

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2023-004832

08/07/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT  
L. Gilbert  
Deputy

ARIZONA DEMOCRATIC PARTY, et al.

ROY HERRERA

v.

NO LABELS, et al.

DAVID B ROSENBAUM

JEFFERSON R DALTON  
DANIEL JURKOWITZ  
WILLIAM J KEREKES  
ROBERT F MAY  
JAMES IAN MITCHELL  
JASON W MITCHELL  
JASON MOORE  
CRAIG A MORGAN  
CHRISTINE J ROBERTS  
CELESTE MARIE ROBERTSON  
JEAN A ROOF  
THOMAS M STOXEN  
ROSE WINKELER  
GARRY GRIFFITH  
GREENLEE CTY ATTY'S OFFICE  
PO BOX 1717  
CLIFTON AZ 85533  
JOSEPH EUGENE LA RUE  
RYAN ESPLIN  
JUDGE COOPER

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RULING RE MOTIONS TO DISMISS

This is a Special Action to preclude a new party organization, the No Labels Party (“No Labels”), from appearing on Arizona’s 2024 primary and general election ballots.

On March 7, 2023, Defendant Adrian Fontes, Arizona Secretary of State (“Secretary”), approved No Labels’ petition for new party recognition (“Petition”). Plaintiffs Arizona Democratic Party and elector Lisa Sanor (collectively “ADP”) allege that the Petition is defective and Fontes erred in approving it. ADP’s Complaint asserts claims for mandamus (Count 1), injunctive and declaratory (Count 2) relief and an order finding the Petition invalid, annulling No Labels’ new party status, and precluding the issuance of ballots for No Labels in 2024. ADP also seeks an award of attorneys’ fees and costs.

Pending are Defendants’ Rule 12(b)(6) Motions to Dismiss. The Court has considered the Motions, ADP’s combined Response, Defendants’ Replies, and counsels’ oral argument. In considering dismissal motions, the Court reviews a complaint for well-pled factual allegations and construes them in favor of the plaintiff (here ADP). *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417 (2008). Conclusory statements alone are not adequate to state a claim. *Id.* at 419.

**Requirements for New Party Petition**

In Arizona, a new political party may qualify for the ballot by filing a petition with the Secretary of State. The Legislature has defined the requirements for a petition. A.R.S. § 16-801(A) states that a new political party may qualify for the ballot

...on filing with the secretary of state a petition signed by a number of qualified electors equal to not less than one and one-third per cent of the total votes cast for governor at the last preceding general election at which a governor was elected...The petition shall:

- (1) Be verified by the affidavit of ten qualified electors of the state, asking that the signers thereof be recognized a new political party. The status as qualified electors of the signers of the affidavit shall be certified by the county record of the county in which they reside.
- (2) Be in substantially the form prescribed by § 16-315.
- (3) Be captioned “petition for political party recognition.”

ADP challenges the verifications (also referred to as “cover affidavits”) submitted with No Labels’ Petition. ADP alleges that the affidavits do not comply (A)(1) above for two reasons:

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1) the text on the affidavit form does not match the language of Subpart A(1), and 2) the signers signed the affidavits before No Labels collected all signatures needed for the Petition.<sup>1</sup>

### **Statutory Interpretation & Standard of Review**

In considering ADP’s claims, the Court applies two well-recognized principles of law. First, to identify the criteria, the Court looks to the plain language of the statute. Courts “construe statutes to give effect to the legislature’s intent,” starting with “the plain text of the statute, as it is the most reliable indicator of its meaning.” *State ex. rel. DES v. Pandola*, 243 Ariz. 418, 419 (2018); *State v. Huante*, 252 Ariz. 191, 194, ¶ 8 (App. 2021). “If a statute, by its terms, is unambiguous, it is applied as written without resorting to other rules of statutory interpretation.”

Second, to assess whether No Labels met the requirements, the Court applies the “substantial compliance” test. Do the affidavits substantially comply with the statute? Court use this standard to judge election-related petitions, such as candidate and initiative petitions. *See Lohr v. Bolick*, 249 Ariz. 428, 431 (2020); *Kromko v. Superior Court*, 168 Ariz. 51, 58 (1991). The parties agree that this standard also applies No Labels’ new party Petition.

