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SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF MARICOPA

LAURIE AGUILERA, a registered voter in Maricopa County, Arizona; DONOVAN DROBINA, a registered voter in Maricopa County, Arizona;

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Maricopa County Recorder; CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES AND STEVE GALLARDO, in their official capacities as members of the Maricopa County Board of Supervisors; MARICOPA COUNTY, a political subdivision of the State of Arizona;

Defendants.

Case No. CV2020-014562

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Come now Plaintiffs, Laurie Aguilera and Donovan Drobina, and submit their response to County Defendants' Motion to Dismiss.

I. Laches Does Not Apply Because There Was No Unreasonable Delay and No Prejudice to Defendants.

Despite the procedural history known to Defendants, Defendants take the position that Plaintiffs took too long to bring their case such that the doctrine of laches should apply to bar them from bringing their claims. This argument is wholly unsupported by both the law and the facts of this case.

First, Plaintiffs filed this action ten days[1] after the election and while the canvassing of votes was still ongoing. The Arizona Supreme Court has held that such a short period does not qualify as a delay. *Leach v. Reagan*, 245 Ariz. 430, 451 (2018) (ten days "does not constitute delay, much less unreasonable delay"). Nor can filing ten days after the incident be considered "dilatory conduct," which is what the defensive doctrine is designed to discourage. *Harris v. Purcell*, 193 Ariz. 409, 410, n. 2 (1998). Indeed, Arizona courts have held that special actions brought up to *two months* after the incident were not subject to a laches defense. *State ex rel. Arizona Dept. of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 343 (App. 1985) ("a special action brought within two months seemed on its face to make the invocation of the doctrine of laches inappropriate"). The idea that ten days is a delay has no basis in the law.

Even if the Court should find that there was a delay attributable to Plaintiffs, the delay has to be "unreasonable" in relation to the problems Plaintiffs' claims attempt to address. "When evaluating a laches defense, a court should evaluate not only the length of the delay, but also the magnitude of the problem at issue." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 560, ¶ 13 (2009). The definition of "reasonable" delay "recognizes that plaintiffs are 'entitled to take time for an investigation,' and 'protests, complaints and negotiations looking toward a settlement of the controversy, go far to explain the reasonableness of the delay.'"*McComb v. Superior Court In & For County of*

[1] And attempted to intervene earlier to bring similar claims in *Trump v. Hobbs*, but were denied intervention when Defendants Maricopa County and Fontes objected.

Maricopa, 189 Ariz. 518, 525 (App. 1997) (quoting Restatement (Second) of Torts § 939 cmt. b (1977)) (action after election not barred by laches); *cf. Mathieu v. Mahoney*, 174 Ariz. 456, 459, (1993) (challenge may be held "to be timely when brought more than a month and a half before absentee voting began").[2]

But even if the Court should find that ten days was an unreasonable delay, Defendants would still be required to establish that they suffered "actual prejudice" by the delay. As the Arizona Supreme Court noted, "even if there is a finding of unreasonable delay, that is not enough—the challenging party must also establish that the delay resulted in actual prejudice to the adverse parties." *Harris v. Purcell*, 193 Ariz. 409, 412, 973 P.2d 1166, 1169 (1998). Here, Defendants have not established how they have been prejudiced by Plaintiffs, nor can they under these facts. Particularly, Defendants have not made the required demonstration that, on the facts as pled, they are unable to provide the requested relief if the Court awards it. *Ariz. Pub. Integrity All. v. Fontes*, No. CV-20-0253-AP/EL, 2020 Ariz. LEXIS 309, at *16 (Nov. 5, 2020) ("Because the County was able to meet the deadlines for early ballots, it suffered no prejudice. And more importantly, Plaintiffs' delay does not excuse the County from its duty to comply with the law.").

For these reasons, Defendants' laches argument fails and should be rejected.

II. Plaintiffs Have Standing as Voters Who Are Alleging Vote Denial and Interference with their Right to Vote.

To establish standing, a party must first establish "a causal nexus between the defendant's conduct and [their] injury." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607 (Ariz. 2020) (internal citations omitted). "This requirement is a low bar and easily shown if there is a direct relationship between the plaintiff and the defendant with respect to the conduct at issue." *Id.* (citations omitted). Further, where Plaintiffs are voters whose right to vote has been denied or their lawfully cast votes have

[2] In considering the reasonableness of any delay, this court should also consider that, as further discussed in the notice of non-opposition, in between the time of the filing of Aguilera I and this case, Plaintiffs have managed to rid themselves of at least one unwieldly intervenor and condense and refine both the parties and relief sought considerably.

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not been counted, they have standing to bring their claims. *See Mecinas v. Hobbs*, No. CV-19-05547-PHX-DJH, 2020 U.S. Dist. LEXIS 111841, at *20 (D. Ariz. June 25, 2020).

In this case, Plaintiff Aguilera's claim that she was denied the right to vote by being refused the opportunity to cure her ballot is a "distinct and palpable" injury that is directly connected to the actions of Defendants. Defendants are tasked with ensuring that every eligible voter is allowed to exercise his or her right to vote without interference. Because Plaintiff Aguilera was directly disenfranchised by Defendants through the voting system and procedures they managed, she has standing to bring her claims in this Court.

