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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

RON GOULD, in his individual capacity,

Plaintiff,

v.

KRIS MAYES, in her official capacity as the Attorney General of the State of Arizona,

Defendant,

and

ARIZONA ALLIANCE FOR RETIRED AMERICANS,

Intervenor-Defendant.

No. CV2024-000815

INTERVENOR-DEFENDANT ARIZONA ALLIANCE FOR RETIRED AMERICANS' REPLY IN SUPPORT OF MOTION TO DISMISS

(Assigned to the Hon. Frank Moskowitz)

Oral Argument Requested

INTRODUCTION

Plaintiff asks the Court to grant Arizona counties the extraordinary power to ignore state law's clear requirement that electronic tabulating equipment be used to count ballots unless it is impracticable. But the Court need not even reach the merits, because Plaintiff lacks standing to pursue his claim: across his complaint and his responses to the Attorney General's and the Alliance's motions to dismiss, Plaintiff never identifies a past, present, or future injury to himself, or any legal right of his that has been affected in any way. Even if he overcame this fundamental hurdle, Plaintiff's claim is meritless: he remains unable to identify any Arizona law authorizing a full hand count of all ballots—outside of narrow circumstances not alleged here—nor does he suggest that county boards have the authority to create such a process without statutory authorization. Though Plaintiff's complaint fails on every level and should be dismissed with prejudice, the Alliance responds here to only the arguments Plaintiff made specifically in response to the Alliance's Motion to Dismiss.[1]

ARGUMENT

I. Plaintiff lacks standing under the Declaratory Judgment Act.

Plaintiff continues his attempt to "construe [the Declaratory Judgments Act] to create standing where standing [does] not otherwise exist." *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980). To bring a claim under the Declaratory Judgment Act, a plaintiff must show that their "rights, status or other legal relations" are "affected by a statute," *Arizona School Boards Association, Inc. v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (quoting A.R.S. § 12-1832), and "that there [is] an actual controversy ripe for adjudication," *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 380 (1978). As explained in the Alliance's Motion to Dismiss First Am. Compl. ("Mot.") at 8–11, Plaintiff does neither

[1] The Alliance also incorporates by reference the Attorney General's Reply Brief at 2–10, which explains that Plaintiff lacks standing because (1) he claims an interest linked to his official role as a Supervisor and the rights of the County Board as a whole, but brings this lawsuit as an individual; (2) he fails to meet the standard to bring a pre-enforcement challenge based on a claimed threat of criminal prosecution; and (3) his past votes do not ripen his injury. The Alliance also incorporates the Attorney General's Reply Brief at 11–12, which rebuts Plaintiff's purported historical analysis of Arizona's election code and explains that there is nothing discretionary about the current, controlling version of the code.

and his meager arguments in opposition fail to manufacture standing where it does not exist.

In response to the argument that *Dail* establishes that Plaintiff lacks standing here, Mot. at 7, Plaintiff ignores *Dail*'s primary holding that the Declaratory Judgment Act ("DJA") does not create standing out of thin air, as well as the Court of Appeals' other cases applying that rule. *Contrast* Pl.'s Resp. to the Alliance's Mot. to Dismiss ("Resp.") at 2 n.1 *with* Mot. at 7–8. The *Dail* plaintiff sought the court's counsel on the legality of a contract under which he had no rights. In finding no standing, the court was clear that under the DJA, "a plaintiff must have sufficient, concrete interests at stake [such] that a court may answer the questions presented in relation to those interests." *Dail*, 128 Ariz. at 203. Just as the plaintiff in *Dail* sought the court's interpretation of a contract that did not affect his rights, Plaintiff seeks the Court's opinion on whether his interpretation of Arizona's election procedures is correct. But that is not what the DJA is for. No matter how much Plaintiff aspires to conduct an unlawful hand count, because he has identified no law that affects his rights, let alone one that contemplates the full hand count he seeks, he lacks standing under the DJA. *See id.* at 202 (to establish standing, a plaintiff "must first show some interest beyond a general desire to enforce the law"). Plaintiff also ignores and fails to grapple with *Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972), *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986), and *Lake Havasu Resort, Inc. v. Commercial Loan Insurance Corp.*, 139 Ariz. 369, 377 (App. 1983), all of which confirm that this Court lacks jurisdiction here, where Plaintiff fails to allege a concrete harm to his legal interests.

