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ARIZONA SUPERIOR COURT
MARICOPA COUNTY

12 KELLI WARD,

13 Plaintiff,

14 v.

15 CONSTANCE JACKSON; FELICIA
16 ROTELLINI; FRED YAMASHITA; JAMES
17 MCLAUGHLIN; JONATHAN NEZ; LUIS
18 ALBERTO HEREDIA; NED NORRIS;
19 REGINA ROMERO; SANDRA D.
20 KENNEDY; STEPHEN ROE LEWIS; and
21 STEVE GALLARDO,

22 Defendants.

23 KATIE HOBBS, in her official capacity as
24 Arizona Secretary of State,

25 Intervenor.

) No. CV2020-015285

) **ARIZONA SECRETARY OF STATE'S**
) **MOTION TO DISMISS**

) **-AND-**

) **PRE-HEARING MEMORANDUM**

) (Assigned to The Hon. Randall Warner)

) (Hearing Set for Dec. 3, 2020, at 10:30 am)

1 **Introduction**

2 Plaintiff brought this “election contest” without a good-faith basis, asking the Court to
3 allow inspection of a “sampling” of ballots so she can try to find errors. Even after the Court
4 granted her requested discovery, she asks the Court for “further inspection.” In the alternative,
5 she asks the Court to either throw out the entire election or declare the Trump Electors elected
6 instead. Plaintiff’s request to invalidate the will of Arizona voter’s is serious, and it must fail.

7 First, Plaintiff’s complaint that her party’s observers didn’t get to sufficiently observe
8 certain steps in the process is barred by laches. Even if Plaintiff had a right to the level of
9 observation she wants, she could have raised that issue long ago, and failed to do so.

10 Second, Plaintiff fails to allege any “misconduct,” fraud, or “illegal votes,” let alone any
11 facts to suggest that these issues would have any effect on the outcome of the presidential
12 election. Indeed, the crux of Plaintiff’s claim now seems to be that bi-partisan election workers
13 made a few errors when duplicating ballots, which could not have possibly altered the results.

14 Third, Plaintiff’s requested relief is both extreme and unavailable. An election contest
15 must rest on facts, not speculation and conjecture aimed at undermining the hard work of
16 Arizona’s election officials. In the end, Plaintiff’s vague allegations do not warrant allowing
17 Plaintiff’s request to re-count ballots or, worst of all, invalidate 3.42 million Arizonans’ votes.

18 **Relevant Facts**

19 **A. The 2020 General Election.**

20 Arizona successfully administered a safe and secure 2020 General Election with record
21 turnout. Election officials worked hard to ensure that Arizonans could exercise their right to vote,
22 from early voting that began on October 7 through Election Day voting on November 3. Since
23 Election Day, county election officials have been working hard to tabulate, verify, and certify
24 the election results in their respective counties.

25 On November 23, Maricopa County completed its canvass, certifying that the Biden
26 Electors received 1,040,774 votes and the Trump Electors received 995,665 votes in the

1 presidential race (a difference of 45,109 votes).¹ Plaintiff does not challenge results in any of the
2 fourteen other counties or in any other race.

3 On November 30, the Secretary certified the statewide canvass for the General Election
4 in the presence of Governor Doug Ducey, Attorney General Mark Brnovich, and Chief Justice
5 Robert Brutinel.² That same day, the Secretary and Governor Ducey signed the certificate of
6 ascertainment for presidential electors, certifying that the Biden Electors received 1,672,143
7 votes in Arizona, and the Trump Electors received 1,661,686 votes (a difference of 10,457
8 votes). The Secretary transmitted the certificate to the United States Archivist, and the certificate
9 is now publicly available in the National Archives.

10 **B. The Early Ballot Verification Process.**

11 When a voter returns an early ballot envelope to a county recorder's office, the county's
12 election department reviews the ballot envelope to make sure the affidavit is signed. If the
13 affidavit is signed, the elections department compares the signature on the ballot affidavit to the
14 voter's signature(s) on file in the county's voter registration records. A.R.S. § 16-550(A); EPM
15 Ch. 2 § VI.A.1. If the election officials are satisfied that the registered voter signed the ballot
16 affidavit, they send the ballot for further processing and tabulation. If not satisfied, the election
17 officials contact the voter to verify the voter's identity, i.e. provide the voter an opportunity to
18 "cure" the early ballot by confirming the alleged inconsistent signature is in fact the voter's
19 signature. In short, the purpose of the verification process is to confirm that the person who
20 signed the ballot affidavit is the voter; it is not to check if the signatures are an exact match.

