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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Arizona Republican Party, Plaintiff, v. Adrian Fontes, as Maricopa County Recorder; and the Maricopa County Board of Supervisors, by and through Clint Hickman, Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, Defendants.	NO. CV2020-014553 **MARICOPA COUNTY DEFENDANTS' RESPONSE TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION** (Honorable John Hannah)

Plaintiff timely filed its Application for Injunctive Relief by 11:59 p.m. yesterday (November 16, 2020) (the "Application"). The County Defendants file this Response **opposing** Plaintiff's Application.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff failed to make its case for injunctive relief. Under *any* standard recognized by Arizona courts for issuing injunctive relief, Plaintiff's Application for Prelimanary Injunction (the "Application") fails. As explained below, Plaintiff has not suggested in its Application, let alone argued, that it is likely to succeed on the merits or will suffer irreparable injury in the absence of an injunction. For good reason: Plaintiff has no possibility of prevailing on the merits, and it is the County, not Plaintiff, that stands to suffer irreparable injury. Plaintiff claims that the balance of hardships tips in its favor, but never explains how that is so—and, as explained below, the hardships do not tip Plaintiff's way, but fall heavily on the County. Plaintiff asserts that the public interest favors granting an injunction, but cites no case law for that proposition. Once again, for good reason: the case law repeatedly states that it is in the public interest to have finality with regard to elections. Plaintiff thus has no hope to obtain an injunction under the four-factor test expounded by the Supreme Court, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21-22 (2008), and used by most state courts as well.

Even under Arizona's alternate "sliding scale" standard, which its courts use in addition to the four-factor test, Plaintiff cannot obtain preliminary injunctive relief. It has asserted that there are "serious questions" that need to be answered, but identified only one in its Application—and, the County Defendants answer it below. And, as already stated (and explained below), Plaintiff's claim that the balance of hardships favors it is incorrect.

Because Plaintiff fails to satisfy any recognized standard for injunctive relief, no injunction should issue.

STANDARD OF REVIEW

Traditionally, to obtain a preliminary injunction a movant must show: likely success on the merits; irreparable injury in the absence of the injunction; that the balance of hardships tips in their favor; and that the public interest favors granting the injunction.

Shoen v. Shoen, 167 Ariz. 58, 63 (App. 1990). Arizona courts have adopted the Ninth Circuit's "sliding scale" standard, allowing injunctions to issue without all the traditional factors, when the movant either shows "probable" success on the merits and the "possibility" of irreparable injury, or shows that their lawsuit raises serious questions concerning public policy and that the balance of hardships tips sharply in her favor. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, ¶ 10 (2006).

ARGUMENT

I. Injunctive Relief is Not Available for Mandamus Actions.

With their proposed Amended Complaint, Plaintiff improperly seeks injunctive relief in a special action for mandamus relief. (Amend. Cmplt., ¶20.) Injunctive relief is not available in a special action. *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 12 (1998) ("[T]he Sears actually seek injunctive relief, which is not available through an action for mandamus or any other form of special action." (Citing Rule 1, Ariz. R.P. Spec. Acts.)). As a result, amendment is futile, and this Court should reject it. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 471, ¶ 40 (App. 2007). Injunctive relief *cannot* issue.

II. Plaintiff Cannot Succeed on the Merits.

Significantly, Plaintiff has not asserted in the Application that it has *any chance at all* of winning on the merits. That is telling, and is really all this Court needs to know about this case. Plaintiff has not, and cannot, articulate a single argument that it is likely to succeed on the merits. The fact of the matter is that Plaintiff has ***no*** possibility of success on the merits. This Court should deny Plaintiff's Application and dismiss its complaint with prejudice.

A. The County Defendants complied with the law.

The 2019 Elections Procedures Manual states: "In counties that utilize vote centers, each vote center is considered to be a precinct/polling location and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is greater." EPM (2019) at 215. Pursuant to statute, the Elections Procedures Manual has the force of law. A.R.S. § 16-452(C). Anyone who

violates its regulations is guilty of a class 2 misdemeanor. *Id*.

As argued in the County Defendants' Motion to Dismiss, the undisputed record shows that the County followed this process promulgated in the Elections Procedures Manual.

