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ARIZONA SUPERIOR COURT

MOHAVE COUNTY

JEANNE KENTCH, an individual; TED BOYD, and individual; ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the Secretary of State; et al.,

Defendants.

No. S8015CV2022-01468

ARIZONA SECRETARY OF STATE KATIE HOBBS' REPLY IN SUPPORT OF MOTION TO DISMISS STATEMENT OF ELECTION CONTEST

(Oral Argument Requested)

(Assigned to Hon. Lee F. Jantzen)

Introduction

Defendant Katie Hobbs, in her official capacity as Arizona Secretary of State ("Secretary"), submits this reply in support of her motion to dismiss. Plaintiffs seek to overturn the results of an election, disenfranchising Arizonans, in derogation of "the strong public policy favoring stability and finality of election results." *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 95 (1978). They allege speculative and unsupported claims to argue for the extraordinary relief of nullifying election results. This "election contest" must be dismissed.

Argument

I. Plaintiffs can't rely on incorrect standards to evade the specific requirements of an election contest.

Because they do not claim the election was tainted with fraud, Plaintiffs must make specific and exacting factual allegations to survive a motion to dismiss: They must plead facts "showing that had proper procedures been used, the result would have been different." *Moore v. City of Page*, 148 Ariz. 151, 159 (Ct. App. 1986).[1] *See also Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (Ariz. Rule 8(a) notice pleading requirements apply to election contests). This standard applies when, as here, there is alleged "misconduct" or an "erroneous count of votes" under A.R.S. § 16-672(A)(5). And Plaintiffs must make this showing regardless of their policy preferences or the merits of the procedures they prefer; if the purported errors could not have

[1] Plaintiffs claim that *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929) establishes that they can prevail so long as the outcome of the election is "uncertain," and that the Secretary misstates the law in citing the formulation of the standard in *Moore*. [Opp. at 12.] But *Moore*'s formulation is based on and interprets exactly the language from *Findley* that Plaintiffs cite. The Court of Appeals' interpretation of the relevant language from *Findley* is both more persuasive and more authoritative than Plaintiffs'. And although the "uncertainty" language appears in these cases, it cannot – and should not – be that a contestant simply declaring that the results of an election are "uncertain" is enough to overturn an election. In any case, because Plaintiffs do not allege facts sufficient to show that the number of voters or ballots affected were greater than the margin of victory, they do not allege facts sufficient to show that the outcome was uncertain under any understanding of this term.

changed the results of this election, those disputes can be addressed in future actions that do not threaten the stability of elections or citizens' votes.

Plaintiffs try to resist the Secretary's Motion based on irrelevant and inaccurate characterizations of the relevant legal standards and the Secretary's arguments. They argue that "dismissal is appropriate under Rule 12(b)(6) only if as a matter of law, plaintiffs would not be entitled to relief under ***any*** interpretation of the facts susceptible of proof." [Opp. at 10 (cleaned up, emphasis original)] But they ignore that a plaintiff must offer facts to meet their burden, not conclusory statements or speculation: "courts are limited to considering the well-pled facts and all reasonable interpretations of those facts." *Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 420 (2008) (emphasis added). Here, there is a factual void at the heart of Plaintiffs' claims that no amount of interpretation can fill: whether Plaintiffs' allegations could impact the outcome of the election. Plaintiffs are required to answer that question with factual allegations, not vague suppositions and legal conclusions. They do not do so.

This is not, as Plaintiffs contend, a matter of requiring evidentiary proof. Rather, the law requires well-pled facts that, if proven, would meet the statutory standard. Plaintiffs have not supplied such facts. Instead, they have speculated about an unspecified number of ballots that might have been subject to various errors, including transposition observed in a totally different election, [Stmt. ¶¶ 39-42], and mis-tabulation based on the example of three ballots, [Stmt. ¶¶ 48-49, 52]. It is not enough to simply invoke the specter that some number of ballots could have been affected, with no factual indication of magnitude of affected votes. As a result, this matter must be dismissed. *See, e.g.*, *Moore*, 148 Ariz. at 159.