21 **C. The Ballot Duplication Process.**

22 When any ballot – whether an early ballot, UOCAVA ballot, or Election Day ballot – is
23 damaged or defective and cannot be read by the vote tabulation machines, it is sent to a Ballot

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25 ¹ [https://azsos.gov/sites/default/files/2020.11.23-Maricopa-
General_Election_Canvass_Summary.pdf](https://azsos.gov/sites/default/files/2020.11.23-Maricopa-General_Election_Canvass_Summary.pdf).

26 ² https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf.

1 Duplication Board (“Duplication Board”) for review and duplication. A.R.S. § 16-621(A); EPM
2 Ch. 10 § II.D. The Duplication Board is made up of two registered voters from different political
3 parties. *Id.* The Duplication Board duplicates the voter’s choices onto a new ballot, and the
4 duplicated ballot is then run through the tabulation machine and counted. In total, Maricopa
5 County duplicated 27,869 ballots in the 2020 General Election.

6 **D. Plaintiff’s “Election Contest.”**

7 Plaintiff first filed a Rule 27 Petition for discovery, then filed her Amended Complaint to
8 assert an election contest a few days later. Plaintiff challenges the results of the presidential
9 election on these grounds: (1) election official “misconduct”; (2) “illegal votes”; and (3) because
10 of an “erroneous count of votes,” the Biden Electors “did not in fact receive the highest number
11 of votes.” [¶¶ 30-31] Her claims stem from two issues.

12 First, she alleges that observers were not close enough to properly observe the signature
13 validation process for early ballots. [*Id.* ¶¶ 11-23] This, according to Plaintiff [¶ 38], warrants
14 throwing out the election results because some officials “potentially allow[ed] falsely or
15 insufficiently verified ballots to be counted.”

16 Second, Plaintiff alleges an attenuated chain of guesswork to conclude that Donald Trump
17 should have won a congressional district in Queen Creek. She claims that election workers and
18 observers had to “catch” errors in Maricopa County’s “highly inaccurate” ballot duplication
19 software, [¶ 27], that the county sent duplicated ballots to a third-party vendor for printing, and
20 observers were “unable to observe” whether the vendor “print[ed] the correct ballots.” [¶ 26].
21 She also claims that there was a “high number of ‘duplicate’ ballots in Congressional District
22 5,” [¶ 28], and that the results in that district “were strongly inconsistent with voter registration
23 data (party affiliation) and with historical voting data,” [*id.*].³

24
25 ³ Plaintiff’s theory has now shifted from the one asserted in her Amended Complaint. In her
26 proposed findings of fact and conclusions of law, Plaintiff asks the Court to find that, based on

1 Based on this, Plaintiff asks the Court to invalidate the election of the Biden Electors and,
2 “if an inspection of the ballots should so prove,” declare the Trump Electors as the winner
3 instead. [Am. Compl. Prayer for Relief]

4 **E. Plaintiff’s Ballot and Envelope Inspection.**

5 The Court initially granted Plaintiff’s request for discovery, and allowed her to inspect a
6 “sampling” of: (1) 100 ballot affidavits to compare them to the voter’s signatures in the voter’s
7 registration file; and (2) 100 duplicated ballots to compare them to the original damaged or
8 defective ballot. At the inspection, the parties identified two duplicated ballots that had a
9 duplication error. One ballot was originally cast for Donald Trump, but the duplicated ballot was
10 cast for Joe Biden, and the other ballot was originally cast for Donald Trump, but the duplicated
11 ballot was cast as an overvote (two bubbles were filled). During the ballot affidavit inspection,
12 the Maricopa County Director of Elections and Early Voting confirmed that Maricopa County
13 was satisfied that all 100 ballot affidavits were signed by the registered voter.

14 After the initial inspection, Plaintiff was permitted to inspect more randomly selected
15 duplicated ballots. During this subsequent inspection, 1,526 duplicated ballots were reviewed
16 and the parties identified 7 duplicated ballots that had errors. Three ballots were originally cast
17 for Donald Trump, but the duplicated ballots were cast as undervotes (no bubble was filled), two
18 ballots were originally cast for Donald Trump, but the duplicated ballots were cast as overvotes,
19 and two ballots were originally cast for Joseph Biden, but the duplicates were cast as overvotes.

20 In total, 1,626 duplicated ballots were reviewed. While 9 errors were identified, those
21 errors if corrected would only change Biden’s margin of victory by a total of 6 votes. If that vote
22 differential was converted to an error rate and applied to the total universe of duplicated ballots,
23 it would only yield 103 more votes for Donald Trump ($6 \div 1,626 = .00369 \times 27,869 = 102.84$).

