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ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation; *et al.*, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant. ARIZONA ALLIANCE OF RETIRED AMERICANS; and MI FAMILIA VOTA, Intervenor-Defendants.	No. S1300CV202300202 **ARIZONA ALLIANCE FOR RETIRED AMERICANS' REPLY IN SUPPORT OF MOTION TO DISMISS** (Assigned to the Hon. John D. Napper)

INTRODUCTION

Intervenor-Defendant Arizona Alliance for Retired Americans ("Alliance") submits this Reply to Plaintiffs' opposition ("Opp.") to Defendant and Intervenor-Defendants' Motions to Dismiss. This Court should dismiss Plaintiffs' Amended Complaint in full and without leave to amend. Count I fails to state a claim for mandamus or other special action relief, and Plaintiffs lack standing to obtain the declaratory judgment they seek in Count II.

The Secretary has discretion to promulgate rules for counting ballots, including by implementing signature verification procedures in the EPM. *See* A.R.S. § 16-452. The Secretary exercised that discretion when he issued guidance explaining what constitutes a voter's "registration record"—an undefined term under Arizona law—for purposes of signature matching. Because Plaintiffs cannot challenge the Secretary's exercise of discretion in a mandamus action, their mandamus claim is improper and should be dismissed. And, because the Secretary's guidance does not clearly conflict with or violate Arizona law, Plaintiffs cannot credibly allege that the Secretary has exceeded his statutory authority or abused his discretion.

Moreover, Plaintiffs lack standing to obtain a declaratory judgment. Plaintiffs fail to allege that they have suffered a "palpable" and "personal" injury because of the Secretary's guidance. They ignore clear Arizona law that requires a specific injury to allege standing, relying instead on a generalized interest in the lawful administration of elections that is shared with the general population. *See State v. Herrera*, 121 Ariz. 12, 16 (1978) (holding that "an individual must himself have suffered 'some threatened or actual injury resulting from the putatively illegal action'" to have standing). And Plaintiffs simply have no answer to the cases that have consistently held that a plaintiff lacks standing when he claims that his vote will be diluted by unlawful ballots because such alleged harm is too speculative. *See, e.g.*, *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020).

At bottom, this lawsuit reflects Plaintiffs' attempt to force their more restrictive and unfounded interpretation of Arizona's signature matching law on the Secretary, the chief

elections official of the state of Arizona. The Alliance intervened because the potential consequences of adopting Plaintiffs' interpretation would be grave for Arizona voters, including members of the Alliance, who could be disenfranchised as a result. Plaintiffs' Amended Complaint should be dismissed for failure to state a claim and lack of standing, as well as for the reasons described in the Secretary's and Mi Familia Vota's motions to dismiss.

ARGUMENT

I. Plaintiffs fail to state a claim under the mandamus statute, A.R.S. § 12-2021.

While some Arizona courts have taken a broader view of what constitutes a mandamus action under Rule 3(a) of the Arizona Rules of Procedure for Special Actions, the hallmark principle that discretionary duties cannot be compelled through mandamus has remained the same. Opp. at 5; *see also, e.g.*, *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465 ¶ 12 (App. 2007) ("[A] mandamus action cannot be used to compel a government employee to perform a function in a particular way if the official is granted any discretion about how to perform it."); *accord* Ariz. R. P. Spec. Act. 1(a) ("[N]othing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition."). Plaintiffs' mandamus claim fails because it seeks to prohibit the Secretary from exercising his discretion to prescribe signature verification procedures. Plaintiffs' policy disagreement with the Secretary's interpretation cannot sustain a mandamus action.

