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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB, et al.,

Plaintiffs,

v.

ADRIAN FONTES, et al.,

Defendant.

No. S-1300-CV-202300202

INTERVENOR-DEFENDANT MI FAMILIA VOTA'S MOTION TO DISMISS

(Assigned to the Honorable John D. Napper)

INTRODUCTION AND BACKGROUND

In December of 2019, a new Elections Procedures Manual (EPM) took effect to "achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting." A.R.S. § 16-452. After more than three years and two full election cycles governing Arizona's election administration, Plaintiffs sued to invalidate a provision in the EPM allowing election administrators to rely on known signatures on official election documents to verify early ballot signatures. A.R.S. § 16-550(A). Their argument, if accepted by this Court, would substantially hamper local election administrators' ability to validate early ballot signatures, increasing their already heavy burden to promptly process and tabulate ballots. In turn, more voters, including those whom Intervenor-Defendant Mi Familia Vota (MFV) seeks to mobilize and activate, would have their signatures rejected and their ballots uncounted. In addition to the reasons briefed by the Secretary of State and Intervenor-Defendant the Arizona Alliance for Retired Americans, the Court should reject Plaintiffs' claims because they are barred by laches, are unripe, and rest on a fundamental misunderstanding of Arizona signature verification procedure.

ARGUMENT

The Court does not need to—and indeed should not—reach the merits of Plaintiffs' arguments. Laches bars Plaintiffs' challenge, as the 2019 EPM has long been in effect and any abrupt change now, in its last several months in operation, would prejudice ongoing election administration in the state. Further, Plaintiffs' challenge is not yet ripe as to future general election cycles because the Secretary is due to issue a new EPM later this year that, upon approval by the Governor and the Attorney General, would supersede the 2019 EPM.

If the Court does not otherwise dismiss this action in its entirety, the Court should still dismiss Plaintiff Restoring Integrity and Trust in Elections because it lacks standing. And if the Court reaches the merits, it should dismiss for the reasons addressed by the Secretary in his brief and because signature verification procedure in Arizona is thorough, rigorous, and robustly safeguards election integrity.

I. Laches bars Plaintiffs' challenge. Their challenge is also unripe, as the 2019 EPM will soon be replaced.

A. Laches

The doctrine of laches has long applied in election cases. *See Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000); *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998). Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct." *Sotomayor*, 199 Ariz. 8 at 83 ¶ 6. In the main, "[t]he laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *McLaughlin v. Bennett*, 225 Ariz. 351, 353 ¶ 5 (2010) (quoting *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006)). True, delay alone does not suffice to sustain a laches defense. *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (2009). But courts weigh this test "under the totality of circumstances," focused on evaluating whether "the delay in prosecuting the claim 'would produce an unjust result.'" *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013) (quoting *Harris*, 193 Ariz. at 410 ¶ 2 n.2).

"Fundamental fairness" is the ultimate concern for laches, and "[i]n election disputes" courts consider the fairness to others outside of the direct proceedings. *Harris*, 193 Ariz. at 414 ¶ 24 (in the initiative challenge context, courts "consider fairness not only to those challenging a ballot measure, but also to those devoting effort and funds to place a proposition on the ballot, and fairness to the thousands of citizens who signed petitions and collected the signatures."). Accordingly, a defendant asserting a laches defense must establish that "a plaintiff's delay prejudiced the defendant, the court, or the public," and "that the plaintiff acted unreasonably." *Prutch*, 231 Ariz. at 435 ¶ 13.

Laches precludes the relief Plaintiffs seek. Arizona and its political subdivisions have operated under the current EPM since December 2019. *See* Ariz. Sec'y of State, *Elections Procedures Manual* (rev. Dec. 2019); *see also Brnovich v. Hobbs*, P1300CV202200269, at *2 (Ariz. Super. Ct. June 17, 2022) (allowing the 2019 EPM to remain in effect after the Governor and Attorney General refused to approve the proposed

2021 EPM and recognizing that the Court was unable to assist the parties in producing a compliant EPM because "[t]he Complaint was filed far too late" for action to be taken "without disrupting elections that have already begun"). The State has coordinated, and the State's counties, cities, and towns have directly administered, a multitude of elections under its guidance.

