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9 **ARIZONA SUPERIOR COURT**
10 **MARICOPA COUNTY**

11 ARIZONA REPUBLICAN PARTY,) No. CV2020-014553
12)
Plaintiff,) **ARIZONA SECRETARY OF STATE**
13 v.) **KATIE HOBBS’ RESPONSE TO**
14) **PLAINTIFF’S APPLICATION FOR**
ADRIAN FONTES, as Maricopa County) **PRELIMINARY INJUNCTION**
15 Recorder; and the MARICOPA COUNTY)
BOARD OF SUPERVISORS, by and through)
16 CLINT HICKMAN, JACK SELLERS, STEVE)
CHUCRI, BILL GATES, and STEVE)
17 GALLARDO,) (Assigned to The Hon. John Hannah)
18)
Defendants.)
19) (Oral Argument Nov. 18, 2020 at 3:15 p.m.)
KATIE HOBBS, in her official capacity as)
20 Arizona Secretary of State; Arizona Democratic)
Party;)
21)
Intervenors.)
22)
23

24 As directed by the Court during the November 16, 2020 hearing, Secretary of State Katie
25 Hobbs (“Secretary”) submits this Response to Plaintiff’s Application for Preliminary Injunction
26 (“Application”).

1 **I. Argument.**

2 A litigant “seeking a preliminary injunction must establish: 1) A strong likelihood that he
3 will succeed at trial on the merits; 2) The possibility of irreparable injury to him not remediable
4 by damages if the requested relief is not granted; 3) A balance of hardships favors himself; and
5 4) Public policy favors the injunction.” *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments*
6 *Ltd. P’ship*, 228 Ariz. 61, 64 ¶ 9 (App. 2011). Plaintiff’s Application falls far short of
7 establishing any of these elements, and in fact seeks remarkably broad relief based on a meritless
8 legal claim that would needlessly delay the certification of the final results of the 2020 General
9 Election. Arizonans deserve better than this desperate grasp at straws, the County Defendants
10 should be permitted to carry out their non-discretionary duties, and the Application should be
11 denied.

12 **A. Plaintiff is unlikely to succeed on the merits.**

13 As detailed in the Secretary’s Motion to Dismiss, Plaintiff simply cannot succeed on the
14 merits of its claim. Plaintiff lacks standing to sue [MTD at 4], but even if it had standing, its
15 claim fails as a matter of law because it rests on Plaintiff’s fundamentally flawed interpretation
16 of Arizona law. [*See id.* at 2-4] Plaintiff is plainly wrong when it claims that A.R.S. § 16-602(B)
17 prohibits counties from sampling from voting centers for the hand count audit. Rather, the statute
18 is silent on the sampling procedure for counties that use a vote center model. What is critical,
19 however, is that the statute directs the Secretary to fill the procedural gap through the Elections
20 Procedures Manual (“EPM”).

21 Beyond failing to state a claim, laches bars Plaintiff’s claim because Plaintiff has known
22 about the hand count procedure for nearly a decade, yet chose to wait until after the election and
23 after the county completed its hand count audit to challenge the procedure in this election. [*Id.*
24 at 4-7] Plaintiff thought so little of this extraordinary request for injunctive relief that it didn’t
25 even request it in its original complaint. And even if none of this were true (which it is), this
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1 Court has no jurisdiction to enjoin the county’s non-discretionary duty to certify its canvass on
2 or before November 23, 2020. [MTD at 8-9]

3 Plaintiff’s claim also suffers from a fatal procedural defect. Indeed, even after filing a
4 proposed amended complaint, Plaintiff still failed to address the EPM’s mandate, which has the
5 force and effect of law. *Arizona Pub. Integrity All. v. Fontes*, __ Ariz. __, 2020 WL 6495694, at
6 *3 (Nov. 5, 2020); A.R.S. § 16-452(C); *see also Gonzalez v. Arizona*, 677 F.3d 383, 397 (9th
7 Cir. 2012) (stating that the EPM “has the force and effect of law”) (citing A.R.S. § 16-452); *cf.*
8 *Hess v. Purcell*, 229 Ariz. 250, 252 ¶ 4 (App. 2012) (affirming trial court ruling that ordered the
9 county to “comply with the [EPM]”). Because Plaintiff failed to challenge the EPM and seek its
10 invalidation, Plaintiff’s mandamus and injunction requests, if granted, would lead to the absurd
11 result of requiring the County to violate Arizona law. [MTD at 7-8]

12 For all the reasons in the Secretary’s Motion to Dismiss, which she incorporates here by
13 reference, Plaintiff has not established a “strong likelihood” of success on the merits. For that
14 reason alone, the Court should deny Plaintiff’s request for an injunction.

15 **B. Plaintiff has failed to show it will suffer irreparable injury.**

16 Plaintiff cannot establish a likelihood of success on the merits, but beyond that Plaintiff
17 doesn’t even try to argue that it will suffer an injury absent an injunction, let alone an irreparable
18 injury. The fact is that it won’t.