Finally, while motions to dismiss may be strongly disfavored in the context of wrongful termination matters, *see* Resp. at 10 (citing wrongful termination case for the proposition that motions to dismiss are disfavored), the calculus is different in election contests, where time is of the essence, s*ee Donaghey*, 120 Ariz. at 95, there is a "strong public policy favoring stability and finality of election results," *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App.

2010) (cleaned up), and courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore*, 148 Ariz. at 159. Quick resolution serves public policy, *id*., while speculative fishing expeditions like this one inject significant delay and uncertainty into the process.

Once the correct standards for an election contest are applied, Plaintiffs' allegations are insufficient and each of their claims must be dismissed, as described below.

II. Under the Applicable Standard, Plaintiffs' Claims Must Be Dismissed.

A. Count I does not allege a viable election contest and must be dismissed.

Plaintiffs claim that various issues that arose on election day in Maricopa County amount to misconduct. But Plaintiffs again do not contend with the relevant caselaw, which states that "honest mistakes or mere omissions" cannot constitute "misconduct." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Plaintiffs cannot explain, for example, why some poll workers in Maricopa County who allegedly did not properly "check out" voters did not commit "honest mistakes" and unintentional errors, rather than something more sinister. And even if their claim that Chairman Gates's tweet, which gave voters several options in response to the printer malfunctions, "was incomplete because it omitted two of the solutions available to affected voters" [Stmt. ¶¶ 35-36] is taken to be true, they still don't explain why this is anything beyond a "mere omission."

The election day issues underlying Count I also do not amount to an "erroneous count of votes." While no Arizona decision explains precisely what an "erroneous count" claim encompasses, both its plain language and common sense make clear that this claim relates to the miscounting of votes on ballots by election officials. For example, if 100 ballots were cast and a correct count would have led to 48 votes for Candidate A, 46 votes for Candidate B, and 6 votes for Candidate C in the contested race but officials counted the votes on those 100 ballots incorrectly (because of, for example, an equipment or aggregation error that counted all 6 votes for Candidate C for one of the other candidates), that would constitute an "erroneous count."

Nothing suggests that this contest ground is implicated by Plaintiffs' allegations about Maricopa County election day issues.

More important, under either the misconduct or erroneous count theories, Plaintiffs still cannot show, as they admit they must [*see* Resp. 12], that these election day issues affected the result of the Attorney General race (or even that it rendered it uncertain). The only "support" that Plaintiffs seemingly muster shows that 395 votes may be affected. Even if the Court were to assume these votes would all favor Hamadeh, which the Court cannot do, this is simply insufficient under the applicable standard. *See Babnew v. Linneman*, 154 Ariz. 90, 93 (App. 1987). And Plaintiffs' vague allusions to "other mistabulations," [Resp. 12] none of which have any support (other than Plaintiffs' speculation that they led to a "material number of voters" being affected, *see, e.g.*, Stmt. ¶¶ 58-59), cannot magically lead to a showing that the election results would be different, such that Plaintiffs' extreme remedy of nullifying the will of the people is warranted.

B. Counts II-IV are speculative and must be dismissed.

Plaintiffs next insist that their vague and unsupported assertions about Counts II-IV are sufficient because they may be able to develop support for their wild speculation at trial. [Resp. 13] Plaintiffs therefore seem to concede that this action is nothing but a fishing expedition for them to gain access to discovery that may somehow "prove" their speculative claims. [*See* Resp. 10 ("Discovery and trial may or may not bear out the Statement's factual allegations.")]. This entirely ignores the proper legal standards to be applied to election contests (*see* Section I, *supra*), and their claims must be dismissed.

