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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

MARK FINCHEM and JEFF ZINK, in their individual capacities, Contestants/Plaintiffs, v. ADRIAN FONTES and RUBEN GALLEGO, officeholders-elect; and KATIE HOBBS, in her official capacity as the Secretary of State; et al., Contestees/Defendants.	No. CV2022-053927 **ARIZONA SECRETARY OF STATE KATIE HOBBS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED STATEMENT OF ELECTION CONTEST** (Assigned to Hon. Melissa Iyer Julian)

Introduction & Background

In this "election contest," Plaintiff/Contestant Mark Finchem asks this Court to overturn the results of the 2022 General Election. In that election, based on the official statewide canvass, the people of Arizona chose Adrian Fontes as their next Secretary of State by a margin of 120,208 votes (almost 5 percentage points). This enormous, insurmountable margin is compelling evidence (1) of Arizonans' will and (2) that this election contest is little more than a publicity stunt. Yet rather than respect the will of the people, Plaintiff asks that the entire election be

"annulled," and that the Court order a special election in just this one race to be "counted by hand" and without mail-in ballots as authorized by law. But that relief is extreme, unfounded, and unavailable. An election contest must rest on facts known to a plaintiff when a contest is filed, not wild speculation and conspiracy theories aimed at undermining the work of Arizona's election officials; and election contests must rest on the law currently in effect, not the law as Plaintiff would prefer it to be. Yet that's just what Plaintiff presents this Court – a medley of unfounded election conspiracy theories and policy preferences that cannot justify overturning an election. Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986), presumptions that Plaintiff's threadbare allegations cannot overcome.

First, Plaintiff's contention that the Secretary engaged in "misconduct" or that "illegal votes" were counted because certain vote tabulation machines used in Arizona were not properly certified in accordance with federal and state law is demonstrably false. As the federal Elections Assistance Commission ("EAC") recently confirmed, there is no problem with the certification of those machines, and even if there were, Plaintiff cannot prove that the machines counted any votes inaccurately. And beyond that, this claim is too little too late, as it was known to conspiracy theorists like Plaintiff long before the election, yet he didn't bring it to court until after he decisively lost his election. It's a textbook case for applying the equitable doctrine of laches.

Second, the Court should also swiftly reject Plaintiff's allegation that the Secretary engaged in "misconduct" by (1) not recusing herself from her constitutional and statutory duties, (2) acting to compel other elections officials to comply with their own such duties, and (3) flagging election misinformation for a private entity. No provision of Arizona law required the Secretary to recuse herself, ensuring that county elections officials comply with the law was within the bounds of her duties, and her Office's flagging misinformation that violated Twitter's terms of service more than a year ago has nothing to do with the 2022 General Election.

Third, even if any of Plaintiff's allegations actually constituted "misconduct" or resulted

in "illegal votes" (they do not), Plaintiff's election contest fails because Plaintiff does not – and could not – adequately allege whether and how any of the alleged conduct impacted the result of the election. *Moore*, 148 Ariz. at 156 (requiring that plaintiff prove that alleged "illegal votes" were "sufficient to change the outcome of the election"); *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929) ("officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result.") (emphasis added). This is yet another independent ground requiring dismissal.

Argument

Plaintiff's election contest fails, and the Court should quickly dismiss it. But the Secretary recognizes that election contests are rare, and first provides the Court with some background and fundamental principles underlying this dispute.

To survive a motion to dismiss, an election contest must be based on well-pleaded facts, rather than on legal conclusions. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin*, 86 Ariz. at 169-70 (election contest subject to dismissal if it fails to state a claim upon which relief can be granted, assessed using the criteria applicable under Rule 12(b)(6)). "A complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8," *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417. 419 ¶ 7 (2008), and the Court may not accept as true "inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter*, 211 Ariz. at 389 ¶ 4.

"[E]lection contests are purely statutory, unknown to the common law, and are neither actions at law nor suits in equity, but are special proceedings." *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959). They are thus the subject of deliberate legislative restriction because of a "strong public policy favoring stability and finality of election results." *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App. 2010) (cleaned up). And A.R.S. § 16-672(A) carefully

circumscribes the valid grounds of a contest: (1) "misconduct" by election boards and canvassers; (2) the elected official was ineligible for the contested office; (3) the contested official gave a "bribe or reward" or "committed any other offense against the elective franchise"; (4) "illegal votes"; or (5) because of an "erroneous count of votes," the elected official didn't "receive the highest number of votes." The Legislature also provided that the exclusive remedies in election contests are (1) judgment confirming the election; (2) judgment annulling and setting aside the election for the contested race; (3) a declaration that the certificate of election of the person whose office is contested is of no further legal force or effect and that a different person secured the highest number of legal votes and is elected. A.R.S. § 16-676(B), (C). The Court lacks jurisdiction to grant any other form of relief.