Plaintiffs have had years to identify their contention with the EPM's guidance on signature verification. To allow their challenge to proceed now would prejudice the public and the State's election administration system, which sees at least local elections year-round, even in odd-numbered years. *See* A.R.S. § 16-204. Plaintiffs' delay is "unreasonable under the circumstances." *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993) (quoting *Flynn v. Rogers*, 172 Ariz. 62, 66 (1992)). Several of the Plaintiffs regularly participate in elections by supporting or opposing candidates and ballot measures, and they have been on notice of the 2019 EPM's provisions since it took effect in December 2019. *See id.* (including "the party's knowledge of his or her right" in the considerations for unreasonable delay). Indeed, this EPM has been in effect even longer than usual (as no EPM was adopted in 2021), thereby giving Plaintiffs even more time to assert their gripes with its interpretations of Arizona's election statutes. Putting forth their challenge now, after extra years of reliance and as a new EPM is due for adoption by the end of this year, is unreasonable.

Further, Plaintiffs' challenge cannot change the outcome of past elections,[1] and forcing election administrators to abruptly change their practices for the local elections remaining this year would disrupt these administrators' duties. Local election

[1] Indeed, their challenge is moot in the context of any elections that have already occurred. *See Ariz. Republican Party v. Richer*, __Ariz. __, No. 1 CA-CV 21-0201, 2023 WL 3013295, at *8 (App Apr. 20, 2023) ("[The Arizona Republican Party] was or should have been aware of the well-established principles that the EPM has the force of law, and that the time to challenge election procedures is *before* an election."). No live controversy presently exists as to the elections already completed, and the Court should not now go back in time to review the qualms Plaintiffs have with how it may have been run. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002) ("Respondents ask us to overlook our own mandate that courts should review alleged violations of election procedure prior to the actual election.").

administrators and the Secretary have used the 2019 EPM's guidance to conduct elections in 2020, 2021, 2022, and now in 2023. These administrators expect a new EPM this year and know that the new EPM will govern elections in 2024 and 2025. *See* A.R.S. § 16-452(B). Employees hired to assist election officials with conducting elections are trained under the current rules as they now exist, including with instructions on how to properly verify early ballot signatures with the tools presently available to them.

Plaintiffs' case seeks to prematurely disrupt this expected, predictable change in the State's uniform system of election procedures. Allowing it to proceed would prejudice election administration by drastically changing administrators' accepted practices on which they have been trained—thereby also prejudicing the public who benefits from their diligent work.

B. Ripeness

Plaintiffs' challenge is also unripe for elections to be conducted after 2023, and this Court should decline to construe EPM provisions that are due to be replaced later this year.

While Arizona does not have a "case or controversy" requirement, Arizona courts nonetheless generally require a live controversy based on present facts of the case, mandated not by the Arizona Constitution, but "solely [as] a matter of prudential or judicial restraint." *Big D Const. Corp. v. Court of Appeals*, 163 Ariz. 560, 563 (1990). Arizona courts apply the doctrine of ripeness "as a matter of sound judicial policy." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 35 (2019) (quoting *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003)). A case is ripe if presently "there is an actual controversy between the parties." *Id.* at ¶ 36. Ripeness looks to the future and "prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *see also Ariz. Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 444 (App. 1984) ("The ripeness doctrine arises from a reluctance of the courts to become involved in the resolution of questions of a hypothetical or abstract nature.").

Courts consistently decline to scrutinize executive or legislative action until that

action is rendered into final form and realized into administrative action or lawmaking. *See Ariz. Downs*, 140 Ariz. at 444–45 ("As applied in the context of administrative review, it has been stated that the basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); *Tilson v. Mofford*, 153 Ariz. 468, 471 (1987) ("[T]he legality of the substance of an initiative cannot be reviewed until the initiative is adopted by the electorate and is later at issue in a specific case."); *League of Ariz. Cities and Towns v. Brewer*, 213 Ariz. 557, 559 ¶ 10 (2006) ("Before a bill passes, the courts generally may not interfere with the legislative process. The legislature may thus introduce, consider, and pass any measure." (internal citation omitted)). To do otherwise would infringe on separation-of-powers first principles. *See Brewer*, 213 Ariz. at 559 ¶ 8 ("The Separation of Powers Clause of the Arizona Constitution expressly prohibits one branch of government from intruding into or 'exercising the powers properly belonging to' another branch." (citing Ariz. Const. art. 3) (alteration omitted)).

