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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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.

Case No. S1300CV2023-00202

ARIZONA SECRETARY OF STATE ADRIAN FONTES' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

(Assigned to Honorable John D. Napper)

Plaintiffs admit that "Arizona law generally makes it very easy to vote."[1] Amended Complaint at ¶ 13 (quoting *Brnovich v. Democratic Nat'l. Comm.*, 141 S. Ct. 2321, 2330 (2021)). Yet Plaintiffs champion a restrictive reading of the term "registration record" as used in A.R.S. § 16-550(A) that will make it more difficult for Arizonans to vote, which will in turn prevent otherwise lawful votes from counting due to artificial restrictions on what can be referenced to verify the signature on a voter's ballot.

For example, we can all agree that our signatures vary over time. A voter's signature when she registered to vote very likely will not look the same 10, 30, or 50 years later. Plaintiffs think the law requires a voter to repeatedly re-register to vote so her signature remains up-to-date. But the Legislature made no such restrictions, and it could have had it wanted to do so. Instead, as written and interpreted in the EPM, A.R.S. § 16-550(A) makes

[1] All defined terms used herein shall be ascribed the same definition stated in the Secretary's Motion.

it far easier for us to compare a voter's evolving signature by allowing recorders to reference reliable and recent exemplars such as prior ballot envelopes cast in recent elections. Plaintiffs' interpretation, however, means that these common sense and reliable means of confirming a voter's signature evaporate, making it more difficult for someone to easily vote by mail the first time, as the law intends.

At bottom, Plaintiffs' position defies, and if accepted will stifle, the Legislature's clear desire to make voting in Arizona very easy and to ensure that all lawful votes are counted. This Court should reject Plaintiffs' invitation to make voting difficult, and thereby disenfranchise voters, for at least two reasons.

First, A.R.S. § 16-550(A) does not restrict what can or cannot constitute a "registration record" as that term is used in A.R.S. § 16-550(A), and the Legislature has empowered the Secretary with the discretion to formulate rules interpreting that term in a manner that effectuates Arizona's election statutes as a whole and their overall mandate to make voting easy so every vote is counted.

Second, the Secretary's interpretation of what constitutes a "registration record" is persuasive in light of the law and well within his legislatively prescribed discretion. Moreover, his interpretation is entitled to more weight than Plaintiffs' conclusory hypothetical "concerns" about ballot integrity. This Court should be loath to rewrite the law more narrowly than the Legislature has stated, or usurp the Secretary of his discretionary authority to formulate the EPM and oversee our elections. *See Cicoria v. Cole*, 222 Ariz. 428, 431, ¶ 15 (App. 2009) ("Courts will not read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself, nor will the courts inflate, expand, stretch, or extend a statute to matters not falling within its express provisions.").

Accordingly, for the following reasons, this Court should grant the Secretary's Motion.

I. THE TERM "REGISTRATION RECORD" IS NOT AS RESTRICTIVE AS PLAINTIFFS CLAIM

"Statutes shall be *liberally construed* to effect their objects and to promote justice." A.R.S. § 1-211 (emphasis added). "Words in statutes should be read in context in determining their meaning." *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364, ¶ 12 (2020) (cleaned up). Similarly, "statutory provisions must be considered in the context of the entire statute and consideration must be given to all of the statute's provisions so as to arrive at the legislative intent manifested by the entire act." *One Hundred Eighteen Members of Blue Sky Mobile Home Owners Ass'n v. Murdock*, 140 Ariz. 417, 419 (App. 1984). But "if the statutory language is not clear, [courts] may consider other factors, including the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Spirlong v. Browne*, 236 Ariz. 146, 149, ¶ 9 (App. 2014) (cleaned up).

Plaintiffs argue that a "registration record" is limited to documents that can effectuate or update a voter's registration, which, they assert, necessarily excludes a variety of other registration records that establish a voter is who she claims to be. Response at 14-16. But A.R.S. § 16-550 is not so narrow, and this Court is constrained to interpret that statute in light of, and consistent with, all of our election statutes and in a manner that harmonizes them and effectuates their general purpose: making voting easy and ensuring every vote counts. When interpreting the term "registration record" under these guiding principles, one is constrained to reject Plaintiffs' restrictive interpretation for several reasons.

