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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Democratic National Committee, DSCC, and
Arizona Democratic Party,

Plaintiffs,

v.

Arizona Secretary of State’s Office,
Michele Reagan, and Mark Brnovich,

Defendants.

No. CV-16-01065-PHX-DLR
ORDER

In their Second Amended Complaint, Plaintiffs the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party allege that two aspects of Arizona’s election regime violate § 2 of the Voting Rights Act (VRA) and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution. First, Plaintiffs challenge Arizona’s prohibition on counting out-of-precinct (OOP) provisional ballots, which derives from the collective effect of A.R.S. §§ 16-122, -135, -584, and related rules prescribed by the Arizona Secretary of State in the Election Procedures Manual. Second, Plaintiffs challenge H.B. 2023, codified at A.R.S. § 16-1005(H)-(I), which makes it a felony for third parties to collect early ballots from voters unless the collector falls into a statutorily enumerated exception. Plaintiffs seek a declaration that the challenged election rules are unlawful, and an order enjoining the Arizona Secretary of State’s Office, Arizona Secretary of State Michele

1 Reagan, and Arizona Attorney General Mark Brnovich (State Defendants) from:

2 a. Implementing, enforcing, or giving any effect to A.R.S. §
3 16-122, § 16-135, or § 16-584 to the extent that they require
4 Defendants to reject provisional ballots in their entirety solely
because they were cast in the wrong precinct;

5 b. Requiring Defendants to count OOP ballots for races for
6 which the voter was otherwise eligible to cast a vote;

7 c. Implementing, enforcing, or giving any effect to H.B.
2023.

8 (Doc. 233 at 41-42.)

9 The Court permitted the Arizona Republican Party, Maricopa County Board of
10 Supervisors member Bill Gates, Scottsdale City Council member Suzanne Klapp, and
11 Arizona state lawmakers Debbie Lesko and Tony Rivero to intervene as defendants.
12 Intervenor-Defendants now move to dismiss the Second Amended Complaint pursuant to
13 Federal Rules of Civil Procedure 12(b)(1), (6), and (7). (Doc. 244.) The motion is fully
14 briefed. For the following reasons, the Court denies the motion.¹

15 **I. Rule 12(b)(7)**

16 Intervenor-Defendants argue that Plaintiffs' complaint is barred by Rules 12(b)(7)
17 and 19(a) because Plaintiffs have failed to name necessary and indispensable parties.
18 (Doc. 244 at 7.) The Court previously denied the State Defendants' motion to dismiss,
19 which asserted an identical argument. (Docs. 245, 267.) For the reasons stated in the
20 Court's March 3, 2017 order denying the State Defendants' motion to dismiss, the Court
21 likewise rejects Intervenor-Defendants' arguments.

22 **II. Rule 12(b)(1)**

23 Rule 12(b)(1) allows a party to raise lack of subject-matter jurisdiction in a pre-
24 answer motion. Intervenor-Defendants assert two jurisdictional defenses. First, they
25 contend that Plaintiffs lack standing to assert their OOP ballot claims because their
26 alleged injuries are not fairly traceable to the State Defendants' conduct and therefore

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28 ¹ Intervenor-Defendants' request for oral argument is denied because the issues are
adequately briefed and oral argument will not assist the Court in resolving the matters
before it. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

1 cannot be redressed by a favorable decision. (Doc. 244 at 3-6.) Second, Intervenor-
2 Defendants' contend that laches bars Plaintiffs' Fifteenth Amendment claim. (*Id.* at 8-
3 10.) The Court addresses each in turn.

4 **A. Standing**

5 Standing derives from Article III of the United States Constitution, which limits
6 federal courts to resolving "Cases" and "Controversies." To have standing, a plaintiff
7 "must have suffered or be imminently threatened with a concrete and particularized
8 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely
9 to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control*
10 *Components, Inc.*, --- U.S. ---, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of*
11 *Wildlife*, 504 U.S. 555, 560-61 (1992)).

12 Intervenor-Defendants contend that Plaintiffs lack standing because they have not
13 sued the parties to whom their alleged injuries are fairly traceable and subject to
14 redress—namely, the individual counties. In this respect, Intervenor-Defendants'
15 standing argument largely mirrors their Rule 19 argument, which the Court has already
16 rejected. For reasons stated in the Court's March 3, 2017 order denying the State
17 Defendants' motion to dismiss, the Court finds that Plaintiffs' alleged injuries are fairly
18 traceable to the State Defendants, and that the State Defendants likely can redress these
19 injuries if ordered to do so by a decision favorable to Plaintiffs.

20 **B. Laches**

21 "Laches is an equitable time limitation on a party's right to bring suit." *Wauchope*
22 *v. U.S. Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993) (internal quotation and
23 citation omitted). The defense applies where "(1) there was inexcusable delay in the
24 assertion of a known right and (2) the party asserting laches has been prejudiced." *Id.*
25 "In the context of election matters, the laches doctrine seeks to prevent dilatory conduct
26 and will bar a claim if a party's unreasonable delay prejudices the opposing party or the
27 administration of justice." *Ariz. Pub. Integrity Alliance Inc. v. Bennett*, No. CV-14-
28 01044-PHX-NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014) (internal quotation

1 and citation omitted). Intervenor-Defendants have established neither element here.