The Legislature has directed the Secretary to proscribe rules for how elections officials are to administer elections throughout the state. A.R.S. § 16-452(A). "The rules shall be prescribed in an official instructions and procedures manual to be issued not later than December 31 of each odd-numbered year immediately preceding the general election." A.R.S. § 16-452(B). As noted above, a new EPM is due later this year and would, upon approval by the Governor and Attorney General, supersede the 2019 EPM and govern elections beginning in 2024. The new EPM may and likely will look substantially different than the 2019 EPM, including with respect to early ballot signature verification.

Like in other well-established administrative and legislative contexts, this Court should decline to entertain Plaintiff's arguments until a final EPM is issued and takes full legal effect. Judicial restraint counsels against needlessly interpreting a statute and an EPM provision and evaluating whether they conflict when the Secretary, in his internal

deliberations and back-and-forth with the Governor and Attorney General, may remove the allegedly offensive provision entirely. Passing judgment on a substantive provision of the EPM at this point would be equal to wading into the lawmaking process at the Legislature and giving premature interpretations of proposed legislation before they became law. *See Brewer*, 213 Ariz. at 559 ¶ 10 ("[J]ust as the courts may not predetermine the substantive validity of the legislature's measures, so too must they refrain from predetermining the substantive validity of the people's initiatives, even if the 'legislation might conflict with the Arizona Constitution or state law.'" (citation omitted)). This case presents the type of entanglement in "abstract disagreements over administrative policies" the ripeness doctrine seeks to avoid. *See Ariz. Downs*, 140 Ariz. at 444–45.

II. Plaintiff Restoring Integrity and Trust in Elections lacks standing to be a party in this action.

In the last "matter of judicial restraint" relevant to this case, Arizona courts have "traditionally required a party to establish standing." *Arizonans for Second Changes, Rehab., and Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 ¶ 22. In mandamus proceedings, a relaxed standard for standing applies. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 11 (2020). Under A.R.S. § 12-2021, a "party beneficially interested" may seek a writ of mandamus to compel a public official to comply with a non-discretionary legal duty.

Plaintiff Restoring Integrity and Trust in Elections, "a Virginia nonprofit social welfare corporation," Compl. at 3, is not "a party beneficially interested" under A.R.S. § 12-2021 for purposes of compelling Arizona elections officials to comply with and faithfully administer Arizona election laws. In *Fontes*, the county recorder argued that the plaintiffs, an Arizona nonprofit corporation and an Arizona voter, lacked standing to challenge his proposed early-ballot instructions to be sent to voters. *Fontes*, 250 Ariz. at 61 ¶ 2, 62 ¶ 9. The court disagreed and concluded plaintiffs, "as Arizona citizens and voters," had standing under the relaxed mandamus standard to compel the county recorder to perform his non-discretionary duties *Id.* at ¶ 12.

Even if this were a proper mandamus case to which *Fontes* applied, the Court should

not expand who counts as a "party beneficially interested" to include Restoring Integrity and Trust in Elections because it is not an Arizona citizen or voter. It has no interest in how Arizona election officials verify early ballot affidavits, and the state did not enact its election laws for its benefit. Indeed, for whose benefit the state's laws were enacted is relevant to whether one is "beneficially interested" for mandamus standing. *See id.* (citing *Armer v. Superior Court*, 112 Ariz. 478, 480 (1975)). In *Armer*, the Court held that two "citizens and taxpayers of Pima County" had standing to seek a writ of mandamus to compel members of a water conservation district to comply with financial disclosure requirements because the citizens were "members of the public for whose benefit the financial disclosure law was enacted." 112 Ariz. at 480. When a plaintiff seeks to compel an official to comply with a public duty, traditional standing requirements are relaxed, "since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced." *Id.*

Arizona did not enact its election laws for the benefit of a nonprofit corporation from Virginia—it enacted them to secure elections for its citizens. Because Restoring Integrity and Trust in Elections is not a citizen here, does not vote here, and does not administer elections here, it lacks beneficial interest standing here. The Court should dismiss it from this action.

