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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Laurie Aguilera, a registered voter in Maricopa County, Arizona; Donovan Drobina, a registered voter in Maricopa County, Arizona; DOES I-X;

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Maricopa County Recorder; Clint Hickman, Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, in their official capacities as members of the Maricopa County Board of Supervisors; Maricopa County, a political subdivision of the State of Arizona;

Defendants.

NO. CV2020-014562

MARICOPA COUNTY DEFENDANTS' MOTION TO DISMISS

(Honorable Margaret Mahoney)

Introduction

This third version of Plaintiffs' complaint about alleged voting irregularities in Maricopa County ("*Sharpiegate III*") was filed on Friday, November 13. Like a B-movie monster, Plaintiffs' shuffle on screen again to threaten this Court and the County Defendants with the waste of public resources. And like many B-movie plots, the sequel is decidedly worse than the original.

Rather than allow Plaintiffs a third bite at the apple and waste judicial and taxpayer resources, the Court should dismiss this complaint. It could do so for any number of reasons. First, Plaintiffs' untimely claims are barred by laches. Second, Plaintiffs lack standing to bring their generalized grievances in a civil suit. Third, Plaintiffs lack a private right of action to bring suit under the cited elections laws or 2019 Elections Procedures Manual. Fourth, Plaintiffs fail to state a claim for which relief can be granted under the Arizona Constitution.

For these reasons, this Court should give Plaintiffs' complaint two thumbs down and dismiss it with prejudice.

Background

Plaintiff Laurie Aguilera filed her original Verified Complaint on November 4, 2020. It was assigned to Judge Mahoney as Case No. CV2020-014083 ("*Sharpiegate I*"). That original lawsuit was all about the Sharpie. It alleged that Ms. Aguilera used a Sharpie brand marker to mark her ballot, and noticed that it bled through on the reverse side. (V. Compl., ¶ 2.4.) According to Plaintiff Aguilera, the tabulation machine would not read her ballot, and it was "cancel[ed]." (*Id*., ¶ 2.7.) Plaintiff alleged that she was not given another ballot, and so was not allowed to vote. (*Id*., ¶ 2.8.) Other counties, Plaintiff alleged, do not use Sharpie markers. (*Id*., ¶ 2.10.) Plaintiff alleged that Maricopa County's provision of Sharpie markers fails to satisfy applicable legal requirements for voting. (*Id*., ¶ 3.8.)

The next day, on November 5, 2020, Plaintiff Aguilera amended her complaint. It

added Mr. Drobina[1] as a plaintiff. It also added a photograph of a ballot, (*id*., ¶ 3.3), which may have been taken illegally. *See* A.R.S. § 16-515(G), (H) (prohibiting photography within seventy-five feet in voting locations when voters are present, and providing that those who violate that prohibition are guilty of class 2 misdemeanors). The factual averments, however, continued the Sharpie theme. Plaintiff Aguilera once again alleged that she completed her ballot with a Sharpie and noticed bleed-through, (*id*., ¶ 2.14), while Plaintiff Drobina alleged that he was provided a Sharpie to mark his ballot and was not given the option of using a ball point pen. (*Id*., ¶ 2.20.) Both Plaintiffs alleged that their ballots were "cancel[ed]" or "rejected." (*Id*., ¶¶ 2.17, 2.21.) And, both Plaintiffs sought declaratory and injunctive relief that would allow them to cast their ballots after election day. (*Id*., Prayer for Relief, ¶ B (demand that they be able to "cure" their ballots).)

On November 6, 2020, Judge Mahoney set an expedited briefing schedule and also set an expedited hearing for Friday, November 12, 2020. (Ex. A, Hearing Set, CV 2020-014083, November 6, 2020). But the next day, November 7, 2020, Plaintiffs dismissed their lawsuit without explanation, just two days after filing it, ending *Sharpiegate I*.