First, "[c]ourts will not read into a statute something that is not within the manifest intent of the legislature as indicated by the statute itself, nor will the courts inflate, expand, stretch, or extend a statute to matters not falling within its express provisions." *Cicoria*, 222 Ariz. at 431, ¶ 15. Nothing in A.R.S. § 16-550(A) prohibits recorders from consulting other official documents in the voter's registration record when verifying early ballot affidavit signatures. Nor does the law restrict or define what precisely shall or shall not qualify as a "registration record." Conversely, Plaintiffs' restricted interpretation of the undefined term "registration record" seeks to "inflate, expand, stretch, or extend" A.R.S. §

16-550(A) in a manner contrary to the liberal interpretation this Court must employ to do justice and which would unjustly make it more difficult to vote in Arizona. *See* A.R.S. § 1-211 (requiring liberal interpretation to promote justice). Plaintiffs' desired remedy, which is to rewrite into a law a narrow definition that does not presently exist, lies with the Legislature and not this Court.

Second, the Legislature knows how to ascribe a term a precise or narrow definition. And the Legislature could have easily defined "registration record" narrowly to specifically include or exclude something, or anything at all. But the Legislature declined to do so, and that matters. Our Supreme Court's observations in a similar analytical context, when considering the omission of a specific item from the definition of a "dangerous instrument", are especially illuminating:

> We presume that if the legislature intended to change the interpretation of the definition of dangerous instrument, it would do so explicitly, rather than by implication. *See Gibbs v. O'Malley Lumber Co.*, 177 Ariz. 342, 345, 868 P.2d 355, 358 (App. 1994) (Because the holding of the case was clear and direct, "if the legislature had ever intended to change either [the statute] or the supreme court's interpretation of that statute, it would have done so explicitly, not by implication."), disapproved of on other grounds by *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 405, 904 P.2d 861, 867 (1995). The legislature knows how to make a change explicit. *See State v. Peek*, 219 Ariz. 182, ¶ 19, 195 P.3d 641 (2008). The legislature could have easily amended § 13-105(12) to exclude dogs and other animals from the definition of dangerous instrument, had it intended to do so. *See Gibbs*, 177 Ariz. at 345, 868 P.2d at 358.

State v. Jones, 248 Ariz. 499, 502, ¶ 13 (App. 2020).

The Legislature has declined to restrictively define what constitutes a voter's "registration record" for purposes of A.R.S. § 16-550. Instead, the Legislature left the term undefined and delegated to the Secretary the duty and discretion to "prescribe rules" with respect to "the procedures for early voting and voting" that, upon approval by the Governor and Attorney General, have the force of law (those rules being embodied by the EPM). *See* A.R.S. § 16-452(A)-(C); *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020). Indeed, a violation of any rule the Secretary adopts is not insignificant; doing so is a class 2 misdemeanor. A.R.S. § 16-452(C). The point here being that the Legislature has left to the Secretary broad and binding discretion to implement rules for voting in Arizona, and

second guessing that discretion, when reasoned and uniform, should occur sparingly, if ever. *See Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 25 (App. 1994) (noting courts will not invalidate a regulation "unless its provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate."). As such, basic principles of statutory construction caution against crowbarring a more restrictive definition where none otherwise exists, even if by implication, especially given the discretion the Legislature has for decades bestowed upon the Secretary vis-à-vis the EPM. *Jones*, 248 Ariz. at 502, ¶ 13.

