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15 **ARIZONA SUPERIOR COURT**
16 **MARICOPA COUNTY**

17 KARI LAKE,

18 Contestant/Plaintiff,

19 v.

20 KATIE HOBBS, personally as Contestee and
21 in her official capacity as the Secretary of
22 State; et al.,

23 Defendants.

) No. CV2022-095403

) **ARIZONA SECRETARY OF**
) **STATE'S MOTION TO DISMISS**
) **COMPLAINT IN SPECIAL**
) **ACTION AND VERIFIED**
) **STATEMENT OF ELECTION**
) **CONTEST**

) (Assigned to Hon. Peter Thompson)

1 **Introduction & Background**

2 Plaintiff/Contestant Kari Lake asks this Court to overturn the results of the 2022 General
3 Election, during which Arizonans chose Governor-Elect Katie Hobbs as their next Governor by
4 a margin of more than 17,000 votes. Yet rather than respect Arizonans’ will, Plaintiff sued to
5 ask this Court to declare her the winner. But that relief is extreme, unfounded, and unavailable.

6 State and county election officials should be commended for their hard work, diligence,
7 and integrity in administering the 2022 General Election. But like all elections that came before
8 it and all elections that will follow it, this election was not perfect – after all, elections are
9 administered by humans. But that is emphatically not a reason for this Court to thwart the
10 people’s will, which is precisely what Plaintiff wants this Court to do. Arizona courts apply “all
11 reasonable presumptions” in “favor [of] the validity of an election,” *Moore v. City of Page*, 148
12 Ariz. 151, 159 (App. 1986), presumptions that Plaintiff simply cannot overcome.

13 **First**, Plaintiff’s allegation (Count I) that the Secretary committed “misconduct” by
14 reporting election misinformation twice to social media platforms about two years ago is
15 baseless. These alleged actions had nothing to do with the conduct of the 2022 General Election,
16 and Plaintiff does not (and cannot) show that it impacted election results.

17 **Second**, Plaintiff’s claims (Count II) that tabulator configurations are susceptible to
18 “hacking,” that a theoretical county official intentionally interfered with voting equipment, and
19 that certain equipment was not properly certified under federal law must fail. There’s no
20 evidence of “hacking,” no evidence of “intentional interference,” and Maricopa County’s
21 election equipment that is required to be certified is properly certified. Plaintiff also fails to
22 adequately allege that the results of the election were affected. Her assertions about the number
23 of votes allegedly lost because the printer issue are based on the number of votes that would be
24 required to change the election results, not an attempt to estimate votes actually affected.

25 **Third**, Plaintiff’s contention (Count III) that certain early ballots were validated based on
26 signatures outside the voters’ “registration record[s]” is brought far too late and, in any case,

1 misreads the law.

2 ***Fourth***, Plaintiff’s claim about alleged ballot chain of custody violations in Maricopa
3 County (Count IV) is speculative, and Plaintiff alleges insufficient facts beyond bald,
4 unsupported allegations that any ballots were “lost” or “illegal ballots added.”

5 ***Fifth***, Plaintiff’s claims (Counts V and VI) that the printer/tabulator issues in Maricopa
6 County violated the equal protection and due process clauses of the Constitution fail absent
7 adequate allegations of intentional conduct, allegations supporting a conclusion that the election
8 was fundamentally unfair or that voters were deprived of the ability to vote, or any allegations
9 about the inadequacy of post-deprivation remedies.

10 ***Sixth***, Plaintiff’s claim (Count VII) that mail-in ballots violate article VII, § 1 of the
11 Arizona Constitution is meritless, and was rejected earlier this year by another trial court.

12 ***Seventh***, Plaintiff’s catch-all claim of an alleged “incorrect certification” (Count VIII) is
13 not a standalone basis for an election contest, and thus fails to state a claim.

14 ***Finally***, Plaintiff’s attempt to declare that there may be an “inadequate remedy” such that
15 she can receive declaratory relief (Count IX) and invocation of causes of action under 42 U.S.C.
16 § 1983 (Count X) have no place in an election contest.

17 **Argument**

18 Plaintiff’s election contest fails. But the Secretary recognizes that election contests are
19 rare, and first provides the Court with some background.

20 To survive a motion to dismiss, an election contest must be based on well-pleaded facts,
21 rather than on legal conclusions. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006)
22 (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin v. Buzard*, 86
23 Ariz. 166, 168 (1959) (election contest subject to dismissal if it fails to state a claim). “A
24 complaint that states only legal conclusions, without any supporting factual allegations” is
25 insufficient, *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417. 419 ¶ 7 (2008), and the Court may
26 not accept as true “inferences or deductions that are not necessarily implied by well-pleaded

1 facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions
2 alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. at 386, 389 ¶ 4 (App. 2006).

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*, 86 Ariz. at 169-70. They
5 are thus the subject of legislative restriction because of a “strong public policy favoring stability
6 and finality of election results.” *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App.
7 2010) (cleaned up). And A.R.S. § 16-672(A) carefully circumscribes the valid grounds of a
8 contest: (1) “misconduct” by election boards/canvassers; (2) the elected official was ineligible
9 for the contested office; (3) the contested official gave a “bribe or reward” or “committed any
10 other offense against the elective franchise”; (4) “illegal votes”; or (5) because of an “erroneous
11 count of votes,” the elected official didn’t “receive the highest number of votes.”

