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4
5 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
6 IN AND FOR THE COUNTY OF YAVAPAI

7 STRONG COMMUNITIES FOUNDATION
8 OF ARIZONA INCORPORATED, ERIC
9 LOVELIS, WILLIAM JOSEPH
10 APPLETON, and LAURA HARRISON,

11 Plaintiffs,

12 v.

13 YAVAPAI COUNTY, ET AL.,

14 Defendants.

No. S1300CV202400175

**YAVAPAI DEFENDANTS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

[Oral Argument Requested]

(Hon. Tina R. Ainley)

15 Yavapai County, Yavapai County Board of Supervisors and the Yavapai County
16 Recorder ("Yavapai Defendants"), by and through Dennis M. McGrane, Yavapai County
17 Attorney, and his deputies undersigned, hereby submit this Motion for Partial Summary
18 Judgment on Plaintiffs' claim for unstaffed drop boxes. No genuine issues of material fact
19 exist for trial on this claim and the Court can determine as a matter of law that elections
20 officials are not required to be continuously present at drop box locations as argued by the
21 Plaintiffs.

22 This Motion is supported by the following Memorandum of Points and Authorities
23 and Yavapai Defendants' Separate Statement of Facts in Support of this Motion ("DSOF").

24 Memorandum of Points and Authorities

25 Plaintiffs allege that Yavapai County's use of drop boxes is unlawful because
26 election officials will not be continuously present at each drop box location in Yavapai
27
28

1 County during the 2024 election. *See* Complaint at ¶¶ 228–234. Plaintiffs also allege that
2 such continuous presence must consist of 1) two election officials; 2) positioned close
3 enough to view each person who deposits a ballot; 3) who can observe conduct that might
4 be unlawful ballot harvesting. *See* Complaint at ¶ 231. Nothing in the Arizona statutes or
5 the 2023 Secretary of State’s Elections Procedure Manual¹ (“2023 EPM”) sets forth such
6 requirements. Plaintiffs’ sole authority in support of their position is a criminal
7 impersonation statute, A.R.S. § 16-1005(E), which states:
8

9
10 A person or entity that knowingly solicits the collection of voted or unvoted
11 ballots by misrepresenting itself as an election official or as an official ballot
12 repository or is found to be serving as a ballot drop off site, *other than those
established and staffed by election officials*, is guilty of a class 5 felony.”

13 (Emphasis added). This criminal statute prevents imposters from impersonating elections
14 officials and misrepresenting locations as official ballot drop off sites. It is not a substantive
15 civil statute that defines election procedures, and it does not prohibit actual election
16 officials from setting up official ballot drop boxes. Yet Plaintiffs ask the Court to construe
17 A.R.S. § 16-1005(E) well beyond its intended application to criminal conduct, so as to
18 affirmatively dictate elections policy and procedure.
19

20 Plaintiffs argue that A.R.S. § 16-1005(E) requires elections officials to be
21 continuously present at all drop box locations throughout the election period. Plaintiffs go
22 so far as to accuse Yavapai County election officials of committing a class 5 felony because
23 they are operating drop boxes that are not continuously monitored in person. *See* Complaint
24 at ¶ 229.
25

26
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28 ¹ The 2023 Elections Procedures Manual is available on the Secretary of State’s website,
https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_1_I_2024.pdf

1 As explained more fully hereafter, the Court should grant partial summary judgment
2 in favor of Yavapai Defendants because (1) Arizona law does not require drop boxes to be
3 constantly monitored in person by multiple elections officials and, even if it that were not
4 the case, (2) only prosecutors, not Plaintiffs, can enforce criminal statutes, (3) no private
5 cause of action exists for Plaintiffs under A.R.S. § 16-1005(E), and (4) A.R.S. § 16-1005(E)
6 does not set forth election rules and procedures.
7

8 **I. Factual Background**

9
10 The underlying facts concerning this Motion are undisputed. Yavapai County
11 currently has 19 drop boxes located throughout the County. (DSOF ¶ 1). Elections officials
12 are not continuously present at drop box locations in Yavapai County. (DSOF ¶ 2).
13 However, Yavapai County's drop boxes are established by county elections officials and
14 are under the monitoring and control of County staff. (DSOF ¶ 3).
15

