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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Kari Lake; Mark Finchem,

Plaintiffs,

v.

Kathleen Hobbs, as Arizona Secretary of State; Bill Gates; Clint Hickman; Jack Sellers; Thomas Galvin; and Steve Gallardo, in their capacity as members of the Maricopa County Board of Supervisors; Rex Scott; Matt Heinz; Sharon Bronson; Steve Christy; Adelita Grijalva, in their capacity as members of the Pima County Board of Supervisors,

Defendants.

No. 22-cv-00677-JJT

(Honorable John J. Tuchi)

PLAINTIFFS' REPLY TO MARICOPA DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

The Maricopa Defendants, in their Opposition ("Opposition") to Plaintiffs' Motion for Preliminary Injunction ("Motion"), ignore expert testimony demonstrating not only that the computerized voting equipment used in Maricopa County and Pima County has multiple unaddressed security failures, *see* ECF nos. 35, 39, 41, but also that elections are being manipulated in those counties through their computerized equipment, ECF no. 38. Plaintiffs' constitutional rights to a free and fair election are thus being violated. Instead, Defendants argue that Plaintiffs, who are candidates for Arizona Governor and Secretary of State, are stuck with these failed computerized machines – even as new security failures in electronic voting machines continue to be uncovered including as recently as a few weeks ago. These security failures eviscerate the fundamental right to a secure and accurate vote. Defendants also argue that Arizonans vote on paper ballots while ignoring that those ballots are processed through computerized scanning machines employing secret software, not available for public inspection, to read and tabulate the votes. Indeed, under Arizona's voting system no human ever looks at the paper ballots from 98% of the precincts. Because no one ever checks the paper ballots, no one can ever know whether the vote tallies reported by Defendants' computerized equipment are accurate. If the computers in some of the 98% of unchecked precincts are secretly compromised to miscount votes *only on election day*, the manipulation will not be discovered. None of the Defendants' proclaimed security measures would prevent or detect an election outcome being changed like this.

Defendants' Opposition rests on the assumption that their election systems are secure against manipulation. Yet they offer no admissible evidence on that point, while Plaintiffs have offered overwhelming evidence to the contrary. The evidentiary balance tips entirely in favor of granting the relief Plaintiffs seek.

The facts supporting Plaintiffs' arguments are stated in the Motion (ECF no. 50) and not repeated here, except as needed to rebut Defendants' Opposition (ECF no. 57).

I. ARIZONANS' VOTES ARE COUNTED BY UNSECURE COMPUTERS.

Defendants' primary argument, Opp. 2-6, is "Arizonans Vote on Paper Ballots."

The casting of paper ballots is meaningless concerning Plaintiffs' Motion because the marks on the paper do not determine election outcomes. Election winners are determined by the data produced by computerized ballot scanners, into which the paper ballots are fed. A.R.S. §§ 16-444(A)(4) ("'Electronic voting system' means a system in which votes are recorded on a paper ballot . . . and such votes are subsequently counted and tabulated by vote tabulating equipment."); 16-444(A)(2) ("'Computer program' includes all programs and documentation adequate to process the ballots"); 16-602(C) (After hand count of five races on ballots in 2% of precincts, "If the randomly selected races result in a difference in any race that is less than the designated margin when compared to the electronic tabulation of those same ballots, **the results of the electronic tabulation constitute the official count for that race**") (emphasis added); *see* Opp. 6-7.

Defendants' use of computerized ballot counting equipment creates an open door through which vote tallies can be electronically compromised. Decls. of Logan, Cotton, Smith (ECF nos. 39, 35, 41). Indeed, Dr. Daugherity's expert Declaration shows that Arizona elections have been artificially controlled through the tabulators tracking a Proportional-Integral-Derivative type control function in a closed-loop feedback system. ECF no. 38. Paper ballots, never looked at in 98% of precincts, provide no defense, for Defendants' system provides no assurance that the vote tallies reported by the computerized scanners match the paper ballots. The paper-ballot argument proves only that Defendants are content to use a deeply flawed system and close their eyes to the opportunity it offers, already exploited in 2020, for manipulation of votes.

Defendants' three major assertions concerning paper ballots, Opp. 2-6, are variously incorrect, incomplete, irrelevant to Plaintiffs' Motion or some combination of the three.