12 Plaintiff also must prove her entitlement to the extraordinary remedy of overturning
13 election results against several important backstops:

- 14 • Arizona courts apply “all reasonable presumptions” in “favor [of] the validity of an
15 election,” *Moore*, 148 Ariz. at 159;
- 16 • the “returns of the election officers are prima facie correct,” *Hunt*, 19 Ariz. at 268; and
- 17 • courts apply a presumption of “good faith and honesty of the members of the election
18 board” that controls absent “clear and satisfactory proof” to the contrary, *id.*

19 All told, to obtain relief in this case, Plaintiff must overcome all these presumptions and
20 make either “a showing of fraud or . . . a showing that had proper procedures been used, the
21 result would have been different.” *Moore*, 148 Ariz. at 159; *see also see also See People ex rel.*
22 *B.J.B. v. Ducey*, No. CV-21-0114-SA, 2021 WL 1997667, at *1 (Ariz. May 11, 2021) (collecting
23 authority for the proposition that a plaintiff is required to prove that the outcome of the election
24 would have been different). And with this background in mind, we turn to each of Plaintiff’s
25 deficient claims.

1 **I. Reporting Election Misinformation to a Private Party Is Not Misconduct and Does**
2 **Not Violate Constitutional Rights.**

3 Plaintiff claims the Secretary of State’s Office flagging for review certain social media
4 posts amounts to “misconduct” and violates federal and state constitutional rights. [Stmt. ¶¶ 91-
5 99; *see id.* ¶ 99] There was no misconduct, and no free speech rights have been violated.

6 Plaintiff cites as support two emails from November 2020 and January 2021 from the
7 Secretary of State’s office to a nonprofit organization, the Center for Internet Security (“CIS”).
8 [Stmt. ¶¶ 94-95 & n.14 (*citing* Exhibits 2 & 4 of Olsen Decl.)] But this correspondence
9 resoundingly proves that there was no impropriety, much less misconduct, on the part of the
10 Secretary’s Office. On November 6, 2020, the Secretary’s Office emailed CIS linking to a post
11 on a Facebook page, with the subject line: “Fake statement by Arizona Election Worker about
12 fraud.” *Id.* On January 7, 2021, the Secretary’s Office emailed CIS, reporting a Twitter
13 account—and two tweets in particular—for review. *Id.* The email stated the reason these tweets
14 were being flagged: that they contained misinformation that would “further undermine
15 confidence in the election institution in Arizona.” *Id.* In neither email did the Secretary’s Office
16 state that CIS, Facebook, or Twitter should take any particular action as to the social media posts.
17 CIS then forwarded the information to Facebook and Twitter. *Id.* As to the November 2020
18 email, a representative of Facebook responded to CIS’s email flagging the Facebook post stating
19 the platform is “looking into it.” *Id.* It is unclear whether Facebook acted, and Plaintiff does not
20 allege that it did. As for the January 2021 email, hours after CIS had emailed Twitter flagging
21 the tweets, Twitter removed both tweets for violating its terms of service. *Id.*

22 These facts are undisputed from the very emails that Plaintiff cites, and they do not
23 constitute misconduct or a violation of constitutional rights because the social media platforms
24 made independent decisions to act (or not act) against the flagged tweets. *O’Handley v. Padilla*
25 is directly on point here. There, after a complaint from the California Secretary of State’s Office,
26 Twitter labeled a user’s election-related tweets as disputed and ultimately suspended his account,

1 based on Twitter’s terms of service, which prohibit spreading election misinformation. 579 F.
2 Supp. 3d 1163, 1175-76 (N.D. Cal. 2022). The Secretary of State’s Office in *O’Handley*, like
3 the Secretary of State’s Office here, did not ask for any particular action in response to the social
4 media posts, and instead simply asserted that the information in the posts was incorrect and
5 flagged them for review. *Id.* at 1190-92. Based on these facts, the court in *O’Handley* held that
6 Twitter’s independent review and decision to take action against the account did not implicate
7 state action and there was thus no violation of plaintiff’s constitutional rights. *Id.* at 1189-92.
8 The court dismissed plaintiff’s claims with prejudice; this Court should do the same.¹

9 Moreover, even if Plaintiff can show that flagging social media posts is misconduct
10 (which she cannot), Plaintiff does not even attempt to allege – nor could Plaintiff show – whether
11 and how this conduct, done about two years before the 2022 elections, affected the election
12 results such that they must be set aside. This alone warrants dismissal.

13 **II. Election Day Issues in Maricopa County Were Not Misconduct.**

14 Plaintiff’s Count II raises several claims related to election day activities in Maricopa
15 County, including that ballot on demand printers were “uncertified” and susceptible to hacking.
16 [Stmt. ¶¶ 141] Plaintiff also questions the alleged commingling of tabulated and non-tabulated
17 ballots [¶¶ 76-79], long wait times at various vote centers [*id.* ¶¶ 80-84], and vaguely alleges that

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¹ While *O’Handley* is particularly on point, other courts have rejected similar claims where, despite alleged state involvement in posts containing COVID-19 misinformation on Twitter and other platforms, the platforms made independent decisions to take action against the posts or accounts. *See Huber v. Biden*, Case No. 21-cv-06580, 2022 WL 827248 (N.D. Cal. Mar. 18, 2022); *Hart v. Facebook Inc.*, Case No. 22-cv-00737-CRB, 2022 WL 1427507 (May 5, 2022); *Informed Consent Action Network v. YouTube LLC*, 582 F. Supp. 3d 712 (N.D. Cal. 2022); *Children’s Health Def. v. Facebook*, 546 F. Supp. 3d 909 (N.D. Cal. 2021).