Arizona courts have also repeatedly confirmed that "[a] declaratory judgment must be based on a real, not theoretical, controversy." *Dail*, 128 Ariz. at 203; *see also Lake Havasu Resort*, 139 Ariz. at 377 ("Declaratory relief will be based on an existing state of facts, not those which may or may not arise in the future."). Plaintiff does not contest this principle. Instead, he asserts that the threat of prosecution is not hypothetical "according to the Complaint." Resp. at 4. But "[c]ourts 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 ¶ 14 (2008) (emphasis added); *see also Election Integrity Project Cal., Inc. v.*

Weber, No. 23-55726, 2024 WL 3819948, at *13 (9th Cir. Aug. 15, 2024) ("[W]e may only credit [a plaintiff's] *factual* allegations. We may not entertain '"imaginary" cases.'" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008))). This Court need not accept Plaintiff's assertion that prosecution is imminent merely because he declared it imminent in his Complaint. Nor may the Court "speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen,* 218 Ariz. at 420.

The conclusions that Plaintiff asks the Court to draw from the facts alleged in his Complaint are far from reasonable. He first asserts that because he voted for a hand count in the past and intends to do so again, he will be individually prosecuted for doing so in the future. Resp. at 4. But the opposite conclusion is the reasonable one, based on Plaintiff's allegations: by his own admission, he has already twice voted for a hand count and faced no criminal repercussions, *see* First Am. Compl. ¶¶ 35, 49, and the Attorney General has never initiated charges against him, *see, e.g., id.* ¶¶ 30, 37, 50, or any other county supervisor who voted for a hand count when the Board as whole rejected such action. Plaintiff blatantly misrepresents the Attorney General's letter in his assertion that she "threatened him with criminal prosecution if he [votes for a hand count] again." Resp. at 4. The Attorney General's letter clearly advises "*the Board* . . . not [to] direct the Elections Department to act illegally" and only if "*it* does" will the Attorney General "promptly sue and obtain a court order." First Am. Compl., Ex. A at 3 (emphases added). The letter makes no mention of any consequences—criminal or otherwise—of individual members' votes if a majority of the Board votes against a hand count.

Plaintiff also contends that because a non-party Supervisor paused before voting against a hand count, he cast his vote "based on fear of prosecution; and that, as Chairperson, he would be more inclined to put the matter to a vote again if the fear of prosecution were removed." Resp. at 4. There is simply no basis for the Court to draw such a conclusion about a non-party's mental state or to speculate on that non-party's contingent future actions. Indeed, if this were true, Plaintiff's argument indicates that a future vote on whether to conduct a full hand count of ballots depends on his success on the merits in this

case. But "[t]o base his standing on events that might be precipitated by the court's determination of the merits in his favor is unacceptable." *Dail*, 128 Ariz. at 203.

In short, Plaintiff asks the Court to disregard Plaintiff's own experience (as alleged in his Complaint), rewrite the Attorney General's letter (which Plaintiff attached to his Complaint), and read the mind of a third party not before it. The Court should decline to do so.

II. Plaintiff does not dispute that county boards lack explicit statutory power to authorize a hand count.

Plaintiff has no response to the Alliance's argument that his claim fails on the merits because neither Plaintiff nor the Mohave Board may create extra-statutory procedures for conducting a hand count in the first instance. As the Alliance explained, Mot. at 15, "[a] county board of supervisors has only those powers 'expressly conferred by statute, or [as] necessarily implied therefrom.'" *Hancock v. McCarroll*, 188 Ariz. 492, 498 (App. 1996) (quoting *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363 (1967)). Plaintiff ignores *Hancock* and the well-established principle it stands for. Although Plaintiff argued in response to the Attorney General's motion that certain election statutes "contemplat[e] use of electronic tabulating machines as being optional," Pl.'s Resp. to Att'y Gen.'s Mot. to Dismiss ("Resp. to AG") at 12, he fails to identify any statute that "expressly confer[s]" or "necessarily implie[s]" that a county board may conduct a full hand count in the first instance. *Hancock*, 188 Ariz. at 498. In fact, Plaintiff "concedes both that use of electronic tabulating machines is widespread and that some election statutes seem to presume that such machines will be used, at least in a significant number of instances." Resp. to AG at 13; *see also id.* at n.14 (noting the Elections Procedures Manual "also clearly makes this same assumption").