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

- Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore*, 148 Ariz. at 159;
- the "returns of the election officers are prima facie correct," *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917); and
- courts apply a presumption of "good faith and honesty of the members of the election board" that must control unless there is "clear and satisfactory proof" to the contrary, *id.*

All told, to obtain relief in this case, Plaintiff must overcome all these presumptions and make either "a showing of fraud or . . . a showing that had proper procedures been used, the result would have been different." *Moore*, 148 Ariz. at 159.

With this background in mind, we turn to each of Plaintiff's deficient claims.

I. Arizona's Vote Tabulation Machines Are Properly Certified.

Plaintiff's first general grievance with the 2022 General Election was that certain, unspecified, vote tabulation machines were not properly certified under state and federal law. Plaintiff thus alleges that the Secretary engaged in "misconduct" by not ensuring the machines'

proper certification, and that all votes counted by those machines are "illegal votes" that must be voided. Not only should Plaintiff have brought this claim – one that has percolated among election conspiracy theorists on the internet for some time now – before the election, but it has no basis in fact or law. This component of Plaintiff's contest must therefore be dismissed.

A. Laches.

To begin, the equitable doctrine of laches bars Plaintiff's claims about vote tabulation machine certification. Laches "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." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Plaintiff checks off all the boxes. Plaintiff waited far too long, his delay is unreasonable, and that delay causes significant prejudice to our elections system, the Courts, and above all, voters whom Plaintiff asks this Court to disenfranchise.

In deciding whether a plaintiff's delay is unreasonable, a court should consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence[.]" *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). And here, Plaintiff knew or should have known of alleged issues with the certification of vote tabulation machines for months, and before the election. Courts uniformly reject challenges to election procedures like this brought only after an election.

Indeed, "[c]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) (citation omitted). Here, rather than seeking relief as to this alleged certification violation years or even months ago, Plaintiff waited until after the election (and after he decisively lost his race) to sue. But "by filing [his] complaint after the completed election," Plaintiff "essentially ask [the Court] to overturn the will of the people, as expressed in the election." *Sherman*, 202 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiff's attempt to "subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful

at the polls." *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (quotation omitted).

Plaintiff's belated claim – brought after all votes have been counted – also causes significant prejudice to voters. Arizonans' ballots were tabulated using the voting and tabulation systems at issue – they had no choice in the matter. Throwing their votes out after-the-fact now in service of Plaintiff's baseless allegations would disenfranchise those voters and violate their due process rights.

Beyond that, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to raise these claims in an election contest 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the [applicable] deadline[s].'" *Sotomayor*, 199 Ariz. at 83 ¶ 9 (citation omitted). Late claims, such as Plaintiff's, "deprive judges of the ability to fairly and reasonably process and consider the issues . . . leaving little time for . . . wise decision making." *Id.*

In sum, Plaintiff's delay in challenging the use of certain vote tabulation equipment prejudices county election officials, the Secretary, and above all else, Arizona voters. Laches thus precludes their "misconduct" and "illegal vote" claims based on this theory.

B. Merits.

Even if not barred by laches, Plaintiff's frivolous arguments fail because the electronic voting systems used in Arizona for the 2022 General Election were properly certified.

