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SUPERIOR COURT, STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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.** S1300CV202300202 **UNDER ADVISEMENT RULING AND ORDER**

HONORABLE JOHN NAPPER	**BY:** Felicia L. Slaton, Judicial Assistant
DIVISION 2	**DATE:** September 1, 2023

The Court has received and reviewed the *Motions to Dismiss* filed by the Secretary of State and Mi Familia Vota, the *Responses* and the *Replies*. The Court also held oral argument on the *Motions*. After the arguments, the Court took the following issues under advisement: (1) does the Complaint state a viable claim for relief and (2) should the Special Action be dismissed because the claims are not ripe for judicial determination. All other motions to dismiss were denied. Considering the *Motions* and arguments of the parties, the remaining *Motions to Dismiss* are **denied**.

Facts and Procedural History

Elections Procedure Manual

Arizona statute requires the Secretary of State, the Attorney General, and the Governor to create an Elections Procedures Manual ("EPM"). *A.R.S. §16-452(B)*. This manual governs how elections are conducted throughout the State. *A.R.S. §16-452(C)*. The EPM carries the force of law and violating its requirements is a criminal offense. *Id.* A new EPM is due to be produced December 31, 2023. *A.R.S. §16-452(B)*. The 2019 version of the EPM remains in effect because a 2021 manual was never approved. *Leibsohn v. Hobbs*, 254 Ariz. 1 at fn 3. (2022).

Arizona law gives the Secretary of State latitude to create procedures to ensure elections are conducted fairly and accurately. *A.R.S. §16-452(A)*. The Secretary is also provided latitude in creating procedures that protect an individual's right to vote. *Id.* However, this discretion is not unfettered. *Leibson* at 254 Ariz. 1 ¶22 (2022). The Secretary is bound by the election statutes and any dictates in the EPM which violate or deviate from these statutes do "not have the force of law." *Id.* The Special Action in this case alleges just such a violation.

Early Voting Registration Record

Arizona has a long history of early voting. These votes are cast either by mailing a ballot or by putting the ballot in an election's drop box. To vote in this manner, the voter fills out their ballot and places 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, (3) and 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 envelope is received by the county recorder, this signature alone is the only verification available to ensure the identity of the person casting the ballot.

Under Arizona law, it is the task of the county recorder to initially determine if the signature on the envelope is the signature of a registered voter. *A.R.S. §16-550(A)*. Arizona statute requires the recorder to compare the signature on the envelope "with the signature of the elector on the elector's registration record." *Id.* If the signatures "correspond" then the vote is tabulated. If the signature is "inconsistent with the elector's signature on the elector's registration record" the recorder must make reasonable efforts to contact the voter and allow "the voter to correct the signature or the county to confirm the inconsistent signature." *Id.*

The Complaint

The issue raised in the Complaint is the definition "registration record" as used in the A.R.S. §16-550. The Complaint alleges a voter's "registration record" is limited to the documents a voter fills out to register to vote. This registration record includes all state and federal forms for registration. The "record" includes each of these forms as they are filled out and saved across time. For example, when a voter originally registers as a member of one party and then re-registers in another, those two registration forms are the "registration record." This Complaint alleges this record increases every time there is a subsequent registration to vote.

The Complaint alleges the current EPM contains a definition of "registration record" which deviates significantly from the statute. The EPM instructs the recorder to consult and review not only registration forms but also "additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot [permanent early voting list] request forms." The Complaint alleges this includes allowing recorders to use signatures on prior early ballot envelopes to verify signatures.

Motion to Dismiss, Secretary of State

The Secretary of State has moved the Court to dismiss the Complaint for failing to state a claim upon which relief can be granted. He first argues the documents outlined in the EPM for review by the recorder to verify a signature are within the statutory meaning of "registration record." In the alternative, he argues, the phrase "registration record" is ambiguous. Therefore, the Arizona Code allows the Secretary to supply the interpretation of this phrase as a part of his duties pursuant to A.R.S. §16-452(A).