1 the election day printer issues may have been intentional and that the alleged lack of printer
2 certification endangered the entire voting process [*id.* ¶¶ 100, 104]

3 **A. Ballot-on-demand printers need not be certified.**

4 Arizona counties use electronic equipment to tabulate votes, and they have done so for
5 many decades. All electronic voting systems undergo federal and state testing and certification
6 before being used in Arizona elections, counties perform logic and accuracy testing on all
7 equipment before and after every election, and the Secretary separately performs logic and
8 accuracy testing on a sample of each county’s equipment before each election with a federal,
9 statewide, or legislative race. *See, e.g.*, A.R.S. §§ 16-442, 16-449, 16-602; 2019 EPM at 76-82,
10 86-100, 235.

11 Under A.R.S. § 16-442(B), voting systems must comply with the Help America Vote Act
12 of 2002 (“HAVA”) and be approved by an accredited laboratory, known as a voting system
13 testing laboratory (“VSTL”). *See also* 2019 EPM Ch. 4 § I. HAVA also establishes standards
14 for electronic voting equipment under 52 U.S.C. § 21081, and the EAC has promulgated
15 voluntary guidelines for voting systems under 52 U.S.C. § 21101. *See* 2005 Voluntary Voting
16 System Guidelines (“VVSG”).

17 HAVA defines a “voting system” for certification purposes to include the total
18 combination of mechanical, electromechanical, or electronic equipment used to define ballots,
19 cast and count votes, report or display election results, and maintain and produce any audit trail
20 information. 52 U.S.C. § 21081(b)(1). Under Arizona law, certification is similarly required only
21 for a “voting system or device,” including “vote recording or tabulating machines or devices.”
22 A.R.S. § 16-442; *see also* 2019 EPM Ch. 4 § I (“A voting system consists of the electronic voting
23 equipment (including central count equipment, precinct voting equipment, and accessible voting
24 equipment) and election management system (EMS) used to tabulate ballots.). Neither the
25 federal nor state certification process defines “voting system” or “voting equipment” to include
26 separate systems like ballot-on-demand printers (“BODs”) or electronic poll books.

1 Plaintiff incorrectly conflates Maricopa’s BODs—which do not require certification—
2 with tabulation and voting equipment. BODs are not part of any electronic voting system used
3 in Arizona as defined under HAVA or Arizona’s requirements, and therefore, do not require
4 testing or certification under HAVA or A.R.S. § 16-442. The Secretary properly certified the
5 electronic voting system that was used in each county in the 2022 elections. And, every county,
6 including Maricopa, successfully passed logic and accuracy testing on their tabulation and voting
7 equipment for the 2022 General Election, which confirmed that the voting systems and election
8 programs were properly configured and performing accurately. Plaintiff’s claim that BODs were
9 not properly certified and that tabulation equipment was “illegally configured” is baseless and
10 should be dismissed on that ground alone. And even if there were a question about BOD
11 certification (there is not), Plaintiff cannot carry her burden to show that any certification lapse
12 led to any actual errors. *Moore*, 148 Ariz. at 159 (requiring “a showing of fraud or . . . a showing
13 that had proper procedures been used, the result would have been different”). This is a separate
14 ground on which Plaintiff’s challenge must fail.

15 **B. Susceptibility to “hacking.”**

16 Relatedly, Plaintiff also alleges (citing the Parikh declaration), that there was somehow
17 actionable misconduct or illegal votes because of her belief that the BOD printers were
18 “susceptible to hacking.” [Stmt. ¶ 141] She does not allege that BOD printers (or any other voting
19 related equipment, for that matter) were actually hacked, or actually resulted in any illegal votes.
20 This kind of rank speculation devoid of even an allegation of actual problems or the number of
21 affected ballots cannot sustain an election contest.

22 **C. Lines at vote centers and alleged “commingling” of ballots.**

23 Next, Plaintiff alleges that there was either “misconduct” or “illegal votes” cast resulting
24 from long lines at certain vote centers in Maricopa County, and further, because – as the County
25 has acknowledged – there were several instances of ballots placed into “Door 3” for tabulation
26 at central count being found in bags of ballots tabulated at a vote center. As to lines, Plaintiff

1 vaguely alleges that voter turnout was suppressed with no actual proof of voter suppression (or
2 even a suggestion of how many voters weren't able to vote). [Stmt. ¶ 84] And as for commingled
3 ballots, Plaintiff vaguely alleges that it "could have easily resulted" in Door 3 ballots not being
4 properly counted or double-counted [*id.* ¶ 77], but provides no sufficient allegations that this
5 actually occurred, or that it occurred in numbers sufficient to change the result of the
6 gubernatorial race.