Indeed, consistent with the Legislature having bestowed upon the Secretary (and only the Secretary) the discretion to enact rules and procedures to effectuate Arizona's voting statutes, he has done so here with regard to what constitutes a "registration record", and his interpretation makes sense. A record is generally understood as a collection of related items or information. *See Record*, https://www.merriam-webster.com/dictionary/record ("a collection of related items of information (as in a database) treated as a unit") (last visited June 24, 2023). And the items Plaintiffs argue are not part of a "registration record" are undeniably part of a *collection* of items *related* to a voter's registration record. A polling place roster and prior early ballot affidavit relate to, and are clear evidence of, a voter having registered to vote (and having actually voted), and that the signature is that voter's actual signature. More importantly, the Legislature chose not to restrictively exclude these things from being considered part of a "registration record" for purposes of the EPM.

Third, courts must "try to interpret statutes in a manner that furthers the perceived goals of the relevant body of legislation." *Cicoria*, 222 Ariz. at 431, ¶ 16. The Secretary's interpretation of what constitutes a "registration record" is contextually consistent with A.R.S. § 16-550(A), his legislatively bestowed discretion to oversee Arizona's elections, and the overall statutory goals of making voting easy and ensuring every vote counts. *See Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 325, ¶ 8 (2011) ("Statutory terms, however, must be considered in context."). Plaintiffs want this Court to interpret the law

by rewriting it to encompass a narrow scope that serves no purpose other than to usurp the Secretary's discretion, make voting more difficult, and as a result, prevent votes from being cast and counted. This defies the law. This Court should not sanction such an undemocratic and inequitable result.

Fourth, those cases Plaintiffs cite in support of rejecting the Secretary's interpretation of the term "registration record" are inapposite. Those cases involve situations where an EPM provision conflicts with a clear unambiguous statutory mandate, or the provision exceeds the scope of the authority delegated to the Secretary. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 46 ¶¶ 20-22 (2022) (invalidating EPM provision where contrary reading was "plainly required" by the statute); *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 20-21 (2021) (noting in dicta that the EPM cannot abrogate a statutory duty, but finding no actual conflict because the EPM "does not even purport to discharge a circulator's duty to comply with the statutory obligation" at issue). Plaintiffs concede (as they must) that "the Legislature has not indexed 'registration record' as a specifically defined term." Response at 13:10-11. Thus, the meaning of "registration record" is not so clearly limited as Plaintiffs insist so as to contradict A.R.S. § 16-550(A) and justify usurping the Secretary's discretionary instruction in the EPM – *an instruction that has existed for years, stood throughout several elections, and which then-Governor Doug Ducey and then-Attorney General Mark Brnovich approved*.[2] *See* https://azsos.gov/elections/about-elections/elections-procedures-manual (posting 2021 EPM, last visited June 30, 2023).

In the end, the EPM merely directs recorders to compare against "additional *known* signatures from other official election documents in the voter's registration record." EPM at 68 (emphasis added). There is no guessing game or uncertainty. These signatures are "known." *Id*. And each of the signatures against which an early ballot signature may be compared – from requests for an early ballot or to be added to the active early voting list, to signature rosters, to prior ballot affidavits – is authenticated and reliable proof that the

[2] These facts are subject to judicial notice and this Court can and should do so when ruling on the Secretary's Motion. *See* Ariz. R. Evid. 201.

voter has registered to vote and cannot be said to be anything other than part of a collection of related items. *See* A.R.S. §§ 16-542(A); 16-544(C); 16-579(A)(1), (D), (E); 16-550(A). The Legislature could have expressly excluded these items from being considered as part of a "registration record" but declined to do so. As such, the Secretary's interpretation of a "registration record" is lawful, correct, and effectuates the overall contextual purpose of Arizona's voting-related statutes.

II. THE SECRETARY'S CORRECT INTERPRETATION OF A.R.S. § 16-452 IS PERSUASIVE, WELL WITHIN HIS DISCRETION, AND GIVEN THE PLAINTIFFS' HEAVY BURDEN OF PERSUASION, ANY DOUBT SHOULD BE RESOLVED IN THE SECRETARY'S FAVOR

A "party attacking the validity of an administrative regulation has a heavy burden." *Watahomigie*, 181 Ariz. at 24. An agency's rulemaking powers "are measured and limited by the statute creating them," *Caldwell v. Arizona State Board of Dental Examiners*, 137 Ariz. 396, 398 (App. 1983), and courts will not invalidate a regulation "unless its provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate." *Watahomigie*, 181 Ariz. at 25. "Additionally, the validity of any regulation authorized by an enabling act depends not so much on its regulatory or prohibitory nature, but on whether it is reasonable." *Id*.