16 **II. Standard for Summary Judgment**

17 Summary judgment is appropriate when the record shows there is no real dispute as
18 to any material facts and the moving party is entitled to judgment as a matter of law. *See*
19 *Ariz. R. Civ. P. 56(a); Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). The party seeking
20 judgment has the burden of satisfying this standard and demonstrating both the absence of
21 any factual conflict and his or her right to judgment. *United Bank v. Allyn*, 167 Ariz. 191,
22 195 (App. 1990).
23

24
25 In this case, partial summary judgment should be granted in favor of Yavapai
26 Defendants because the Court can conclude as a matter of law that Arizona law does not
27 require elections staff to be continuously present at drop box locations. No factual disputes
28 exist for trial in this matter and the interpretation of A.R.S. § 16-1005(E) and the 2023

1 EPM is a pure question of law.

2 **III. Legal Argument**

3 A. Arizona Law Does Not Require Elections Officials to be Continuously Present
4 at Drop Box Locations.

5 Plaintiffs argue that the phrase “staffed by election officials”, as used in A.R.S. § 16-
6 1005(E), should be understood to mean that drop boxes must be continuously monitored
7 in person by election officials. Plaintiffs then go even further, alleging that a drop box only
8 qualifies as being “staffed” if there are 1) at least two election officials; 2) positioned close
9 enough to view each person who deposits a ballot; 3) who can observe conduct that might
10 be unlawful ballot harvesting. *See* Complaint at ¶ 231. Plaintiffs’ allegation is merely
11 Plaintiffs’ preference of how they think the use of drop boxes should be administered. Such
12 an interpretation strains credulity, as it is directly contradicted by the provisions of the 2023
13 EPM and unsupported by the plain language of A.R.S. § 16-1005(E) which is the sole
14 authority upon which Plaintiffs rely. Plaintiffs have neither challenged any of the
15 provisions of the 2023 EPM related to drop boxes, nor joined the Arizona Secretary of
16 State as a party to this action.

17 The statute expressly exempts from criminal impersonation drop boxes that are
18 “established and staffed by election officials”. A.R.S. § 16-1005(E). In a nutshell, Plaintiffs’
19 entire argument is that the term “staffed” should be understood to mean “requiring the
20 continuous presence of election officials”, and that this interpretation should be
21 extrapolated to override both the 2023 EPM and established election practices going back
22 more than twenty years.

23 Judge Napper’s recent decision in *Arizona Free Enterprise Club v. Fontes*,

1 S1300CV202300872 (Yavapai Cnty. Super. Ct. April 25, 2024, currently on appeal) which
2 Plaintiffs filed as Supplemental Authority on April 29, 2024, roundly rejected the argument
3 being made by Plaintiffs. That ruling (a copy of which is attached hereto as **Exhibit “A”**),
4 which specifically referenced A.R.S. § 16-1005(E), stated as follows:
5

6 [T]he EPM does not require that staffed drop-boxes always be monitored by
7 an election worker. For instance, the EPM mandates that a fire suppression
8 device be placed inside all ballot drop-boxes, “that are placed outdoors or not
9 within the sight of elections officials.” *2023 Elections Procedures Manual*
10 *Sec. I(5) pp. 7*. Therefore, the definition of staffed in the EPM clearly does
11 not require a drop-box to be indoors or be monitored at all times.

12 *****

13 The Legislature has delegated to the Secretary [of State] the responsibility
14 to “prescribe rules to achieve and maintain the maximum degree of
15 correctness, impartiality, uniformity and efficiency on the procedures for
16 early voting,” including the “collection of ballots.” A.R.S. § 16-452(A). In
17 this instance, the Secretary has included as a method of collecting ballots
18 the use of drop-boxes that are not always monitored by elections
19 officials.

20 *Arizona Free Enterprise Club*, at 5. The court granted the Secretary of State’s cross-motion
21 for summary judgment, holding as follows:
22

23 It is within the Secretary’s discretion to allow counties to choose to use drop-
24 boxes. The Legislature has not required that these drop-boxes always be
25 monitored. The decision to use staffed but unmonitored drop-boxes is within
26 the discretion of the Secretary. Accordingly, the Plaintiffs’ *Motion for*
27 *Summary Judgment* is **denied**. The cross-*Motions for Summary Judgment* are
28 **granted**.

