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** Pro hac vice*

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

STEPHEN RICHER, et al.,

Defendants,

and

ADP and DSCC,

Intervenor-Defendants.

No. CV2022-013185

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

(Assigned to the Honorable Katherine Cooper)

INTRODUCTION

Plaintiffs filed this lawsuit just a month before the 2022 general election to challenge Defendants' hiring practices for election workers. But the 2022 general election is now over, and Plaintiffs still have not alleged facts showing that Defendants' hiring practices during that election violated any law. Plaintiffs concede in their Amended Complaint that Defendants complied with the statutes requiring partisan parity for workers during the general election itself. Am. Compl. ¶ 7. And Plaintiffs' Response to the Motions to Dismiss has no answer to Intervenors' argument that Plaintiffs failed to allege a violation of the modest partisan parity requirements applicable to the central counting place boards that conduct hand audits, including during recounts. Intervenors' Mot. to Dismiss ("MTD") at 4–6. Plaintiffs' effort to "compel the County to . . . hire an equal number of Republican and Democratic election workers for each election cycle" thus fails because Plaintiffs' own allegations show Defendants have done just that. MTD Resp. at 2.

That leaves Plaintiffs' broader argument that Defendants may not even set the schedules that the election workers they appoint and supervise must work. *See id.* Arizona law authorizes Defendants to supervise the election workers they appoint. Regardless, Plaintiffs have no viable cause of action to make their this argument. No mandamus claim is available, because the argument seeks to prohibit Defendants from doing something (imposing work schedules) rather than requiring Defendants to do something. Plaintiffs try to reframe this argument as compelling Defendants to offer jobs to Plaintiffs' designees. But the records that Plaintiffs attach to their Response confirm that Defendants did so and that Plaintiffs' designees either failed to respond or declined the offers. *E.g.*, Pls.' Ex. A at 107–120. Plaintiffs also bring a declaratory judgment claim, but no such claim is available because the 2022 election is over and no challenge for future elections is yet ripe.

The Court should therefore dismiss the Amended Complaint.

ARGUMENT

Plaintiffs say this case seeks to enforce Defendants' "non-discretionary legal duties to (a) hire an equal number of Republican and Democratic election workers for each election

cycle and, (b) appoint all of the Republican Party's board nominees for this and future election cycles," even if they are unwilling to work the days and hours required to do the job. MTD Resp. at 2, 7. Plaintiffs fail to allege that Defendants violated the first asserted legal duty, and the second asserted legal duty does not exist. Moreover, this case is now moot as applied to the 2022 election, which has ended, and is not yet ripe with respect to any future election. For all these reasons, the Court should dismiss this case.

I. Plaintiffs do not state a claim for a violation of the parity requirements.

Plaintiffs do not state a claim for a violation of the statutes requiring parity between major political parties for certain types of election workers because Plaintiffs do not allege facts showing that Defendants violated those requirements in the 2022 general election. To the contrary, Plaintiffs' operative Amended Complaint expressly admits that "the County informed Plaintiffs that it had now come into compliance with the law requiring parity in the general labor pool for board workers," Am. Compl. ¶ 7, and does not allege facts to demonstrate any continuing violation of those requirements. Rather, the Amended Complaint alleges that "the remaining issue in this case" is a distinct one: "the County's imposition of day and hour requirements, or alternatively the imposition of onerous requirements on the Party's board nominees." *Id.* Plaintiffs' discussion of the parity requirements in their Response to the Motions to Dismiss is therefore beside the point because Plaintiffs do not allege that Defendants are violating them. Plaintiffs do not argue otherwise: their Response's discussion of the parity requirements does not cite a single paragraph of their Amended Complaint alleging that those statutes have been violated. *See* MTD Resp. at 3–4.

The Amended Complaint also raised a concern related to the composition of the central counting place boards that conduct the hand audits associated with post-canvass recounts. Am. Compl. ¶¶ 8, 42–59. But as Intervenors explained in their Motion to Dismiss, the statute governing hand count audits does not require parity: it requires only that "not more than seventy-five percent of the persons performing the hand count shall be from the same political party." Intervenors' MTD at 5 (quoting A.R.S. § 16-602(B)(7)). And the

Amended Complaint does not allege any basis for believing that Defendants will violate that modest requirement. *Id.* at 5–6. Plaintiffs' Response ignores this argument entirely and does not even cite the governing statute, A.R.S. § 16-602. Plaintiffs have therefore waived any argument that the Amended Complaint states a claim for violation of the limited parity requirements that govern hand audits associated with post-canvass recounts. *See Chalpin v. Snyder*, 220 Ariz. 413, 423 ¶ 40 n.7 (App. 2008) (finding that a party's "[f]ailure to respond in an answering brief to a debatable issue" constitutes waiver).

