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19 ARIZONA SUPERIOR COURT

20 MARICOPA COUNTY

21 Arizona Republic Party,
22
23 Plaintiff,
24
25 v.
26 Adrian Fontes, et al.
27
28 Defendants.

No. CV2020-014553

**RESPONSE IN OPPOSITION TO
ARIZONA REPUBLICAN PARTY'S
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Expedited Election Matter

(Assigned to the Hon. John Hannah)

21 Defendant-Intervenor the Arizona Democratic Party (“ADP”), by its undersigned
22 counsel, hereby responds in opposition to Plaintiff’s Motion for Preliminary Injunction (the
23 “Motion”). In its Motion, Plaintiff asks the Court to order Maricopa County (the “County”)
24 to re-do a hand count audit that it completed last week—even though the hand count audit
25 was conducted in full compliance with state law, with the participation of the Arizona
26 Republican Party, and found zero discrepancies from the machine tabulated recount.

27 Plaintiff’s motion should be denied because it does not satisfy any of the four factors
28 that would entitle it to preliminary relief. *First*, Plaintiff has not established likelihood of

1 success on the merits; its entire claim hinges on a misreading of state law. *Second*, it has
2 failed to even allege—much less prove—that it will experience any harm at all absent
3 injunctive relief, let alone irreparable harm. *Third* and *fourth*, the equities and the public
4 interest militate against an eleventh-hour order disrupting Arizona’s certification of
5 election results in the middle of the canvassing process.

6 Even setting aside those failures, the request for equitable relief is barred by the
7 doctrine of laches in light of Plaintiff’s undue and prejudicial delay in filing suit. The Court
8 should deny Plaintiff’s motion on this ground alone. For any and all of these reasons, relief
9 is not appropriate here.

10 **Legal Standard**

11 In considering a motion for a preliminary injunction the court evaluates whether the
12 movant has established “(1) a strong likelihood of success on the merits, (2) the possibility
13 of irreparable injury if the requested relief is not granted, (3) a balance of hardships
14 favoring that party, and (4) public policy favoring a grant of the injunction.” *Arizona Ass’n*
15 *of Providers for Persons with Disabilities v. State*, 219 P.3d 216, 222 (Ct. App. 2009). A
16 court applying this standard may apply a “sliding scale” in which “the moving party may
17 establish either (1) probable success on the merits and the possibility of irreparable injury;
18 or (2) the presence of serious questions and [that] ‘the balance of hardships tip[s] sharply’
19 in favor of the moving party.” *Id.* “A court should not wield its injunctive power to disrupt
20 the settled rights of others without first requiring from the applicant significant evidence
21 that he is on legally solid ground.” *P & P Mehta LLC v. Jones*, 123 P.3d 1142, 1144 (Ct.
22 App. 2005).

23 **Argument**

24 **I. Plaintiff cannot succeed on the merits.**

25 Although Plaintiff concedes that it must show at least “the presence of serious
26 questions,” to establish entitlement to relief, it offers little more other than ominous
27 assertions that “there will be lingering questions about the legitimacy of these results”
28 absent an injunction. Mot. at 3. But “whether there are ‘serious questions’” for the purposes

1 of injunctive relief “depends more on the strength of the legal claim than on the gravity of
2 the issue.” *Arizona Association*, P.3d at 222 (Ct. App. 2009). The relevant inquiry is
3 whether there are “serious questions *going to the merits*.” *Id.* (citing *Luckette v. Lewis*, 883
4 F. Supp. 471, 474 (D. Ariz. 1995)) (emphasis in original).