- Defendants assert their equipment is a "*different* version than that addressed in *Curling* [*v. Raffensperger*, 493 F.Supp.3d 1264 (N.D. Ga. 2020)]." *Id.* at 3. The equipment in *Curling* is Dominion Voting Systems' Democracy Suite 5.5A. 493 F. Supp. 3d at 1277. Defendants use "Dominion Voting Systems Democracy Suite 5.5B." Opp. Ex. 1 ¶¶ 5-10. The distinction Defendants make between version 5.5A

and 5.5B is without significance for at least four reasons.

- First, both the 5.5A and 5.5B systems are merely modifications of the underlying Democracy Suite 5.5 system, as shown in the Election Assistance Commission accreditation documentation for each, and both use essentially the same equipment. EAC Doc. DVS-018-MTP-02 at 5 (5.5A system), attached as Exhibit A to the Declaration of Andrew D. Parker (June 29, 2022);[1] EAC Doc. TR-01-01-DVS-2019-01.02 at 1 (5.5B system) (Decl. of Andrew D. Parker Ex. C, ECF no. 42-1) ("June 8 Parker Decl.").[2]
- Second, Professor Halderman, the expert in the *Curling* litigation, testified that the same ICX equipment used in Georgia would also be used in "parts of 16 states" including "large parts of Arizona, California . . ." Decl. of J. Alex Halderman, *Curling v. Raffensperger*, no. 1:17-cv-2989 (N.D. Ga. Sept. 21, 2021) (ECF no. 1177-1), attached as Exhibit B to the Declaration of Andrew D. Parker (June 29, 2022).
- Third, as stated in the Motion and in the Declaration of Doug Logan, *see* Mot. at 22-23, "erroneous code" and incorrect vote-counting were recently discovered in Democracy Suite 5.5B in Williamson County, Tennessee. The 5.5B system was found, post-certification for use, to be flawed and to count votes wrong. Defendants have no response to the errors found in the 5.5B system.

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[1] "The **Dominion D-Suite 5.5-A** voting system is a paper-based optical scan voting system consisting of the following elements: Election Management System (EMS), ImageCast Central Count (ICC), ImageCast X BMD (ICX BMD), and ImageCast Precinct (ICP). The **D-Suite 5.5-A** voting system is a modification from the baseline EAC certified **Democracy Suite 5.5 (D-Suite 5.5).**"

[2] "The D-Suite 5.5-B Voting System is a paper-based optical scan voting system with a hybrid paper/DRE option consisting of the following major components: The Election Management System (EMS), the ImageCast Central (ICC), the ImageCast Precinct (ICP and ICP2), the ImageCast X (ICX) DRE w/ Reports Printer, ImageCast X (ICX) DRE w/VVPAT, the ImageCast Evolution (ICE), and the ImageCast X (ICX) BMD. The D-Suite 5.5-B Voting System configuration is a modification from the EAC approved D-Suite 5.5 system configuration."

- Fourth, any distinction between the 5.5A and 5.5B systems does not extend to security against vote manipulation, because *all* computerized voting systems can be manipulated. Halderman testified to Congress that "optical scanners" are "computers" that "[f]undamentally . . . suffer from security weaknesses" and in "*every single case*" where cybersecurity experts have studied optical scanners "they've found severe vulnerabilities that would allow attackers to sabotage machines and to alter votes." June 8 Parker Decl. Ex. H at 75-76. *See also* Logan Decl. ¶¶ 54, 90-91 (ECF no. 39).

- Defendants criticize Plaintiffs' citation of Dr. Halderman's testimony to the Senate and of an article in the *Ohio St. Technology Law Journal*, suggesting that Arizona's system meets the standards advocated in these documents. Opp. 4. Arizona's use of paper ballots that are never, in 98% of precincts, looked at by any human after they are cast provides no security against computerized manipulation of votes. The existence of the unreviewed ballots is meaningless for security.
- Defendants distinguish their equipment from the equipment addressed in the recent CISA report, Opp. 5, but they fail to address the *significance* of the CISA report. The CISA report found nine security failures in equipment that had been certified for use by the federal government. This report shows that federal certification is *useless to ensure that equipment is secure*. The failure of the federal process to ensure that computerized voting systems are secure from manipulation is a critical fact supporting an injunction against their use – even if the particular equipment certified in this instance, notwithstanding nine security failures, differs from the equipment used by Maricopa County. Defendants continue to rely on federal certification as a guarantee of security, *see* Maricopa County Defs.' Mot. to Dismiss at 2-3 (ECF no. 27), when certification plainly means no such thing.