1. Arizona's Established History of Using Electronic Voting Equipment.

Arizona counties use electronic equipment to tabulate votes, and they have done so for many decades. All electronic voting systems undergo federal and state testing and certification before being used in Arizona elections. *See* A.R.S. §16-442. The Secretary has certified the

electronic voting system that was used in each county in the 2022 elections.[1]

Under A.R.S. § 16-442(B), electronic voting equipment must comply with the Help America Vote Act of 2002 ("HAVA") and be approved by an accredited laboratory, known as a voting system testing laboratory ("VSTL"). *See also* 2019 EPM Ch. 4 § I. There are two VSTLs accredited by the U.S. Election Assistance Commission ("EAC"): (1) Pro V&V and (2) SLI Compliance, a Division of Gaming Laboratories International, LLC ("SLI"). HAVA also establishes standards for electronic voting equipment under 52 U.S.C. § 21081, and the EAC has promulgated voluntary guidelines for voting systems under 52 U.S.C. § 21101. *See* 2005 Voluntary Voting System Guidelines ("VVSG").[2]

2. Pro V&V and SLI are properly accredited testing laboratories.

Plaintiff's argument that the Pro V&V certificate of accreditation should have been signed by the Commissioner and not the Executive Director and therefore is not properly accredited is demonstrably false. The EAC has a longstanding precedent, as evidenced by accreditation certificates going back to 2007, that permits the Executive Director to sign the certificate for a test laboratory.[3] Plaintiffs cannot point to any law that requires the Commissioner to sign the

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[1] *See* Ariz. Sec'y of State, *2022 Election Cycle / Voting Equipment*, https://azsos.gov/sites/default/files/2022_Election_Cycle_Voting_Equipment_Aug.pdf.

[2] EAC Voluntary Voting System Guidelines, https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines.

[3] *See, e.g.* , EAC Certificate of Accreditation, Wyle Laboratories, Inc., https://www.eac.gov/sites/default/files/eac_assets/1/1/Wyle%20Laboratories%20Accrediatation%20Certificate.pdf; EAC Certificate of Accreditation, CIBER, Inc. (Oct. 4. 2007), https://www.eac.gov/sites/default/files/eac_assets/1/6/CIBER_Accreditation_Certificate.jpg (Oct. 7, 2008); EAC Certificate of Accreditation, SLI Compliance, Division of Gaming Laboratories International (Jan. 10, 2018), LLC, https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Certificate_of_Accreditation011018.pdf; EAC Certificate of Accreditation, SLI Compliance, Division of Gaming Laboratories International, LLC (Nov. 15, 2022), https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI%20Accreditation%20Certificate%20VVSG%202.0%202022%20signed%20v3_0.pdf

certificate instead of the Executive Director. That the EAC Executive Director signed the certificate of accreditation for Pro V&V does not render the accreditation invalid. Instead, the EAC has publicly confirmed that both Pro V&V and SLI are properly accredited and have retained their accreditation during testing any election equipment currently in use in Arizona.[4]

3. ES&S equipment is properly certified.

Plaintiff points to similar conspiracy theories specifically attacking the Election Systems and Software ("ES&S"), EVS 6.0.4.0 voting system, but point to no plausible support for their claims. This voting system was tested and certified under the VVSG in 2019. U.S. Election Assistance Comm'n, ES&S EVS 6.0.4.0, https://www.eac.gov/voting-equipment/evs-6040. SLI Compliance ("SLI"), the federal lab that tested the equipment, was properly accredited throughout the relevant period.

On May 3, 2019, EAC certified ES&S's EVS 6.0.4.0 voting system. Throughout the relevant time period – from application approval of ES&S's EVS 6.0.4.0 and designation of SLI as the lead testing laboratory on October 15, 2018, throughout SLI's testing of the voting system, and to the EAC's certification of the system on May 3, 2019 – SLI maintained its accreditation, as indisputably evidenced by the dates on its Certificate of Accreditation.[5]

And even if any part of SLI's testing of EVS 6.0.4.0 occurred between January 10, 2021 and February 1, 2021, that fact would not have "voided" the testing and certification of the voting system because SLI's accreditation was never revoked and never expired. Under HAVA, EAC accreditation of a VSTL cannot be revoked unless the EAC Commissioners vote to revoke the accreditation. 52 U.S.C. § 20971(c)(2) ("The accreditation of a laboratory for purposes of this

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[4] *See* U.S. Election Assistance Commission Memorandum, https://www.eac.gov/sites/default/files/voting_system_test_lab/files/VSTL%20Certificates%20and%20Accreditation_0.pdf

[5] ES&S's EVS 6.0.4.0 was also reviewed and tested by Arizona's Equipment Certification and Advisory Committee. It was conditionally certified by the state on November 5, 2019 and finally certified on February 24, 2020.

section may not be revoked unless the revocation is approved by a vote of the Commission."). The Commission accredited SLI on February 28, 2007, and, since then, the Commission has not revoked SLI's accreditation, which Plaintiff cannot contest. Nothing in federal or state law says a VSTL loses its accreditation if the EAC does not formally issue a new "certificate" every two years.