Plaintiff's claim ostensibly relies on A.R.S. § 16-602(B). But that statute simply refers elections officials who implement voting centers to the Elections Procedures Manual:

> For each countywide . . . general . . . election, the county officer in charge of the election shall conduct a hand count at one or more secure facilities. The hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452.

A.R.S. § 16-602(B) (emphasis added). The purpose of the hand count audit is to confirm that the tabulation machines in randomly-selected polling locations operated properly. Auditing votes by precincts would make no sense when (1) there were no precinct-based polling locations utilized, and (2) any voter, no matter where they reside, can vote at any vote center. The County Defendants conducted their hand count audit *exactly* as prescribed by law. As a matter of statutory interpretation, Plaintiff fails to state a claim for which relief can be granted.

B. Laches bars Plaintiff's claims.

The Elections Procedures Manual has commanded counties using vote centers to conduct a hand count audit of ballots cast at *vote centers* since at least 2012. (County Defendants' Motion to Dismiss at 8-9.) So, Plaintiff knew or should have known that the County would conduct a hand count audit of ballots cast at vote centers, as the law requires, since Maricopa County announced on September 16, 2020, that it would use vote centers. *See* "Election Day & Emergency Voting Plan, November General Election" (September 16, 2020) at 5 (and *passim*), *available at* https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Electio

n%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf.[1] Yet, Plaintiff did not file its lawsuit then. But there is more: a member of Plaintiff **actually participated** in the selection of the vote centers that had their ballots audited—the very practice that Plaintiff now challenges. That selection took place on November 4, 2020—a full eight days before Plaintiff filed its lawsuit. Yet, Plaintiff *still* did not file its lawsuit. No, Plaintiff waited until November 12, 2020, to file its lawsuit. Laches bars Plaintiff's claims.

"Over the last 25 years, the Arizona Supreme Court has repeatedly cautioned that litigants should bring election challenges in a timely manner or have their requests for relief denied on the basis of laches." *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922 (D. Ariz. 2016) (colleting cases). "In election matters, time is of the essence" because disputes "must be initiated and resolved" without interfering with important election deadlines. *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998). "The real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance," and "[t]he effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge 'places the court in a position of having to steamroll through the delicate legal issues in order to meet the [applicable] deadline[s].'" *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000) (citation omitted). Late filings "deprive judges of the ability to fairly and reasonably process and consider the issues . . . and rush appellate review, leaving little time for reflection and wise decision making." *Id.* (citation omitted).

In non-election litigation, a few days might not seem like much. But in election-related litigation, with imminent election-related deadlines, a few days matter immensely. So, Arizona courts dismiss election-related challenges when plaintiffs wait too long to file them. For example, the Arizona Supreme Court affirmed dismissal of an election-related challenge when the plaintiff timely filed his complaint on the final day of the statutory filing deadline. *Harris*, 193 Ariz. at 413, ¶ 18. The court ruled that, by waiting to file until

[1] The date of publication is provided at the bottom of page 3 of the document.

the final day allowed by statute, plaintiff "failed to exercise diligence in preparing and advancing his case." *Id*. The court recognized that the plaintiff could have filed earlier, and should have—because it was election-related litigation. *Id*.

Here, Plaintiff could have brought its lawsuit as early as 2012, when the procedure it challenges was adopted by the Elections Procedures Manual. (County Defendants' Motion to Dismiss at 8-9.) Instead, Plaintiff waited until the eve of the canvass to bring its lawsuit, and now seeks an injunction to stop the canvass so its lawsuit can proceed. That is the type of interference with election-related deadlines that the doctrine of laches was designed to prevent.

Laches bars Plaintiff's claim. This Court should not just deny the Application for injunctive relief. This Court should dismiss Plaintiff's lawsuit.

C. Additional Reasons Plaintiff Has No Possibility of Success on the Merits.

In addition to laches, there are any number of reasons that Plaintiff has no possibility of success on the merits.

First, Plaintiff seeks mandamus relief, but that relief is not available here. The County Defendants complied with their duties under the law, so mandamus—which is an order to government officials to comply with their legal duties—cannot be granted. In fact, were the Court to grant mandamus as Plaintiff has requested, the Court would order the County Defendants to *violate* the law, not comply with it. (*See* County Defendants' Motion to Dismiss, at 6-9).[2]

Second, Plaintiff has not sought to enjoin the Elections Procedures Manual. Without an injunction of the Elections Procedures Manual, the County Defendants are obligated to follow it, and Plaintiff cannot prevail. *See Ariz. Pub. Integrity All. v. Fontes*, --- Ariz. ---, 2020 WL 6495694, at *3, ¶ 16 (Ariz. Nov. 5, 2020) (noting the Elections Procedures Manual "has the force of law").