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26 the two errors identified in Plaintiff’s inspection, there were “serious errors” in the Duplication
Board’s duplication of ballots that warrant overturning the election results.

1 **Argument**

2 **I. Plaintiff Fails to State a Claim for an Election Contest.**

3 “[E]lection contests are purely statutory, unknown to the common law, and are neither
4 actions at law nor suits in equity, but are special proceedings.” *Griffin v. Buzard*, 86 Ariz. 166,
5 168 (1959); *Brown v. Superior Court*, 81 Ariz. 236, 239 (1956) (“It is fundamental that rules
6 governing election contests are purely statutory”); *Barrera*, 117 Ariz. at 529 (“The right to a . . .
7 contest of the ballots cast at an election did not exist at common law . . . and the granting of such
8 right lies within the discretion of the legislature.”) (citations omitted). They are thus the subject
9 of deliberate legislative restriction because of “strong public policy favoring stability and
10 finality of election results.” *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App.
11 2010) (quotation omitted). And A.R.S. § 16-672(A) carefully circumscribes the valid grounds
12 of a contest: (1) “misconduct” by election officials; (2) the elected official was ineligible for the
13 contested office; (3) the contested official gave a “bribe or reward” or “committed any other
14 offense against the elective franchise”; (4) “illegal votes”; or (5) because of an “erroneous count
15 of votes,” the elected official didn’t “receive the highest number of votes.”

16 These five statutory grounds are the only grounds on which an elector may contest the
17 results of an election, and Plaintiff bears the burden to show that the contest is based on one of
18 these grounds. *Henderson v. Carter*, 34 Ariz. 528, 534–35 (1928) (contestant “assumes the
19 burden of showing that his case falls within the terms of the statute providing for election
20 contests”); *see also Fish v. Redeker*, 2 Ariz. App. 602, 606 (1966) (contestant failed to show that
21 conduct came “within the statutory definition of grounds for an election contest”). Beyond that,
22 Plaintiff bears the burden of proving that she is entitled to the extraordinary remedy of
23 overturning election results. Arizona courts apply “all reasonable presumptions” in “favor [of]
24 the validity of an election,” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986), which control
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1 absent “a showing of fraud” or “a showing that . . . the result would have been different.” *Id.*⁴
2 The facts alleged in Plaintiff’s Amended Complaint cannot carry this heavy burden.

3 **A. Plaintiff’s Claims of “Misconduct” Are Barred by Laches.**

4 To begin, laches bars Plaintiff’s Amended Complaint [¶ 22] that observers were “at least
5 ten to twelve feet away” and thus couldn’t see voter signatures during the early ballot signature
6 verification process. The equitable doctrine of laches “will bar a claim if a party’s unreasonable
7 delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz.
8 496, 497 ¶ 10 (2006). Plaintiff checks off all the boxes.

9 During this election, political party observers were permitted to observe early ballot
10 processing, including signature verification, and in fact the Republican Party had observers
11 present to observe the early ballot affidavit signature verification process. [¶ 23]

12 Plaintiff’s failure to bring her claims at that time – or at any time in the nearly two months
13 since early voting began – is unreasonable. In deciding whether a plaintiff’s delay is
14 unreasonable, a court should consider “the justification for the delay, the extent of the plaintiff’s
15 advance knowledge of the basis for the challenge, and whether the plaintiff exercised
16 diligence[.]” *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016)
17 (citation omitted). Plaintiff concedes that observers complained they couldn’t see the signature
18 verification process, [¶ 23 (alleging that observers complained and received “binoculars,” but
19 the voter signatures were still “almost completely unreadable”)], yet Plaintiff did nothing more
20 to remedy the issue. Instead, Plaintiff waited until after her preferred candidate lost the election
21 to raise these complaints for the first time. *See McComb v. Superior Court In & For Cty. of*
22 *Maricopa*, 189 Ariz. 518, 526 (App. 1997) (“[A] candidate or other election participants should

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24 ⁴ Courts around the country require a similar showing. *E.g., Martin v. Fulton Cty. Bd. of*
25 *Registration & Elections*, 835 S.E.2d 245, 266–67 (Ga. 2019) (“[W]e presume that election
26 returns are valid, and the party contesting the election has the burden of showing an irregularity
or illegality sufficient to change or place in doubt the result of the election.”) (quotations and
alterations omitted).

1 not be allowed to . . . subvert the election process by intentionally delaying a request for remedial
2 action to see first whether they will be successful at the polls.”) (quotation omitted).