Motion to Dismiss, Mi Familia Vota

Mi Familia Vota also moved the Court to dismiss the Complaint. It argues, the case is not ripe for decision because a new EPM is in the process of being constructed. They argue the new EPM may not utilize the same definition of registration record. Therefore, any ruling from the Court would be an advisory opinion since the issue is not ripe for decision until the new EPM is issued.

Application of Law

Dismissal

Motions to dismiss are not favored in Arizona law. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). In determining whether to grant a motion to dismiss, the Court must assume the truth of all of the allegations alleged in the complaint. *Luchanski v. Congrove*, 193 Ariz. 176, 179 ¶ 17 (App. 1998). The dismissal of a complaint is appropriate "only if as a matter of law plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof." *AUDIT-USA v. Maricopa County*, 254 Ariz. 536, ¶6 (2023).

The Registration Record

As noted above, the issue before the Court is the definition of "registration record." When interpreting statutes, the Court's duty is "to give effect to the intent of the legislature." *Estate of Braden ex. rel. Gabaldon v. State*, 288 Ariz. 323, 325 ¶8 (2011). The plain language of a statute is the best indicator of legislative intent. *Azore, LLC v. Bassett*, 236 Ariz. 424, 427 ¶9 (App. 2014). Absent a specific definition provided by the legislature, courts give "terms their ordinary and commonly accepted meaning." *JH2K I LLC v. Arizona Department of health Services*, 246 Ariz. 307, 310 ¶9 (App. 2019). When a statute is "clear and unambiguous" the Court "need not resort to other methods of statutory interpretation to discern the legislature's intent because its intent is readily discernable from the face of the statute." *State v. Holle*, 240 Ariz. 300, 302 ¶11 (2016).

Here, the langue of the statute is clear and unambiguous. The statute requires the recorder to review the voter's *registration* record. The common meaning of "registration" in the English language is to sign up to participate in an activity. Courts often look to dictionaries to determine the ordinary meaning of a word. *In re Paul M*, 198 Ariz. 122, 124-25 ¶7 (App. 2000). The Merriam Webster Dictionary, defines registering as "to enroll formally especially as a *voter* or student." (emphasis added).

No English speaker would linguistically confuse the act of signing up to participate in an event with the act of participating in the event. Registering your child to play in a soccer tournament is not the same thing as the child playing in the tournament. Registering to attend law school is not the same as attending classes. Registering to vote is not the same as voting. Applying the plain and obvious meaning of "registration," the legislature intended for the recorder to attempt to match the signature on the outside of the envelope to the signature on the documents the putative voter used to register.

The Secretary urges the Court to determine the legislature intended other documents to be included in the definition of "registration record" based on a legislative change in the text of the statute. A prior version of the statute required the recorder to compare the signature on the envelope to the putative voter's "registration form." *See, A.R.S. §16-550(A)* Laws 2019, Ch. 39 §2. The Secretary argues the linguistic change from "form" to "record" indicates the Legislature's intent to expand the documents the recorder can review when trying to match signatures. Therefore, he argues, county recorders can review all sorts of signed documents in the voter's history even if they have nothing to do with the act of registering.

This argument fails because the change by the legislature simply increased the volume of documents to be reviewed by the recorder but not their character. Under the old version of the statute the recorder was only to compare the signature on the singular *form* used by the putative voter to register to vote against the signature on the envelope. The new statute has increased the universe of comparable documents from a singular form to the

entire record. However, the legislature chose not to remove the limitation on the types of documents that constitute the "record." That limitation remains the same, documents are a part of the "registration record" only if they involve the voter's "registration."

In the alternative, the Secretary argues the definition of "registration record" is ambiguous. Therefore, he is entitled to provide guidance on its interpretation based on the statutory authority to conduct elections fairly and impartially. *A.R.S. §16-452(A)*. Under this theory, his broad definition of registration record does not violate the requirements of A.R.S. §16-650.

