STATECRAFT
LAW • GOVERNMENT • CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com

Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, an Arizona nonprofit corporation; RESTORING INTEGRITY AND TRUST IN ELECTIONS, a Virginia nonprofit corporation; and DWIGHT KADAR, an individual, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, Defendant.	No. S-1300-CV-202300202 **PLAINTIFFS' CONSOLIDATED RESPONSE TO THE MOTIONS TO INTERVENE**

Plaintiffs Arizona Free Enterprise Club, Restoring Integrity and Trust in Elections, and Dwight Kadar respectfully submit this consolidated response in opposition to the separate motions to intervene by each of Arizona Alliance for Retired Americans (the "Alliance") and Mi Familia Vota ("MFV").

I. Neither Movant Can Intervene As of Right Because It Has Not Alleged Any Direct and Protectable "Interest" That Is Not Already Adequately Represented by the Secretary of State

A person may intervene as of right if it "claims an interest relating to the subject of the action, and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest, unless existing parties adequately represent that interest." Ariz. R. Civ. P. 24(a). As detailed below, neither movant has any legally protected "interest" that could ever be impaired by the outcome of these proceedings. Further, the ostensible "interests" they posit are, even if viable, adequately represented by the Secretary of State.

A. The Movants' Conjectural Concern That Some Unspecified Number of Voters May Be Required to Confirm or Cure Their Signature Is Not A Protectable "Interest"

The proposed intervenors struggle to articulate any cognizable "interest" in these proceedings. "For the purposes of intervention of right, an applicant must show it has such an interest in the case that the judgment would have a *direct* legal effect upon its rights. A mere possible or contingent equitable effect is insufficient." *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 28, ¶ 15 (App. 2014) (emphasis in original; internal citation omitted). "A bare allegation that one's interest may become impaired does not, without more, create a right to intervene." *Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447 (App. 1989).

The gravamen of this case is that the 2019 Elections Procedures Manual ("EPM") is inconsistent with A.R.S. § 16-550(A), to the extent it authorizes the validation of early ballot affidavit signatures using documents—such as precinct signature rosters or historical early ballot affidavits from prior elections—that are not "registration records" because such documents cannot be used to effectuate or amend a voter's registration.[1]

[1] MFV's argument that "the term 'registration record' is broader than just 'registration form,' and . . . a registration record may include several of the voter's *known* signatures from previously validated official election documents," MFV Mot. at 1, conjoins a

The proposed intervenors' subjective convictions that the relevant EPM provision aligns with the controlling statute or embodies sound public policy are not "interests" that are "protected" by any law. *See Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 280, ¶ 64 (App. 2011) (proposed intervenor had no "protectable interest in upholding or challenging the constitutionality of legislation"); *Miracle v. Hobbs*, 333 F.R.D. 151, 155 (D. Ariz. 2019) ("The Court is . . . unmoved by the highly generalized argument that Proposed Intervenors have an interest in upholding the constitutionality of" a challenged law); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (finding that proposed intervenors had "only a general ideological interest in seeing that Michigan enforces [a ballot measure]," which was insufficient to sustain intervention); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (rejecting motion to intervene where purported "interest" was "based on what [proposed intervenor] regards as enlightened public policy").

Perhaps recognizing this inevitability, both motions strain to contrive ostensible injuries to each proposed intervenor's respective members and to the organizations themselves. Neither argument persuades.

1. <u>The Movants' Members Have No Direct Interest in the EPM's Extra-Statutory Signature Verification Protocol</u>

Both movants expound a vague, speculative and attenuated hypothetical chain of events under which certain voters will be allegedly disenfranchised should the Court read A.R.S. § 16-550(A) to mean what it says. The gist of their arguments is the same—namely, that, if the counties' early ballot affidavit signature validations are confined to comparative exemplars in the voter's "registration record" (properly defined), then some unspecified, wholly unidentified voters in each proposed intervenor's constituencies will "have[] their

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mischaracterization of the Plaintiffs' claims with a misstatement of the law. As the Complaint acknowledged repeatedly, a "registration record" consists of all documents that effectuate or amend a voter's registration, not merely a voter's initial registration "form." *See* Compl. ¶¶ 16, 21, 23. But A.R.S. § 16-550(A) does not authorize the use of ***any*** "election document[]" to validate an early ballot affidavit signature; rather, only those documents that qualify as a "registration record" can supply a valid signature exemplar.

early ballots incorrectly rejected due to an erroneous signature mismatch determination." Alliance Mot. at 5; *see also* MFV Mot. at 3.