As to Count II, Plaintiffs assert, with no support, that some unknown but "material" number of voters were denied provisional ballots "as a result of poll worker error." Resp. 14. This bare claim cannot stand, as it doesn't reasonably allege misconduct or show how the election results would have been different without this supposed error. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005) (stating courts must reject "inferences or deductions

that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts"). The same goes for Counts III and IV about ballot duplication and adjudication, where Plaintiffs point to an apparent error rate from an entirely different election two years ago[2] or to less than a handful of instances of supposed errors (none of which they allege relate to the Attorney General race). The illogical jump from these reed-thin facts to Plaintiffs' claim that the election results must be nullified is an "unreasonable inference" that must be rejected.

C. Count V is barred by laches, meritless, and must be dismissed.

First, laches bars Plaintiffs' claim about ballot signature matching. Plaintiffs do not argue in response, nor can they, that they were unaware of the EPM provision and the practice of not narrowly limiting a voter's "registration record" to just the registration form for signature matching purposes. Waiting (years) to bring a challenge to this until after the election results are made known and Hamadeh has lost is precisely the type of dilatory tactic that has been squarely addressed and rejected by Arizona courts. *See McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (rejecting similar attempt to "intentionally delaying a request for remedial action to see first whether [a candidate] will be successful at the polls"). Plaintiffs could have brought a challenge to the relevant EPM provision years ago, but do so now, in this election contest context where they ask this Court "to overturn the will of the people," *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002), thereby prejudicing both voters and the Court.

At best, Plaintiffs respond [at 15] by citing a 1986 court of appeals decision that rejected an "estoppel" claim in an election contest. *See Moore v. City of Page*, 148 Ariz. 151, 155-56

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[2] An example in a less politically charged context proves the point. Imagine a breach of contract action where X has a contract with Y. X has no evidence that Y has breached the contract, but sues alleging that they did because two years ago, Y breached a separate contract with Z. On that allegation, it would be patently unreasonable to infer that Y breached their contract with X. The Court would not hesitate to dismiss such a farcical claim, and it should do the same here.

(App. 1986). But whatever the court of appeals said in 1986, it confirmed in 1997 that known "violations in the elections *process*," meaning "the manner in which an election is held" must be brought before the election. *McComb*, 189 Ariz. at 526. The Arizona Supreme Court drew this same distinction – that is, requiring challenges to "the manner in which an election is held" be brought before the election – in 2002. *Sherman*, 202 Ariz. at 342 ¶ 10. And how counties verify early ballots, which constitute the vast majority of all ballots cast in Arizona, is most certainly a "manner in which the election is held."

Plaintiffs' claim also fails on the merits. Plaintiffs make no attempt to engage with the Secretary's arguments that there is a difference between a voter registration form and the voter registration record. Instead, Plaintiffs merely conflate the two to suit their theory. [Resp. 17] Their argument that "any purported distinction between 'forms' and 'records' is immaterial," Resp. 17 n.3, disregards the plain text and legislative history, as the Secretary has extensively explained in her Motion. Plaintiffs ignore this, highlighting the baselessness of their claim.

D. Plaintiffs' requested relief for Count II is unavailable.

Plaintiffs' Count II asks this Court to permit a select group of voters to vote after election day. Contest ¶ 82. Even if Plaintiffs' substantive allegations were enough to justify some relief on Count II, which they are not, *see supra* Section II.B, Plaintiffs cannot obtain a partial re-vote after election day. That request conflicts with both statute and precedent. *See* Mot. at 9-10 (citing sources including *Babnew v. Linneman*, 154 Ariz. 90, 93 (Ct. App. 1987), holding that votes not cast cannot be counted in an election contest).