This argument fails because there is no ambiguity in the statute. Pursuant to the statute, the recorder is to compare the signature on the envelope to the voter's prior registrations (the record). *A.R.S. §16-550(A)*. If they match, then the vote is counted. *Id.* If they do not, the voter is contacted to address any possible concerns. *Id.* There is no ambiguity in this statute or the process.

The Court finds the Special Action states claim upon which relief can be granted. The Court finds the Plaintiffs have correctly defined registration record. The 2019 EPM creates a process that contradicts the plain language of A.R.S. §16-550(A). Therefore, this portion of the EPM and the instruction from the Secretary do "not have the force of law." *Leibson*, at 254 Ariz. ¶ 22. This is the remedy sought in the Special Action. Accordingly, the Secretary of State's *Motion to Dismiss* is **denied**.

Ripeness

In Arizona, ripeness is a doctrine of judicial restraint. *City of Surprise v. Arizona Corporation Commission*, 246 Ariz. 206, 209 ¶ 8 (2019). Its purpose is to ensure courts "refrain from issuing advisory opinions" and allow for the "issues to be fully developed between two adversaries." *Id.* Specifically, the doctrine is intended to prevent, "a court from rendering a premature judgement on a situation that may never occur." *Fann v. State*, 251 Ariz. 425, 431-32 ¶11 (2021). A case is ripe for decision if there is an actual controversy between the parties. *Id.*

In this case, the 2019 EPM remains in effect. *Leibsohn v. Hobbs*, 254 Ariz. 1 at fn 3. (2022). It contains an incorrect definition of registration record as does the advice from the Secretary of State as alleged in the Complaint. This incorrect definition and instruction currently carry the weight of law. *A.R.S. §16-452(C)*. Further, the Plaintiffs are entitled to have the Secretary exercise the non-discretionary duty of properly instructing county recorders on how to tabulate votes in compliance with Arizona statutes.

As long as the 2019 EPM remains in effect, there is an active and actual controversy between adversaries. Any judgment in this case is not premature, because the problem alleged in the Special Action is occurring in elections across the State. The Court further finds, the issues are capable of being fully developed by the parties and are appropriate for a judicial determination.

Mia Familia Vota does not dispute any of these points. Instead, they argue the issue is not ripe because there is supposed to be a new EPM in December of 2023. *A.R.S. §16-542(B)*. While the production of a new EPM is statutorily required, the multiple offices of the executive branch have not consistently adhered to the statute's dictates. They were unable to produce an EPM in 2021. This is why the 2019 manual carries the force of law to this day. The Court has been unable to find any authority suggesting a case is not ripe for decision because a government actor may choose a different course of conduct in the future.

The controversy alleged in the Special Action exists today. It exists between two parties that are capable of fully litigating the issues. The Court also finds the correct tabulation of votes to be an issue of statewide importance. The Court finds the Special Action is ripe for decision. The possibility of the Governor, the Secretary of State, and the Attorney General making different decisions in the future does not alter the fact that a judicable controversy exists now. Accordingly, Mia Familia Vota's *Motion to Dismiss* is **denied**.

IT IS ORDERED, setting a Status Conference on **Tuesday, September 19, 2023** at **9:00 a.m.** before the Honorable John Napper, Division 2, Courtroom 301, Prescott Judicial District, 120 S. Cortez Street, Prescott, Arizona. The parties and counsel may appear remotely via Microsoft Teams. The Microsoft Teams link for remote appearances can be found on the Yavapai County, Division 2 website at https://courts.yavapaiaz.gov/superiorcourt/Divisions.

DATED this 1st day of September, 2023.

eSigned by Napper,John 09/01/2023 15:51:53 xlXWTpdF

HON. JOHN NAPPER
Judge of the Superior Court, Division 2

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