This reasoning, however, dissipates under scrutiny. First, it is entirely conjectural. Neither proposed intervenor actually alleges that any specific voter within its constituency has ever had his or her vote validated on the basis of a signature beyond the "registration record" (properly defined) or that they might need to rely on such signatures in the future. Indeed, neither has even alleged that they represent voters who have signatures on file beyond the properly defined registration record. General averments that putative signature mismatches occur with higher frequency among certain demographic subsets is insufficient to establish an interest that could sustain intervention. Such statistical allegations do not indicate (and certainly do not establish) that such mismatches are more probable when the comparative signature is drawn from an actual "registration record," as distinguished from another type of election-related document (such as a historical early ballot envelope).[2]

Further, a signature mismatch is not innately injurious to the voter. Every early voter whose affidavit signature is flagged as inconsistent with his or her registration record is entitled by law to "correct" or "confirm" the signature at any time up until the fifth business day after a federal election (or the third business day after any other election). *See* A.R.S. § 16-550(A). The Alliance's curious assertion that curing "require[s] significant resources because many of the Alliance's members are unable to travel, do not have access to printers or the Internet, do not know how to scan documents, and/or require assistance with processing documents," Alliance Mot. at 8–9, is simply untethered from the reality of signature rehabilitation. If a signature is deemed questionable, the county recorder will affirmatively contact the voter by telephone, email or text message and ask the voter to confirm his or her identity and the authenticity of the signature. *See* A.R.S. § 16-550(A);

[2] More generally, this argument appears to be animated by an unfounded supposition that signature mismatches manifest an error or informational deficiency on the part of the county recorder or other responsible official, rather than a *bona fide* and genuine question relating to the authenticity of the signature or the identity of the voter.

EPM at 68 (providing that the county recorder "shall make a reasonable and meaningful attempt to contact the voter via mail, phone, text message, and/or email"). In other words, the affected voter need only answer the phone to emend the signature discrepancy, and the proposed intervenors need not do anything at all. There is no need for any person to travel, access a printer or the Internet, know how to scan documents, or need to process documents. These allegations, however true they may be, are irrelevant.[3]

In short, the movants' posited "interest" on behalf of their respective memberships relies on the speculative hypothetical that these individuals' signatures are disproportionately susceptible not just to early ballot affidavit signature mismatches, but specifically *erroneous* mismatches that would not have occurred *but for* the county recorder's reliance on only documents that constitute "registration records"—***and*** that such individuals cannot or will not pick up the phone when the county recorder calls to correct or confirm the signature. Even if this convoluted constellation of suppositions were facially plausible, the attenuated chain of remote contingencies upon which it depends does not constitute a "direct," *Woodbridge*, 235 Ariz. at 28, ¶ 15, relationship between the proposed intervenors' interests and the claims in this case. *See also Silver v. Babbitt*, 166 F.R.D. 418, 426 (D. Ariz. 1994) ("An interest that is ... contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule' for intervention." (internal citation omitted)); *cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (rejecting the notion that court could rely on a putative "statistical probability that some of [an organization's] members are threatened with concrete injury").

[3] The Alliance appears to be conflating early ballot affidavits that contain mismatching signatures with those that lack any signature at all. Voters who omit a signature from their early ballot affidavit must supply a valid signature to the county recorder no later than 7:00 p.m. on Election Day. *See* A.R.S. § 16-550(A). While this remedial mechanism can more arduous than curing a mismatched signature—which need not entail anything more than a verbal affirmation from the voter—it is wholly irrelevant to the claims and issues in this case.

2. The Movants' Organizational Interests Are Not Directly Affected By This Litigation

The proposed intervenors likewise have not delineated any discernible organizational interest that could be impaired by the outcome of this proceeding. Both movants vaguely aver that their unfavored disposition will require them "to spend time and money to educate [their] members on the new signature matching rules and any ways they can decrease the likelihood that their ballots will be rejected due to signature mismatch." Alliance Mot. at 8; *see also* MFV Mot. at 5. But an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

It may be true that the Alliance and MFV each engage in outreach and education relating to early voting, but that is something of a *non sequitur*. To have a credible "interest" in this case, the movants must show some nexus between those efforts and the specific legal issue in dispute, *i.e.*, the definitional ambit of the term "registration record." It strains credulity to posit that either the Alliance or MFV apprises the public of the distinction between registration forms and (for example) historical early ballot affidavits for signature verification purposes, or that either organization's members are or will be cognizant of those differentiations when signing an early ballot affidavit. Tellingly, neither movant actually advances such an assertion, but rather reverts to equivocal generalities of some inchoate adverse impact on their public education campaigns. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 921 (D.C. Cir. 2015) ("Although Lovera alleges that FWW will spend resources educating its members and the public about the NPIS and USDA inspection legend, nothing in Lovera's declaration indicates that FWW's organizational activities have been perceptibly impaired in any way."). These conclusory assertions, however, cannot

sustain intervention as of right.