Although not binding, "courts may consider an agency's interpretation of a statute it is authorized to implement …." *Maricopa Cnty. v. Viola*, 251 Ariz. 276, 279, ¶ 1 (App. 2021), as amended (May 20, 2021), review denied (Dec. 7, 2021). Indeed, courts can and do consider an agency's interpretation of the law persuasive. *See Silverman v. Ariz. Dep't of Econ. Sec.*, ___ P.3d ___, ¶ 23, 2023 WL 3959955, *5 (App. June 13, 2023) ("Although we do not owe deference to an agency's interpretation of the law, we may find agency interpretations persuasive and will consider DES' historical interpretation of A.R.S. § 46-460(D)(8).") *citing* A.R.S. § 12-910(F). All of this is notwithstanding the relatively recent amendments to the statutes governing appeals from administrative decisions (*i.e.*, A.R.S. § 12-910).

The Secretary is empowered to do so and prescribe rules in the EPM for how one

can update their registration information. *See* A.R.S. §§ 16-246(G) ("…the county recorder or other officer in charge of elections may allow a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual* adopted pursuant to § 16-452." (emphasis added)); 16-542(A) ("Notwithstanding § 16-579, subsection A, paragraph 2, at any on-site early voting location or other early voting location the county recorder or other officer in charge of elections may provide for a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)); 16-542(E) ("… at any on-site early voting location the county recorder or other officer in charge of elections may provide for a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)); 16-542(I) ("… the county recorder or other officer in charge of elections may allow a qualified elector to update the elector's *voter registration information as provided for in the secretary of state's instructions and procedures manual adopted pursuant to § 16-452*." (emphasis added)). It follows then, that absent explicit Legislative direction constraining what can constitute a "registration record", the Secretary is equally empowered with discretion to develop rules settling this issue. And that is all the Secretary has done.

The issue, then, is whether the Secretary's EPM "provisions cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate" expressed in A.R.S. § 16-550(A). *Watahomigie*, 181 Ariz. at 25. Here, the Secretary's interpretation of the term "registration record" cannot be decried as outside any reasonable construction of the term in light of the law and overall principles informing our election statutes. Indeed, the Secretary's interpretation of the term "registration record" is at minimum persuasive and easily harmonized with the legislative mandate empowering the Secretary to create the EPM. And given the Legislature expressly declined to define the term, the Secretary's interpretation does not conflict with an express legislative directive so as to be

unreasonable. As such, the Secretary's reasonable interpretation of what constitutes a "registration record" must not be discarded easily, especially when doing so strips the Secretary of his discretionary administrative authority, rewrites into the law a restrictive definition that does not otherwise exist, and conflicts with the Legislature's general goals of making voting easy and ensuring every vote counts. Separation of powers principles caution strongly against this Court exercising power that more properly belongs with another government branch.

III. CONCLUSION

Plaintiffs are correct that voting in Arizona is meant to be generally easy. The EPM, and its interpretation of what constitutes a "registration record", have been in place for years and through several elections, and continue to make voting generally easy and ensure every vote counts. Yet Plaintiffs' interpretation of A.R.S. § 16-550(A) means to make voting more difficult. Had the Legislature wanted to make the term "registration record" at all restrictive, the Legislature would have done so. But instead, the Legislature declined to define the term and has empowered the Secretary to create rules to effectuate A.R.S. § 16-550(A) through the EPM. This Court has no legal reason to usurp the Secretary's discretion, rewrite the law to be more restrictive than stated, or satiate Plaintiffs' desire through judicial fiat. This Court should dismiss this action.

RESPECTFULLY SUBMITTED: June 30, 2023.

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