19 Plaintiff’s entire claim is a generalized complaint that Maricopa County’s hand count
20 audit relied on an improper sampling of ballots. But even if that were true (it isn’t), Plaintiff fails
21 to show that this sampling procedure harmed anyone, including Plaintiff. In fact, Maricopa
22 County’s hand count audit revealed zero discrepancies in the tabulation of ballots. [*See* Maricopa
23 County Def.’s Mot. to Dismiss Ex. A] Plaintiff thus has no good faith basis to claim that this
24 process – which didn’t alter a single vote or reveal a single irregularity – somehow injured
25 Plaintiff or its members. Indeed, aside from its erroneous interpretation of what the law requires,
26 Plaintiff does not even attempt to explain why a hand count audit based on a sampling of

1 precincts is preferable or better suited to assuring the accuracy of the tabulation machines as
2 compared to an audit based on a sampling of vote centers. In short, contrary to Plaintiff’s
3 contention [at 3] that the current hand count procedure could leave the public with “lingering
4 questions about the legitimacy of these results,” Maricopa County’s hand count audit establishes
5 that votes were tabulated accurately. The only “questions about the legitimacy” are those
6 unilaterally raised by Plaintiff and its officers and members in the media, a public relations
7 strategy without legal or factual basis that does not entitle Plaintiff to relief from this Court.

8 **C. The balance of hardships and public interest weigh heavily against an**
9 **injunction.**

10 Finally, Plaintiff fails to establish the only element it actually addresses in its Application.
11 In “because I said so” fashion, Plaintiff proclaims [at 2] that “there is zero real hardship to
12 Defendants” if the Court enjoins the Maricopa County Board of Supervisors from fulfilling its
13 statutory duty to canvass the election by November 23, 2020.¹ From Plaintiff’s perspective [at
14 2-3], delaying the canvass won’t interfere with other statutory deadlines, because Plaintiff is only
15 seeking to delay the canvass by “one day” and the Secretary only needs “a couple of days at
16 most” to complete the statewide canvass after she receives the county canvass results. Not so. In
17 reality, Plaintiff is asking the Court to delay the county canvass for as long as it takes the county
18 to re-do its hand count audit “by precinct.”

19 Indeed, Plaintiff argues [at 2] that the county cannot complete the canvass until after it
20 completes the hand count, and questions [at 3] whether the county can complete a “correct

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22 ¹ Plaintiff’s only fact witness is its own counsel of record. [Decl. of L. Miller, attached to
23 Plaintiff’s Application] From an ethics perspective, Arizona courts disfavor attorneys serving as
24 both a witness and an advocate. *E.g., Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128
25 Ariz. 99, 103 (1981) (“Our belief is that an adversary system works best when the roles of the
26 judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of those roles
inevitably diminishes the effectiveness of the entire system.”). And ethical considerations aside,
the Court should give no weight to a self-serving declaration from Plaintiff’s counsel about the
hardships an injunction would impose on Defendants.

1 sampling” as requested by Plaintiff by “November 30th,” which is the Secretary’s deadline to
2 certify the statewide canvass. As detailed in the Secretary’s Motion to Dismiss [at 6], postponing
3 Maricopa County’s canvass while it conducts the near-impossible (if not impossible) task of
4 identifying ballots based on precincts to perform another hand count audit would have a
5 disastrous effect on Arizona’s final certification of the 2020 General Election results. This is a
6 hardship on the county, the Secretary, and all Arizona voters.

7 Allowing a litigant to postpone the county’s statutorily mandated canvass, simply by
8 filing a lawsuit, would upend the electoral process. The Secretary, like the counties, has a
9 mandatory duty to complete the statewide canvass after she receives canvasses from all fifteen
10 counties. A.R.S. § 16-648; *Campbell v. Hunt*, 18 Ariz. 442, 450 (1917). Given the strict deadlines
11 with which the Secretary and others must comply to certify the canvass and carry out other tasks
12 and the catastrophic cascade of effects that could follow from a late canvass, the balance of
13 hardships and public interest weigh heavily against an injunction. *See Ron Barber for Cong. v.*
14 *Bennett*, No. CV-14-02489-TUC-CKJ, 2014 WL 6694451, at *9 (D. Ariz. Nov. 27, 2014)
15 (finding that delaying the canvass would delay “state processes from occurring, which will delay
16 resolution of this election,” and thus the balance of hardships favored election officials and the
17 electorate).

18 At bottom, Plaintiff’s requested injunction would not only cause significant hardship and
19 administrative burdens for election officials, but it would also harm the public’s important
20 interest in finality and in effectuating the will of Arizona’s voters.

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1 **II. Conclusion.**

2 For all these reasons, the Secretary requests that the Court deny Plaintiff's request for a
3 preliminary injunction.

4 RESPECTFULLY SUBMITTED this 17th day of November, 2020.

5 **COPPERSMITH BROCKELMAN PLC**

6 By /s/ Roopali H. Desai

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8 D. Andrew Gaona

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11 **ORIGINAL** efiled and served via email
12 this 17th day of November, 2020, upon:

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6 /s/ Verna Colwell _____

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