5 Plaintiff makes no attempt to establish likelihood of success on the merits, and it
6 plainly cannot. Plaintiff’s central claim is straightforward: that A.R.S. § 16-602(B) requires
7 the County to conduct a hand count audit of precincts rather than vote centers. Mot. at 3.
8 In Plaintiff’s telling, the County violated § 16-602(B) because it performed a hand count
9 audit on ballots from two percent of *vote centers*, when (in Plaintiff’s view) it should have
10 instead sampled ballots from two percent of *precinct locations*. Compl. ¶ 19. Accordingly,
11 Plaintiff reasons, this Court should issue a writ of mandamus compelling the County to re-
12 do its hand count audit, this time counting ballots from two percent of precinct locations.
13 *Id.* ¶ 21(B).¹

14 But A.R.S. § 16-602(B) requires no such thing. In order to show entitlement to
15 mandamus relief, Plaintiff must establish “that the respondent had a legal duty to do the
16 thing which the petitioner seeks to compel.” *Sines v. Holden*, 360 P.2d 218, 219 (1961).
17 And § 16-602(B) simply states that “[a]t least two percent of the precincts in [each] county,
18 or two precincts, whichever is greater, shall be selected at random from a pool consisting
19 of every precinct in that county.” The statute is thus silent on the procedures for counties,
20 like Maricopa, that use vote centers instead of precincts—except that it expressly directs
21 the Secretary of State to fill statutory gaps by promulgating the Election Procedures Manual
22 (“EPM”), which carries the force of law. *See* A.R.S. § 16-602(B) (hand count procedures
23 should be conducted “as prescribed by this section and in accordance with hand count
24

25 ¹ In a precinct-based election, voters can vote only at their assigned precinct location.
26 In a vote center election, voters can cast a ballot at any convenient voting location in their
27 county of registration. Because the County implemented a vote center model for the 2020
28 general election, it did not have precincts. *See* Elections Dep’t, Election Day & Emergency
Voting Plan—November General Election 3 (Sept. 16, 2020), available at
<https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Election%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf>.

1 procedures established by the secretary of state in the official instructions and procedures
2 manual”); *see also* A.R.S. § 16-452(C). The EPM fills that statutory gap. It explains that
3 “[i]n counties that utilize vote centers, each voter center is considered to be a
4 precinct/polling location and the officer in charge of elections must conduct a hand count
5 of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is
6 greater.”² That is precisely what Maricopa County did here. Ex. A.³

7 Even if Plaintiff’s statutory reading were correct, Plaintiff cannot explain how any
8 remedy could plausibly be implemented. Plaintiff’s preference is that the County disregard
9 the EPM and only hand audit ballots from precinct locations. Mot. at 3. But for the 2020
10 general election, the County *had zero precinct locations*. Plaintiff’s position thus means
11 that the County would audit ballots from two percent of zero precinct locations—in other
12 words, that it would not hand count audit *any* ballots in 2020. That absurd result confirms
13 that Plaintiff has not made the requisite showing on this essential factor.

14 Plaintiff asserts that this election should be conducted “by the book,” Mot. at 3, and
15 on that point ADP agrees. The books in question are the election code and the EPM, and
16 they clearly and unambiguously direct that Maricopa County conduct a hand count audit
17 of two percent of vote centers. The County did just that—and found no discrepancies.
18 Because Plaintiff has failed to show that the County violated any Arizona law, it cannot
19 succeed on the merits and is not entitled to mandamus or preliminary relief. *Arizona*
20 *Association*, 219 P.3d at 222.

21 **II. Plaintiff has not established that it will suffer irreparable harm.**

22 Even if it had demonstrated a likelihood of success on the merits, Plaintiff has not
23 met its burden to show that it will experience any injury at all, let alone “irreparable injury.”
24 *Shoen v. Shoen*, 804 P.2d 787, 792 (Ct. App. 1990). The Motion’s sole reference to the

26 ² State of Arizona, *2019 Elections Procedures Manual* (Dec. 2019) at 215,
27 [https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUA
L_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

28 ³ Exhibits referenced in this motion refer to those submitted by the County with its
Motion to Dismiss.

1 irreparable injury prong is in the recital of the legal standard; it presents no argument or
2 evidence that Plaintiff will be harmed if the Court fails to order the County to re-do their
3 hand count audit. That failure provides an independent ground to deny a preliminary
4 injunction.