II. ***PURCELL* DOES NOT PRECLUDE THE RELIEF PLAINTIFFS SEEK.**

Defendants' second argument against injunctive relief, based on *Purcell v.*

Gonzalez, 549 U.S. 1 (2006), asserts that not enough time remains before the November 8, 2022, election to count ballots by hand, without regard to the security failures of their tabulating equipment. Opp. 6-9. Plaintiffs' Motion addressed the issue of time, Mot. at 33-35, and Defendants do not provide any caselaw showing that four months is inadequate to change the method of *counting* votes, as opposed to election changes that directly affect voters, like poll locations, district lines, or voter eligibility. Defendants' preparations for the election may largely be kept the same if the use of computerized machines is enjoined. The only difference would be the use of a different system, post-election, to count votes.

Defendants' fact-based *Purcell* arguments provide them no refuge, either. Obviously counting votes with humans rather than machines will mean more work must be done by humans. But the constitutional right to vote may not be cast aside for the convenience of public officials. An honor system allowing voters to vote by simply writing a tally mark on a single, shared piece of paper used by all voters would save substantial trouble and expense in conducting elections. But an honor system using tally marks would not sufficiently guard against manipulation or fraud, to satisfy constitutional requirements – regardless of the cost savings and simplicity it would offer. Defendants claim voters will be confused by putting their ballots into a ballot box instead of a scanner. Opp. 7. A sign affixed to the ballot box, explaining that the votes will be counted by hand instead of scanned, would dispel any confusion. If that wasn't enough, Defendants could have voters feed their ballots into the scanners before the hand count. Defendants claim that hand counts are not reliable. *Id*. Hand count errors can be minimized through reasonable care. Hand count errors cannot be systematically programmed, so random errors will tend toward cancelling each other out, rather than swinging election outcomes in a pre-selected direction. The greater risk to an accurate election tally is not a small number of counting errors; the far greater risk is large-scale rigging of computerized machines.

Defendants half-heartedly raise the possibility of "nefarious, intentional miscounts." Opp. 8. That possibility can be eliminated by permitting rival political parties to contribute representatives to each team of vote counters – the same process already used in Arizona's

minimalistic statutory hand count procedure used in 2% of precincts. A.R.S. § 16-602(B)(7). Defendants claim that hand counting would require too many people, again offering the strawman comparison of the 2020 centralized post-election recount of Maricopa votes. Opp. 8-9. An actual hand count of votes, done in the first instance, would reasonably be done on site at each voting location, using local persons. That method distributes the work instead of concentrating it on a handful of people. Defendants' logistical objections ignore that votes were hand conducted for all elections prior to the introduction of voting machines.

Obtaining correct, accurate vote counts is constitutionally required. Reporting final election results within hours of the closing of the polls is not. Arizona may not constitutionally rely on unsecure computerized machines to determine the outcome of its elections merely because the unsecure system allows easier reporting of an election outcome that no one knows to be true or not. *Purcell* requires no such thing.

III. PLAINTIFFS HAVE MET THE *WINTER* ELEMENTS FOR INJUNCTIVE RELIEF.

Lastly, Defendants dispute that Plaintiffs meet the *Winter* factors for preliminary relief. Opp. 9-14. None of Defendants' arguments disturb the showing made in the Motion that Plaintiffs satisfy the applicable factors. *See* Mot. at 24-35.

A. Success on the Merits.

Regarding the "success on the merits" factor, Defendants merely incorporate the arguments made in their motion to dismiss. Opp. 9-10. Those arguments are rebutted in

- Plaintiffs' Opp. to the Maricopa Defs.' Motion to Dismiss (ECF no. 56) at pp. 5-10 (timeliness); 3-5 & 11-12 (factual allegations); 14-17 (legal and factual basis);
- The Motion at pp. 33-35 (timeliness); 2-23 (factual allegations); 25-32 (legal and factual basis); and
- The Declarations of Andrew D. Parker (ECF no. 42), Douglas Logan (ECF no. 39), Benjamin Cotton (ECF no. 35), John R. Mills (ECF no. 40), Shawn A. Smith (ECF

no. 41), and Walter C. Daugherity (ECF no. 38).

These filings are incorporated by reference, in response to Defendants' arguments.

