R.S. § 16-550(A) nor A.R.S. § 16-
23 161 mandate such a narrow reading (or else why revise § 16-550(A) in 2019). Thus, Ms.
24 Lake’s restrained interpretation of the term “record” in this context cannot carry the day.

25 Fifth, if one accepts that the term “record” is ambiguous in the context of A.R.S. § 16-
26 550(A), then that ambiguity necessarily equips the Secretary – Arizona’s chief election officer
27 – with the discretion to determine what constitutes a registration record. And his
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1 administrative “interpretation of applicable statutes and regulations is entitled to great weight.”
2 *Ariz. Cannabis Nurses Ass’n v. Ariz. Dep’t of Health Services*, 242 Ariz. 62, 65–66, ¶ 8 (App.
3 2017) (internal quotations and citation omitted); *see also Scottsdale Healthcare Inc. v.*
4 *AHCCCS*, 206 Ariz. 1, 8 ¶ 27 (2003) (same); *Ariz. Water Co. v. Ariz. Dep’t Water Resources*,
5 208 Ariz. 147, 154 ¶ 30 (2004) (when the legislature “has not spoken” on an issue,
6 “considerable weight should be accorded to an executive department’s construction of a
7 statutory scheme it is entrusted to administer.’ In such cases, ‘a court may not substitute its
8 own construction of a statutory provision for a reasonable interpretation made by the
9 administrator of an agency.” (cleaned up)). Moreover, a “party attacking the validity of an
10 administrative regulation has a heavy burden.” *Watahomigie v. Ariz. Bd. of Water Quality*
11 *Appeals*, 181 Ariz. 20, 24 (App. 1994). An agency’s rulemaking powers “are measured and
12 limited by the statute creating them,” *Caldwell v. Ariz. State Bd. of Dental Examiners*, 137
13 Ariz. 396, 398 (App. 1983), and courts will not invalidate a regulation “unless its provisions
14 cannot, by any reasonable construction, be interpreted in harmony with the legislative
15 mandate.” *Watahomigie*, 181 Ariz. at 25.

16 The Secretary is empowered to promulgate the EPM, and at least in the current EPM,
17 the Secretary determined that the term “record” encompasses more than just the “form” an
18 elector uses to register to vote. This interpretation is reasonable and entirely consistent with
19 the law. For example, in 2019, A.R.S. § 16-550(A) was expressly revised to replace “form”
20 with “record”. And Arizona law permits voters to update their registration information at an
21 emergency voting location, and to that end, permits the Secretary to proscribe rules in the EPM
22 for doing so. *See* A.R.S. § 16-246(G) (“...the county recorder or other officer in charge of
23 elections may allow a qualified elector to update the elector’s *voter registration information as*
24 *provided for in the secretary of state’s instructions and procedures manual* adopted pursuant to
25 § 16-452.” (emphasis added)). Indeed, other statutes clearly recognize that a voter can update
26 registration information in the manner the Secretary prescribes in the EPM. *See* A.R.S. §§ 16-
27 542(A) (“Notwithstanding § 16-579, subsection A, paragraph 2, at any on-site early voting
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1 location or other early voting location the county recorder or other officer in charge of
2 elections may provide for a qualified elector to update the elector’s *voter registration*
3 *information as provided for in the secretary of state’s instructions and procedures manual*
4 *adopted pursuant to § 16-452.*” (emphasis added)); 16-542(E) (“... at any on-site early voting
5 location the county recorder or other officer in charge of elections may provide for a qualified
6 elector to update the elector’s *voter registration information as provided for in the secretary of*
7 *state’s instructions and procedures manual adopted pursuant to § 16-452.*” (emphasis added));
8 16-542(I) (“... the county recorder or other officer in charge of elections may allow a qualified
9 elector to update the elector’s *voter registration information as provided for in the secretary of*
10 *state’s instructions and procedures manual adopted pursuant to § 16-452.*” (emphasis added)).
11 So the Secretary’s interpretation of the term “record” as more expansive than just a form used
12 to register to vote can be harmonized with the legislative mandate empowering the Secretary to
13 create the EPM. *See Watahomigie*, 181 Ariz. at 25; A.R.S. § 16-542(A) (permitting creation of
14 EPM to “prescribe rules to achieve and maintain the maximum degree of correctness,
15 impartiality, uniformity and efficiency on the procedures for early voting and voting”).