Plaintiffs also argue that they bring claims to prevent violations of the parity requirements in future election cycles. MTD Resp. at 12–14. But in addition to not alleging a violation of the parity requirements during the most recent election, the Amended Complaint provides no allegations to show that such a violation is likely to occur in future elections. The mere possibility that Defendants could violate the law in the future is inadequate to state a claim entitling Plaintiffs to relief, particularly where Plaintiffs admit that Defendants did not violate the law in the most recent election. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420 ¶ 14 (2008) ("Rule 8 does 'not permit a trial or appellate court to speculate about hypothetical facts that might entitle the plaintiff to relief.'").

II. Plaintiffs do not state a claim based on Defendants' setting work schedules for election workers.

Rather than allege a violation of the parity requirements, Plaintiffs principally focus on a different grievance: they contend that Defendants have a duty to appoint all of Plaintiffs' nominees to election boards and that Defendants therefore may not set work schedules for those appointees. MTD Resp. at 4–7. But Arizona law gives Defendants authority to supervise the election workers they appoint. And regardless, Plaintiffs have no cause of action to support this claim: it is not viable in mandamus because it does not seek to enforce an affirmative, nondiscretionary duty, and no declaratory judgment action is ripe.

A. Defendants have authority to set election workers' schedules.

Plaintiffs' challenge to Defendants' imposing work schedules fails to state a claim

because Defendants have the authority to set such schedules. Plaintiffs do not cite any statute prohibiting Defendants from setting work schedules for election workers or requiring Defendants to impose the more relaxed work schedules that Plaintiffs say they would prefer. *See id.* Plaintiffs instead argue that no statute expressly authorizes Defendants to set work schedules for election workers. *Id.*

But County authority may be express or implied: a county has "such powers as have been expressly *or by necessary implication* delegated to it by the legislature." *Maricopa Cnty. v. Black*, 19 Ariz. App. 239, 241 (1973) (emphasis added). And Defendants' power to set work schedules for election workers is implied by the many legal provisions charging Defendants with overseeing elections and election workers in Maricopa County. The very statutory provision governing the appointment of election board members provides that it "does not prevent the board of supervisors or governing body from refusing for cause to reappoint, or from removing for cause, an election board member." A.R.S. § 16-531(I). That provision makes clear that Defendants may set and enforce work requirements for election board members, such as schedules—otherwise, there could be no "cause" for removal or refusal to reappoint. Similarly, A.R.S. § 16-621(A) provides that "[a]ll proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of election"—confirming Defendants' authority to direct election workers' activities there, which includes setting work schedules. And the Election Procedures Manual—which Plaintiffs argue "has the force of law," MTD Resp. at 4 n.3—repeatedly tasks "the County Recorder(s)" (for early voting) and the "Board of Supervisors" (for election day voting) with carrying out the necessary tasks, making clear that those officials are in charge of conducting elections and overseeing the poll workers who do the actual work. *See, e.g.*, EPM 47 (processing mail ballot requests); EPM 60 (receiving mail ballots); EPM 63 (conducting on-site early voting); EPM 68 (signature verification); EPM 128–29 (establishing precincts, vote centers, and polling places); EPM 139 (setting poll worker compensation); EPM 195 (overseeing the central counting place and processing early ballots and provisional ballots); EPM 204 (verifying provisional ballots). Defendants could

not carry out those tasks if they did not have the authority to tell the election workers they appoint when to show up for work.

Moreover, Plaintiffs may not rely on the statutes requiring parity between political parties to support this claim, because they fail to explain how these requirements could make it harder for *only* Plaintiffs (that is, Republicans) to find enough members willing to serve as election workers, when the rules apply equally to election workers appointed by *both* major political parties, including Intervenors (Democrats). Though Plaintiffs allege that "earnest and civic-minded citizens" are deterred from serving on Maricopa County election boards due to the County's "long hours," they neither provide any support for this bald causal inference nor explain why these hours uniquely deter Republican board nominees. Am. Compl. ¶¶ 35–36. The same working day and hour requirements apply to Maricopa County election workers of all political stripes; it is pure conjecture that these requirements would somehow cause a failure to achieve partisan parity.