7 As noted above, the Court may not accept as true "inferences or deductions that are not
8 necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions
9 from such facts, or legal conclusions alleged as facts" in a statement of election contest. *Jeter*,
10 211 Ariz. at 389 ¶ 4. And merely declaring that there was some amount of alleged "voter
11 suppression" or that Door 3 ballots "could easily" have gone uncounted or were double-counted
12 is insufficient to sustain an election contest.

13 **D. No evidence of intentional acts.**

14 Plaintiff alleges that there was intentional inference with tabulators that caused election
15 day issues in Maricopa County, and that this would constitute "misconduct" under the election
16 contest statutes if it occurred. The only cited evidence for this remarkable accusation is the
17 declaration of a so-called "expert" who somehow concludes that various procedural violations
18 can "only be characterized" as intentional. That expert declares that "given the required
19 standards and procedures involved with the election process, an unintentional widespread failure
20 of this magnitude occurring could not arise absent intentional misconduct." [Stmt. ¶ 104, citing
21 Parikh Decl. ¶ 7] The "expert" makes these wild conclusions without having inspected any of
22 the machines at issue.

23 This bare-bones allegation cannot be enough to survive a motion to dismiss. Again, the
24 Court cannot accept as true "inferences or deductions that are not necessarily implied by well-
25 pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal
26 conclusions alleged as facts," *Jeter*, 211 Ariz. at 389 ¶ 4, and that Plaintiff found an "expert"

1 willing to sign a declaration that makes wild guesses about alleged intentional acts of
2 unidentified persons does not make the logical leap that Plaintiff asks the Court to take any less
3 unreasonable.

4 **E. Inadequate allegations that the result of the election was affected.**

5 To state a valid election contest based on any misconduct other than fraud, a contestant
6 must allege facts sufficient to show that “the result would have been different.” *Moore*, 148 Ariz.
7 at 159. Plaintiff has not alleged facts to support the number of votes allegedly lost as a result of
8 the issue. The numbers she cites apparently come from the Baris Declaration, which assumes its
9 own conclusion as its calculations are based on the percentage of votes that would have been
10 necessary to affect the election, not an estimate of the actual number of votes lost. [Baris Decl.
11 at 10 (indicating that a change as small as 2.5% “would have altered the outcome of the
12 gubernatorial election” and applying that figure to subsequent calculations)] Thus, Baris’
13 analysis does not support a conclusion that tens of thousands of votes were suppressed. It doesn’t
14 reflect the the suppression of even one vote because his exit poll only interviewed people who
15 had voted successfully. Any attempt to extrapolate the number of votes lost from the incidence
16 of self-reported issues among successful voters is pure speculation, and therefore Count II fails
17 to state cognizable election contest claims.

18 **III. Plaintiff’s Early Ballot Signature Verification Claims Are Barred by Laches and**
19 **Legally Baseless.**

20 Plaintiff also contends (Count III) – based solely “on information and belief” – that there
21 were an unidentified number of “illegal votes” cast because “a material number of early ballots”
22 were validated by county recorders across the state based on a signature match from something
23 other than a voter’s “registration record.” [Stmt. ¶ 151] This claim apparently rests on Plaintiff’s
24 presumption that a voter’s “registration record” is narrowly limited to a voter’s registration form,
25 and further on the idea that any provision of the 2019 Election Procedures Manual that authorizes
26

1 early ballot validation based on other signature exemplars is unenforceable. [*Id.* ¶¶ 98-99] Count
2 III fails for multiple, independent reasons.

3 **A. Laches.**

4 To begin, the equitable doctrine of laches bars Count III. Laches “seeks to prevent dilatory
5 conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing party or the
6 administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Plaintiff waited
7 years to challenge this practice and provision of the EPM, that delay is unreasonable, and that
8 delay causes significant prejudice to our elections system, the Courts, and above all, voters whom
9 Plaintiff asks this Court to disenfranchise.

10 In deciding whether a plaintiff’s delay is unreasonable, a court should consider “the
11 justification for the delay, the extent of the plaintiff’s advance knowledge of the basis for the
12 challenge, and whether the plaintiff exercised diligence[.]” *Arizona Libertarian Party v. Reagan*,
13 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). And here, Plaintiff knew or should
14 have known of this practice since at least 2019, when the EPM was approved by the Secretary,
15 Governor, and Attorney General and thus obtained the force and effect of law. Courts uniformly
16 reject challenges to election procedures like this brought only after an election.

17 Indeed, “[c]hallenges concerning alleged procedural violations of the election process
18 must be brought prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9
19 (2002) (citation omitted). Here, rather than seeking relief as to this alleged conflict between the
20 statute and EPM years or even months ago, Plaintiff waited until after the election (and after she
21 lost her race) to sue. But “by filing [her] complaint after the completed election,” Plaintiff
22 “essentially ask[s] [the Court] to overturn the will of the people, as expressed in the election.”
23 *Sherman*, 202 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiff’s attempt to “subvert the
24 election process by intentionally delaying a request for remedial action to see first whether they
25 will be successful at the polls.” *McComb v. Superior Court In & For Cty. Of Maricopa*, 189
26 Ariz. 518, 526 (App. 1997) (quotation omitted).