3 As explained below, there is no legal right to observe the signature verification process
4 and, moreover, no statutory basis to challenge signature mismatches. Even so, if Plaintiff
5 believed she had a valid legal objection—as she (incorrectly) seems to think she does now
6 [¶ 21]—then she should have filed an emergency lawsuit then to correct this supposed
7 “misconduct” by election officials.⁵ Yet Plaintiff waited until now to file this lawsuit, when they
8 could do the most damage to electoral systems and voter confidence.

9 Because Plaintiff and her party’s observers failed to raise these concerns when it was
10 supposedly happening, even if their complaints were valid (which they aren’t, for the reasons
11 described below), it is no longer possible to address the issue. It was then that the best and most
12 accurate facts, witnesses, and information existed and when judicial intervention could have
13 remedied any alleged issues while the process was still ongoing. Plaintiff’s inexcusable delay
14 prejudices the Secretary, the County, the Defendants, the administration of justice, and above all
15 else, Arizona voters. Laches precludes her claims.⁶

16 **B. Plaintiff’s Allegations Do Not Amount to “Misconduct.”**

17 Election contests must rest on facts, not “mere suspicion and conjecture of wrongdoing.”
18 *Hunt v. Campbell*, 19 Ariz. 254, 264 (1917). But that is exactly what Plaintiff does here.

19
20 ⁵ As Plaintiff knows as Chair of the Arizona Republican Party, each political party may designate
21 representatives to act as early ballot challengers, and there is a process for timely challenging
22 early ballots. A.R.S. § 16-552(C). Signature mismatches are not a basis for challenge, but even
23 assuming they were, “[c]hallenges to early ballots must be submitted prior to the opening of the
24 early ballot affidavit envelope,” and a challenge “received after the affidavit envelope containing
25 the ballot has been opened may be summarily denied as untimely.” EPM Ch. 2 § 5.

26 ⁶ If Plaintiff challenges longstanding election procedures, [¶¶ 11-17 (complaints about the
signature verification process in general)], that claim is also barred by laches. *See Tilson v.*
Mofford, 153 Ariz. 468, 470 (1987) (electoral procedures “cannot be questioned after the people
have voted”).

1 Plaintiff alleges that county officials engaged in “misconduct” by (1) failing to allow
2 observers to stand close to the signature verification process for early ballots, and (2) failing to
3 allow observers to watch one step in the ballot duplication process. These allegations do not—
4 and cannot—amount to actionable “misconduct” because, contrary to Plaintiff’s erroneous
5 assumption, nothing in the law entitles political party observers to a close-up view of the
6 signature verification process or duplication process. Beyond that, Plaintiff fails to allege facts
7 sufficient to suggest any wrongdoing by Maricopa County officials, much less to overcome the
8 presumption that election officials acted in good faith. Even if the County improperly restricted
9 observation (which it didn’t), a mere failure to comply with election observation requirements
10 is not a valid basis to sustain an election contest. And even if Plaintiff has now identified 7
11 duplication errors, mere mistakes and minor irregularities are insufficient as a matter of law.

12 **1. Plaintiff Is Not Entitled to Her Preferred Method of Observation.**

13 Arizona law does not grant observers the specific right to observe the signature
14 verification process or the duplication process. Instead, the EPM (at ch. 8, sec. III) provides that
15 County Recorder processing procedures (which includes signature verification) and early voting
16 may be observed only if permitted by the County Recorder or other officer in charge of elections.
17 In other words, observation is a discretionary privilege, not a right.

18 Here, Maricopa County chose to allow observation of early voting processing, but that
19 did not entitle political parties to observe in every way and in the exact proximity they desired.
20 Indeed, the purpose of allowing political party observers is to observe the process as a whole;
21 not to allow the observers to conduct signature verification or ballot duplication themselves.
22 Moreover, even if observers had a right to observe signature verification proceedings (which
23 they do not), Arizona law does not entitle observers to challenge early ballots on the grounds
24 that the signature was a mismatch and was improperly verified. The EPM (at ch. 2, sec. V)
25 provides that challenges to early ballots may only be made on either (or both) of the two grounds
26 listed in A.R.S. § 16-591: (1) that the person is not qualified to vote, or (2) that the person has

1 already voted in the same election. Thus, Plaintiff’s claim that the election results should be
2 overturned because of inadequate observation access—a claim that has been made over and over
3 again by the Trump Campaign as part of a national strategy to sow doubt about the integrity and
4 results of the election—has no legal foundation.⁷