Finally, Plaintiffs argue that political parties, rather than Defendants, are tasked with setting work schedules for poll workers. MTD Resp. at 6–7. But Plaintiffs do not cite any legal authority for that argument. Political parties are entitled to "designate[] qualified voters" to serve as poll workers. A.R.S. § 16-531(a). But they have no further role after that. It would be anomalous in the extreme to conclude that Plaintiffs rather than Defendants are entitled to set election worker schedules, when it is Defendants who appoint, manage, and pay the election workers. And Plaintiffs do not allege that any election anywhere in Arizona has ever been run with political parties in charge of election worker scheduling. Plaintiffs therefore fail to state a claim that Defendants' imposition of day and hour requirements on election workers violate Arizona law.

B. Plaintiffs have no cause of action to challenge Defendants' setting of work schedules.

Plaintiffs also fail to state a claim challenging Defendants' setting of election worker work schedules for an additional reason: Plaintiffs have no cause of action entitling them to sue. Plaintiffs rely on mandamus and the Uniform Declaratory Judgments Act, but neither

provides a cause of action under these circumstances.

1. Mandamus relief is unavailable.

Mandamus relief is unavailable because Plaintiffs do not seek "to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears v. Hull*, 192 Ariz. 65, 68 ¶ 11 (1998) (quoting *Bd. of Ed. v. Scottsdale Ed. Ass'n*, 109 Ariz. 342, 344 (1973)). As explained in the previous section, Plaintiffs identify no statute "specifically impos[ing] . . . a duty" on Defendants not to set day and hour requirements for election workers. Rather, they point to the *absence* of a statute on point, MTD Resp. at 5–7. But the *absence* of a statute does not involve a specifically imposed affirmative duty that could be enforceable by mandamus. *See, e.g.*, *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 466 ¶ 19 (App. 2007) (holding that court was "not free to craft a mandatory obligation with which [it] can then compel the Attorney General to comply through the mandamus power" in the absence of legislative or constitutional directive).

Moreover, mandamus "will lie only 'to require public officers to perform their official duties when they refuse to act,' and not 'to restrain a public official from doing an act.'" *Sears*, 192 Ariz. at 68 ¶ 11 (quoting *Smoker v. Bolin*, 85 Ariz. 171, 173 (1958)). Plaintiffs seek to prohibit something—the setting of work schedules—that they believe is unlawful, rather than to compel Defendants to act. Plaintiffs insist that this is "a mandamus action on all fours," MTD Resp. at 3, but they do not cite a single case issuing mandamus relief under similar circumstances, where the allegation is that officials are taking legally unauthorized action, rather than failing to act.

Plaintiffs attempt to avoid this problem by reframing their demand as a request that Defendants be compelled to appoint Plaintiffs' election board nominees. But Plaintiffs do not allege that Defendants are refusing to appoint Plaintiffs' nominees. Rather, they allege that Plaintiffs' nominees are declining the jobs or quitting them because the jobs are too demanding. *See, e.g.*, Am. Compl. ¶ 36 (alleging that Defendants' job requirements "deter Republican workers from participating in the administration of Arizona elections"); *id.* ¶ 40 (quoting Gila County election director's statement that many election workers quit due to

the length of the work day); *id.* ¶ 50 ("the County is requiring Nominees to commit to working full days each and every day their board is in operation"). The attachments to Plaintiffs' Motion to Dismiss Response confirm this, showing that Defendants offered positions to all of Plaintiffs' nominees, but that many ignored the offers or declined them. *See* Pls.' Ex. A at 107–120. The only way to redress this alleged problem would be to prohibit Defendants from requiring work schedules for board appointees, which would be beyond the scope of relief available via mandamus. *See Sears*, 192 Ariz. at 68 ¶ 11.

2. A declaratory judgment is unavailable.

Plaintiffs' other cause of action under the Uniform Declaratory Judgments Act fares no better because Plaintiffs have not alleged facts to show "a controversy which is real and not merely colorable, . . . based on an existing state of facts, not those which may or may not arise in the future." *Land Dep't v. O'Toole*, 154 Ariz. 43, 47 (App. 1987) (citation omitted). A declaratory judgment will not be entered as to "future rights in anticipation of an event which may never happen." *Merritt-Chapman & Scott Corp. v. Frazier*, 92 Ariz. 136, 139 (1962). Here, all of Plaintiffs' allegations relate to the 2022 election, which is now over. And while Plaintiffs also seek relief for future elections, recruitment of poll workers for future elections has not begun, so there is no controversy over future elections under the "existing state of facts." *Land Dep't*, 154 Ariz. at 47. Plaintiffs therefore fail to allege a "real and not merely colorable" controversy entitling them to the relief they seek: micromanagement by this Court over how Maricopa County administers its future elections. *Id.*