1 Plaintiff's belated claim – brought after all votes have been counted – also causes
2 significant prejudice to voters. Many Arizonans' early ballots were validated and tabulated based
3 on the challenged EPM provision, and throwing their votes out after-the-fact in service of
4 Plaintiff's unsupported claim would disenfranchise those voters. And while Arizona law
5 generally requires early voters whose signatures cannot be verified receive notice and an
6 opportunity to "cure" those signatures, A.R.S. § 16-550(A) . *Sotomayor v. Burns*, 199 Ariz. 81,
7 83 ¶ 9 (2000) (finding claims barred by laches and considering fairness to the parties, the court,
8 "election officials, and the voters of Arizona"). This would treat similarly situated voters
9 differently and violate both the equal protection and due process rights of voters who would not
10 receive the benefit of the statutory cure period.

11 In sum, Plaintiff's delay in challenging this EPM provision prejudices county election
12 officials, the Secretary, and above all else, Arizona voters. Laches bars this claim.

13 **B. Merits.**

14 Even if not barred by laches, Plaintiff's Count III claims and her challenge to the EPM
15 provision about early ballot signature verification are legally baseless. "A party attacking the
16 validity of an administrative regulation has a heavy burden." *Watahomigie v. Ariz. Bd. of Water*
17 *Quality Appeals*, 181 Ariz. 20, 24 (App. 1994). An agency's rulemaking powers "are measured
18 and limited by the statute creating them," *Caldwell v. Arizona State Bd. of Dental Examiners*,
19 137 Ariz. 396, 398 (App. 1983), and courts will not invalidate a regulation "unless its provisions
20 cannot, by any reasonable construction, be interpreted in harmony with the legislative mandate."
21 *Watahomigie*, 181 Ariz. at 25. Plaintiff fails to carry her heavy burden.

22 **1. Plaintiff's interpretation of A.R.S. § 16-550 contradicts the statute's**
23 **text and legislative history.**

24 A.R.S. § 16-550(A) requires the county recorder to compare the signature on early ballot
25 affidavits with the signature in the voter's "registration record." Consistent with this
26 requirement, the 2019 EPM, at page 68, specifies that, besides the voter's registration form, the

1 county recorder “should also consult additional known signatures from other official election
2 documents in the voter’s registration record, such as signature rosters or early ballot/PEVL
3 request forms,” when conducting early ballot signature verification. Plaintiff’s erroneous
4 argument that this EPM provision conflicts with A.R.S. § 16-550(A) assumes – contrary to the
5 plain text and legislative history of that statute – that the statutory reference to a voter’s
6 “registration record” is narrowly limited to the registration form or some other singular
7 document.

8 Nothing in the plain text of A.R.S. § 16-550(A) limits the county recorder’s review to the
9 voter registration form; nor does A.R.S. § 16-550(A) or any other law prohibit county recorders
10 from consulting other official documents in the voter’s registration record when verifying early
11 ballot affidavit signatures. Indeed, if, as Plaintiff insists, the Legislature wanted to restrict the
12 county recorder’s review to the registration form alone, it knows how to do so because that’s
13 exactly what the law said before the Legislature explicitly amended it. Before 2019, A.R.S. §
14 16-550(A) required the county recorder to compare the signature on early ballot affidavits to
15 “the signature of the elector on his registration form.” But in 2019, the Legislature amended
16 A.R.S. § 16-550(A) to replace the reference to “the signature of the elector on his registration
17 form” with today’s construction referencing “the elector’s registration record.” S.B. 1054, 54th
18 Leg., 1st Reg. Sess. (Ariz. 2019). Here, the Legislature acted to expressly expand the county
19 recorder’s review from just the “registration form” to documents in the “registration record.”
20 The Court should reject Plaintiff’s baseless effort to render meaningless this legislative act.

21 **2. Plaintiff’s interpretation would lead to absurd results.**

22 As the state’s Chief Election Officer, the Secretary must maintain the statewide voter
23 registration database, which contains the voter registration record of all Arizona voters. See
24 A.R.S. § 16-142; EPM, Ch. 1(IV)(A). These registration records in the voter registration
25 database often include not just the voter’s registration form, but also other – more recent –
26 documents associated with the voter’s registration and voting activity, such as the signature

1 roster or electronic poll book signatures, early ballot request forms, active early voting list
2 request forms, and early ballot affidavits from prior elections. That a voter’s registration record
3 includes other documents beyond the registration form is apparent from the Legislature’s usage
4 of the term “registration record” in other parts of Title 16. *See, e.g.*, A.R.S. § 16-153(A) (allowing
5 certain voters to protect from public disclosure their personal identifying information, “including
6 any of that person’s documents and voting precinct number contained in that person’s voter
7 registration record” (emphasis added)); A.R.S. § 16-168(F) (protecting “the records containing
8 a voter’s signature” within a voter’s registration record (emphasis added)).

9 Indeed, for long-time registered voters, the registration form in the voter’s record may be
10 decades old, and their signature may degrade or change over time, as reflected in more recent
11 official documents in the registration record. Plaintiff’s insistence that officials may only consult
12 the registration form – and not any other official documents in the voter’s registration record –
13 both defies the plain text and legislative history of A.R.S. § 16-550(A) and would lead to absurd
14 results. Counties would have to reject early ballots based on signature comparison to an outdated
15 exemplar while ignoring more recent signatures available in the voter’s registration record.
16 Further, Plaintiff’s argument would absurdly lead to some voters being required to cure their
17 signature for every early ballot they cast or face disenfranchisement because the county,
18 according to Plaintiff, must always compare the voter’s early ballot affidavit signature to their
19 decades-old registration form, despite knowing that the voter’s signature has changed based on
20 more recent documents in the registration record. The Court should reject Plaintiff’s erroneous
21 and nonsensical reading of the law. *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293, 297 ¶ 11
22 (App. 2017) (courts “will not interpret a statute in a manner that would lead to an absurd result.”).