5 **2. Plaintiff Cannot Overcome the Presumption of Regularity.**

6 Even if Plaintiff was entitled to her preferred method of observation (she is not), she
7 cannot overcome the presumption of regularity necessary to prevail in a contest. The “returns of
8 the election officers are prima facie correct,” and courts apply a presumption of “good faith and
9 honesty of the members of the election board” that must control unless there is “clear and
10 satisfactory proof.” *Hunt*, 19 Ariz. at 268; *see also Burri v. Campbell*, 102 Ariz. 541, 543 (1967)
11 (“It is a settled principle of law that official acts of public officers are presumed to be correct
12 and legal, in the absence of clear and convincing evidence to the contrary.”). To overcome this
13 strong presumption, Plaintiff cannot rely on “mere suspicion and conjecture of wrongdoing.”
14 *Hunt*, 19 Ariz. at 264. But that’s exactly what Plaintiff’s Amended Complaint does.

15 For her claim over early ballots, Plaintiff claims that election officials “potentially
16 allow[ed] falsely or insufficiently verified ballots to be counted,” [¶ 38 (emphasis added)], and
17 that she “has no way of knowing . . . whether falsely or insufficiently verified ballots were
18 counted.” [¶ 39] She also suggests [¶ 15] that County election workers may have accepted “false
19 or copied signatures” on ballot affidavits. The basis for her concern about fraudulent signatures?

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22 ⁷ That Plaintiff is not entitled a front-row seat to the signature-verification and ballot duplication
23 processes is confirmed by recent decisions in other states rejecting similar claims. *See, e.g.,*
24 *Kraus v. Cegavske*, 2020 WL 6483971, at *1 (Nev. Nov. 3, 2020); *Stokke v. Cegavske*, No. 2:20-
25 cv-02046 (D. Nev. Nov. 6, 2020); *Constantino v. City of Detroit*, ___ N.W.2d ___, 2020 WL
26 6882586, at *1 (Mich. Nov. 23, 2020); *Constantino v. City of Detroit*, No. 20-014780 (Mich.
Cir. Ct. Nov. 13, 2020), [https://www.greatlakesjc.org/wp-content/uploads/Opinion-and-Order-
Judge-Kenny-Costantino.pdf](https://www.greatlakesjc.org/wp-content/uploads/Opinion-and-Order-Judge-Kenny-Costantino.pdf); *In re Canvassing Observation*, 2020 WL 6737895, at *8–9 (Pa.
Nov. 17, 2020).

1 A “registered voter’s scanned signature [is] publicly available from the Department of Motor
2 Vehicles,” so “a voter’s signature relatively easy to reproduce.” [¶ 13] Nonsense.

3 For one thing, Arizona and federal law circumscribe the release and use of personally
4 identifying information, including a person’s name, and other information on a driver’s license.
5 See A.R.S. §§ 28-440–458; 18 U.S.C. §§ 2721–2725. Indeed, there are very limited
6 circumstances under which a requestor can obtain this information, either because of a
7 specifically defined professional need or with the written consent of the individual. A.R.S. § 28-
8 455(C). What’s more, the requestor must also present personal identification and explain the
9 reason for making a request, A.R.S. § 28-449(B), which must be verified and maintained by the
10 Department, A.R.S. § 28-449(B), (D). The requestor also must certify, under penalty of perjury,
11 that the records are being used solely for the indicated purpose. Ariz. Dep’t of Transp. Motor
12 Vehicle Div., *Motor Vehicle Record Request*, [https://apps.azdot.gov/files/mvd/mvd-forms-
13 lib/46-4416.pdf](https://apps.azdot.gov/files/mvd/mvd-forms-lib/46-4416.pdf) (last visited Nov. 28, 2020). The notion that a meaningful number of bad actors
14 obtained voters’ signatures and fraudulently signed ballot affidavits in their names is absurd.

15 Plaintiff also intends to allege that Maricopa County made signature verification errors.
16 She makes this argument solely on the grounds that handwriting experts could not conclusively
17 opine, based on their industry standards, that a voter’s signature matched the signature on file.
18 But county election officials are not required to verify signatures based on these expert standards.
19 That forensic document examiners declined to *conclusively* opine under their rigorous
20 professional standards whether an early ballot signature is a match for the 8-10% of voters who
21 have only one signature on file does not render verification of those signatures improper.

22 First, as Plaintiff admits, that this group of signatures lacks more than one comparator
23 signature does not mean that “the signatures were invalid or fraudulent.” [Pl.’s Mot. for Cont.
24 Inspec. at 2, n.2] Second, the standards that forensic document examiners use are not the same
25 as the standards used by county elections officials. Forensic document examiners are often used
26 in criminal cases; for example, they may be used to determine whether a criminal defendant has

1 committed forgery or fraud. *See, e.g., United States v. Prime*, 431 F.3d 1147, 1153–54 (9th Cir.
2 2005) (affirming admission of forensic document examiner’s expert testimony in wire fraud and
3 counterfeiting cases); *State v. Coghill*, 216 Ariz. 578, 581 (App. 2007) (use of forensic document
4 examiner in child pornography case).