Notably, while Defendants incorporate by reference the merits arguments from their Motion to Dismiss, Opp. 9, their Motion to Dismiss offered little argument that Plaintiffs' claims are *legally* untenable. Most of Defendants' arguments in their Motion to Dismiss are improper, unsupported factual assertions (on matters concerning which the Court now should consider actual, admissible evidence) or time-related arguments (which at most apply to the 2022 Election, not any successive elections). Accordingly, Defendants' incorporation of the legal and merits arguments from their Motion to Dismiss provides no basis upon which the Court can deny Plaintiffs' Motion.

B. Irreparable Harm.

Most of Defendants' attention concerning the *Winter* factors is directed toward the "irreparable harm" factor. Opp. 10-13. Defendants advance three incorrect assertions.

"[S]peculative" Harm. Defendants claim the harm presented by use of their computerized machines to count ballots is insufficiently likely, to justify injunctive relief. Opp. 10-11. First, as noted above Dr. Daugherity's unrebutted expert declaration shows that vote manipulation through the computerized voting machines is occurring—and thus is not speculative. Second, Defendants' "speculative" argument is further addressed in pages 3-6 of Plaintiffs' Opposition to the Arizona Secretary of State's Motion to Dismiss First Amended Complaint (ECF no. 58). It is not speculative – it is guaranteed – that if Defendants rely on computerized machines to count the ballots in 98% of precincts, as they intend, no one will never know whether the vote totals reported by the machines represent the votes actually cast by the voters. It is not speculative, but guaranteed, that secret software manipulation can cause the machines to report incorrect vote totals on Election Day (yet also work properly both prior to and after Election Day). It is not speculative that persons have means, motive, opportunity, and impunity to change the votes reported by computerized scanners. *See* Mot. 8-23; Pls.' Opp. to Ariz. Secretary of State's Mot. to

Dismiss First Am. Compl. at 11-16. The harms to Plaintiff's rights are not speculative.

The cases cited by Defendants concerning speculative harm are not remotely on point with Plaintiffs' claims, factually. None of Defendants' cases involved elections. In *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1059-60 (9th Cir. 2009) the Ninth Circuit reversed the district court's denial of injunctive relief, including the district court's determination that the plaintiffs had failed to show the likelihood of irreparable harm. In *Stormans, Inc. v. Selecky*, the Ninth Circuit remanded for a determination of whether there was a "likelihood" of irreparable injury after the district court found "[w]ithout discussion or analysis" the "possibility of irreparable injury." 586 F.3d 1109, 1138 (9th Cir. 2009). *Stormans* noted that a constitutional (First Amendment) claim "certainly raises the specter of irreparable injury" because "constitutional violations cannot be adequately remedied through damages." *Id*. (quotation omitted). The language from *Stormans* quoted by Defendants, Opp. at 10, appears in the court's discussion of the "public interest" factor for preliminary relief, not the irreparable harm factor. 586 F.3d at 1139.

Defendants do not dispute that deprivation of constitutional rights constitutes irreparable injury, *see* Mot. at 32, and they do not cite any caselaw to support their implicit argument that an unconstitutionally unsecure system of administering elections cannot be enjoined unless the plaintiff proves, prior to the election, that vote manipulation or hacking "will occur," Opp. at 11, in a future election. If it could be proved that a criminal conspiracy to steal an election through vote manipulation "will occur," the culprits could be arrested for their conspiracy. But that level of certainty is not required before an unconstitutionally unsecure election system should be enjoined. If, as here, it is clear that Arizona's election system *can* be manipulated, that manipulation can pass *undetected*, that *attempts* to hack recent elections in the United States have been detected, and Arizona's voter registration database *was hacked* in 2016, then Plaintiffs have shown a likelihood of harm. *See* Mot. 8-23; Pls.' Opp. to Ariz. Secretary of State's Mot. to Dismiss First Am. Compl. at 11-16 (ECF no. 58). Arizona's system, as currently implemented, guarantees that voters cannot know with reasonable certainty that the reported election winners actually received the

most votes. The means, motive, opportunity, and impunity to manipulate Arizona's elections all exist. That is enough.