Plaintiffs concede in their Opposition that discretionary duties cannot be compelled through mandamus. Opp. at 5. But they contend that principle is "irrelevant" here. *Id.* Not so. Plaintiffs seek relief under the mandamus statute, A.R.S. § 12-2021, to compel the Secretary to "implement and effectuate the signature verification process[.]" Am. Compl. ¶ 41. Mandamus is proper only if the Secretary has no discretion in performing the duty that Plaintiffs seek to enforce. Indeed, the State Bar Committee Note to Rule 3 of the Arizona Rules of Procedure for Special Actions states that mandamus applies "only where [a person] has ***no discretion*** in connection with the requirement of performance," such as for performing a "ministerial act,

having ***no discretion*** in the manner of its performance[.]" (emphases added). Thus, if the Secretary has *any* discretion over implementing and effectuating the signature verification process, then Plaintiffs' mandamus claim must fail.

That is plainly the case here. Under A.R.S. § 16-452(A), "the secretary of state shall 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 . . . counting . . . ballots." Far from describing a "ministerial act," this statute confers broad discretion on the Secretary to prescribe rules about procedures for counting ballots, which includes the signature verification process. Plaintiffs argue that the Secretary does not have discretion to "administratively redefine in the EPM the term 'registration record,'" Opp. at 5, but all parties, including Plaintiffs, agree that "registration record" is not a defined term in Arizona law. *See* Opp. at 13 ("[T]he Legislature has not indexed 'registration record' as a specifically defined term[.]"). The Secretary has thus not *redefined* anything; he has exercised his discretion to prescribe signature verification rules that fill in the gaps left open by Arizona law. Plaintiffs' policy disagreement with the Secretary's use of discretion to provide election officials and voters with guidance about what constitutes a "registration record" cannot form the basis of a proper mandamus proceeding.

Plaintiffs admit that the Secretary has "certain policymaking discretion" under Arizona law, citing various statutes that require the Secretary to prescribe additional rules in the EPM. Opp. at 5 & n.1 (citing A.R.S. §§ 16-168(I), 16-315(D), 16-579(E)). But Plaintiffs do not (and cannot) explain why those specific statutes provide the Secretary with discretion, while the broader A.R.S. § 16-452(A)—which each of those statutes specifically refers to—does not. When A.R.S. § 16-452(A) is read in context and according to its common meaning, as Plaintiffs urge, *see* Opp. at 14 (citations omitted), it bestows broad discretion on the Secretary to issue rules for signature verification.

As the Alliance explained in its motion to dismiss, *Arizona Public Integrity Alliance*

["AZPIA"] *v. Fontes*, 250 Ariz. 58 (2020), is not on point because it involved a mandamus action against a county recorder (not the Secretary) who had a non-discretionary duty to follow the Secretary's instructions in the EPM. The Arizona Supreme Court found that "[t]he legislature has expressly delegated to *the Secretary* the authority to promulgate rules and instructions for early voting" through A.R.S. § 16-452, the same statute at issue here. *Id.* at 62–63 ¶ 15. The Secretary had discretion to set the applicable rules. However, *county recorders* were *required* to follow the rules and procedures set by the Secretary and had no discretion to deviate from them. *See id.* at 63 ¶ 17. Mandamus relief was thus proper to prohibit the then-Maricopa County Recorder from issuing supplemental guidance to voters that was not sanctioned by the Secretary. *Id.* at 64–65 ¶ 27. In contrast, this case involves a challenge to signature verification procedures that the Secretary has clear discretion to prescribe pursuant to his broad authority under A.R.S. § 16-452. This case is also clearly distinguishable from Plaintiffs' other cited mandamus cases, which did not challenge any discretionary duties. *See, e.g.*, *Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶ 18 (2020) (discussing whether Secretary failed to perform nondiscretionary constitutional duty to accept petition signatures); *Ariz. Dep't of Water Res. v. McClennen*, 238 Ariz. 371, 375, ¶ 18 (2015) (holding that statute at issue did *not* provide "broad discretion"); *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 213 ¶ 24 (2019) (holding municipalities, not commissions, had "exclusive authority" to regulate condemnations). As such, Plaintiffs' request for mandamus relief here is not appropriate.

II. Plaintiffs fail to credibly allege that the EPM's signature matching procedures exceed the Secretary's legal authority or show an abuse of discretion.