Under the substantial compliance standard of review, a technical defect in a petition is not fatal. Courts focus on whether the defect will confuse or mislead the electors signing the petition. *Bee v. Day*, 218 Ariz. 505, 507 ¶ 10 (2008). Thus, a petition that does not confuse or mislead passes muster absent a clear statement from the Legislature that a different standard applies. Here, the Legislature has expressly allowed for substantial compliance in evaluating a new party petition, stating in Subpart (A)(2) that a new-party petition “shall...[b]e in substantially the form prescribed by § 16-315.”

### **The Affidavit Language Was Accurate**

The affidavit form that No Labels used – a form prescribed by the Secretary – substantially complies with § 16-801(A). Subpart (A)(1), the affidavit provision, requires ten affiants verify that the signers of the Petition ask to form the party. The form states: “We, the ten undersigned qualified electors of the state of Arizona, request that the signers of the attached petitions be recognized as a new political party, to be called No Labels Party.” Compl. ¶ 25.

ADP alleges that the affidavit is incorrect because it should quote Subpart (A)(1) verbatim and ask that “the *signers thereof* be recognized as a new political party.” *Id.* at ¶ 31. They contend that the form’s language, “*signers of the attached petitions*,” misstates the purpose of the Petition. Neither the Complaint nor the statute supports this position.

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<sup>1</sup> ADP does not challenge the validity of the signatures on the Petition or the affidavits.

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First, there is no statutory requirement that the affidavit use these exact words. Subpart (A)(3) is the only provision that calls for specific wording on the petition, and it applies solely to the caption on the petition,<sup>2</sup> not the affidavits.

Second, the affidavit form accurately reflects the text in (A)(1). The statutory “signers thereof” *are* the “signers of the petition” referenced in the affidavit. The signers ask to form a new party, not the affiants. The affiants verify the signers’ request. The statute does not ask the ten affiants to be the party.

Subpart (A)(1) makes sense when read in context. It is the first of three subparts that together comprise the elements for a new party petition. A.R.S. §§ 16-801(A)(1)-(3). The main paragraph, 801(A), refers to “the petition” and states: “A new political party may become eligible for recognition...on filing with the secretary of state *a petition* signed by a number of qualified electors. The *petition* shall:” (emphasis added) Each subpart completes the phrase “[t]he *petition* shall,” starting with the word “[b]e.” Subpart (A)(1) reads: “The *petition* shall (1) Be verified by the affidavit of ten qualified electors of the state, asking that the *signers thereof* [i.e. the petition] be recognized as a new political party.” (emphasis added). Given the context, “signers thereof” refers back to the “petition” and can have only one meaning – that the affiants verify that the voters signing the Petition ask to be a new party. *BSI Holdings LLC v. Ariz. Dep’t of Transp.*, 244 Ariz. 17, 19, ¶ 9 (2018) (“Words in statutes should be read in context in determining their meaning.”)

The second sentence in Subpart (A)(1) reinforces this interpretation by distinguishing “signers thereof” from “signers of the affidavit.” The second sentence states: “The status as qualified electors of the *signers of the affidavit* shall be certified by the county record of the county in which they reside.” A.R.S. § 16-801(A)(1) (emphasis added). Two different phrases side by side —“the signers *thereof*” in the first sentence, and “the signers *of the affidavit*” in the second sentence. “[W]e must assume that the legislature intended different consequences to flow from the use of different language.” *P.F. West, Inc. v. Super. Ct.*, 139 Ariz. 31, 34 (App. 1984). If “signers thereof” referred to the affiants, the Legislature would have said “signers of the affidavit,” as it did in the second sentence.

Finally, the affidavits substantially comply with (A)(1) as the Complaint does not allege that anyone was confused or misled by the phrase “signers of the attached petitions be recognized as a new political party.” There is no allegation that the affiants were confused as to who would be the party or that they believed it to be the ten of them.

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<sup>2</sup> Subpart (A)(3) requires that a petition “b]e captioned ‘petition for political party recognition’”

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**No Temporal Requirement**

Similarly, the timing of the affiants' signatures does not invalidate the signatures on the Petition. ADP alleges that, because No Labels continued to collect signatures after the "Affidavit of Elector" sheets were signed, none of the verifications actually verified the Petition. Compl. at ¶¶ 27-30.