The EAC has directly addressed this false allegation, clarifying that SLI "remained in good standing with the requirements of [the EAC's] program and retained their accreditation," that the "lack of generating a new certificate does not indicate that [SLI was] out of compliance," and that "[a]ll certifications during this period remain valid as does the lab accreditation." *See* EAC, *VSTL Certificates and Accreditation*, July 22, 2021;[6] *see also* EAC Memorandum, *SLI Compliance EAC VSTL Accreditation*, Jan. 27, 2021 ("Due to the outstanding circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended period. While this process continues, SLI retains its EAC VSTL accreditation.").[7]

In sum, there was a valid certificate of accreditation for SLI throughout the testing and certification process for EVS 6.0.4.0, the voting system Plaintiff highlights. And even if the slight gap in the dates on SLI's certificates of accreditation covered any relevant time period, Plaintiff can point to nothing in federal or state law that invalidated SLI's EAC VSTL accreditation for that reason. Arizona law requires that electronic voting systems comply with HAVA and be approved by an accredited VSTL. All voting equipment used in Arizona, including the EVS 6.0.4.0, complies with those requirements, and Plaintiffs cannot plausibly argue otherwise.

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[6] https://www.eac.gov/sites/default/files/voting_system_test_lab/files/VSTL%20Certificates%20and%20Accreditation_0.pdf

[7] https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Accreditation_Renewal_delay_memo012721.pdf.

C. Speculation.

Even if Plaintiff's claims about vote equipment certification had even a shred of truth (and they don't) and the Secretary somehow committed "misconduct" related to that equipment (which she didn't), Plaintiff nowhere alleges how this would change the results of the election as to the races at issue. Nor could Plaintiff possibly prove that, particularly given the massive margins of victory in his race. This is a necessary – and here, missing – element of Plaintiff's election contest because he doesn't allege that any Defendant or other person committed fraud. *See Moore*, 148 Ariz. at 159 (requiring "a showing of fraud or . . . a showing that had proper procedures been used, the result would have been different"). Dismissal is thus required.

II. The Secretary's Actions Before and After the 2022 General Election Were Not "Misconduct."

Beyond Plaintiff's wild and baseless allegations about voting equipment certification, he also alleged that the Secretary committed actionable "misconduct" by (1) not recusing herself when no statute required her to, (2) taking appropriate legal and other action to hold other elections officials to their constitutional and statutory duties, and (3) identifying election disinformation on social media. This is not "misconduct" by any stretch of the imagination, but rather the actions of a public official fulfilling her own duties, ensuring that all Arizonans' votes are counted, and identifying false information that undermined confidence in Arizona's safe and secure elections systems and dedicated elections officials. That Plaintiff calls any of this behavior "misconduct" should tell the Court and the public all they need to know about this baseless litigation.

A. The Secretary did not have to recuse herself.

Plaintiff claims that the Secretary "had an ethical duty to recuse herself" and that her failure to do so is some "form of self-dealing." [Stmt. ¶ 70; *see also id.* ¶¶ 19-24] But Plaintiff cites no authority, and they are plainly wrong that the Secretary had to recuse herself from election-related duties just because of her candidacy.

A.R.S. §§ 38-501 to 38-511 govern conflicts of interest for state officers and other government officials and employees. *See* A.R.S. § 38-501 (application of conflict-of-interest statutes). The primary focus of Arizona's conflict-of-interest statutes is preventing an official from obtaining improper financial benefits because of their position in government.[8] The law also requires public officials to recuse only when the official has a "substantial interest" in the decision, as defined by statute. A.R.S. § 38-503(B). An interest is "substantial" only if it is (1) "pecuniary or proprietary," (2) "nonspeculative," and not among the "remote" interests excluded by statute. *Id.* § 38-502(11). Even if the Secretary's interest in winning an election qualifies as a pecuniary interest, it fails the other two requirements.