Indeed, Plaintiffs do not even attempt to argue that this relief is permitted in an election contest. *See* Resp. at 8-9. Instead, they contend that they can evade the carefully selected remedies available under A.R.S. § 16-676 by resort to mandamus. As the Secretary's Motion explains, that is wrong. Mot. at 9 (citing *Donaghey v. Attorney Gen.*, 120 Ariz. 93 (1978)). But Plaintiffs neither address the controlling precedent on this point nor cite any contest case permitting such a procedural end-run. Instead, they cite *Ariz. Pub. Integrity Alliance v. Fontes*,

250 Ariz. 58, 62, ¶¶ 11–12 (2020). But this case stands for the unobjectionable proposition that election decisions can be challenged by a mandamus – not an election contest like this – *before the votes are counted*, when doing so does not risk the integrity of the election or disenfranchise voters. As the Arizona Supreme Court held as far back as 1917, "[i]t is no part of the functions of the writ of mandamus to determine contested elections, or settle the ultimate title to a public office when disputed.. . . [T]he remedy provided therefor is a statutory contest or the writ of quo warranto." *Campbell v. Hunt*, 18 Ariz. 442, 449 (1917).[3]

III. Laches bars Plaintiffs' election contest.

Finally, this entire election contest is barred by laches. Plaintiffs claim laches should not apply here because they filed the contest within the statute of limitations. [Resp. 5] But Arizona courts have repeatedly recognized that laches can apply to bar a suit even when it is filed within the statute of limitations. *See Harris v. Purcell*, 193 Ariz. 409, 413 ¶ 18 (1998) ("While plaintiff met the ten-calendar-day deadline to challenge certification, he failed to exercise diligence in preparing and advancing his case."); *id.* 413 ¶ 23 (rejecting as "without merit" an argument like Plaintiffs', to collapse laches analysis with timeliness of filing under statute); *see also Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006).

Moreover, the Secretary's arguments about prejudice are not "speculation," as Plaintiffs assert. [Resp. 6] Plaintiffs do not deny that the substance of their claims in this contest are near-identical to the one they filed 17 days earlier. These dilatory actions necessarily prejudice both

[3] Plaintiffs also argue that Defendants "cannot have it both ways": either Plaintiffs' claims are "cognizable and redressable under the election contest statutes," or Plaintiffs "necessarily lack any plain, speedy and adequate remedy at law" and may pursue a mandamus claim. Op. at 9. Here, however, the election contest statues provide the right framework for evaluating Plaintiffs' claims. The dispute is whether Plaintiffs are entitled to their preferred remedy for those claims. Plaintiffs essentially argue that they have no adequate remedy because the governing statutory regime does not contain their preferred remedy. But Plaintiffs do not have a right to their preferred remedy; the Legislature has selected the remedies set out in A.R.S. § 16-676 as both adequate and exclusive remedies for claims such as Plaintiffs'. *Donaghey v. Attorney Gen.*, 120 Ariz. 93 (1978).

the Secretary and this Court, leaving them with a far shorter time period to properly review, respond to, and decide Plaintiffs' claims, including their burdensome discovery demands.[4] Plaintiffs know about the hearing, in less than a week, to determine the recount results and the January 2, 2023 date for new officials to take office yet inexplicably chose to sit on their filing. Laches applies here.

Conclusion

For the reasons stated above and in the Secretary's Motion to Dismiss, the Court should dismiss Plaintiffs' "election contest" with prejudice.

RESPECTFULLY SUBMITTED this 16th day of December, 2022.

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[4] Plaintiffs briefly raise arguments relevant to their Verified Petition to Inspect Ballots, arguing they must be permitted discovery. [Resp. 4] The Secretary has opposed Plaintiffs' Verified Petition and incorporates those arguments by reference. Because Plaintiffs fail to state any cognizable claims for relief, there is no basis in law to permit discovery. Nor have Plaintiffs established that discovery is necessary and their burdensome discovery demands are not in accordance with A.R.S. § 16-677. Indeed, by stating that "[d]iscovery or trial may or may not bear out the Statement's factual allegations," [Resp. 10] and that "Plaintiffs need not produce evidence of anything at this juncture—nor can they" without discovery [Resp. 11], Plaintiffs apparently concede that their claims are based on pure speculation. This Court should deny Plaintiffs' request for a fishing expedition.

ORIGINAL efiled and served via electronic means this 16th day of December, 2022, upon:

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