23 **C. Speculation.**

24 Even if Plaintiff’s claims in Count III were not barred by laches (they are) and even if
25 those claims had any basis in law (they do not), Count III also fails because it is based entirely
26 on speculation. As with “misconduct” and “erroneous count of votes,” a contest based on “illegal

1 votes” requires the contestant to prove (1) that illegal votes were cast and (2) that those illegal
2 votes “were sufficient to change the outcome of the election.” *Moore*, 148 Ariz. at 156. Plaintiff
3 doesn’t – and obviously can’t – allege a single plausible fact to support this claim. This
4 fundamental failure independently dooms these claims.

5 Beyond that, however, Plaintiff provides no principled way for the Court to even consider
6 this claim and the remedy Plaintiff seeks. Plaintiff cavalierly asks this Court to proportionally
7 reduce the tabulated returns of early ballots to exclude early ballots validated in alleged violation
8 of the law. [Stmt. ¶ 155] But she doesn’t allege how many early ballots were validated using a
9 signature exemplar on something other than a voter registration form, and she could never prove
10 what that number is because the counties do not track which signature exemplar was used to
11 verify a particular ballot. And this should go without saying, but it would be impracticable for
12 counties to re-do early ballot signature verification at this stage. Granting Plaintiff’s request
13 would therefore require the Court to: (1) guess how many early ballots would have been rejected
14 had counties applied Plaintiff’s absurd interpretation of A.R.S. § 16-550(A); and then (2) guess
15 how these voters would have voted in the Governor’s race to “proportionally reduce” the vote
16 totals. The Court should reject Plaintiff’s request to apply conjecture upon conjecture to overturn
17 the election result.

18 **IV. Speculative Chain of Custody Issues Cannot Invalidate Ballots.**

19 In Count IV, Plaintiff alleges that there were breaches of the chain of custody of ballots
20 because an alleged “whistleblower” supposedly observed certain batches of ballots arrived
21 without proper chain of custody forms, and that Runbeck printed 9,530 duplicate ballots “with
22 no chain of custody.” [Stmt. ¶¶ 158-61] She claims that this alone entitles her to “an order either
23 setting aside the election or proportionally reducing the tabulated returns of early ballots” by
24 some unidentified number. [*Id.* ¶ 162]

25 Even if some unknown number of ballots were not accompanied at all times by
26 appropriate chain of custody documentation, that does not mean there was actionable

1 misconduct, there is no evidence or reasonable inference that any “legal ballots [were] lost or
2 illegal ballots . . . added” [Stmt. ¶ 113, 161], much less enough to change the results of the
3 election, and it is not a ground on which to invalidate an entire election and disenfranchise
4 millions of Arizonans.

5 **V. Election Day Issues in Maricopa County Did Not Violate the Constitution or**
6 **Change the Result of the Election.**

7 Counts V and VI assert as grounds for contesting the election that the printer/tabulator
8 issues in Maricopa County resulted in the violation of equal protection and due process rights
9 under the Fourteenth Amendment to the U.S. Constitution. These claims fail.

10 **A. Plaintiff Has Not Alleged the Required Intentional Conduct.**

11 The Complaint acknowledges that its due process and equal protection claims both
12 require intentional conduct. [Stmt. ¶¶ 145 (“If the intentional actor was a Maricopa County
13 election official . . . that official misconduct also would constitute an Equal Protection and Due
14 Process violation.”); 164 & 169 (“Assuming *arguendo* that a state actor caused the tabulator
15 problems” in alleging equal protection and due process violations)]. *See also Fares Pawn, LLC*
16 *v. Indiana Dep’t of Fin. Institutions*, 755 F.3d 839, 846 (7th Cir. 2014) (“Negligent or accidental
17 differential treatment does not count.”); *Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005)
18 (due process violation requires “an intentional act on the part of the government or its officials”).
19 But as discussed above in Section II.D, Plaintiff has not alleged what the underlying electronic
20 or mechanical cause of the issues were, let alone identify which humans were involved or any
21 facts suggesting their intentions. These claims therefore fail.

22 **B. Plaintiff Has Not Alleged the Discriminatory Intent Required to Support an**
23 **Equal Protection Claim.**

24 An equal protection violation requires not only intentional conduct, but also an actual
25 intent to discriminate. *See Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022). Such intent
26 cannot “be inferred from the action itself.” *Snowden*, 321 U.S. at 8. Disparate impact only gives

1 rise to an inference of discriminatory intent where “a clear pattern, *unexplainable on grounds*
2 *other than* [intentional discrimination], emerges from the effect of the state action.” *Arlington*
3 *Heights*, 429 U.S. at 266 (emphasis added).

