

August 15, 2023

The Honorable Adrian Fontes  
Arizona Secretary of State  
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**Re: Public Comments on July 2023 Draft of the Arizona Elections Procedures Manual**

Secretary Fontes:

We write on behalf of Restoring Integrity and Trust in Elections (“RITE”) and the Lawyers Democracy Fund (“LDF”) concerning the July 2023 draft Elections Procedures Manual (“EPM”).

As you know, the EPM drafting and publication processes are not subject to the notice and public comment periods for administrative rulemaking under the Arizona Administrative Procedures Act, and interested parties need not exhaust administrative remedies before judicially challenging one or more provisions of the EPM as inconsistent with or unauthorized by controlling statutes. Even so, RITE and LDF express their views here, in an attempt to avert or narrow future litigation.

**Joinder of Public Comments Submitted by the Arizona State Legislature**

Our clients have reviewed and agreed with the public comments previously submitted jointly by the Speaker of the Arizona House of Representatives and the President of the Arizona Senate. *See Letter from Warren Petersen & Ben Toma to Adrian Fontes, Public Comments on the Draft 2023 Elections Procedures Manual* (Aug. 14, 2023), available at [https://www.azsenaterepublicans.com/\\_files/ugd/2f3470\\_68a6d97b7c1645bd985057ffde62836b.pdf](https://www.azsenaterepublicans.com/_files/ugd/2f3470_68a6d97b7c1645bd985057ffde62836b.pdf). Both RITE and LDF join those comments in full, and note particularly strong concerns attendant to the following sections of the draft EPM, for the reasons expressed in the Legislature’s comments:

1. Chapter 1, Section VII(C) re: extending the statutory voter registration deadline,
2. Chapter 2, Section I(B) re: delayed implementation of statutory changes governing the active early voting list,
3. Chapter 2, Section I(D) re: extending the UOCAVA voting deadline,
4. Chapter 2, Section I(I) re: ballot drop-off location and drop boxes,
5. Chapter 8, Section II(A) re: partisan balance on election boards,
6. Chapter 8, Section III(A) re: the appointment of political party observers,
7. Chapter 9, Section III re: causing “offense” in polling places, and
8. Chapter 11 re: hand count audits performed by the counties.

### **Verification of Early Ballot Signatures**

Under A.R.S. § 16-550(A), the county recorders must compare early ballot signatures to the signatures in a voter’s “registration record.” Textually and logically, the term “registration record” encompasses the registration forms submitted by that individual, and any amendments thereto made by the submission of new forms, an early ballot request form, a response to an Active Early Voting List notice, or a provisional ballot envelope.

If the early ballot signature is “inconsistent with the signature of the elector on the elector’s registration record,” the county recorder must contact the voter and attempt to ascertain whether the voter, in fact, personally completed and signed the early ballot affidavit. The early ballot cannot be tabulated unless and until the voter timely “confirm[s] the inconsistent signature.” *Id.*

Section VI(A)(1) of the draft EPM, however, conflicts with A.R.S. § 16-550(A) because it permits the verification of early ballot affidavit signatures using documents—namely, polling place rosters and early ballot envelopes from prior elections—that have no effect on registration and thus are not “registration records.” Specifically, the draft EPM provides:

In addition to the voter registration form, the County Recorder should also consult additional known signatures from other official election documents in the voter’s registration record, such as signature rosters or early ballot/AEVL request forms, in determining whether the signature on the early ballot affidavit was made by the same person who is registered to vote.

When the Arizona State Legislature has not explicitly imbued a statutory term with a bespoke definition, “courts apply common meanings.” *State v. Pena*, 235 Ariz. 277, 279, ¶ 6 (2014). In this interpretive project, the relevant statutory provision “should be read in context” and the Court “may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved.” *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, ¶ 24 (2022) (citation omitted).

The term “registration record” certainly includes a voter’s registration form—*i.e.*, the document designated by federal or state law to establish his or her eligibility to participate in Arizona elections. *See* 52 U.S.C. § 20508(b); A.R.S. §§ 16-121.01, 16-152, 16-166(F). And for a period of time, this “registration form” was the sole statutorily authorized reference point for validating early ballot affidavit signatures. In 2019, though, the Legislature amended A.R.S. § 16-550(A) to authorize the use of any signature in the voter’s “registration record” as an exemplar for early ballot verification. *See* 2019 Ariz. Laws ch. 39 § 2. This legislation augmented the pool of potential signature specimens to encompass all documents that Arizona law recognizes as mechanisms for updating a voter’s registration—namely:

1. an amendment submitted through the Motor Vehicles Division, *see* 52 U.S.C. § 20504(c)(2); A.R.S. §§ 16-112, 16-121.01, 16-136;
2. a formal early ballot request or response to an Active Early Voting List Notification, A.R.S. §§ 16-135(E), 16-542(F); or
3. a provisional ballot submission envelope, *see id.* §§ 16-137, 16-584(C), (D).

The proposed EPM language, however, traverses this statutory perimeter by designating effectively *all* election related documents in the county recorder’s possession as “registration records”—even if they do not actualize or amend a voter’s registration, or have anything to do with registration at all. “In construing a statute, [courts]

must, if possible, give effect to every word, not merely select words.” *State v. Burbey*, 243 Ariz. 145, 148, ¶ 10 (2017). Signatures must be verified by reference not just to any election-related “record,” but to a particular type of election-related record: a **registration** record.

The premise that polling place rosters and (more significantly) previous early ballot affidavits are “registration records” is semantically and structurally incongruent with A.R.S. § 16-550(A). An early ballot affidavit signature is the item to which an actual “registration record” is compared, which necessarily implies that it is wholly extrinsic to—and therefore not a component of—the voter’s “registration record.” The notion that an early ballot envelope automatically transmutes into a “registration record” after the election in which it is cast is textually untenable. It also is logically dubious. A document that has nothing to do with a voter’s registration before an election does not, *sua sponte*, develop a relationship to registration after the election. Moreover, the erroneous validation of any given early ballot affidavit converts what would be an isolated wrong into a systematic distortion; the incorrectly verified affidavit signature is now elevated to a signature exemplar in all future elections.

In sum, a “registration record,” within the meaning of A.R.S. § 16-550(A), is a document that effectuates or amends an individual’s registration as a qualified elector in Arizona elections. To the extent the proposed EPM language purports to authorize early ballot affidavit signature verification using documents that do not conform to these elements—namely, polling place signature rosters and historical early ballot affidavits—it is *ultra vires* and invalid.

### Conclusion

We appreciate your attention to these matters. If further information would assist your review, please do not hesitate to contact us.

Respectfully,

/s/ Kory Langhofer  
Kory Langhofer

cc: Colleen Connor, State Election Director ([cconnor@azsos.gov](mailto:cconnor@azsos.gov))  
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