29 *Id.*

30 Based on the foregoing, it is apparent that Judge Napper did not subscribe to the
31 narrow definition of “staffed” being asserted by Plaintiffs in this matter. To the contrary,
32 the court found that a drop box could be “staffed” even though it was not constantly
33 monitored by an election official. *Id.*

34 While Judge Napper’s decision is not binding authority, Yavapai Defendants adopt

1 the above reasoning of Judge Napper and further point out that when it comes to election
2 procedures, the legislature knows how to explicitly state when it requires two persons or
3 constant monitoring or viewing as it did in A.R.S. §§ 16-564(B) (“...two members of the
4 election board...” shall accompany a locked ballot box moved in an emergency); 16-
5 562(A) (“...neither the ballot boxes nor the voting booths shall be hidden from view...”);
6 16-564(A) (ballot box shall be exhibited “...in the presence of persons assembled at the
7 polling place...”); 16-566(A) (voting booths to be set up “...in clear view of the election
8 officers.”); 16-570(B) (voting machines shall be placed “...in the full view of all election
9 officers and observers at the polling place.”); and 16-621(A) (damaged ballots shall be
10 duplicated “...in the presence of witnesses...”).

11
12
13 When it comes to drop boxes, however, the legislature clearly omitted any such
14 monitoring or viewing requirements. *See* A.R.S. §§ 16-1005(E), 16-558.01 (voter in special
15 district mail in election “shall return the elector’s marked ballot to...a designated
16 depository site as provided in section 16-411”) and 16-411(D) (“board may designate one
17 or more sites for voters to deposit marked ballots until 7:00 p.m. on the day of election.”).²

18
19
20 The legislature’s decision to specifically include monitoring and viewing language in
21 several ballot box statutes, but not to include similar language in return drop box statutes
22 makes Plaintiffs’ interpretation of A.R.S. § 16-1005(E) unsupportable. *See Comm. for*
23 *Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249-50, ¶8 (App. 2006)
24 (“[W]e assume that when the legislature uses different language within a statutory scheme,
25 it does so with the intent of ascribing different meanings and consequences to that
26
27

28

² Neither A.R.S. § 16-558.01 nor 16-411 use the word “staffed.”

1 language.”); *see also City of Flagstaff v. Mangum*, 164 Ariz. 395, 398 (1990) (“Where the
2 legislature uses a term within one statute and excludes it from another, the term usually
3 will not be read into the provision from which it was excluded.”).

4
5 Such an interpretation is consistent with common sense. Yavapai County drop boxes
6 are “staffed” in the sense that election personnel are assigned to perform certain tasks with
7 respect to their operation. This understanding is also consistent with the Oxford English
8 Dictionary, which defines “staffed” as “[s]upplied or provided with staff; *spec.* operated
9 by staff”. Oxford English Dictionary, s.v. “staffed (adj.), sense 2.b,” July 2023,
10 <https://doi.org/10.1093/OED/6065965085> [emphasis in the original]. Yavapai County drop
11 boxes are “operated by staff”, namely, by county election officials, even if those officials
12 are not constantly present at each drop box location. Clearly, the common usage of the term
13 “staffed” is broad enough to encompass this reasonable interpretation.
14
15

16 There is simply no legal basis to support Plaintiffs’ position that Arizona law
17 requires the constant presence of election officials at drop box locations. Accordingly,
18 Plaintiffs’ drop box claim fails as a matter of law and Yavapai Defendants are entitled to
19 summary judgment on that issue.
20

21 **B. Only Prosecutors, Not Plaintiffs, Can Enforce A.R.S. § 16-1005(E).**

22 Count XII of Plaintiffs’ Complaint alleges that Yavapai Defendants, through their
23 use of drop boxes, are violating A.R.S. § 16-1005(E), which is a class 5 felony. *See*
24 Complaint at ¶¶ 228–234. Even if this allegation were true (it is not), it is the province of
25 state and county prosecutors, not Plaintiffs, to enforce the provisions of A.R.S. § 16-
26 1005(E).
27
28

Per A.R.S. § 16-1001, Title 16, Chapter 7 (“PENAL PROVISIONS”) defines

1 “crimes involving elections and crimes against the elective franchise, and prescribing
2 penalties therefore.” A.R.S. § 16-1021 further states that such crimes shall be enforced by
3 the Attorney General, County Attorney or city or town attorney. It is well-established under
4 Arizona law that “[t]he duty and discretion to conduct prosecutions for public offenses
5 rests with the county attorney” and “[g]enerally, the courts have no power to interfere with
6 the discretion of the prosecutor unless he is acting illegally or in excess of his powers.”
7
8 *State v. Murphy*, 113 Ariz. 416, 418 (1976).

