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15 **ARIZONA SUPERIOR COURT**

16 **MOHAVE COUNTY**

17 JEANNE KENTCH, an individual; TED  
18 BOYD, and individual; ABRAHAM  
19 HAMADEH, an individual; and  
20 REPUBLICAN NATIONAL COMMITTEE, a  
21 federal political party committee,

22 Plaintiffs/Contestants,

23 v.

24 KRIS MAYES,

25 Defendant/Contestee,

26 and

KATIE HOBBS, in her official capacity as the  
Secretary of State; et al.,

Defendants.

No. S8015CV2022-01468

**ARIZONA SECRETARY OF STATE  
KATIE HOBBS' BENCH  
MEMORANDUM**

Hearing: December 23, 2022

Time: 9:00 a.m.

(Assigned to Hon. Lee F. Jantzen)

## Introduction

In their Complaint, Plaintiffs make vague allegations that County Defendants “erroneously designat[ed] or mischaracterize[ed] voter’s manifested intent” as to an unspecified number of “undervotes.” [Stmt. ¶ 92] “Undervotes” include markings on ballots that are not tabulated as votes because the voter did not properly fill in the ballot oval, such that the voting tabulator does not read them as votes. Undervotes also include ballot races in which a voter chose not to vote (though they may have voted on other races contained on the same ballot). In their Complaint, Plaintiffs claim County Defendants “improperly tabulated voters’ selections and erroneously counted votes as undervotes.” [Stmt. ¶ 4(f) (emphasis added)] However, not until the oral argument on Defendants’ Motions to Dismiss 3 days ago, and as the parties have begun to discuss ballot inspection in the subsequent days, did it become clear that Plaintiffs are not claiming that any election official acted improperly by failing to follow relevant election procedures regarding designating undervotes or marking properly voted ballots as undervotes. Instead, the thrust of Plaintiffs’ complaints now as to undervotes seems to be that election officials and staff are not manually reviewing and duplicating or adjudicating all ballots with undervotes. This is a challenge to counties’ established practices and procedures as authorized in the Elections Procedures Manual (“EPM”) and it is not appropriate to bring this challenge as part of an election contest. The EPM clearly requires counties to review ballots containing overvotes, but does not require the same for undervotes (nor does any statute require review of undervotes). Plaintiffs were therefore on notice since at least when the EPM was issued in 2019 that undervotes would not be reviewed. Their attempt to challenge these established procedures now as part of their election contest is improper and must be dismissed.

In its order on Defendants’ Motions to Dismiss, this Court dismissed Count V of Plaintiffs’ Complaint regarding an election procedure authorized by EPM, and of which Plaintiffs have similarly had notice for years, for the very reasons that apply here. This Court held that Count V was barred because “[t]here is not an allegation of election workers improperly

1 not complying with the EPM.” Court Order at 4. Rather, the challenge was to the EPM provision  
2 itself, which “has been in place since 2019 and should not be the subject of a post-election  
3 challenge.” *Id.* In any event, the counties’ procedures as to undervotes cannot be misconduct  
4 under the election contest statute when they violated no law. The Court should dismiss Plaintiffs’  
5 claims regarding undervotes for these same reasons.

## 6 **Argument**

### 7 **I. Plaintiffs’ Challenge to Undervote Procedures Cannot Be Brought After the** 8 **Election.**

9 Plaintiffs knew or should have known that undervotes would not be reviewed since at  
10 least 2019, when the EPM was approved by the Secretary, Governor, and Attorney General and  
11 thus obtained the force and effect of law. *See, e.g.*, 2019 Elections Procedures Manual<sup>1</sup> at 93  
12 (requiring “outstacking,” or putting aside for review, ballots with overvotes but not undervotes);  
13 *id.* at 201 (“Over-voted ballots shall be sent to the Ballot Duplication Board” for review  
14 (emphasis added)). But they waited years to challenge this practice as part of an election contest.  
15 Courts uniformly reject challenges to election procedures like this brought only after an election.  
16 Indeed, “[c]hallenges concerning alleged procedural violations of the election process must be  
17 brought prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002)  
18 (citation omitted). Here, rather than seeking relief as to these established policies and practices  
19 years or even months ago, Plaintiffs waited until after the election (and after Hamadeh lost his  
20 race) to sue. But “by filing their complaint after the completed election,” Plaintiffs “essentially  
21 ask [the Court] to overturn the will of the people, as expressed in the election.” *Sherman*, 202  
22 Ariz. at 342 ¶ 11. The Court should thus reject Plaintiffs’ attempt to “subvert the election process  
23 by intentionally delaying a request for remedial action to see first whether they will be successful

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24  
25 <sup>1</sup>  
26 [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

1 at the polls.” *McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App.  
2 1997) (quotation omitted).

3 Ruling on Plaintiffs’ claim as part of an election contest would cause significant harm to  
4 voters. Arizonans cast ballots in the 2022 election in reliance on their election officials properly  
5 complying with requirements set out in the EPM. To throw their votes out after-the-fact in  
6 service of Plaintiffs’ unsupported claim would disenfranchise those voters. *Sotomayor v. Burns*,  
7 199 Ariz. 81, 83 ¶ 9 (2000) (considering fairness to the parties, the court, “election officials, and  
8 the voters of Arizona”). Moreover, Plaintiffs’ raising this as part of their election contest “places  
9 the court in a position of having to steamroll through the delicate legal issues in order to meet  
10 the [applicable] deadline[s].” *Id.* at 83 ¶ 9. (citation omitted). Filings such as Plaintiffs’ “deprive  
11 judges of the ability to fairly and reasonably process and consider the issues . . . leaving little  
12 time for . . . wise decision making.” *Id.*

13 **II. Even If Plaintiffs’ Challenge to Undervote Procedures Could Be Brought Now,**  
14 **there Was No Misconduct Because the Counties Violated No Law.**

15 Even if Plaintiffs’ claims regarding undervote procedures had not been brought far too  
16 late (and they were), it should go without saying that it is not actionable “misconduct” under the  
17 election contest statutes for county election officials to simply follow the EPM.

18 **Conclusion**

19 For these reasons, this Court should dismiss Plaintiff’s claims regarding undervotes.

20 Respectfully submitted this 22nd day of December, 2022.

21 **COPPERSMITH BROCKELMAN PLC**

22 By /s/ D. Andrew Gaona

23 D. Andrew Gaona

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1 ORIGINAL efiled and served via electronic  
2 means this 22nd day of December, 2022, upon:

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