4 In this case there is no “pattern” of state action that suggests discriminatory animus.
5 Instead, the facts alleged in Plaintiff’s Complaint suggest that the reason that the printer/tabulator
6 issue allegedly disproportionately affected Republican voters is because the problems arose on
7 election day, when more Republican voters went to the polls. [Stmt. ¶ 63 (alleging that three
8 times as many election day voters in Maricopa County voted for Plaintiff as her opponent)²]
9 These facts are far from a “clear pattern, unexplainable on grounds other than” an intent to
10 discriminate, and therefore fail to support an inference of discriminatory intent, particularly
11 where there are no allegations to even support a conclusion of intentional conduct.

12 **C. Plaintiff’s Due Process Allegations Are Inadequate in Other Respects.**

13 **1. Allegations Fail to Support “Fundamental Unfairness” of Election.**

14 Voters can have their substantive due process rights violated during an election only if
15 the election is “conducted in a manner that is fundamentally unfair.” *Bennett v. Yoshina*, 140
16 F.3d 1218, 1226 (9th Cir. 1998). The threshold for “fundamental unfairness” is high. “In general,
17 garden variety election irregularities do not violate the Due Process Clause, even if they control
18 the outcome of the vote or election.” *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998);
19 *see also Shannon*, 394 F.3d at 96 (“[a] voting machine malfunction is the paradigmatic example
20 of a ‘garden variety’ election dispute that is not cognizable as a due process violation, even if
21 the malfunction is alleged to have affected the result of the election,” and that such issues
22 “differ[] significantly from purposeful state conduct directed at disenfranchising a class or group
23 of citizens”).

24 _____
25 ² Plaintiff cites election-day exit polling to allege that the issues were more prevalent in more
26 Republican-leaning areas in the county, but the declaration cited for this allegation entirely fails
to set forth the underlying facts for those conclusions. [Stmt. ¶ 143]

1 Plaintiff has not alleged that the election day issues were caused by a deliberate policy
2 decision by a governmental body. *Cf. Ury v. Santee*, 303 F. Supp. 119, 123-24 & 126 (N.D. Ill.
3 1969) (due process violation arose from creation of election precincts “grossly unequal in
4 number of registered voters” and the failure to establish and staff facilities adequate to the needs
5 of those precincts). Plaintiff also has not alleged an outright denial of the right to vote. That in-
6 person voting proved harder than expected, and that some voters may have been discouraged
7 from voting altogether, does not automatically equate to denial of the right to vote. *See Hennings*
8 *v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975); *see also D’Amico v. Mullen*, 351 A.2d 101, 103
9 (1976) (holding in an election contest case that the fact that prospective voters may have been
10 “discouraged by the long lines” and may have left without voting was not equivalent to alleging
11 that they “would have been denied the right to exercise their franchise had they awaited their
12 turn at the polls”).

13 Here, although many voters faced unexpected inconveniences on Election Day, those
14 inconveniences did not rise to the level of denying them the right to vote. Plaintiff does not—
15 and cannot—allege that any voter who waited in line was ultimately unable to vote. She also
16 does not—and cannot—allege that waiting in line at a voting center suffering from a tabulator
17 malfunction was the only way for voters to cast their ballots on November 8, because there were
18 several other options available to them: inserting a completed ballot in Door 3 for later
19 tabulation, checking out of the voting center and voting at a different voting center, casting a
20 provisional ballot at a different location, or completing and dropping off an early ballot if the
21 voter had one. Thus, Plaintiff’s allegations fail to describe the “fundamental unfairness” required
22 to support a substantive due process claim. *Bennett*, 140 F.3d at 1226.

23 **2. Plaintiff Has Not Alleged Deprivation of the Right to Vote or**
24 **Inadequate Postdeprivation Remedies.**

25 “A procedural due process claim has two elements: (1) a deprivation of a constitutionally
26 protected liberty or property interest, and (2) a denial of adequate procedural protections.”

1 *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th Cir. 2021) (citation and quotations
2 omitted). When the alleged deprivation arises from a random and unauthorized act by a
3 governmental actor—an act that, by its nature, renders predeprivation procedures
4 impracticable—the procedural due process requirement may be satisfied with an adequate
5 postdeprivation remedy. *Id.* at 1226. Plaintiff has failed to allege either required element.

6 First, as described above in Section V.C.1, the facts alleged here do not establish that
7 voters were deprived of the right to vote. Moreover, Plaintiff’s failure to allege the lack of an
8 adequate postdeprivation remedy is also fatal to her claim. *Pilgrim v. Littlefield*, 92 F.3d 413,
9 417 (6th Cir. 1996). As shown by this election contest, Arizona provides a postdeprivation
10 process that allows voters to raise errors or misconduct in the election process after the fact. *See*
11 *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 467 (2d Cir. 2006) (candidate
12 removed from ballot afforded adequate postdeprivation remedy through the availability of
13 proceeding allowing aggrieved candidates to contest ballot designations).

14 **D. Plaintiff Has Not Adequately Alleged that the Printer/Tabulator Issues**
15 **Changed the Results of the Election.**

16 Stating a valid election contest claim requires alleging that “the result would have been
17 different.” *Moore*, 148 Ariz. at 159. As explained in Section II.E, Plaintiff has not alleged facts
18 to support the number of votes allegedly lost because of the issue, and therefore Counts V and
19 VI fail to state cognizable election contest claims.