Sharpiegate II premiered a mere two days later when Plaintiffs sought to intervene in *Trump, et al., v. Hobbs, et al*., No. CV2020-014248, assigned to Judge Kiley. (*See* Exhibit B, Motion to Intervene; Exhibit C, Complaint-in-Intervention.) The complaint-in-intervention made the same allegations, and sought essentially the same relief, as the Verified Complaint that Plaintiffs had just voluntarily dismissed. Plaintiffs claimed that intervention was required because (1) *Trump v. Hobbs* presented the *only* chance Plaintiffs would have to litigate the issues set forth in their complaint-in-intervention, and (2) Plaintiffs would have no other opportunity to protect their rights and interests, (Exhibit B, Motion to Intervene, at 5), despite the fact the Plaintiffs had dismissed essentially the same claims, premised on the same facts, two days earlier. *Sharpiegate II* had a limited run: Judge Kiley denied Plaintiffs' motion to intervene the same day it was filed. (Exhibit D,

[1] Plaintiff Drobina's Declarations attached to the Amended Complaint in *Sharpiegate I* and the Complaint in the instant action both indicate that he is not represented by Kolodin Law Group PLLC.

Min. Entry (November 9, 2020), at 3.)

Now, the same Plaintiffs have filed essentially the same lawsuit, alleging essentially the same facts, and seeking essentially the same relief. ("*Sharpiegate III*"). This time, the Plaintiffs do not give the Sharpies a leading role, but a cameo in the supporting declarations do. And, Plaintiffs' refiled lawsuit relies on the same basic facts, and seeks the same basic relief, as the previous lawsuits. Once again, Plaintiff Aguilera alleges that her ballot was "canceled," (Cmplt., ¶ 3.24), and Plaintiff Drobina alleges that his ballot "failed to scan[,]" i.e., was "rejected", (*id.*, ¶ 3.32.) And once again, Plaintiffs seek the same relief: a chance to vote, contrary to law, after election day. (*Id*. at 12 (praying for "injunctive relief allowing Plaintiff Aguilera to cast a new ballot").

Argument

I. Plaintiffs' claims are barred by laches.

The equitable doctrine of laches "seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Here, Plaintiffs' claims are barred by laches because **(A)** they waived any opportunity to address and correct alleged poll worker errors on Election Day and **(B)** they waited until ten days after Election Day to file this lawsuit after this Court had already set a briefing and hearing schedule in *Sharpiegate I*.

A. Plaintiffs did not address alleged poll worker errors on Election Day.

Plaintiffs unreasonably delayed bringing this lawsuit because they could have addressed these issues on Election Day, but did not. In deciding whether a plaintiff's delay is unreasonable, a court should consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence[.]" *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted).

Here, Plaintiffs could have filed an emergency lawsuit on Election Day to immediately address supposed irregularities at Maricopa County voting centers. The

Arizona Supreme Court even issued an Administrative Order extending Superior Court hours on Election Day in all fifteen counties "[t]o ensure prompt consideration of any legal dispute regarding voting on November 3, 2020."[2] Relatedly, Plaintiffs other concerns with vote counting, public access, and similar issues should have been raised when vote counting was on-going. But Plaintiffs did not raise any of their concerns prior to filing this lawsuit. Because Plaintiffs failed to raise these concerns when it was supposedly happening on Election Day, it is no longer possible to address those circumstances nor give Plaintiffs the relief they seek. *See, e.g.*, A.R.S. § 16-565 (stating that the polls close at 7:00 p.m. on election day, but those already in line shall be allowed to vote); § 16-566(B) (requiring that no one be allowed to vote after those identified in § 16-565 have cast their ballots). On a more basic level, the delay causes prejudice to the County Defendants because the best and most accurate facts, witnesses, and information existed then.

B. Plaintiffs unreasonably delayed in filing this lawsuit.

Plaintiffs also unreasonably delayed by waiting to bring this suit for ten days. "Over the last 25 years, the Arizona Supreme Court has repeatedly cautioned that litigants should bring election challenges in a timely manner or have their requests for relief denied on the basis of laches." *Arizona Libertarian Party*, 189 F. Supp. 3d at 922. "In election matters, time is of the essence" because disputes "must be initiated and resolved" without interfering with important election deadlines. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998); *see also Lubin,* 213 Ariz. at 497 ¶ 10 ("Time is of particular importance because all disputes must be resolved before the printing of absentee ballots.").