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[2] Plaintiff amended its Complaint on November 16, 2020. Substantively, the Amended Complaint remains the same as the original. The Amended Complaint is due to be dismissed for the reasons articulated in County Defendants' Motion to Dismiss.

Finally—and, perhaps most importantly—in the Application, Plaintiff reduces its lawsuit to a single question, stating: "The question is simply whether there is a remedy that the Court can grant at this time, i.e. can the correct sampling be done, and can it be done before November 30th." The question begins from the wrong premise: as already explained, the "correct sampling" *was already* done. But regardless, the answer about whether there is time to do the "sampling" Plaintiff wants is a resounding, unequivocal, ***no***. As Co-Director of Elections Scott Jarrett testifies in his Declaration,[3] attached as Exhibit A, it would likely take his staff fourteen days just to set up the necessary procedures, and sort the ballots by precinct. (Ex. A, "Jarrett Decl.," ¶ 20.) Then, the new—and, *unlawful*—hand count audit would have to be conducted, requiring more time. (*Id*. ¶ 21.) As Mr. Jarrett testifies, "It would not be possible to do that [i.e., the relief Plaintiff seeks] within that timeframe [i.e., by November 30, 2020] with our current staffing." (*Id*. ¶ 9.) Because it would not be possible for the County to do what Plaintiff wants, its lawsuit should be dismissed.

III. Plaintiff Will Not Suffer Irreparable Injury—But, the County Will If an Injunction Issues.

Plaintiff does not argue that it will suffer irreparable injury in the absence of an injunction. That, too, is telling. If Plaintiff would suffer some injury in the absence of an injunction—*any injury at all*—Plaintiff would alert the Court to it when seeking an injunction. Yet, Plaintiff mentions no injury in the Application.

The County Defendants, however, will be irreparably harmed if the Court issues an injunction. The law commands that the County *must* canvass the election by November 23, 2020. A.R.S. § 16-642(A). That deadline can only lawfully be postponed if "the returns from any polling place in the election district where the polls were opened and an

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[3] In its Application, at page 2, and in its Response to the Defendant/Intervenors' Motion to Dismiss, at page 1-2, Plaintiff takes issue with the fact that the County Defendants have not yet responded to its interrogatories, *propounded yesterday*. Despite the fact that no discovery responses can possibly be required yet under the Rules, the responses are in Mr. Jarrett's Declaration.

election held are found to be missing[,]" *id*. 16-642(C), which is not the case here. Plaintiff suggests that this statute should be "broadly construed" to encompass other situations, Application at 2, and also claims the statutory deadline is "non-final," *id*. at 1. Nonsense. The law is clear; the deadline is final; and postponement is not available to accommodate a Plaintiff who needlessly delayed bringing its unmeritorious lawsuit, and now seeks to upend Maricopa County's election with an equally-unmeritorious application for injunctive relief. Allowing Plaintiff to upend the County's election, by granting the Application, will irreparably harm the County by ordering the County to act contrary to law—all because Plaintiff wants the County to conduct a different hand count audit than the one the law requires.[4]

Plaintiff failed to plead likelihood of success on the merits and irreparable harm; therefore, under the traditional preliminary injunction standard, their motion is legally inadequate and must be denied.

IV. The Balance of Hardships Favors the County, *not* Plaintiff.

Plaintiff asserts that the balance of hardships tips in its favor, Application at 2, but never explains *how*. To be clear: Plaintiff does not articulate a single hardship that will tip in its favor. It simply says, incorrectly, that the County Defendants will not suffer hardship. That does not demonstrate tipping hardship toward Plaintiff. It demonstrates rather a telling lack of hardship to Plaintiff. Because Plaintiff seeks an injunction under the "serious questions / balance of hardships" prong of the sliding scale, its failure to articulate a single hardship is fatal to the Application.

Make no mistake: the balance of hardships tips decidedly toward the County. As already discussed, an injunction against the canvass will cause the County to violate its duty under the law.