16 Finally, if Ms. Lake is challenging Maricopa County’s review of one or more portions
17 of a voter’s registration record other than that voter’s registration form, then very clearly her
18 challenge is barred, because “challenges concerning alleged procedural violations of the
19 election process must be brought prior to the actual election.” *Sherman v. City of Tempe*, 202
20 Ariz. 339, 342, ¶ 9 (2002). To be clear, this is *not* a laches argument. The word “laches” is
21 nowhere mentioned in *Sherman*. Nor is the word “laches” found in *Tilson v. Moffard*, 153
22 Ariz. 468, 470 (1987) or *Kerby v. Griffin*, 48 Ariz. 434, 444-46 (1936) – the two cases
23 *Sherman* relies on related to this issue. *Sherman*, 202 Ariz. at 342, ¶¶ 9-11 (“Ordinarily, we
24 would find Respondents’ claim precluded because they did not challenge the timing of the
25 City’s distribution of publicity pamphlets before the election.”). This is a jurisdictional
26 argument. *See Tilson*, 153 Ariz. at 470 (“Indeed, we have held that the procedures leading up
27 to an election cannot be questioned after the people have voted, but instead the procedures
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1 must be challenged before the election is held.”), holding modified by *Arizona Together v.*
2 *Brewer*, 214 Ariz. 118, 149 P.3d 742 (2007). If Count III is based on an argument that
3 something in a voter’s record besides a registration form was used in connection with adhering
4 to A.R.S. § 16-550, then Ms. Lake’s claim is barred.

5 All of this to say, to the extent that Ms. Lake takes issue with what the term
6 “registration record” means for purposes of A.R.S. § 16-550(A), the Court must similarly find
7 that her claim lacks merit and should dismiss Count III because (1) she fails to even clearly
8 articulate her argument, (2) it would render the legislature’s change to A.R.S. § 16-550(A)
9 from “form” to “registration record” trivial and void, (3) it would similarly render the
10 Secretary’s instructions and procedures for updating voter information via the EPM null and
11 void, and (4) it is an argument over which the Court lacks jurisdiction. Such an upheaval of
12 our election statutes and processes should not be entertained, especially not by a begrudged
13 candidate 7 months after the election. It is time for finality.

14 **D. THE SECRETARY JOINS THE OTHER DEFENDANTS’ BRIEFING**

15 Dismissal is also appropriate for the additional reasons the other Defendants outline in
16 their respective motions and supporting memoranda. Rather than restate those arguments here,
17 for purposes of judicial economy, the Secretary instead incorporates those arguments herein by
18 reference.

19 **III. CONCLUSION**

20 This Court should dismiss Count III with prejudice.

21 RESPECTFULLY SUBMITTED: May 9, 2023.

22 **SHERMAN & HOWARD L.L.C.**

23 By: /s/ Craig A. Morgan

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1 **ORIGINAL** of the foregoing filed via
2 AZ TurboCourt this 9th day of May, 2023.

3 With a **COPY** of the foregoing served by email
4 this 9th day of May, 2023to:

5 The Honorable Peter A. Thompson
6 MARICOPA COUNTY SUPERIOR COURT
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/s/Lori Hinkel _____

EXHIBIT A

EXHIBIT A

2019 Ariz. Legis. Serv. Ch. 39 (S.B. 1054) (WEST)

ARIZONA 2019 LEGISLATIVE SERVICE

First Regular Session of the Fifty-Fourth Legislature

Additions are indicated by **Text**; deletions by
~~Text~~ .

Vetoed are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

CHAPTER 39

S.B. 1054

ELECTIONS

AN ACT AMENDING SECTIONS 16-445, 16-550 AND 16-621, ARIZONA
REVISED STATUTES; RELATING TO CONDUCT OF ELECTIONS.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 16-445, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-445 >>

§ 16-445. Filing of computer election programs with secretary of state

A. For any state, county, school district, special district, city or town election, including primary elections, ~~utilizing~~ **that uses** vote tabulating devices as provided in this article, there shall be filed with the secretary of state at least ~~ten~~ **seventeen** days before the date of the election a copy of each computer program for each election. The secretary of state shall hold all computer program software filed pursuant to this section in escrow for three years. The secretary of state shall securely destroy the software filed pursuant to this section on the expiration of the ~~three-year~~ **three-year** period.

B. A copy of any subsequent revision of the computer program shall be filed in the same manner within forty-eight hours following the revision.

C. Any tape or disc used in the programming or operation of a vote tabulating device ~~upon~~ **on** which votes are counted and any tape used in compiling vote totals shall be kept under lock and seal, and if there is a retally of votes, the officer entrusted with the tapes or discs shall submit ~~his~~ **the officer's** affidavit stating that they are the tapes or discs, or both, used in the election and have not been altered.