B. The Secretary of State Adequately Represents the Movants

Even if one or both movants could invoke a cognizable "interest" in this litigation, the Secretary of State is adequately representing it. The proposed intervenors both correctly point out that government officials do not always adequately represent a private organization's discrete interests. For example, if an executive branch official proffers only a limited or qualified defense of a challenged legislative enactment, private parties' participation may be necessary to supply full adversity. *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (significant differences between governmental intervenor and proposed intervenor regarding the appropriate scope of relief justified intervention). But the mere incantation of that principle does not establish an entitlement to intervene; rather, the potential divergence must have become manifest in some articulable way. "In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *see also Planned Parenthood*, 227 Ariz. at 280, ¶ 60 ("The Attorney General has been charged with upholding the constitutionality of the statute, and [proposed intervenor] has identified no aspects of its own interests as a supporter of the challenged legislation that will be inadequately represented by the state. We therefore conclude that the application for intervention was properly denied.").

The Secretary of State and his counsel are well-versed in the governing law, familiar with signature verification concepts, and quite adept at formulating a defense. *See Prete v. Bradbury*, 438 F.3d 949, 958-59 (9th Cir. 2006) (rejecting argument that proposed intervenor's purported "expertise" and "experience" with ballot measures warranted intervention in challenge to statutory procedures for processing petitions, observing that the defendant Secretary of State "is undoubtedly familiar with the initiative process and the requisite signature-gathering; indeed, defendant is the government party responsible for counting the signatures."). While it is conceivable that the proposed intervenors may

quibble with some facets of the Secretary's approach, "mere[] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right." *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 402–03 (9th Cir. 2002). In contrast to legislation, which is enacted by a separate branch of government, the EPM is promulgated by the Secretary himself; he hence has a singularly vested interest in defending its terms. Indeed, if he were inclined to revise the EPM in a manner favorable to the Plaintiffs' position on this issue, he could and would do so irrespective of this litigation.

For this reason, both the Alliance and MFV have insisted in other election-related proceedings that third parties cannot intervene as of right absent a tangible and substantial showing of a disagreement between the proposed intervenor and the named governmental defendants. *See, e.g.*, Pls.' Opp. to Mot. to Intervene at 11 (May 26, 2022), Doc. 46, *Mi Familia Vota v. Hobbs*, No. 2:22-cv-00509-SRB (D. Ariz.) (criticizing what it characterized as an "attempt to rebut the presumption [of adequacy] by . . . rattling off one-size-fits-all generalizations that are not specific to the issues at hand and fall far short of the '*very* compelling showing' standard"); Reply Memo. of Law in Further Support of Pl.'s Mot. for a Temporary Restraining Order and Preliminary Injunction and in Opp. to Committees' Mot. to Intervene at 7 (Oct. 5, 2020), Doc. 30, *Mi Familia Vota v. Hobbs*, No. 2:20-cv-01903-SPL (D. Ariz.) ("Because [the Secretary] is the State's highest elections official, a presumption of adequacy of representation exists."); Pls.' Opp. to Mot. to Intervene at 10 (Sept. 16, 2022), Doc. 67, *Arizona Alliance for Retired Americans v. Hobbs*, No. 2:22-cv-01374-GMS (D. Ariz.) (arguing that proposed intervenor "fails . . . to articulate a single argument it intends to make if intervention is granted that it believes the Attorney General is unwilling or incapable of making itself").

So it is here. In the absence of any actual divergence in objectives between a proposed intervenor and the Secretary—which neither movant has managed to articulate—the Secretary remains an adequate representative of the proposed intervenors' ostensible interests.

II. The Court Should Deny Permissive Intervention

The Court has broad discretion to deny any permissive intervention that may "unduly delay or prejudice the adjudication of the original parties' rights." Ariz. R. Civ. P. 24(b)(3). In assessing this risk, the Court considers contextual variables, including (1) "the nature and extent of the intervenors' interest," (2) "their standing to raise relevant legal issues," (3) "the legal position they seek to advance, and its probable relation to the merits of the case," (4) "whether the intervenors' interests are adequately represented by other parties," (5) "whether intervention will prolong or unduly delay the litigation," and (6) "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Bechtel v. Rose In & For Maricopa Cnty.*, 150 Ariz. 68, 72 (1986).

The first four considerations are effectively subsumed within the rubric for intervention as of right. *See supra* Section I; *see also Roberto F. v. Ariz. Dep't of Economic Security*, 232 Ariz. 45, 53, ¶ 35 (App. 2013) (initial *Bechtel* factors weighed against intervention where there was no evidence that the named parties "were unable or unwilling to fully promote and protect" the proposed intervenor's interests); *Dowling v. Stapley*, 221 Ariz. 251, 272–73, ¶ 70 (App. 2011) (same).