First, any alleged effect on votes or the election outcome resulting from any of her decisions is too speculative to qualify. Under Arizona Supreme Court precedent, a potential "los[s] of . . . votes" flowing from a decision is too speculative to require recusal. *Hughes v. Jorgenson*, 203 Ariz. 71, 74 (2002). Second, and independently dispositive, the Secretary's interest as a candidate in her decisions about election administration is remote because it is "no greater than the interest" of the many other candidates affected by those decisions. *See* A.R.S. § 38-502(10)(j) (defining as "remote" an interest shared by a class of persons consisting of ten or more people); *see also Shepherd v. Platt*, 177 Ariz. 63 (App. 1993) (applying the "Rule of 10" and rejecting an argument that two members of the Apache County Board of Supervisors, who were also members of the Navajo Nation and served as members or employees of the Navajo Tribal Council, had a conflict of interest over County expenditures on the Navajo Reservation). The Secretary's exercise of her election administration and oversight duties, including as to

[8] *See, e.g.*, A.R.S. § 38-504(C) ("A public officer or employee shall not use or attempt to use the officer's or employee's official position to secure any valuable thing or valuable benefit for the officer or employee that would not ordinarily accrue to the officer or employee in the performance of the officer's or employee's official duties if the thing or benefit is of such character as to manifest a substantial and improper influence on the officer or employee with respect to the officer's or employee's duties.").

equipment certification and combatting misinformation, will impact all candidates in an election. For both these reasons, being a candidate on the ballot does not require the Secretary to recuse from her election-related responsibilities.

Further undermining the case for recusal is that it conflicts with Arizona's decision to assign the duty to "prescribe rules" and fulfill elections tasks to an elected official, not an appointed one. A.R.S. § 16-452(A). Plaintiff's argument would turn a job requirement (election to office) into a reason for disqualification from one of the most important and visible aspects of the job. *See Ariz. Farmworkers Union v. Ag. Empl. Relations Bd.*, 158 Ariz. 411, 413 (App. 1988) (cautioning against turning "the interest of [an official] that qualifies him" for a position into a basis for recusal). And Plaintiff's logic would not stop with Secretaries of State. Arizona law entrusts elections duties to many elected officials, including County Recorders and members of County Boards of Supervisors across the 15 counties – who, unlike the Secretary, issue and count ballots. *See, e.g.*, A.R.S. §§ 16-131, 645, 646 (prescribing duties for county recorders and county boards of supervisors). To require all these officials to recuse every time they are a candidate on the ballot would effectively shorten their legal terms of office. This incompatibility with Arizona's choice to entrust elected officials with election administration duties reaffirms that the Secretary had no duty to recuse.

It is thus little surprise that Plaintiff fails to identify even one prior Secretary of State who recused simply because she was a candidate on the ballot. This omission is remarkable. If Arizona law required Secretaries of State and County Recorders and Supervisors to recuse from election duties whenever they are on the ballot, one would expect examples to pour forth. Just like Secretary Hobbs, sitting Secretaries of State and county officials with election-related duties can and have stood for re-election and run for other offices while continuing to fulfill their election administration duties consistent with Arizona's well-developed and long-standing election laws and procedures. The dearth of recusals speaks volumes. *See Ariz. Newspapers Ass'n v. Superior Ct.*, 143 Ariz. 560, 563 (1985) (giving weight to settled practice under statute).

B. The Secretary's demands that Arizona election officials comply with the law was not misconduct.

It was also not actionable "misconduct" under the election contest statutes for the Secretary to take certain steps – including sending demand letters, filing a special action, pointing out the potential applicability of criminal statutes, and having her lawyer threaten sanctions against an action that had no merit [Stmt. ¶¶ 29-43] – after the election to compel county officials to complete their nondiscretionary statutory and constitutional duty to canvass the results of the election. "Misconduct" is not whatever Plaintiff says or believes it is; instead, the Arizona Supreme Court has said that under the rubric of "misconduct," even "honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain. *Findley*, 35 Ariz. at 269 (emphasis added). Not only does misconduct not include a public official taking appropriate and reasonable steps to ensure that they can carry out their own duties, but by the time the Secretary did all these things, all votes had been cast and tabulated. The Secretary fulfilled her duties by compelling the Cochise County Board of Supervisors to certify their canvass as required by law, and making a criminal referral where it was clearly appropriate: against officials who refused to follow the law. Any claim of "misconduct" on these grounds is baseless.

C. The Secretary's office reporting election misinformation on a social media platform was not misconduct.

Plaintiff next claims it was "misconduct" for the Secretary of State's Office to flag for review two tweets from an individual's Twitter account. [Stmt. ¶¶ 42-45] There is no misconduct by the Secretary or her Office here.