5 Plaintiff's failure to even allege—let alone establish—redressable and cognizable
6 legal injury dooms not only its entitlement to preliminary relief, but also, as discussed in
7 ADP's Motion to Dismiss, its standing to bring these claims at all. *Sears v. Hull*, 192 Ariz.
8 65, 69, 961 P.2d 1013, 1016 (1998) (stating that standing requires “a distinct and palpable
9 injury” rather than an “allegation of generalized harm that is shared alike by all or a large
10 class of citizens”). Put simply, Plaintiff cannot explain how it will be injured if the County
11 does not re-do a process that did not alter a single vote. *See ThermoLife Int'l LLC v. Am.*
12 *Fitness Wholesalers LLC*, No. CV-18-04189-PHX-JAT, 2019 WL 3840988, at *4 (D. Ariz.
13 Aug. 15, 2019) (Plaintiff is “required to show that its alleged injury is not simply
14 ‘conjectural or hypothetical’”) (*quoting TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d
15 820, 826 (9th Cir. 2011)). The failure to establish this essential element independently
16 forecloses Plaintiff's claim for relief.

17 **III. The equities and public interest tip sharply against an injunction.**

18 Although Plaintiff concedes that it must show that “the balance of hardships tips
19 sharply” in its favor, it offers no evidence that it would experience any hardship whatsoever
20 if denied an injunction. Instead, it vaguely claims that both it and “the voting public” will
21 be harmed, because both will question “the legitimacy of this election and its results.” Mot.
22 at 3. But political actors cannot intentionally stir up unfounded fears of fraud, and then
23 point to that self-created fear as a reason to prevail in election-related litigation.

24 Further, Plaintiff offers no evidence for its cavalier assertions that an injunction
25 would afford “zero real hardship” to the County or Secretary of State, that the Secretary
26 could easily accommodate that inevitable delay through the “relatively simple task” of
27 belatedly compiling election results, and that an array of statutory deadlines can be moved
28 under liberal interpretations of A.R.S. § 16-642(C) and A.R.S. § 16-648(C) (which provide

1 for certification delays in the event of “missing” election results). Mot. at 2, 3.⁴ When
2 seeking the extraordinary remedy of preliminary relief, Plaintiff has an obligation to
3 provide more than speculation and unsupported assertions as to any of the factors necessary
4 to the granting of a preliminary injunction. *Shoen*, 804 P.2d at 792 (denying preliminary
5 relief where movant “failed to satisfy its burden as to any of the factors necessary to the
6 granting of a preliminary injunction,” including a showing of irreparable harm).

7 **IV. Other grounds for denying relief.**

8 Preliminary injunctive relief is additionally inappropriate here for several reasons.

9 First, Plaintiff has failed to support its request for relief with evidence. The Arizona
10 Rules of Civil Procedure require that an injunction or temporary restraining order may be
11 granted either upon a verified complaint or on affidavit. Plaintiff has provided neither.
12 Despite being on notice that its original Complaint was not properly verified, *see* County
13 Motion to Dismiss 7 n.3, the Amended Complaint still lacks verification by a party
14 representative. Further, neither the Amended Complaint nor the motion for injunctive relief
15 is accompanied by sworn declarations attesting to the truth of the relevant facts of the
16 dispute.⁵ This is not a nitpicky procedural defect; the reason that verified complaints or
17 affidavits are required is because a party seeking preliminary relief asks the court to
18 circumvent the typical litigation process and immediately issue orders that affect the rights
19 of the parties. *See Office of Cochise Cty. Attorney v. Morgan*, No. 2 CA-CV 2018-0093,
20 2019 WL 2474727, at *2 (Ariz. Ct. App. June 13, 2019) (“Preliminary injunctions are
21 disfavored because they affect the status quo pending a trial on the merits.”).

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23
24 ⁴ Plaintiff’s willingness to stretch or contract statutory text when doing so suits it
25 further undercuts its claims. While insisting on a rigid reading of § 16-602(B), Plaintiff
26 simultaneously insists that certification can be delayed under A.R.S. § 16-642(C)’s
27 “missing returns” exception because the language can be “broadly construed as
28 encompassing any situation in which the returns are not ready.” Mot. at 2. Plaintiff provides
no authority for this breezy assertion, and no explanation for why, in its view, some
provisions of Arizona’s election code should be construed leniently and others strictly.

⁵ The Motion attached one declaration, but it solely discusses past practices at the
Secretary of State’s office with respect to certifying declarations, and does not otherwise
attest to the facts alleged in the Complaint.

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Dated: November 17, 2020

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