5 The standards in such cases—often, beyond a reasonable doubt—are plainly not the same
6 as those used by trained, but non-expert, county officials to adjudicate signature matches in the
7 elections context, where the presumption is that a vote is valid. *Cf. A.R.S. § 16-121.01* (voter is
8 presumed to be properly registered and a challenger must prove by clear and convincing
9 evidence otherwise). Indeed, this Court held earlier this year that county recorders may
10 “undoubtedly” err in determining signature verification, but that such error is not grounds for
11 judicial intervention. *See Arizonans for Second Chances Rehabilitation & Public Safety v.*
12 *Bingham*, No. CV-2020-009428, at 3 (Maricopa Sup. Ct. Aug. 20, 2020) (Warner, J.). In fact,
13 other courts have found that lay elections officials are more likely to erroneously reject valid
14 signatures—not accept invalid signatures. *See Frederick v. Lawson*, No. 119CV01959SEBMJD,
15 2020 WL 4882696, at *14 (S.D. Ind. Aug. 20, 2020).

16 Third, it cannot be that the Arizona legislature intended to exclude all first-time voters
17 (who only have one comparator signature on file) from being able to have their signatures
18 properly verified and thus successfully cast an early ballot. If the Legislature had intended to
19 create such an exclusion, it could’ve done so. In fact, although such restrictions are
20 constitutionally suspect, certain other states *do* exclude first-time voters from being able to vote
21 by mail. *See, e.g., Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 2020 WL
22 5412126, at *31 (M.D. Tenn. Sept. 9, 2020), *stay denied*, 977 F.3d 566, 568 (6th Cir. 2020)
23 (enjoining as unconstitutional Tennessee’s ban on voting by mail for first-time voters). But
24 Arizona has not done so, and the Court should decline Plaintiff’s suggestion to effectively create
25 such a categorical restriction out of whole cloth here.

1 As for Plaintiff’s claim about duplicated ballots, she alleges that Maricopa County’s ballot
2 duplication software was “highly inaccurate,” leaving it to election workers or observers to
3 “catch” errors, [¶ 27]; that “for whatever reason,” the software erroneously prefilled “Biden”
4 “much more often” than “Trump,” [*id.*]; and that observers were “unable to observe” whether a
5 third-party vendor was receiving and “printing the correct ballots,” [¶ 26]. During the inspection
6 of 1,626 duplicated ballots, the parties identified only nine errors, which affected both
7 candidates. None of that is “misconduct.”

8 Contrary to Plaintiff’s claim [¶ 36] that “misconduct” includes any “erroneous conduct
9 without wrongful intention,”⁸ under Arizona law, “honest mistakes or mere omissions on the
10 part of the election officers” are not enough to establish “misconduct.” *Findley v. Sorenson*, 35
11 Ariz. 265, 269 (1929). Courts around the country agree that “a technical error, without more,”
12 cannot override the “constitutional right of the voters . . . to cast their vote and have their vote
13 counted.” *Witten v. Butcher*, 238 W. Va. 323, 329 (2016); *see also, e.g., In re Feb. 14, 2017,*
14 *Special Election on Moses Lake Sch. Dist. #161 Proposition 1*, 413 P.3d 577, 587 (Wash. App.
15 2018) (“Elections cannot be held invalid nor the returns impeached for mere irregularities. Even
16 gross irregularities not amounting to fraud do not vitiate an election.”) (citation omitted).

17 Plaintiff’s allegations that election officials didn’t “allow legal observers to observe,” or
18 the claim that Duplication Boards made a few duplication errors, fails to state a claim for an
19 election contest based on “misconduct.”

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23 ⁸ With no citation, Plaintiff purports to quote [¶ 36] a California case interpreting misconduct
24 this way. The Secretary assumes Plaintiff is quoting *In re Cryer*, 247 P. 252, 253 (Cal. Ct. App.
25 1926), which rejected a complaint like Plaintiff’s. There, the court stressed that an election
26 contest must allege “at least some definite particularity in the charge of malconduct by election
officers” and rejected the plaintiff’s claim because, “[w]ithout the slightest emphasis on any part
of the conduct of the boards or officers of election,” the complaint was “not anything other than
a general charge that the election count was irregular and erroneous.” *Id.* at 233-54. So too here.