III. Any remaining claim regarding the 2022 election is moot and barred by laches.

The Amended Complaint seeks relief "for the remainder of the 2022 election cycle and in future election cycles." Am. Compl. ¶ 5. But even the recounts of the 2022 election are now over, so there is nothing more to challenge and Plaintiffs' claims are now moot. *See* Maricopa Cnty. Elections Dep't, *Important Election Dates and Deadlines* (as last visited Dec. 21, 2022), https://elections.maricopa.gov/voting/election-calendar.html

(showing that the recount is complete on December 22). Moreover, Plaintiffs' claims regarding the 2022 election cycle are barred by laches, because Plaintiffs waited far too long to assert them and *still* have not moved for any emergency relief. *See* Intervenors' MTD at 7–11. Plaintiffs attempt to justify their delay in filing suit by stating that the alleged "disparity numbers" in election-worker hiring during the primary election "had to be gleaned from public records." MTD Resp. at 10. But Plaintiffs' remaining claims have nothing to do with that alleged disparity, which Plaintiffs admit no longer existed in the general election. Am. Compl. ¶ 7. Thus, Plaintiffs' claims are now based entirely on Defendants' imposition of day and hour requirements on election workers—requirements that Defendants have always imposed, and that Plaintiffs have known about for months. Plaintiffs do not identify any allegations in the Amended Complaint that are relevant to their remaining claims that they could not have made months ago. The prejudice that would flow to Defendants, voters, Intervenors, and the Court from a last-minute change to the recount procedures is obvious, Intervenors' MTD at 9–11, and Plaintiffs offer no substantive response on that issue, MTD Resp. at 11. And though Plaintiffs call Intervenors' laches argument "improper at the Motion to Dismiss level," they ignore many cases granting motions to dismiss on laches grounds. *See, e.g.*, *Kromko v. Superior Ct. In & For Cnty. of Maricopa*, 168 Ariz. 51 (1991); *Harris v. Purcell*, 193 Ariz. 409, 412 (1998).

IV. Any claim regarding future elections is speculative and not yet ripe.

Plaintiffs protest that they also seek relief for future election cycles. MTD Resp. at 11. Intervenors agree that challenges to the procedures used in future election cycles are not barred by laches. But they are also not yet ripe. The Amended Complaint's factual allegations are focused entirely on the 2022 primary and general elections. *See* Am. Compl. ¶¶ 21–59. Aside from one stray reference to "future election cycles," *id.* ¶ 5, and requests for relief in "future elections," *id.* at 16–17 (demand for relief), Plaintiffs make no factual allegations showing that unlawful procedures will be used in future elections. That, no doubt, is because the procedures that will be used in future elections have not yet been determined. "The ripeness doctrine prevents a court from rendering a premature judgment

or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997); *see also Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986) ("Declaratory relief will be based on an existing state of facts, not those which may or may not arise in the future."). Plaintiffs' claims with respect to future elections are therefore not yet ripe and should be dismissed for that reason.

V. Intervenors tried to confer on their motion, but Plaintiffs never responded.

Plaintiffs' final argument, that Intervenors failed to conduct a "good faith consultation" with them before moving to dismiss, is simply false. On November 18—four days before Intervenors filed their motion to dismiss—Intervenors' counsel emailed Plaintiffs' counsel stating that Intervenors intended to move to dismiss and asking to schedule a call to "confer about the issues we intend to raise in the motion." Ex. A. Plaintiffs never responded.[1] Intervenors therefore more than satisfied Rule 7.1(h)'s requirement that they "attempt[] to confer with" Plaintiffs. Ariz. R. Civ. P. 7.1(h).

CONCLUSION

For these reasons, the Court should dismiss the Amended Complaint.

[1] Plaintiffs refer to a phone call with Intervenors' counsel; the referenced phone call occurred the day earlier, on November 17. On that call, counsel for the Republican Party of Arizona informed Intervenors' counsel that Plaintiffs planned to proceed with the case despite the end of the election, and Intervenors' counsel stated that Intervenors would likely move to dismiss.

Dated: December 27, 2022

Respectfully submitted,

/s/ Daniel A. Arellano

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2022, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Maricopa County, for filing using the AZTurboCourt System. I further certify that a copy of the foregoing was sent via email this same date to:

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