9
10 By bringing an action to purportedly enforce A.R.S. § 16-1005(E), Plaintiffs seek to
11 usurp the discretion given to prosecutors in deciding how best to enforce Arizona criminal
12 statutes. Plaintiffs are essentially asking the Court to act as both prosecution and jury by
13 determining that Yavapai election officials are committing a class 5 felony. Prosecutors,
14 not Plaintiffs, are the ones authorized under Arizona law to determine whether a violation
15 of A.R.S. § 16-1005(E) has occurred. Moreover, the Court cannot direct either a county
16 attorney or the Attorney General to prosecute a criminal action. *See Smith v. Superior*
17 *Court*, 101 Ariz. 559 (1967) (superior court did not have jurisdiction to direct attorney
18 general to prosecute criminal action dealing with false voter registration.)
19
20

21 Since the passage of A.R.S. § 16-1005(E) in 2011, Yavapai Defendants are unaware
22 of any criminal prosecution of an election official in the State of Arizona for operating a
23 drop box that has less than an around-the-clock presence of two election officials
24 positioned close enough to view the person dropping off the ballots, as Plaintiffs have
25 embellished the word “staffed.” This strongly suggests that the common usage of “staffed”,
26 at least among the State’s prosecutors, does not equate with Plaintiff’s extreme
27 interpretation of constant monitoring.
28

1 The discretion to charge alleged criminal behavior is left to prosecutors, not
2 Plaintiffs. It is apparent that prosecutors in Arizona have never interpreted A.R.S. § 16-
3 1005(E) in the manner being urged by Plaintiffs in this case.
4

5 C. A.R.S. § 16-1005(E) Provides No Private Cause of Action.

6 Courts may not infer a private right of action “based on a criminal statute where
7 there is no indication whatsoever that the legislature intended to protect any special group
8 by creating a private cause of action by a member of that group.” *Phoenix Baptist Hosp. &*
9 *Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 294 (App. 1994) (citation omitted) (statute
10 imposing criminal liability upon a spouse who willfully fails to provide necessary medical
11 care for the other spouse does not support a civil claim that a spouse’s separate property is
12 liable for cost of medical care for other spouse); *see also Chabrowski on behalf of ARTBE*
13 *Enterprises, LLC v. Litwin*, 2017 WL 2841212 (Dist. Ariz. January 19, 2017) (“Plaintiff
14 has not shown, and the Court otherwise does not find, that the Arizona legislature intended
15 to protect a special group of people by criminalizing theft in [A.R.S.] § 13-1802. The
16 criminal statute therefore does not provide for a private right of action by civil litigants.”).
17
18
19

20 There is nothing to indicate that the legislature intended to protect a special group
21 when it enacted A.R.S. § 16-1005(E). To the contrary, it is obvious that A.R.S. § 16-1005(E)
22 was enacted to protect the general citizenry of Arizona from those who would impersonate
23 election officials or authorized ballot drop off sites. As such, Plaintiffs cannot maintain a
24 civil action based on A.R.S. § 16-1005(E). Plaintiffs’ drop box claim fails as a matter of
25 law because A.R.S. § 16-1005(E) does not provide a private cause of action for
26 enforcement.
27
28

1 D. A.R.S. § 16-1005(E) Describes Criminal Misconduct, Not Election Procedures.

2 As explained above, A.R.S. § 16-1005(E) is a criminal statute. Plaintiffs' arguments
3 are based on it allegedly establishing the parameters for ballot drop boxes for Arizona
4 election law generally. Because of its criminal nature, however, it cannot form the basis
5 for setting forth substantive election procedures.
6

7 In contrast, the legislature has specifically delegated power to the Secretary of State
8 to "prescribe rules to achieve and maintain the maximum degree of correctness,
9 impartiality, uniformity and efficiency on the procedures for early voting," including the
10 **collection** of ballots. A.R.S. § 16-452(A). The authority to establish drop boxes and the
11 rules governing doing so are specifically set forth in the 2023 EPM. *See* 2023 EPM at pgs.
12 71-74. Those rules expressly permit the use of drop boxes that are not constantly monitored
13 by election officials. *Id.* Plaintiffs have not challenged the 2023 EPM Procedures.
14
15