Here, Plaintiffs initially brought *Sharpiegate I* the day after Election Day. Then Plaintiffs amended their complaint. And then—after this Court entered an expedited schedule for briefing and a hearing in *Sharpiegate I*, (Ex. A, Hearing Set, CV 2020-

[2] Ariz. Sup. Ct. Admin. Order No. 2020-165, http://www.azcourts.gov/Portals/22/-admorder/Orders20/2020165%20pdf.pdf?ver=2020-10-22-130220-183 (last visited Nov. 14, 2020).

014083, November 6, 2020)—Plaintiffs effectively filed a notice of nevermind, voluntarily dismissing their lawsuit.

But there's more. Two days after dismissing *Sharpiegate I*, Plaintiffs then attempted to graft the same lawsuit, *Sharpiegate II*, on to a different matter, *Trump v. Hobbs*. After the denial of their motion to intervene on Monday, November 9, 2020, Plaintiffs waited until Friday, November 13, 2020 to refile this present lawsuit. There is no plane of reality in which this dilatory litigation conduct is reasonable.

At a minimum, Plaintiffs' delay in filing suit prejudices the County Defendants and Arizona voters who deserve finality. *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (finding claims barred by laches and considering fairness to the parties, the court, "election officials, and the voters of Arizona"). Beyond that, "[t]he real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the [applicable] deadline[s].'" *Sotomayor*, 199 Ariz. at 83 ¶ 9 (2000) (citation omitted). Late filings, such as Plaintiffs', "deprive judges of the ability to fairly and reasonably process and consider the issues . . . and rush appellate review, leaving little time for reflection and wise decision making." *Id.* (citation omitted).

Arizona courts dismiss election-related challenges when the plaintiffs wait too long to file them. "Too long" in election matters may be a matter of a few days, or even a single day, and would not be "too long" in other types of litigation. For example, the supreme court affirmed dismissal of an election-related challenge when the plaintiff waited to file his complaint until the final day of the statutory filing deadline. *Harris v. Purcell*, 193 Ariz. 409, 413, ¶ 18 (1998). The plaintiff's lawsuit was timely, because he filed *within* the period allowed by statute; but, despite that, the supreme court recognized that "he failed to exercise diligence in preparing and advancing his case. *Id*. The supreme court recognized that the plaintiff could have easily filed earlier, and should have. *Id*.

Further, the supreme court faulted the plaintiff for passing on an earlier hearing date that the trial judge wanted to assign, and insisting on a later date. *Id*. 413, ¶ 21.

Here, Plaintiffs *actually did* file earlier—but then dismissed their lawsuit, and waited six days to refile the present lawsuit. And, the hearing date that Judge Mahoney set for *Sharpiegate I*, November 13, 2020, was the date that Plaintiffs re-filed this lawsuit, *Sharpiegate III*. In other words, Plaintiffs here are in the same position as the plaintiffs in *Harris*: they could have filed earlier, and could have had an earlier hearing, but did not exercise diligence in prosecuting their case.

Perhaps aware that laches bars their lawsuit, Plaintiffs attempt to argue in their "Notice of Non-Opposition" that the instant lawsuit is actually a different one. (Ex. E, Pls.' Ntc. of Non-Opposition, November 15, 2020.) For example, they argue that "Aguilera I was brought as a class-action on behalf of all Maricopa County voters who experienced issues having their ballots read on election day[,]" while the instant litigation "has been brought only on behalf of individual voters Laurie Aguilera and Donovan Drobina." (*Id*. at 2.) But that argument is not correct: Plaintiffs' current Complaint in the case at bar names "DOES I-X" as plaintiffs, as did both complaints in *Sharpiegate I*. What is more, the current Complaint states that "[r]eferences to plaintiffs should also be taken to those Maricopa County voters who experienced similar issues." (Cmplt., filed November 13, 2020, at ¶ 4.6 n.1.) Plaintiffs also "explain" their dismissal of *Sharpiegate I* by claiming that too many parties had intervened to allow them to litigate their claims the way they wanted. (Ex. E, Pls. Ntc. of Non-Opposition, at 2.) Yet, they admit that they sought to intervene two days later in *Trump v. Hobbs*—litigation that contained the same parties as *Sharpiegate I*. (*Id*.) That explanation makes no sense.