1 **3. Alleged Violations of Election Observation Requirements or Minor**
2 **Duplication Errors Cannot Void the Election Results.**

3 Plaintiff also relies on the EPM and election statutes to claim [¶¶ 32-35] that election
4 officials violated a legal obligation to allow observers to watch the tabulation process. But early
5 ballot processing is not part of the tabulation process, and the EPM nowhere requires that
6 observers be required to be so close as to be able to conduct signature verification or ballot
7 duplication themselves. Thus, Plaintiff’s claim is based on the false assumption that she and her
8 party were entitled to up-close observation of the signature verification and ballot duplication
9 processes. In any event, unless an election statute “expressly provides that a failure to observe
10 certain requirements invalidates the vote,” courts will not “throw out” votes merely “because the
11 [election officials] failed to comply with the statutory regulations.” *Findley*, 35 Ariz. at 269. That
12 is because “general statutes directing the mode of proceeding by election officers are deemed
13 advisory, so that strict compliance with their provisions is not indispensable to the validity of the
14 proceedings themselves.” *Id.*; *Chenoweth v. Earhart*, 14 Ariz. 278, 286 (1912) (an election
15 procedure does not “declar[e] that a failure . . . render[s] the election void” is “directory only”).

16 Even if the law could be construed to require any observation of early ballot signature
17 verification and up-close observation of ballot duplication, a failure to comply with A.R.S. §§
18 16-621 and 16-552 cannot overturn the election results because those statutes do not provide for
19 that remedy. *Findley*, 35 Ariz. 265 at 269; *cf. Pacion v. Thomas*, 225 Ariz. 168, 170–71 ¶ 12
20 (2010) (rejecting election contest alleging campaign finance violations, and “declin[ing] to infer
21 a statutory remedy into the campaign finance statutes that the legislature eschewed”).

22 In the end, Plaintiff’s allegation that election officials violated observer requirements,
23 even if accurate, without more, is not enough to invalidate the will of Arizona’s voters

24 **C. Plaintiff Fails to Allege a Single “Illegal Vote” Was Cast.**

25 To prevail in a contest on this ground, the contestant has the burden of proving (1) that
26 illegal votes were cast and (2) that those illegal votes “were sufficient to change the outcome of

1 the election.” *Moore v. City of Page*, 148 Ariz. 151, 156 (App. 1986). Plaintiff doesn’t even try
2 to allege facts that would establish either element.

3 Plaintiff wildly speculates that some votes may have been illegally cast because observers
4 were unable to see certain processes, [¶¶ 23, 26], that ballot duplication software was “highly
5 inaccurate” [¶ 27]; and that Donald Trump underperformed in one congressional district [¶ 28].
6 But those are not allegations that even a single “illegal” vote was cast, which is required to even
7 argue that the Court should invalidate the election results on this ground. In *Moore*, for example,
8 even when the plaintiff established that certain citizens were unlawfully allowed to “maintain
9 their eligibility” to vote, the contest failed because the contestant didn’t prove “that any of these
10 ineligible citizens actually voted in the election.” 148 Ariz. at 156. The same is true here.

11 To the extent Plaintiff shifts her theory again and tries to claim that the Duplication Board
12 members fraudulently changed votes when duplicating ballots, that claim must fail. Plaintiff did
13 not allege fraud in her Amended Complaint, and even so, she cannot carry her heavy burden of
14 proof. Under Arizona law, “[f]raud will not be presumed and must be proved by clear and
15 convincing evidence.” *Powers v. Guar. RV, Inc.*, 229 Ariz. 555, 562 ¶ 27 (App. 2012). And “[i]n
16 no case is it more imperative than in election contests that the maxim should be applied that the
17 burden of proving fraud is upon him who alleges it.” *Hunt*, 19 Ariz. at 264 (quotation omitted).
18 Plaintiff cannot ask the Court to infer or presume fraud “from slight irregularities, unconnected
19 with incriminating circumstances; nor should it be held as established by mere suspicions, often
20 having no higher origin than partisan bias and political prejudices.” *Id.*

21 In all events, even if Plaintiff could establish that some of these votes may have been
22 illegally cast, she fails to allege any facts to suggest that it would affect the outcome of the
23 election. Plaintiff’s new theory appears to be an argument that, because a miniscule percent of a
24 sample of duplicated ballots had errors, the Court should invalidate the entire election. That
25 argument is improper, as noted below, but even if the Court found that .37% of the duplicated
26 ballots should have been counted for the Trump Electors, it still wouldn’t change the outcome.