16 There is no conflict between the 2023 EPM and A.R.S. § 16-1005(E). Specifically
17 referencing A.R.S. § 16-1005(E), Judge Napper found that "[t]he text of the 2023 EPM
18 does not deviate from Arizona statute." *Arizona Free Enterprise Club*, at 5. Clearly, the
19 2023 EPM sets forth the rules and procedures governing early voting, including drop boxes,
20 while A.R.S. § 16-1005(E) provides criminal penalties for those who would misrepresent
21 themselves as an election official or as an official ballot drop off site. A.R.S. § 16-1005(E)
22 serves an important purpose, but that purpose has nothing to do with affirmatively
23 implementing the election rules and procedures governing drop boxes.
24
25

26 **IV. Conclusion**

27 For the foregoing reasons, the Court should find as a matter of law that Yavapai
28 County election officials are not required to be constantly present at drop box locations. As

1 explained above, Plaintiffs' position is contradicted by Arizona statute, the 2023 EPM, and
2 common sense. The Court should further find that Plaintiffs lack a private cause of action
3 to enforce the criminal statute, A.R.S. § 16-1005(E), and that its provisions are inapplicable
4 to general civil election law and procedures.
5

6 Accordingly, Yavapai Defendants respectfully request that their Motion for Partial
7 Summary Judgment be granted.

8 RESPECTFULLY SUBMITTED this 31st day of October, 2024.

9
10 DENNIS M. MCGRANE
11 YAVAPAI COUNTY ATTORNEY

12 By: /s/Michael J. Gordon
13 Thomas M. Stoxen
14 Michael J. Gordon
15 Deputy County Attorneys

16
17 Copy of the foregoing delivered/
18 emailed this 31st day of October, 2024 to:

19 Honorable Tina R. Ainley
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27
28
By /s/Jeanie Mikels

EXHIBIT "A"

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SUPERIOR COURT, STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

ARIZONA FREE ENTERPRISE CLUB,
an Arizona nonprofit corporation, and
MARY KAY RUWETTE, individually,

Plaintiffs,

vs.

ADRIAN FONTES, in his official
capacity as the Secretary of State of
Arizona,

Defendant,

ARIZONA ALLIANCE OF RETIRED
AMERICANS; and MI FAMILIA VOTA,

Intervenors-Defendants.

ARIZONA FREE ENTERPRISE CLUB,
an Arizona nonprofit corporation;
RESTORING INTEGRITY AND TRUST
IN ELECTIONS, a Virginia nonprofit
corporation; and DWIGHT KADAR, an
individual,

Plaintiffs,

vs.

ADRIAN FONTES, in his official
capacity as the Secretary of State of
Arizona,

Defendant.

Case No. S1300CV202300872
S1300CV202300202

**UNDER ADVISEMENT
RULING AND ORDER**

HONORABLE JOHN NAPPER

DIVISION 2

BY: Felicia L. Slaton, Judicial Assistant

DATE: April 25, 2024

The Court has received and reviewed the parties' cross-Motions for Summary Judgment, Motions to Dismiss, the Responses, and the Replies. The Court also held oral arguments and reviewed supplemental pleadings and evidentiary submissions. The Court has reviewed the files in both cause numbers. In both cases, the Court finds the 2023 Elections Procedures Manual complies with Arizona law. Accordingly, the Plaintiffs' Motions for Summary Judgment are **denied**, and the Defendants' Motions for Summary Judgment are **granted**.

Facts and Procedural History

The Arizona Legislature is responsible for passing laws controlling elections. *Ariz. Const. Art. VII §1, Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023). Conducting elections is a complicated process and the Legislature has required the Secretary of State (the elections officer for the State) (“Secretary”), to draft an election procedures manual (“EPM”). *A.R.S. § 16-452(A)*. The purpose of this manual is to “achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots.” *Id.* Once signed by the Governor, the Attorney General, and the Secretary, the EPM is binding and violating its requirements is a criminal offense. *A.R.S. §16-452(C)*. However, any section of the EPM which violates an election statute does “not have the force of law.” *Leibsohn v. Hobbs*, 254 Ariz. 1, ¶22 (2022).