2 First, “[t]o determine whether delay was unreasonable, a court considers the
3 justification for the delay, the extent of the plaintiff’s advance knowledge of the basis for
4 the challenge, and whether the plaintiff exercised diligence in preparing and advancing
5 his case.” *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016).
6 Intervenor-Defendants attack the underlying merits of Plaintiffs’ Fifteenth Amendment
7 claim and argue that Plaintiffs did not properly seek leave to add it, but they do not
8 squarely address Plaintiffs’ knowledge of and diligence in advancing the claim. Plaintiffs
9 state that they added their intentional discrimination claim in light of evidence obtained
10 during the preliminary injunction phase of this litigation, including the preclearance file
11 for S.B. 1412. The Court finds that Plaintiffs did not unreasonably delay the assertion of
12 this new claim.

13 Second, “[t]o determine whether delay has prejudiced a defendant, a court
14 considers only prejudice that stems from the plaintiff’s delay in bringing suit, not
15 difficulties caused by the fact of having been sued.” *Id.* Further, “[t]o determine whether
16 delay has prejudiced the administration of justice, a court considers prejudice to the
17 courts, candidates, . . . election officials, and voters.” *Id.* For example, “[u]nreasonable
18 delay can prejudice the administration of justice by compelling the court to steamroll
19 through . . . delicate legal issues in order to meet election deadlines.” *Id.* (internal
20 quotations and citation omitted). Here, Intervenor-Defendants identify no prejudice
21 beyond the inconvenience of having to litigate an additional claim. Although they
22 superficially claim that “‘the voters of Arizona’ will suffer significant prejudice if the
23 Court were to proceed with Plaintiffs’ Fifteenth Amendment claim and enjoin H.B. 2023
24 on intentional discrimination grounds” (Doc. 244 at 8), they fail to explain why this is so.
25 For these reasons, the Court finds that Plaintiffs’ Fifteenth Amendment intentional
26 discrimination claim is not barred by laches.

27 **II. Rule 12(b)(6)**

28 The task when ruling on a motion to dismiss under Rule 12(b)(6) “is to evaluate

1 whether the claims alleged [plausibly] can be asserted as a matter of law.” *Adams v.*
2 *Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678
3 (2009). When analyzing the sufficiency of a complaint, the well-pled factual allegations
4 are taken as true and construed in the light most favorable to the plaintiff. *Cousins v.*
5 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual
6 allegations, however, are not entitled to the assumption of truth, *Iqbal*, 556 U.S. at 680,
7 and therefore are insufficient to defeat a motion to dismiss for failure to state a claim,
8 *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2008).

9 Intervenor-Defendants contend that Plaintiffs fail to state plausible claims under
10 the VRA and the First, Fourteenth, and Fifteenth Amendments. With the exception of
11 Plaintiffs’ newly added Fifteenth Amendment claim, the legal standards applicable to
12 Plaintiffs’ statutory and constitutional claims have been discussed at length in the Court’s
13 prior orders denying Plaintiffs’ preliminary injunction motions. (Docs. 204, 214.) The
14 Court will not flood the pages of this order with a duplicative recitation of these standards
15 or the allegations underlying Plaintiffs’ claims. Suffice it to say that, having reviewed
16 Intervenor-Defendants’ motion to dismiss, the Court finds that the arguments presented
17 therein are best reserved for an ultimate decision on the merits with the benefit of a fully
18 developed factual record. Though in ruling on Plaintiffs’ preliminary injunction motions
19 the Court found insufficient evidence to establish a likelihood of success on the merits,
20 Plaintiffs’ claims are not wholly implausible.

21 Moreover, though the Court’s preliminary injunction orders were affirmed by a
22 divided three-judge panel, the Court is not oblivious to the fact that a majority of active
23 and non-recused judges on the Ninth Circuit voted to rehear the cases en banc, and that in
24 issuing a shortly-lived stay the en banc panel necessarily concluded that Plaintiffs were
25 likely to succeed at least on their appeal of this Court’s order denying a preliminary
26 injunction of H.B. 2023. It is axiomatic that a plaintiff cannot simultaneously fail to state
27 plausible claims to relief and be likely to succeed on those claims.

28 The Court also finds telling that the State Defendants, who are the parties actually


1 accused of the statutory and constitutional violations, have not argued that Plaintiffs'
2 Second Amended Complaint fails to state plausible claims to relief, nor have they sought
3 dismissal under Rule 12(b)(6).

4 Intervenor-Defendants raise important legal arguments on the various statutory
5 and constitutional claims, some of which were accepted by the Court at the preliminary
6 injunction stage. But the Court is unwilling to dispose of Plaintiffs' claims entirely at this
7 phase of the litigation, particularly in light of the substantial disagreement among the
8 judges of the Ninth Circuit as to whether Plaintiffs are likely to succeed on the merits of
9 those claims. Instead, full factual development and a hearing will ensure that the
10 important issues raised in the Second Amended Complaint and in the instant motion
11 receive due and fair consideration.

12 **IT IS ORDERED** that Intervenor-Defendants' Motion to Dismiss (Doc. 244) is
13 **DENIED.**

14 Dated this 13th day of April, 2017.

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Douglas L. Rayes
United States District Judge