III. Early ballot signatures are reliably validated against previously authenticated signatures of the voter.

County recorders must compare an elector's early ballot signature against that on the elector's "registration record." A.R.S. § 16-550(A). The Secretary's brief ably demonstrates why the term "registration record" deliberately encompasses more than just a "registration form" or its amendments. And to the extent the term is ambiguous, the Secretary is also correct that his interpretation in the EPM is entitled to substantial deference, given the Legislature's express delegation to the Secretary to "prescribe rules" with respect to "the procedures for early voting and voting" that, upon approval by the Governor and Attorney General, receive the force of law. A.R.S. § 16-452(A)–(C); *Fontes*, 250 Ariz. at 63 ¶ 16.

And unlike here, the cases questioning certain EPM provisions arise when a contrary statute is clear or when the subject of the rule exceeds the scope of the delegation. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 46 ¶¶ 20–22 (2022) (invalidating EPM provision where contrary reading was "plainly required" by the statute); *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 20–21 (2021) (noting in dicta that the EPM cannot abrogate a statutory duty, but finding no actual conflict because the EPM "does not even purport to discharge a circulator's duty to comply with the statutory obligation" at issue); *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021) (declining to give EPM binding effect on subject beyond the scope of the delegation in A.R.S. § 16-452). The meaning of "registration record" certainly is not so clearly limited to "registration form" as to contradict and thereby invalidate the Secretary's instruction in the EPM.

On the merits, MFV adds only that the Amended Complaint's insinuation that the EPM rule here "increases . . . the risk of erroneous signature verifications," Compl. at ¶ 30, is not well taken. The Amended Complaint suggests that an elector's registration record can be "corrupted by the addition of an invalid signature," *id.* at ¶ 31, thus "erod[ing] the utility of signature matching as an identity verification mechanism." *Id.* at ¶ 32. That is simply not true. The EPM directs recorders to check against "additional ***known*** signatures from other official election documents in the voter's registration record." EPM at 68 (emphasis added). Each of the signatures against which an early ballot signature may be compared—whether on requests for an early ballot or to be added to the active early voting list, signature rosters, and prior ballot affidavits—are themselves authenticated and reliable:

- A voter requesting an early ballot must provide, in addition to the voter's name and address, "the date of birth and state or country of birth or other information that if compared to the voter registration information on file would confirm the identity of the elector." A.R.S. § 16-542(A).
- A signature on a request form to be included on the active early voting list must be compared and validated against—critically—the voter's "registration ***form***." A.R.S. § 16-

544(C). The Legislature thus clearly knows how to direct comparison against a registration ***form*** as opposed to the registration ***record*** more broadly.

- Before a voter may sign a signature roster at a polling location to receive a ballot, the voter must, in addition to giving his name and address, provide qualifying voter identification. A.R.S. § 16-579(A)(1), (D)–(E).
- And, of course, before an early ballot envelope is processed and its enclosed ballot is tabulated, the voter signature on the envelope must match that in the voter's registration record, which can include any of the above validated signatures, in addition to that on the original voter registration form. A.R.S. § 16-550(A).

Plaintiffs' insinuations to the contrary aside, the validation procedures in A.R.S. § 16-550(A) and the EPM are consistent with and further the safety and reliability of early voting in Arizona. The Court should reject Plaintiffs' misconstruction of the statute and unfounded suggestions of impropriety.

CONCLUSION

For the foregoing reasons and those discussed by the Secretary and the Arizona Alliance for Retired Americans, the Court should dismiss the Amended Complaint for failure to state a claim.

1 Dated: May 22, 2023

Respectfully submitted,

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GOOD FAITH CONSULTATION CERTIFICATE

Pursuant to Rule 12(j) of the Arizona Rules of Civil Procedure, counsel for all parties telephonically conferred on April 28, 2023, to discuss whether the Defendants' various grounds for dismissal could be resolved with repleading or other action. The parties were unable to resolve the issues.

/s/ Austin T. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2023, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Yavapai County, for filing using the AZTurboCourt System. I further certify that a copy of the foregoing was sent via email this same date to:

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