20 **VI. Mail-In Ballots Comply with Art. VII, § 1.**

21 Next, Count VII alleges that mail-in ballots cast under A.R.S. § 16-547 “do not satisfy
22 the ballot-secrecy requirements of Arizona’s Constitution” and that “[a]ll absentee ballots cast
23 in the 2022 general election are illegal votes.” [Stmt. ¶ 174] Plaintiff acknowledges that the
24 Arizona Republican Party raised a similar challenge earlier this year and that matter is pending
25 in the court of appeals [*id.* ¶ 175], yet fails to acknowledge that the trial court (Judge Lee Jantzen)
26 dismissed the party’s claim with prejudice because the Arizona Constitution does not prohibit

1 mail-in voting. [*See Ariz. Republican Party v. Hobbs, et al.*, No. CV-2022-00594 (Mohave Cnty.
2 Super. Ct), June 6, 2022 Order (attached as **Exhibit 1**)]

3 First, and just like Plaintiff’s claim about early ballot verification procedures (Count III,
4 *see* Section III(A), *supra*), this is a challenge to a more-than-thirty-year old statute and election
5 procedure that Plaintiff didn’t bring until after the election and after she lost. The Court should
6 thus dismiss it on laches grounds alone.

7 Plaintiff’s claim also fails on the merits. “Our state constitution, unlike the federal
8 constitution, does not grant power, but instead limits the exercise and scope of legislative
9 authority.” *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013) (emphasis added).
10 That means courts don’t look “to the constitution to determine whether the legislature is
11 authorized to act”—the Legislature has full power to act unless the Constitution says otherwise.
12 *Id.* (cleaned up). And as Judge Jantzen held, Article VII, Section 1 of the Arizona Constitution
13 does not prohibit voting by mail. That provision provides that “[a]ll elections by the people shall
14 be by ballot, or by such other method as may be prescribed by law; [p]rovided, that secrecy in
15 voting shall be preserved.” It ensures the right to a secret ballot, but leaves the precise methods
16 of voting to the Legislature. The Legislature exercised that power by adopting early voting laws
17 that preserve secrecy in voting, which include detailed procedures ensuring the secrecy of early
18 ballots and preventing fraud and coercion. *E.g.*, A.R.S. § 16-545(B)(2) (early ballot envelopes
19 must conceal the ballot and be tamper-evident when sealed); A.R.S. § 16-548(A) (requiring
20 voters to conceal their votes and fold their voted early ballot so it cannot be seen); A.R.S. § 16-
21 552(F) (requiring election officials to remove voted ballot from envelope without unfolding or
22 reviewing it); A.R.S. §§ 16-1005, 16-1012, 16-1013 (criminalizing various conduct relating to
23 early ballots and voter intimidation).

24 Plaintiff alleges no facts to support her facial constitutional claim against this
25 comprehensive statutory scheme, to say nothing of carrying her heavy burden of establishing
26 “that no set of circumstances exists under which” early ballots can be secret. *State v. Arevalo*,

1 249 Ariz. 370, 373 ¶ 9 (2020) (“If ‘there is a reasonable, even though debatable, basis for
2 enactment of the statute, the act will be upheld unless it is clearly unconstitutional.’”) Count VII
3 must thus be dismissed on the merits.

4 **VII. Incorrect Certification.**

5 Plaintiff’s Count VIII contains no new factual allegations, and is little more than a “catch-
6 all” intended, apparently, to be inclusive of all the counts before it. [Stmt. ¶ 178] But the counts
7 above must rise or fall on their own (either individually or collectively), rendering this Count
8 duplicative and subject to dismissal.

9 **VIII. Inadequate Remedy & Plaintiff’s Alternative Federal Claims.**

10 Finally, in Counts IX and X, Plaintiff tries to invoke this Court’s jurisdiction under either
11 the Uniform Declaratory Judgment Act (Count IX) or 42 U.S.C. § 1983 to provide alternative
12 relief in this election contest must fail. “[E]lection contests are purely statutory, unknown to the
13 common law, and are neither actions at law nor suits in equity, but are special proceedings.”
14 *Griffin*, 86 Ariz. at 169-70. For that reason, Arizona courts reject attempts to use other legal and
15 equitable mechanisms to achieve the same ends as an election contest when the “gravamen” of
16 the complaint is an election contest. *Donaghey v. Att’y Gen.*, 120 Ariz. 93, 95 (1978). If Plaintiff
17 wants to seek prospective declaratory or § 1983 relief, that’s her prerogative. She cannot,
18 however, raise these standalone claims here.

19 **Conclusion**

20 Arizona’s “strong public policy favoring stability and finality of election results,” *Ariz.*
21 *City Sanitary Dist*, 224 Ariz. at 334 ¶ 12, means that the judiciary must be wary of interfering
22 with presumptively valid election results. The burden on an election contestant is thus
23 exceedingly high, and here, is a burden that Plaintiff failed to meet. For all the reasons discussed
24 above, the Court should dismiss Plaintiff’s “election contest” with prejudice. The Secretary
25 further reserves her right to seek an award of fees against Plaintiff and her counsel under Rule
26 11, Ariz. R. Civ. P., and A.R.S. § 12-349.

1 RESPECTFULLY SUBMITTED this 15th day of December, 2022.

2 **COPPERSMITH BROCKELMAN PLC**

3 By /s/ D. Andrew Gaona

4 D. Andrew Gaona

5 **STATES UNITED DEMOCRACY CENTER**

6 Sambo (Bo) Dul

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