These arguments and explanations are unavailing, and cannot overcome reality: (1) Plaintiffs filed their lawsuit on November 4, 2020, when it was arguably too late, (2) then dismissed their lawsuit on November 7, 2020, after a briefing schedule and hearing had been set, (3) then tried to intervene in another lawsuit on November 9, 2020, bringing the same claims as the lawsuit they had just dismissed, (4) then waited four more

days (ten days after the election) before filing the instant lawsuit, arising from the same set of facts and making essentially the same claims as the previous ones, on November 13, 2020. In sum, Plaintiffs have wasted judicial resources and the resources of Maricopa County elections officials with unreasonable delay in bringing, dismissing, and re-bringing this lawsuit, prejudicing the Court, Maricopa County election officials, and Arizona's voters. Laches precludes their claims.

II. Plaintiffs lack standing to sue.

Plaintiffs lack standing to sue. "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury. An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). Here, Plaintiffs' class-action-by-footnote demonstrates that any perceived harm is not distinct and palpable. (*See* Cmplt. at 8, n.1). Further, Plaintiff Drovina lacks standing because he actually cast a ballot. (*See* Cmplt., ¶ 3.33); *cf. Sears*, 192 Ariz. at 70, ¶ 23 (1998) ("To have standing to bring a constitutional challenge, however, a plaintiff must allege injury resulting from the putatively illegal conduct.").

For example, Plaintiffs lack standing to complain about the County's decision to make the electronic adjudication of votes accessible by internet rather than in person because they failed to allege how that harmed them. (Cmplt., ¶¶ 4.41–4.43). Indeed, Plaintiffs' Complaint is just a series of generalized grievances about how Maricopa County administers elections. There is no standing.

III. Plaintiffs lack a private right of action to sue.

Plaintiffs attempt to bring their "Causes of Action" directly under Arizona's elections statutes and the Elections Procedures Manual. (Cmplt., ¶¶ 4.1–4.20, 4.34–4.43). This Court should dismiss them as a matter of law because Plaintiffs do not have an express or implied private right of action under these statutes.

Generally speaking, no private right of action exists to enforce Title 16. In fact, an implied private right of action in Title 16 has only been recognized twice. The first

occurred in *Chavez v. Brewer*, 222 Ariz. 309 (Ct. App. 2009), when the Arizona Court of Appeals held that citizens for whose benefit a specific statutory protection had been enacted could sue to compel elections officials to provide it. In that *Chavez*, plaintiffs who had various physical disabilities sued seeking mandamus relief to enforce A.R.S. § 16-447(A), which requires all polling places to have at least one voting machine that meets the requirements of the federal Help America Vote Act, codified at 52 U.S.C. §§ 20901 et seq. *Chavez*, 222 Ariz. at 313-14, ¶ 8 (identifying the plaintiffs, their various physical challenges, and the fact that they sought mandamus relief); *id*. at 314, ¶ 9 (identifying A.R.S. § 16-447(A) as the provision of law that plaintiffs sought to enforce). The court of appeals concluded that, because "the legislature enacted some statutes that clearly benefit individuals with disabilities[,]" those with the requisite disabilities for whose benefit the statutes had been enacted could sue to enforce them. *Id*. at 318, ¶ 28. Somewhat similarly, the Arizona Supreme Court concluded that voters could bring mandamus actions to compel elections officials to comply with their nondiscretionary duties when the plaintiffs had a beneficial interest in the performance of those duties. *Arizona Public Integrity Alliance v. Fontes*, No. CV-20-0253-AP/EL, 2020 WL 6495178 at *2-3, ¶¶ 9-12 (Ariz. Nov. 5, 2020) ("*API*").

Those two cases, both mandamus actions, are the sole universe of cases in which Arizona courts found a private right of action to enforce Title 16. Otherwise, no court has ever recognized a private right of enforcement. It simply does not generally exist.