Plaintiffs also do not properly allege that the Secretary has exceeded his legal authority or abused his discretion under Rules 3(b) or 3(c) of the Arizona Rules of Procedure for Special Actions. Unlike here, cases finding that an official has exceeded the scope of their authority or abused their discretion arise when an official has acted contrary to a clear statute, or when the subject of the rule prescribed by the official clearly exceeds the scope of the legislature's

delegation. For example, in *Leibsohn v. Hobbs*, 254 Ariz. 1, 46 ¶¶ 20–22 (2022), the Arizona Supreme Court invalidated an EPM instruction when a contrary reading was "plainly required" by other subsections of the underlying statute. By contrast, in *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶¶ 20–21 (2021), while the Court concluded that the EPM cannot abrogate a statutory duty, the Court did not invalidate the EPM because it "does not even purport to discharge" the duty at issue.

Plaintiffs cannot credibly allege that the Secretary's guidance about what constitutes a "registration record" so clearly contradicts Arizona law—which does not even define the term—that the Secretary has abused his discretion or exceeded the scope of his broad authority. At the very least, there is ambiguity in what "registration record" means such that the Secretary's guidance does not clearly violate the law. *Cf. Tilley v. Delci*, 220 Ariz. 233, 238 (Ct. App. 2009) ("'Abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."). Courts have consistently respected the Secretary's broad discretion to prescribe rules in the EPM, particularly when, as here, they fall within the scope of A.R.S. § 16-452. In *AZPIA*, for example, the Arizona Supreme Court noted that the Secretary had the authority to prescribe rules and instructions for early voting in the EPM, and a county recorder could not unilaterally change those rules because doing so "contradict[ed] the purpose of the EPM, which is to 'prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency.'" 250 Ariz. at 64 ¶ 24 (citing A.R.S. § 16-452(A)). The Secretary has the same discretion here to provide rules for signature verification procedures.[1]

[1] Even if Plaintiffs were correct that the EPM provides for signature matching of documents beyond the "registration record" as described in A.R.S. § 16-550(A), Opp. at 4—and they are not for the reasons set forth by the Secretary—that does not show that the Secretary has exceeded his legal authority. The Secretary's discretion to issue rules governing signature matching is based on the broad language of A.R.S. § 16-452 and is not confined solely to A.R.S. § 16-550(A) (which is directed at county recorders, not the Secretary). In other words, A.R.S. § 16-550(A) provides a statutory floor, not a ceiling, for signature matching: it requires county recorders to,

III. Plaintiffs lack standing to obtain declaratory relief.

Plaintiffs cannot rely on "beneficial interest" standing because they have failed to sufficiently plead mandamus or any other special action, for the reasons set forth above. As such, they are required to satisfy Arizona's "rigorous" standing requirement for their declaratory relief claim. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377 ¶ 10 (App. 2008) (citation omitted); *see also Sears v. Hull*, 192 Ariz. 65, 69 ¶¶ 15-17 (1998) (dismissing case for lack of standing after finding plaintiffs did not adequately plead a mandamus action); *AZPIA*, 250 Ariz. at 62 ¶¶ 10–11 (contrasting "more relaxed standard for standing in mandamus actions" with ordinary requirement that plaintiff "must allege a distinct and palpable injury"). To do so, Plaintiffs must demonstrate that they have suffered a "palpable injury personal to themselves." *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 16 (2003); *see also Land Dep't v. O'Toole*, 154 Ariz. 43, 47 (App. 1987) ("To vest a court with declaratory judgment jurisdiction, the claimant must show sufficient facts to establish a controversy which is real and not merely colorable."). Notably, the Declaratory Judgment Act's use of the word "affected" to describe the harm suffered by a prospective plaintiff, A.R.S. § 12-1832, does not reduce Plaintiffs' burden of showing a justiciable controversy, as Plaintiffs themselves admit. Opp. at 7 (quoting *Café Valley, Inc. v. Navidi*, 235 Ariz. 252, 255, ¶ 10 (App. 2014)). Rather, to obtain declaratory relief, a plaintiff "must have a sufficient, concrete interest at stake" and "must demonstrate some actual, concrete harm" based on "an existing state of facts, not those which may or may not arise in the future[.]" *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986).