Post-Election "[R]edress." Defendants claim that post-election remedies would redress Plaintiffs' harms, asserting that "**if** actual evidence exists that would support an allegation that votes were manipulated or improperly counted," then paper ballots could be recounted. Opp. at 12 (emphasis added). Plaintiffs have shown, though, that computerized vote tallies can be manipulated *without leaving evidence of the interference*. It is nonsensical for Defendants to argue that undetectable manipulation can be dealt with after the election if evidence then exists showing the undetectable manipulation. Again, the existence of paper ballots means nothing, because no one will ever look at the ballots from 98% of precincts. If votes are changed by the computerized scanners in one or several of the 98% of un-checked precincts, neither Defendants nor anyone else will ever know it, and no post-election redress can be obtained. Moreover, the fact that Maricopa County election records were deleted just prior to the Arizona Senate's audit of those systems further shows Defendants' argument is disingenuous. Motion at 11, 30.

Harm to County. Defendants claim they will suffer "irreparable harm" from failing to effectuate Arizona's statutory scheme of using computerized ballot scanners. Opp. 13. Failing to effectuate an unconstitutional statutory scheme is not irreparable harm. Failing to *enjoin* an unconstitutional statutory scheme inflicts irreparable harm.

"[A] strong showing of irreparable harm" is not required to obtain an injunction against "constitutional injuries," because "the need for immediate injunctive relief without further delay" is a "direct corollary of the matter's great importance." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (quotation omitted). Plaintiffs have shown two independently sufficient forms of irreparable harm: the certainty that Arizona will certify its election results which are not reasonably known to be accurate or correct; and the likelihood that the election will be manipulated because Defendants' computerized system provides a means and an opportunity for undetectable manipulation to those who have already demonstrated the motive and inclination to try to hack U.S. elections.

C. Balance of Equities and the Public Interest

The only argument Defendants advance concerning the "balance of equities" and "public interest" factors for obtaining preliminary relief is the assertion that Plaintiffs waited too long to bring their Motion. Opp. 13. Defendants' time-based arguments are addressed in detail at pages 5-10 of Plaintiffs' Opposition to Maricopa Defendants' Motion to Dismiss First Amended Complaint (ECF no. 56). Furthermore, in *Reynolds v. Sims*, 377 U.S. 533, 545 (1964), the Supreme Court affirmed an injunction entered in July 1962 concerning apportionment of districts for state legislative races in the November 1962 election – a far more disruptive injunction than the relief sought by Plaintiffs here.

Defendants rely on *Benisek v. Lamone*, a case where the plaintiffs sought a preliminary injunction against the boundaries of congressional districts that had been drawn in 2011. 138 S.Ct. 1942, 1943 (2018). *Benisek* does not explain what "generally show[ing] reasonable diligence" means for motion seeking a preliminary injunction against the use of electronic equipment to count votes, and the considerations cited by the Court in *Benisek* for its decision are not applicable here. The *Benisek* plaintiffs filed their first complaint challenging the district boundaries in 2013, then waited more than three years before seeking a preliminary injunction in 2017. *Id*. at 1944. Plaintiffs here brought their motion on June 22, 2022, less than two months after the Amended Complaint. This is not "unnecessary, years-long delay." *Id*. In *Benisek*, the challenged election practice was the drawing of district boundaries, which would necessarily affect candidate selection, campaign efforts, and poll locations. The plaintiffs said they needed injunctive relief by August 18, 2017, to ensure timely redistricting in advance of the next election. *Id*. at 1945. Plaintiffs here seek only a modification of election-day ballot counting procedures, which will not affect candidate selection, campaigns, or poll locations. *Benisek* is not on point.

Plaintiffs' Motion shows in detail that the balance of equities and public interest factors favor entry of the injunction they request. Defendants concede these arguments by failing to respond to them. Their only argument concerning these factors, the timing/delay argument, is without merit. All of the *Winter* factors favor Plaintiffs.

IV. CONCLUSION

Plaintiffs seek an injunction prohibiting the use of computerized machines to tabulate the votes in Arizona's future elections, because the machines are unconstitutionally unsecure and unable to provide a reliable, accurate vote tally. The details of how a replacement method, presumably a hand count, should proceed are open to discussion, and may vary between counties depending on the number of voters, voting locations, etc. Plaintiffs offered a hand count proposal in their Amended Complaint. Arizona's statutory process for the hand count at 2% of precincts provide another option. The primary objective of Plaintiffs' Motion is an injunction against the unconstitutionally unsecure use of computerized equipment, which the Court should enter as soon as possible to require Defendants to develop an alternate method of vote tabulation.

DATED: June 29, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Andrew D. Parker