Plaintiffs seek to establish their private right to sue by relying on *API*. (*See* Cmplt., ¶ 2.5). Plaintiffs claim that *API* stands for the proposition that Arizona voters have standing to challenge alleged violations of Title 16 by election officials. (*Id*.) Not so: Plaintiffs' reliance is misplaced. Unlike the plaintiffs in *API*, Plaintiffs' claims in this lawsuit are not in the nature of mandamus—indeed, Plaintiffs dropped their request for mandamus relief from *Sharpiegate I*. *API* is therefore inapposite, and cannot confer standing to these Plaintiffs in this litigation, nor establish their right to bring this lawsuit. *See also Sears*, 192 Ariz. at 69, ¶ 14 ("If we were to adopt the Sears' argument, virtually

any citizen could challenge any action of any public officer under the mandamus statute by claiming that the officer has failed to uphold or fulfill state or federal law, as interpreted by the dissatisfied plaintiff.").

Further, the *Chavez* decision shows that Aguilera lacks an implied right of action under the cited elections laws. There, the Arizona Court of Appeals determined that plaintiffs could bring suit directly under an election law statute because, as individuals with disabilities, they were a "class for whose especial benefit the statute was enacted. *Chavez*, 222 Ariz. at 318, ¶ 28. Pointedly, the *Chavez* decision did not conclude that all voters are a class for which a private right of action exists to challenge election administration. Plaintiffs cannot maintain their statutory claims consistent with *Chavez*.

IV. Failure to state constitutional claims.

Plaintiffs fail to state a claim under the Arizona Constitution's Free and Equal Elections Clause, Ariz. Const. art 2, § 21, because their complaint merely repackages their statutory claims under the guise of the Constitution. (*See* Cmplt., ¶ 4.29 ("Proper counting of their votes would have required that Plaintiffs' votes be read and recorded in an automated fashion by a perfectly accurate machine.")).

And Plaintiffs fail to state a claim under the Arizona Constitution's Equal Privileges and Immunities Clause. (*See* Cmplt., ¶¶ 4.31–4.33); Ariz. Const. art. 2, § 13. Plaintiffs simply fail to allege unequal treatment under law. Instead, Plaintiffs take the concept of equal treatment to an absurdly molecular level where any "different" treatment by elections officials—handing voters a ballot with their right rather than left hand, supplying blue ink rather than black ink pens, requiring voters to circulate clockwise rather than counterclockwise through the vote center—would trigger a claim.

The guarantees in the equal protection clauses of the 14th Amendment and the state constitution "are essentially the same in effect," and Arizona's courts may rely on federal equal protection jurisprudence. *Vong v. Aune*, 235 Ariz. 116, 122–24, ¶¶ 31–37 (App. 2014). The Supreme Court has held that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment

rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal citation omitted). In contrast, discriminatory statutes or procedures that substantially burden citizens' exercise of voting rights on equal terms are subject to strict scrutiny and are generally found to be constitutionally unsound. *See id.*; *see also Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003); *Graham v. Tamburri*, 240 Ariz. 126, 130, ¶ 12 (2016) (adopting *Burdick* framework in constitutional dispute arising under Arizona law).

Here, Plaintiffs allege no fact that would even remotely lend itself to an analysis under the *Burdick* framework. Plaintiffs do not challenge any state law or even practice by the County, rather as the Complaint sets forth this case is about "Two individual who experienced difficulties voting on election day." (V. Compl., ¶ 1.1). These allegations, even if true, do not rise to the level of a deprivation of constitutional rights.

Moreover, courts distinguish between "state laws and patterns of state action that systematically deny equality in voting" and "episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote." *See Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980). "Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause." *Id.*; *see also Hendon v. N.C State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("[T]he failure of the ballots to comply fully with the statutory requirements does not constitute a violation of the due process clause. There is no indication that the failure was other than simple negligence on the part of election officials."); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) ("Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents intentional or purposeful discrimination.").

Indeed, "Elections are, regrettably, not always free from error," *Hutchinson v. Miller*, 797 F.2d 1279, 1286–87 (4th Cir. 1986), let alone the "risk" of error. In just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution "d[oes] not authorize federal courts to be state election

monitors." *Gamza v. Aguirre*, 619 F.2d at 454. It is "not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations." *Fournier v. Reardon*, 160 F.3d 754, 757 (1st Cir. 1998). There is no legal or factual basis for Plaintiff's constitutional claims.

Conclusion

For the foregoing reasons, Defendants ask this Court to grant their motion to dismiss.

RESPECTFULLY submitted this 16th day of November 2020.

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