Plaintiff cites as support a series of emails from January 2021, included as an exhibit in a separate litigation. [*Id.* ¶ 42 & n.8 (*citing Missouri v. Biden*, Case No: 3:22-cv-01213-TAD-KDM, Document 71-8 Filed 08/31/22, pages 45-46 of 111 PagelD #: 2793-2794)] But this

correspondence resoundingly proves that there was no impropriety, much less misconduct, on the part of the Secretary's Office. On January 7, 2021, the Secretary's Office emailed a nonprofit organization, the Center for Internet Security ("CIS"), reporting a Twitter account—and two tweets in particular—for review. *Id.* The email stated the reason these tweets were being flagged: that they contained misinformation that would "further undermine confidence in the election institution in Arizona." *Id.* The Secretary's Office did not state that CIS or Twitter should take any particular action as to the tweets or the Twitter account. CIS then forwarded the information to Twitter. Hours later, after Twitter reviewed the information, the platform decided to remove both tweets for violating the terms of service. *Id.*

These facts are undisputed from the very emails that Plaintiff cites, and they do not constitute misconduct because Twitter made an independent decision to act against the flagged tweets. *O'Handley v. Padilla* is directly on point here. In that case, after a complaint from the California Secretary of State's Office, Twitter labeled a user's election-related tweets as disputed and ultimately suspended his account, based on Twitter's terms of service, which prohibit spreading election misinformation. 579 F. Supp. 3d 1163, 1175-76 (N.D. Cal. 2022). The Secretary of State's Office in *O'Handley*, like the Secretary of State's Office here, did not ask for any particular action in response to the tweets, and instead simply asserted that the information in the tweets was incorrect and flagged them for review. *Id.* at 1190-92. Based on these facts, the court in *O'Handley* held that Twitter's independent review and decision to take action against the account did not implicate state action and there was thus no violation of plaintiff's constitutional rights. *Id.* at 1189-92. The court dismissed plaintiff's claims with prejudice, *id.* at 1192. This Court should do the same.[9]

[9] 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);

Plaintiff next complains that Finchem's Twitter account was temporarily suspended on October 31, 2022 and asserts that "[o]n information and belief the suspension was directly caused by Hobbs' illicit censoring of her constituents in concert with Twitter (as pled herein)." [Stmt. ¶ 46; *see also id.* ¶ 50 (claiming "Fontes and Secretary Hobbs . . . caused his Twitter account to be suspended"). But Plaintiff points to zero evidence that the Secretary (or the Secretary and Adrian Fontes, as Plaintiff's theories evolve) were involved in any way in Finchem's temporary Twitter suspension. This kind of rank speculation with no support must lead to dismissal. *See Jeter*, 211 Ariz. at 389 ¶ 4 (courts may not accept as true "inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts").

III. Plaintiff Fails to Show That Any Alleged Misconduct in the Secretary's Actions Changed Election Results.

Finally, even if Plaintiff established that the Secretary committed actionable "misconduct" because certain vote tabulation machines used in Arizona were not properly certified or by (1) not recusing when recusal was not required, (2) taking legal action to compel elections officials to satisfy their duties, (3) flagging tweets as potentially violating Twitter policies, or somehow being involved in Mr. Finchem's brief Twitter removal (and he did not), his claims would still fail because he did not allege – and cannot establish – whether or how any of these things would have changed the result of the election for Secretary of State such that it must be set aside. This deficiency also warrants dismissal. *Findley*, 35 Ariz. at 269 (misconduct will not support an election contest absent proof that it "affect[s] the result.") (emphasis added).

Conclusion

Arizona has a "strong public policy favoring stability and finality of election results," *Ariz. City Sanitary Dist*, 224 Ariz. at 334 ¶ 12, which means that the judiciary must be wary of

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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).

interfering with presumptively valid election results. The burden on an election contestant is thus exceedingly high, and here, is a burden that Plaintiff failed to meet. For all the reasons discussed above, the Court should dismiss Plaintiff's "election contest" with prejudice, and without leave to amend. The Secretary further reserves her right to seek an award of fees against Plaintiff and his counsel under Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349.

Respectfully submitted this 13th day of December, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
D. Andrew Gaona

STATES UNITED DEMOCRACY CENTER
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