The issues before the court are: (1) did the Legislature intend for a prior ballot envelope to be a part of a voter’s registration record pursuant to A.R.S. §16-550 and §16-550.01 (Cause # P1300CV202300202); and (2) does the use of unmonitored drop-boxes to collect early ballots violate Arizona law. (Cause # P1300CV202200872)

Application of Law

Registration Record

This part of the litigation involves how early ballots are verified based on the definition of the phrase “registration record” in A.R.S. §16-550 and §16-550.01. In a prior ruling on a Motion to Dismiss, the Court found the signature on a previous ballot envelope did not meet the definition of a registration record in A.R.S. §16-550. Since this ruling, a new EPM has been adopted and the Arizona Legislature has relied on the new EPM when reenacting and amending the relevant statute. As explained below, based on these changes, the Court finds the Legislature intends for a previous ballot envelope to be included in a voter’s registration record.

Verification

In order to have his/her early vote counted, a voter must fill out their ballot and place it in a pre-printed envelope. *A.R.S. §16-547(A)*. The outside of this envelope contains an affidavit indicating the voter is: (1) registered to vote in the county; (2) has not voted and will not vote anywhere else; and (3) personally filled out the ballot within the envelope. *Id.* The voter signs the envelope attesting to these facts under penalty of perjury. *Id.*

When the early ballot is received by the county recorder, they then go about trying to determine if the signature on the envelope is the signature of the registered voter. *A.R.S. § 16-550(A)*. This is done by comparing the ballot envelope to the signature “on the elector’s registration record.” If the two signatures are clearly consistent, then the vote is counted. *A.R.S. §16-550.01(B)*. If the two signatures are not consistent, the voter is notified and given the opportunity to confirm the signature. *Id.*

The current EPM allows a county recorder to compare the signature on the current voter envelope to the signature on the envelope from prior early votes. The signature from the prior early vote envelopes being a part of the “registration record.” Meaning, the 2023 EPM includes in the definition of “registration record” the previous act of early voting.

Legislative Reenactment

When this litigation began, the 2019 EPM remained in effect. The 2019 EPM did not include this method for verifying a signature. However, the parties do not dispute the Secretary told recorders that a prior verified vote was a proper tool for comparison. The 2023 EPM formally adopts this process and includes “prior early ballot affidavits” as part of the registration record. *Ariz. Sec. State. 2023 Elec. Pro. Man. VI.(A)(1)*.

As mentioned above, the Legislature recently amended several elections statutes. These include changes to A.R.S. §16-550 and the addition of A.R.S. §16-550.01. These statutory amendments came after the 2023 EPM was implemented. The amendments rely heavily on the text from the 2023 EPM. In some places the statutes outright adopt language directly from the 2023 EPM. The new statutes also use the phrase “registration record” multiple times.

The Legislature had every opportunity to eliminate “prior early ballot affidavits” as a comparison tool but chose not to do so. Nothing in these amendments suggests the Legislature found the EPM’s working definition of registration record was improper. The Legislature also chose not to provide a definition of registration record in the amended or newly enacted statutes.

The Legislature is presumed “to know how an administrative department interprets the statutes it is responsible to administer.” *State, ex rel., Arizona Dept. Revenue v. Short*, 192 Ariz. 322, 325 ¶14 (App. 1998). In a different context, the Arizona Supreme Court has held courts can infer that the legislature approves of another body’s definition of a statute when there, “is some reason to believe that the legislature has considered and declined to reject that interpretation.” *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 106 (1993). More directly, when the, “legislature re-enacts a statute after uniform construction by the officers required to act under it, the presumption is that the legislature knew of such construction and adopted it in re-enacting the statute.” *Jenny v. Arizona Express, Inc.*, 89 Ariz. 343, 346 (1961) (*see also, Mummert v. Thunderbird Lanes, Inc*, 107 Ariz. 244 (1971)).

This is exactly what has happened here. The Arizona Legislature tasked the Secretary of State, the Attorney General and the Governor with constructing the EPM. When they did so in 2023, they included prior ballot envelopes in the working definition of “registration record.” There can be little doubt the Legislature was aware of this definition because they included much of the language from the EPM into this new legislation, including the phrase registration record.

This Court may or may not have been correct about the definition of registration record when it ruled on the previous Motion to Dismiss. However, its prior reasoning is no longer sound based on the Legislature’s adoption of the definition of registration record from the 2023 EPM when reenacting A.R.S. §16-550(A) and enacting of A.R.S. §16-550.01. Regardless of the prior ruling of this Court, it is now presumed from these legislative changes that the Legislature intended to adopt the EPM’s use of prior ballot envelopes to verify signatures.