The Court finds no statutory timing requirement for signing the affidavits. A.R.S. § 16-801(A)(1) states that "[t]he petition shall: [b]e verified by the affidavit of ten qualified electors of the state, asking that the signers thereof be recognized as a new political party." The statute does not mandate that the verifications be signed *only after* all signatures in support of the petition have been collected. Moreover, the Court has no authority to insert such a requirement. *Ponderosa Fire Distr. v. Coconino Cnty.*, 235 Ariz. 597, 604 p. 30 (App. 2014) (courts "cannot rewrite a statute under the guise of divining legislative intent.")

Nor does (A)(1) define a "petition" as a document bearing a designated number of signatures at the time of verification. It simply requires that a petition be "in substantially the form prescribed by § 16-315" which describes the form of the petition, not the signatures themselves.

Finally, even if the statute requires all signatures before affidavits are signed (and it does not), that affidavits here substantially comply with the statute. The Secretary verified that No Labels submitted more than enough valid signatures. The Complaint does not allege that the signing of the affidavits confused or misled those who signed the Petition.

In sum, Counts 1 and 2 fails to state a claim. The affidavit language substantially complies with the statutory text of (A)(1), and the Court can find no temporal requirement governing when affidavits are executed.

**Writ of Mandamus Claim (against Fontes only)**

Count 1 is dismissed for the additional reason that mandamus relief is not available as a matter of law. For mandamus relief to issue, ADP plead and prove that a) it lacks a "plain, adequate, and speedy remedy at law," and b) the Secretary failed to "perform[] . . . an act which the law specially imposes as a duty . . . ." A.R.S. § 12-2021.

Mandamus is "an "extraordinary remedy" issued by a court to compel a public officer to perform a non-discretionary duty. *Sensing v. Harris*, 217 Ariz. 261, 263, ¶ 6 (App. 2007). It can be used to compel an officer to act in a matter involving discretion, "but not designate how that

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discretion shall be exercised.” *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995). Mandamus is not available to challenge whether a public official allegedly “misapplied or misinterpreted” the law. *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370, ¶ 21 (2013).

And it is not appropriate in this case. Like the administrator in *Stagecoach Trails*, the Secretary “complied with his legal duty” by acting on the Petition. *Id.* at 371. He evaluated it as he was required to do. Compl. ¶¶ 24, 40. Alleging that Fontes misapplied the law in evaluating the Petition does not establish a mandamus claim. Similarly, no law imposes a particularized duty “to determine” that the Petition is deficient by construing the affidavit requirements as ADP does. *Id.* ¶ 41.

### **Motion for Judicial Notice**

After briefing closed on the pending motions, Plaintiffs filed a Motion for Judicial Notice of a June 2, 2023, letter from No Labels to the Secretary. The letter states that No Labels will not participate in Arizona’s primary election and therefore will not register as a political party committee or file campaign finance reports in Arizona. ADP alleges that this information further supports its claim that the Petition is defective because No Labels’ petition sheets falsely told voters that it would participate in the primary.

The Court denies the Motion for Judicial Notice because it presents Petition challenges that are not alleged in the Complaint and, therefore, are not before the Court at this time.

The Court finds, however, that the Motion outlines potential claims based on new information that, if pled, may be a proper subject of relief. *Spitz v. Bache & Co., Inc.* 122 Ariz. 530, 531 (1979) (granting leave to amend a pleading “[i]f the underlying facts or circumstances relied upon...may be a proper subject of relief.”). Rule 15(a)(2) authorizes a party to amend a pleading by stipulation or leave of the court that “must be freely given when justice requires.” Accordingly, absent a stipulation that Plaintiffs may amend the Complaint, Plaintiffs may file a Motion for Leave to Amend Complaint which will permit both sides to be heard on whether an Amended Complaint is filed.

### **Conclusion**

For these reasons, **IT IS ORDERED** granting No Labels’ and the Secretary of State’s Motions to Dismiss without prejudice for Plaintiffs to file a stipulated Amended Complaint or, alternatively, a Motion to Amend Complaint **by September 11, 2023**.