1 Given the 10,457 vote margin of victory in the presidential race in Arizona, and that there
2 were only 27,869 total duplicated ballots in Maricopa County, Plaintiff cannot show that these
3 imaginary “illegal votes” made any difference in the election. *Moore*, 148 Ariz. at 157 (election
4 contest also failed because, “considering the overwhelming number of votes by which the bonds
5 were approved, the outcome of the election could not have differed even if every illegal vote had
6 actually been cast in favor of the bond issue.”).

7 **D. Plaintiff Fails to Allege Facts to Suggest That Defendants Did Not Receive**
8 **the Highest Number of Votes.**

9 Finally, for the same reason Plaintiff fails to state a claim based on alleged “illegal votes,”
10 Plaintiff fails to allege any facts to suggest that “by reason of erroneous count of votes,” the
11 Biden electors “did not in fact receive the highest number of votes” in the presidential race.
12 A.R.S. § 16-672(A)(5). It is not enough to allege that a Democratic candidate won in a
13 historically Republican district. At bottom, Plaintiff’s disappointment [¶ 28] that “the results in
14 CDS/Queen Creek were strongly inconsistent with voter registration data (party affiliation) and
15 with historical voting data” does not support an inference that any votes were counted
16 incorrectly, let alone enough to change the outcome of the election. *Coleman v. City of Mesa*,
17 230 Ariz. 352, 356 ¶ 9 (2012) (courts accept “well-pleaded factual allegations and indulge all
18 reasonable inferences from those facts, but mere conclusory statements are insufficient.”). And
19 even accepting Plaintiff’s new statistical argument, the Biden Electors still received more votes.

20 **II. Plaintiff Cannot Challenge the Entire “Election.”**

21 Even if Plaintiff established any of the above, her request to invalidate the entire 2020
22 General Election is not a valid remedy. The plain language of A.R.S. § 16-672(A) – language
23 which must be followed strictly – requires that an election contest relate to either a specific
24 candidate “declared elected” or a specific ballot measure “declared approved.” *See also* A.R.S.
25 § 16-673(A) (requiring a contestant to file a statement of contest specifically setting forth “[t]he
26 name of the person whose right to the office is contested”). It does not authorize a general

1 challenge to the conduct of an “election.” To the extent Plaintiff’s Amended Complaint does
2 that, it fails to comply with the statute, and fails to state a claim upon which relief can be granted.

3 Indeed, the election contest statutes make clear that the exclusive remedies in such actions
4 are (1) judgment annulling and setting aside the election for the contested race, (2) a declaration
5 that a person is elected, and (3) a declaration that “the certificate of election of the person whose
6 office is contested is of no further legal force or effect.” A.R.S. § 16-676(B), (C). The Court
7 lacks jurisdiction to grant any other form of relief, and any such claims should be dismissed.

8 **III. Plaintiff Cannot Use an Election Contest to Get a Recount.**

9 As detailed above, “election contests are purely statutory,” and subject to legislative
10 restriction. *Griffin*, 86 Ariz. at 168. The Legislature authorized only a single “discovery” device
11 it deemed relevant to an election contest: the inspection of “ballots” through a procedure that a
12 contestant may file only “[a]fter the statement of contest has been filed.” A.R.S. § 16-677(A).
13 This procedure also requires the contestant to satisfy certain conditions, such as posting a bond,
14 establishing that she “cannot properly prepare for trial” without the inspection, and agreeing to
15 pay inspection costs and expenses if she doesn’t prevail in the contest. A.R.S. § 16-677(B).

16 Contrary to these requirements, Plaintiff continues to ask this Court for improper
17 discovery. Her requested relief includes an “inspection (sampling) of mail-in ballots (including
18 their signed envelopes and/or scans thereof) in order to compare them to the signatures on file;
19 and to compare “duplicate” ballots to the original ballots from which they were ‘duplicated.’”
20 [Am. Compl. at 8] In fact, her proposed findings of fact and conclusions of law ask the Court to
21 order that her inspection of duplicated ballots continue post-judgment. In other words, Plaintiff
22 filed her Amended Complaint with no factual basis for her claim that any errors occurred, but
23 she wanted to inspect some random number of ballots and affidavits to see if she could find
24 some. That is an improper use of the election contest statutes, and Plaintiff cannot rest on pure
25 speculation to request the extraordinary relief (authorized nowhere in statute) of re-counting
26 voted ballots after Election Day to “check” for errors.

1 RESPECTFULLY SUBMITTED this 2nd day of December, 2020.

2 **COPPERSMITH BROCKELMAN PLC**

3 By /s/ Roopali H. Desai

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