D. All materials submitted to the secretary of state shall be used by the secretary of state or attorney general to preclude fraud or any unlawful act under the laws of this title and title 19 and shall not be disclosed or used for any other purpose.

Sec. 2. Section 16-550, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-550 >>

§ 16-550. Receipt of voter's ballot; cure period

A. Upon ~~On~~ receipt of the envelope containing the early ballot and the completed ~~ballot~~ affidavit, the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on his ~~the elector's~~ registration form ~~record~~. **If the signature is inconsistent with the elector's signature on the elector's registration record, the county recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the inconsistent signature and allow the voter to correct or the county to confirm the inconsistent signature. The county recorder or other officer in charge of elections shall allow signatures to be corrected not later than the fifth business day after a primary, general or special election that includes a federal office or the third business day after any other election.** If satisfied that the signatures correspond, the recorder or other officer in charge of elections shall hold ~~them~~ **the envelope containing the early ballot and the completed affidavit** unopened in accordance with the rules of the secretary of state.

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

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

D. This section does not apply to:

1. A special taxing district that is authorized pursuant to section 16-191 to conduct its own elections.

2. A special district mail ballot election that is conducted pursuant to article 8.1 of this chapter.

Sec. 3. Section 16-621, Arizona Revised Statutes, is amended to read:

<< AZ ST § 16-621 >>

§ 16-621. Proceedings at the counting center

A. All proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual provided for in section 16-452 under the observation of representatives of each political party and the public. The proceedings at the counting center may also be observed by up to three additional people representing a candidate for nonpartisan office, or representing a political committee in support of or in opposition to a ballot measure, proposition or question. A draw by lot shall determine which three groups or candidates shall have representatives participate in the observation at the counting center. Persons representing a candidate for nonpartisan office or persons or groups representing a political committee in support of or in opposition to a ballot measure, proposition or question, who are interested in participating in the observation, shall notify the officer in charge of elections of their desire to be included in the draw ~~no~~ **not** later than ~~ten~~ **seventeen** days before the election. After the deadline to receive submissions from the interested persons or groups, but prior to ~~seven~~ **fourteen** days before the election, the county officer in charge of elections shall draw by lot, from the list of those ~~who~~ **that** expressed interest, three persons or groups and those selected shall be notified and allowed to observe the proceedings at the counting center. If a group is selected ~~they~~ **the group** may alter who represents that group for different days of observation but on any given observation day a selected group shall not send more than one observer. A group may rotate an observer throughout the day. No persons except those authorized for the purpose shall touch any ballot or ballot card or return. All persons who are engaged in processing and counting of the ballots shall be qualified electors, shall be deputized in writing and shall take an oath that they will faithfully perform their assigned duties. There shall be no preferential counting of ballots for the purpose of projecting the outcome of the election. If

any ballot, including any ballot received from early voting, is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. All duplicate ballots shall be clearly labeled “duplicate” and shall bear a serial number ~~which~~ **that** shall be recorded on the damaged or defective ballot.

B. If for any reason it becomes impracticable to count all or a part of the ballots with tabulating equipment, the officer in charge of elections may direct that they be counted manually, following as far as practicable the provisions governing the counting of paper ballots.

C. For any statewide, county or legislative election, the county recorder or officer in charge of elections shall provide for a live video recording of the custody of all ballots while the ballots are present in a tabulation room in the counting center. The live video recording shall include date and time indicators and shall be linked to the secretary of state's website. The secretary of state shall post links to the video coverage for viewing by the public. The county recorder or officer in charge of elections shall record the video coverage of the ballots at the counting center and shall retain those recordings as a public record for at least as long as the challenge period for the general election. If the live video feed is disrupted or disabled, the recorder or officer in charge of elections is not liable for the disruption but shall attempt to reinstate video coverage as soon as is practicable. Any disruption in video coverage shall not affect or prevent the continued tabulation of ballots. This subsection is contingent on legislative appropriation.

D. The county recorder or other officer in charge of elections shall maintain records that record the chain of custody for all election equipment and ballots during early voting through the completion of provisional voting tabulation.

Approved by the Governor, April 1, 2019.

Filed in the Office of the Secretary of State, April 1, 2019.

Filing Details

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Filing Type	General Civil	Location ⓘ	Maricopa - Superior Court
Customer Name	Raymundo Mota	Customer Email	rmota@shermanhoward.com
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