The movants fare no better on the two remaining factors. The Alliance promises "evidence regarding the impact" [Alliance Mot. at 12] of the Plaintiffs' proffered interpretation of A.R.S. § 16-550(A), while MFV alludes to "unique background relating to Latino voters in Arizona who will be affected by the Court's decision" [MFV Mot. at 5–6]. Such extraneous presentations, however, are not only superfluous but affirmatively improper. The crux of this case is whether the EPM's construction of the term "registration record" is definitionally consistent with the plain terms of the relevant statutes. This Court's review of EPM provisions does not entail discretionary policymaking judgments. To the contrary, when (as here) an EPM provision is challenged as being *ultra vires*, the Court must construe the controlling statutes independently and *de novo*. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 46, ¶ 22 (2022) (emphasizing that "it is this Court's role, not the Secretary's,

to interpret" a statute underlying an EPM provision); *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364, ¶ 10 (2020) ("We do not defer to the agency's interpretation of a rule or statute."). Either the term "registration record," as used in A.R.S. § 16-550(A), encompasses documents—such as precinct registers and historical early ballot affidavits—that cannot effectuate or amend a voter's registration, or it does not. Whatever "evidence" of extrinsic circumstances the movants intend to introduce is not—and could not be—germane to this question of law.

Finally, the motions are redundant of each other. The movants postulate effectively the same interest; while they purport to represent different demographic constituencies, they cannot credibly contend that whatever outcome ostensibly protects the interests of retired voters would be detrimental to those of Latino voters, or *vice versa*. Thus, if the Court is persuaded that permissive intervention is somehow warranted, it should confine that disposition to only one of the movants.[4]

III. Alternatively, the Court Should Prohibit Redundant Briefing

If the Court grants one or both motions, it should cabin any such leave to intervene with strictures that prohibit redundant or duplicative submissions. MFV itself recently urged an Arizona federal court to "impose strict limits" on proposed intervenors "to prevent unnecessary delay, duplication, and prejudice to existing parties and to judicial economy." Pls.' Opp. to Mot.to Intervene at 13 n.4 (May 26, 2022), Doc. 46, *Mi Familia Vota v. Hobbs*, No. 2:22-cv-00509-SRB (D. Ariz.). The District of Arizona has wisely heeded such requests, constraining intervenors in election-related disputes to coordinate with the Secretary of State, join the governmental parties' briefing whenever feasible, and "to move for leave to file separate briefing" in the event that a named party would not or could not advance a particular argument or defense. *See Mi Familia Vota v. Hobbs*, No. 2:21-cv-01423-DWL, 2021 WL 5217875, at *2 (D. Ariz. Oct. 14, 2021) (citing *Arizona Democratic*

[4] In such a scenario, the Plaintiffs would take no position on which of the two movants should be permitted to intervene.

Party v. Hobbs, 2020 WL 6559160, at *1 (D. Ariz. 2020)).

Similar safeguards are sensible and appropriate here. There certainly will be substantial overlap, if not full congruity, between the positions of the Secretary of State and those of the intervenor(s). If the Court is inclined to expand the proceedings, it should preclude the intervenor(s) from burdening both the Court and the Plaintiffs with duplicative papers or other submissions.

CONCLUSION

For the foregoing reasons, the Court should deny both motions. If it concludes that third party intervention is appropriate, however, the Court should (1) grant leave to only one of the movants and (2) order any intervenor to coordinate its defenses and arguments with the Secretary of State and prohibit any redundant or duplicative briefing.

RESPECTFULLY SUBMITTED this 3rd day of April, 2023.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Craig A. Morgan
Shayna Stuart
Jake T. Rapp
SHERMAN & HOWARD L.L.C
2555 East Camelback Road, Suite 1050
Phoenix, Arizona 85016
CMorgan@ShermanHoward.com
SStuart@ShermanHoward.com
JRapp@ShermanHoward.com
Attorneys for Arizona Secretary of State Adrian Fontes

D. Andrew Gaona
Austin C. Yost
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5486
agaona@cblawyers.com
ayost@cblawyers.com

Aria C. Branch
John Geise
Lali Madduri
Dan Cohen
Ian Baize
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
T: (202) 968-4330
abranch@elias.law
jgeise@elias.law
lmadduri@elias.law
dcohen@elias.law
ibaize@elias.law
Attorneys for Proposed Intervenor-Defendant Arizona Alliance for Retired

Americans

Roy Herrera
Daniel A. Arellano
Jillian L. Andrews
Austin T. Marshall
HERRERA ARELLANO LLP
1001 North Central Avenue, Suite 404
Phoenix, AZ 85004
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com
austin@ha-firm.com
Telephone: (602) 567-4820
Attorneys for Proposed Intervenor-Defendant Mi Familia Vota

/s/Thomas Basile
Thomas Basile