Plaintiffs allege no facts that meet these requirements. They ignore entirely the Alliance's arguments that Plaintiffs have not identified injuries specific to them rather than the public at large, *see* All. Mot. to Dismiss at 9–10, or that speculative allegations of vote dilution do not suffice for standing, *see id.* at 10–11. Instead, Plaintiffs again insist that their "interest in the

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at minimum, compare signatures based on a person's registration record, and is silent as to any additional signature matching procedures.

lawful administration of Arizona election processes" gives them standing to sue whenever they disagree with a state official's interpretation of state election law. Opp. at 7. The argument does not consider controlling authority finding such injury too generalized to confer standing upon a private party. *See Sears*, 192 Ariz. at 69 ¶ 16 ("An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975))).

The cases cited by Plaintiffs do not contradict this principle, and each are also distinguishable because they involve direct harms to the parties in question, which is not the case here. *See, e.g.*, *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224–25 ¶¶ 18, 20 (2022) (finding the challenged law directly prevented plaintiffs from implementing safety measures during the COVID-19 pandemic, and disclaiming proposition that "merely asserting an interest" suffices for standing); *Pena v. Fullinwider*, 124 Ariz. 42, 44 (1979) (finding Arizona consumers had standing to challenge legislation that deprived them of cost-per-unit information for consumer goods, which prevented them from comparing costs); *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1086 (D. Ariz. 2020) (finding membership organization had standing to challenge signature requirement that would disenfranchise its members).[2] Plaintiffs have alleged no such direct injury, and therefore lack standing.

Plaintiffs' fallback argument is that the Court should just wave away these important standing requirements even though Arizona courts have "required as a matter of judicial restraint that a party possess standing to maintain an action." *Sears*, 192 Ariz. at 71 ¶ 24. In accordance

[2] Plaintiffs suggest that because the plaintiffs in *Arizona Democratic Party* and other voting rights cases that seek to challenge burdensome "regulatory restrictions" on the franchise had standing, this Court ought to grant Plaintiffs an unconditional right to challenge "regulatory expansions," regardless of their lack of standing, to prevent a "structural asymmetry[.]" Opp. at 9–10. But Plaintiffs miss the point: the *Arizona Democratic Party* plaintiffs and others had standing because the challenged policy caused them an injury by disenfranchising their members, *see* 485 F. Supp. 3d at 1085–86, while Plaintiffs here lack standing because they have not been injured.

with that general proposition, the Arizona Supreme Court instructs that the courts should waive standing only in "exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." *Id.* at 69 ¶ 25; *see also id.* ("The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception."). This is not one of those cases. The election procedures in question have been in place for nearly four years and the consequences of adopting the Plaintiffs' unsupported interpretation would be significant for Arizona voters. Allowing this case to proceed would set a dangerous precedent by allowing anyone who disagrees with a provision in the EPM to challenge it, even if they lack standing to do so. Doing so in the current climate would almost certainly subject the EPM to an endless parade of challenges, even more overwhelming than the cases Arizona courts have recently had to contend with, undermining the legislature's express intent that the EPM provide a means to "achieve and maintain the maximum degree of . . . uniformity and efficiency on the procedures for early voting and voting[.]" A.R.S. § 16-452(A). Unlike past cases in which courts have waived standing, this case's disposition is unlikely to resolve *any* future dispute over Arizona election law. *Cf. Goodyear Farms v. City of Avondale*, 148 Ariz. 216 (1986) (settling constitutionality of municipal annexation statute); *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 111–12, n.7 ¶ 25 (App. 2012) (waiving standing only in the alternative, to determine Independent Redistricting Commission's "capacity to sue for declaratory and injunctive relief"). This court should not waive standing and should dismiss Plaintiffs' declaratory judgment claim.

CONCLUSION

For these reasons, the Alliance asks the Court to grant its motion to dismiss.

RESPECTFULLY SUBMITTED this 30th day of June, 2023.

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