Despite these concessions, Plaintiff asks the Court to grant county boards legal authority to conduct a full hand count in the first instance. But this Court cannot supply that power when the Legislature did not. *Orca Commc'ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 182 ¶ 11 (2014) ("[I]t is not the function of the courts to rewrite statutes." (citation

omitted)). That is especially true here, where accepting Plaintiff's request would drastically change the state's ballot-tabulation process in a way not contemplated by the Legislature. The Court should decline to create such a process out of whole cloth and adhere to the "basic principle that courts will not read into a statute something which is not . . . indicated by the statute itself." *Town of Scottsdale v. State ex rel. Pickrell*, 98 Ariz. 382, 386 (1965).

At bottom, as the Alliance explained (Mot. at 16), Plaintiff's desired hand count is precisely the type of rogue conduct the Arizona Supreme Court cautioned against in *Arizona Public Integrity Alliance v. Fontes*: "[W]hen public officials . . . change the law based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process." 250 Ariz. 58, 61 ¶ 4 (2020)). The Court should not aid in Plaintiff's unlawful quest to conduct a hand count unauthorized by Arizona law.

III. Legislative immunity does not apply.

Plaintiff makes no new arguments to support his claim that he is protected by legislative immunity. Instead, he doubles down on his contention that Arizona law gives counties "discretionary authority as to whether to decide to hand count or electronically tabulate ballots in the first instance, or both." Resp. at 5. That argument fails because no provision of Arizona law grants county boards such discretion. *See supra* Part II; *see also* Mot. 15–16. Conducting an extra-statutory hand count of all ballots falls far outside Plaintiff's or the Board's authority, but even if Plaintiff was exercising a lawful power, he is not entitled to legislative immunity as a County Supervisor. Because county boards only have the power to implement election laws—not enact them, A.R.S. § 11-251(3)—their actions are not "legislative in nature," *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 138 ¶ 22 (App. 2003), and thus cannot benefit from legislative immunity.

IV. Plaintiff's baseless request for sanctions should be rejected.

This Court should not entertain Plaintiff's meritless request for sanctions under A.R.S. § 12-349(A)(3). The Alliance was granted intervention and ordered by this Court to

"answer or otherwise respond to the complaint," which the Alliance did by filing its Motion. Order Granting Mot. to Intervene. Complying with a court order and exercising its full rights as a party cannot be considered to "unreasonably expand" these proceedings. *Cf. League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997) ("[A]s a general rule, intervenors are permitted to litigate fully once admitted to a suit.").

Plaintiff's attempt to wield A.R.S. § 12-349(A)(3) to limit and punish the Alliance's participation in this litigation is frivolous and unprecedented. Plaintiff fails to identify—and the Alliance is unaware of—any analogous situation where a party was deemed to "unreasonably expand" a proceeding merely by filing a motion to dismiss. This statute is overwhelmingly applied against plaintiffs for bringing baseless claims. And in the few cases where fees were awarded against defendants, defendants had withheld material information during discovery or trial, which is not the case here.[2] As the Alliance previously informed Plaintiff, no Arizona court has ever imposed sanctions solely because a party made some similar arguments as another party in filing a dispositive motion. If anything, it is Plaintiff's baseless threat of sanctions—coupled with Plaintiff's unnecessary objections to the Alliance's attorneys' *pro hac vice* motions and notice of lodging proposed Motion to Dismiss—that have unnecessarily expanded these proceedings under Section 12-349(A)(3).

CONCLUSION

For these reasons, the Court should grant the Alliance's Motion to Dismiss.

RESPECTFULLY SUBMITTED this 26th day of August, 2024.

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By: */s/ D. Andrew Gaona*
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[2] *See, e.g.*, *Solimeno v. Yonan*, 224 Ariz. 74, 81–82 ¶ 32 (App. 2010) (awarding fees under (A)(3) against defendant when defendant's failure to disclose resulted in mistrial after five-day jury trial, reasoning defendant's conduct had "significantly delayed and expanded the litigation because a new trial was required several months later, and the time devoted to the first trial was largely wasted").

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