Off the Rolls

This reading of registration record also complies with Arizona statute in other ways. Intervenor *Mi Familia Vota* points out: a person that requests to vote by early ballot must actually do so or they will be removed from the early voting rolls. *A.R.S. §16-544(H)(4)*. This failure to early vote could ultimately cause a

voter to be dropped from the voting rolls altogether. Meaning, the act of early voting keeps an individual registered to vote in future elections. In Arizona, early voting is simultaneously registering.

Plaintiffs acknowledge the failure to early vote across time can result in a person no longer being able to vote. They argue this path to being off the rolls is so byzantine that it could not have been on the Legislature's mind when they used the phrase "registration record." However, there is no factual record before the Court substantiating this argument. Even though somewhat convoluted, in the system constructed by the Legislature, the act of early voting operates to ensure a voter remains registered.

While not conclusive of legislative intent, this voting/registration paradigm is consistent with the Legislature adopting the 2023 EPM's use of prior ballot envelopes to verify signatures as registration records. Courts are to "harmonize and give effect" to all provisions of a statutory scheme. *Marsh v. Atkins*, 256 Ariz. 233, ¶14 (App. 2023). Including prior ballot envelopes in the definition of registration accomplishes this goal.

Database Argument

The Secretary argues signatures on prior ballot envelopes are registration records because they are kept in a database containing other records related to voters and elections. This database must be kept pursuant to federal statute. The Court is not compelled by this argument. Where or how something is stored does not define the item. Whether or not a record is a "registration record" can only be determined by the content of its character, as defined by the Legislature, and not by the company it keeps.

Conclusion

The Court finds the Legislature intended to adopt the 2023 EPM's use of prior voting envelopes in the definition of registration record when it reenacted A.R.S. §16-550 and adopted A.R.S. §16-550.01. Using this definition also harmonizes other portions of the Arizona elections statutes. Accordingly, the Plaintiffs' *Motion for Summary Judgment* is **denied**. The cross-*Motions for Summary Judgment* are **granted**.

Drop Boxes

Staffed vs. Monitored

When this litigation began, the 2019 EPM was also still in effect. The prior version of the EPM allowed for "unstaffed drop-boxes." The Plaintiffs objected to this portion of the EPM arguing unstaffed drop boxes were not allowed by Arizona statute. The direction of this litigation was also impacted by the enactment of the 2023 EPM and the Legislature amending several voting statutes.

The 2023 EPM creates a process for counties to use drop boxes for the collection of early ballots. *2023 Elections Procedures Manual II(I) pg. 71*. A county recorder may opt to use drop-boxes and the location of the drop-boxes must be approved by the board of supervisors for the county. *Id.* Any county choosing to utilize drop-boxes must comply with the EPM's drop-box requirements. *Id.*

The EPM requires that, "a ballot drop-box shall be located in a secure location such as inside or in front of a federal, state, local or tribal government building." *Id.* At issue here are drop-boxes that are placed outside government buildings. As to these drop-boxes, the EMP states, "A drop-box staffed by elections officials may be placed outdoors and shall be securely fastened in a manner to prevent moving or tampering." *Id.* at II(I)(1)(a).

The section of the EPM matches A.R.S. §16-1005(E) which states, “a person or entity that knowingly solicits the collection of voted or unvoted” that is found “to be serving as a ballot drop off site, other than those established and staffed by certain election officials” is guilty of a class 5 felony. The text of the 2023 EPM does not deviate from Arizona statute.

The issue before the Court is: what is the definition of the word “staffed” as used in the EPM and Arizona statute. The Arizona code states, “in order to be valid and counted, the ballot affidavit must be delivered to the office of the county recorder or other officer in charge of elections or may be deposited at any polling place in the county not later than 7:00 p.m. on election day.” *A.R.S. §16-547(D)*. From this, Plaintiffs argue “staffed” must mean the ballot must be delivered to a drop-box which is monitored by an officer in charge of elections. Plaintiffs appear to be arguing “staffed” and “monitored” are equivalents.

While not defining the term “staffed,” the EPM does not require that staffed drop-boxes always be monitored by an election worker. For instance, the EPM mandates that a fire suppression device be placed inside all ballot drop-boxes, “that are placed outdoors or not within the sight of elections officials.” *2023 Elections Procedures Manual Sec. I(5) pp. 7*. Therefore, the definition of staffed in the EPM clearly does not require a drop-box to be indoors or be monitored at all times.