But further, the relief Plaintiff requests in its Amended Complaint would create an

[4] The County Defendants' hand count audit, conducted as the law requires, revealed "no discrepancies." (County Defendants' Mot. to Dismiss, Exhibit A, "Hand Count / Audit Report," at 1.) In other words, the hand count audit revealed that the tabulation machines tabulated the ballots 100% correctly.

unjustified hardship to the County. The County has already conducted the hand count audit of ballots that is required by statute and the Elections Procedures Manual. Plaintiff nonetheless wants the County to conduct a second hand-count audit, *not authorized by any law,* of the ballots that *would* have been cast at randomly-selected precincts—*if* the County had used precincts, which it didn't. Anyway, here is some of the harm that the County would suffer if the requested recount were ordered.

First, it would cause the County to break the law, because the requested recount is not lawful. The statute provides for when additional hand count audits should occur, after the first has been conducted. A.R.S. § 16-602(C) - (E). "When one of the political parties would like a different method" is not listed.

Second, there are practical problems. The 167,788 ballots cast in vote centers are currently stored in bags associated with the vote center in which they were cast. (Jarrett Decl., ¶ 6.) The ballots contain a mark indicating which precinct the voter who cast it resides in. (*Id*. ¶ 12.) But that mark cannot be read by the tabulation machines: it must be discerned by the human eye. (*Id*.) To sort the ballots by the 748 precincts in Maricopa County, all 167,788 ballots would have to be examined by the Elections Department staff. (*Id*. ¶¶ 13, 18.) Plaintiff repeatedly advances the incorrect claim that the County could conduct its requested, unlawful recount in "one day and a half." (*See, e.g.*, Plaintiff's Response to Defendant/Intervenors' Motion to Dismiss, filed November 17, 2020, at 1.) But that claim is not correct. Here is the reality: Co-Elections Director Scott Jarrett reasonably estimates that it would take his full staff fourteen days to set up the procedures and process, conduct the necessary training, and then sort those ballots—each of which have to be examined by one of his staff members to determine into which precinct stack it belonged. (*Id*. ¶¶ 10, 17-20.) And, that does not include the time it would take to conduct the hand count audit. (*Id*.) During that two-week period, nothing else would get done in the Elections Department. (*Id*. ¶ 21.)

Third, the recount would create election-integrity problems. Plaintiff's proposed recount would risk damaging, or even losing, ballots, which by law must be preserved for

two years in case an audit of the vote centers is ever *actually* needed (as opposed to someone merely wanting one). (*Id*. ¶¶ 7, 16.) There would be no way to link the ballots back to the vote centers at which they were cast, which would render any needed, future audit impossible. (*Id*. ¶¶ 14-15.)

The balance of hardships tips toward the County. No injunction should issue.

V. The Public Interest Favors Denying the Injunction.

The County, and its electorate, deserve finality to the 2020 General Election. The Arizona Supreme Court has recognized that there is a "strong public policy favoring stability and finality of election results." *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 95 (1978); *see also Jennings v. Woods*, 194 Ariz. 314, ¶ 84 (1999) (noting courts reluctant to disturb an election already held).

VI. There is No "Serious Question" Here.

Plaintiffs assert that the Court should grant an injunction because "there are serious questions[.]" (Application at 2.) That *is* one of the prongs of the "sliding scale," but the movant must also show that the balance of hardships tips in its favor, which Plaintiff cannot show. Plaintiff also does not show "serious questions" in its Application. It never lists a single one. It just claims there are some. Unless, maybe, the "serious questions" is "[t]he question" identified on page 3 of the Application, about whether the remedy Plaintiff wants can happen before November 30th. If that is the serious question, it has been answered: it cannot happen. (Jarrett Decl. ¶¶ 8-9.) Regardless, the County Defendants cannot tell what "serious questions" are present here. Judging by the Application, neither can Plaintiff.

Plaintiffs have failed to identify a "serious question," and regardless, the public interest strongly favors denying the injunction. Therefore, even under the more lenient "sliding scale" standard their motion is legally inadequate and must be denied.

CONCLUSION

For the foregoing reasons, this Court should (1) deny Plaintiff's Application as moot, and (2) dismiss Plaintiff's complaint with prejudice.

RESPECTFULLY submitted this 17th day of November 2020.

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