The Arizona Legislature recently amended A.R.S. §16-547(D). This amendment occurred after the creation of the 2023 EPM. As outlined above, the Legislature is presumed to be aware of the EPM’s use of staffed but unmonitored drop-boxes. *State, ex rel., Arizona Dept. Revenue v. Short*, 192 Ariz. 322, 325 ¶14 (App. 1998). Further, the reenactment of A.R.S. §16-547(D) without providing an alternative definition for deliver or staffed, indicates the Legislature was adopting the use of these types of drop-boxes for the delivery of ballots. *Jenny v. Arizona Express, Inc.*, 89 Ariz. 343, 346 (1961) (*see also, Mummert v. Thunderbird Lanes, Inc.*, 107 Ariz. 244 (1971).) The leaving of item for another to pick up later is also consistent with the dictionary definition of deliver. (*See, Merriam Dictionary* <https://www.merriam-webster.com/Dictionary/Deliver>, searched 4/23/2024 “to take and hand over to or leave for another.”).

The Legislature has delegated to the Secretary the responsibility to “prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting,” including the “collecting of ballots.” *A.R.S. §16-452(A)*. In this instance, the Secretary has included as a method for collecting ballots the use of drop-boxes that are not always monitored by elections officials. After the reenactment of the A.R.S. §16-547(D), the use of these drop-boxes to collect ballots is well within the discretion of the Secretary.

Standing

The 2019 EPM contained a definition of “unstaffed” drop-box and outlined the requirements for their use. Plaintiffs argued these drop-boxes violated the text of Arizona statute. Therefore, the Plaintiffs sought to force the Secretary to perform the non-discretionary act of following Arizona law. A writ of mandamus may be an appropriate tool in these circumstances. *State Board of Technical Registration v. Bauer*, 84 Ariz. 237, 239 (1958).

The 2019 EPM is no longer in effect and the 2023 EPM no longer uses unstaffed drop-boxes. The 2023 EPM requires all drop-boxes to be staffed. The 2023 EPM does not require the staffed drop-boxes to always be monitored. As outlined above, the Legislature was aware of the use of this type of drop-box when it reenacted A.R.S. §16-457(D). At a very minimum, the reenactment of this statute indicates the legislative intent that the

use of these drop-boxes is well within the discretion of the Secretary. While mandamus is a tool to require a government official to, “compel a public officer to perform a discretionary act” it cannot be used to require the official “to exercise that discretion in a particular manner.” *Blankenbaker v. Marks*, 231 Ariz. 575, 577 ¶7 (App. 2013).

The Secretary, the Attorney General and the Governor exercised their discretion in the defining of drop-boxes in the 2023 EPM. The Legislature adopted this definition when it reenacted and amended the statute at issue. Accordingly, Plaintiffs do not have standing to require the Secretary to exercise his discretion in a particular manner. *Blankenbaker*, at ¶ 7.

Conclusion

It is within the Secretary’s discretion to allow counties to choose to use drop-boxes. The Legislature has not required that these drop-boxes always be monitored. The decision to use staffed but unmonitored drop-boxes is within the discretion of the Secretary. Accordingly, the Plaintiffs’ *Motion for Summary Judgment* is **denied**. The cross-*Motions for Summary Judgment* are **granted**.

IT IS THEREFORE ORDERED, in Cause # P1300CV202300202, the Plaintiffs’ *Motion for Summary Judgment* is **denied**.

IT IS FURTHER ORDERED, in Cause # P1300CV202300202, the Defendant and Intervenors’ *Cross-Motion for Summary Judgment* is **granted**.

IT IS FURTHER ORDERED, in Cause # P1300CV202200872, the Plaintiffs’ *Motion for Summary Judgment* is **denied**.

IT IS FURTHER ORDERED, Cause # P1300CV202200872, the Defendants’ *Motion for Summary Judgment and Intervenors’ Motion to Dismiss* are **granted**.

IT IS FURTHER ORDERED, Defendants are to file a form of Judgment with the Court within 10 days of this Order. The Judgment shall contain the appropriate language from Rule 54 of the Arizona Rules of Civil Procedure.

DATED this 25th day of April, 2024.



eSigned by NAPPER, JOHN 04/25/2024 13:23:35 I18T1OaJ

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