Plaintiff Drobina claims that his ballot was physically rejected multiple times by Defendants' choice of vote tabulating equipment, rendering his properly marked ballot unreadable by the automated machine and causing it to be improperly subjected to an inferior manual adjudication process. Plaintiff Drobina's claim stems directly from the decisions made by Defendants to lease tabulators that were not able to process his ballot although he marked it as instructed. Plaintiffs, as Arizona citizens and voters, have a beneficial interest in whether their ballots were correctly and automatically counted as state law requires, and thus have standing to bring claims that allege their rights were violated. See *Ariz. Pub. Integrity All. v. Fontes*, No. CV-20-0253-AP/EL, 2020 Ariz. LEXIS 309, at *6-7 (Nov. 5, 2020).[3] Independently, every voter has standing to bring claims that public officials have violated Arizona election law. *Id.*

Because alleging a palpable injury is not required for voters to bring an action to enforce Arizona election law, and because, even if required, each plaintiff has alleged a

[3] Defendants attempt to distinguish this case from *Ariz. Pub. Integrity All. v. Fontes* by claiming this case is not a mandamus action. However, just as in this case, Plaintiffs in *Ariz. Pub. Integrity All. v. Fontes* sought mixed declaratory and injunctive relief for violations of Arizona election law. Just as in this case, Defendants alleged that that *Ariz. Pub. Integrity All. v. Fontes* was not a mandamus action. The Supreme Court of Arizona found otherwise. *See also Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607 (Ariz. 2020) ("one purpose of a mandamus action is to determine the extent of a state official's legal duties."), *Hess v. Purcell*, 229 Ariz. 250, 255 n.4, (App. 2012) (mandamus broadly construed).

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palpable injury that is connected to the actions of Defendants, they have standing to bring their claims. Defendant's argument on this point fails twice over.

III. Plaintiffs Properly Stated Violations of the Arizona Constitution.

Despite clear language in Plaintiffs' Complaint that tracks the constitutional provisions at issue, Defendants argue that Plaintiffs failed to state a cognizable constitutional claim. This argument also fails.

First, Plaintiffs expressly alleged violations of Article II, § 21 of the state constitution in their Third Cause of Action by alleging that Defendants interfered with and prevented Plaintiff Aguilera's right of suffrage in that she was forced to use a voting system in which her ballot was rendered unreadable and was then denied the ability to cure her ballot. See Complaint, ¶¶ 4.22-4.30. The Arizona constitution prohibits exactly this: "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." A.R.S. Const. Art. II, § 21. Plaintiff need not waste the Court's time in explaining her straightforward claim. Plaintiff Drobina's claim, meanwhile is that, while he was able to cast a ballot, defendants did not count his ballot according to the procedures demanded by law. *See Chavez v. Brewer*, 222 Ariz. 309, 320, 214 P.3d 397, 408 (App. 2009) (Article II, § 21 right is "implicated when votes are not **properly** counted.") (emphasis supplied). Namely, Plaintiff Drobina claims that his ballot was not automatically tabulated with perfect accuracy as the law requires. Thus, though his ballot may or may not have been counted, it was not properly counted.

Plaintiffs' Fourth Cause of Action was also equally clear in alleging that Plaintiffs' rights under Article II § 13 were also violated. There, Plaintiffs allege that neither of them were treated equally as compared with other voters who were either allowed to cure their ballot and have it counted, or those whose properly marked ballots were instantly read with accuracy by the tabulating machines. The fact that some voters did the exact same thing as Plaintiffs yet had their ballots instantly accepted is evidence of the failure of Defendants to ensure that *all* voters are treated *equally and fairly* in the exercise of their right to vote. Contrary to Defendants' imaginative description of Plaintiffs' allegations, Plaintiffs did

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not allege "absurdly molecular level" differences. Rather, accepting Plaintiffs' pleading at face value as this Court must do, these differences were significant to affect whether and how Plaintiffs' votes were tabulated. Defendants' attempts to portray Plaintiffs as being unhinged from reality is offensive and should be disregarded as mere attempts to distract from the seriousness of the allegations. Not surprising is the absence of any legal support for their argument.

Second, Defendants' assertion that Plaintiffs are simply "repackaging" statutory claims is simply incorrect and likewise lacks a single citation to support it. If it were true, Defendants would undoubtedly list out all of the statutes they claim are being repackaged. But instead of citing a single one, Defendants shift attention away from this glaring omission and attempt to direct the Court to a body of federal jurisprudence, which actually supports their argument even less.

Indeed, the federal jurisprudence they cite, all of which stems from *Burdick v. Takushi*, 504 U.S. 428 (1992), has absolutely nothing to do with this case. The *Burdick* line of cases serve only to guide analysis concerning the point at which a governmental *restriction* surrounding the exercise of voting actually becomes a *burden* on the right to vote. Its progeny includes cases that document the evolution of the current balancing test, called the *Anderson-Burdick* balancing test, which has nothing to do with this case. *See Anderson v. Celebrezze*, 460 U. S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); *Burdick v. Takushi*, 504 U. S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

The body of law surrounding *Burdick v. Takushi*, 504 U.S. 428 (1992) and its progeny, are irrelevant because there is no burden analysis required in this case. The test is premised on the existence of a government-imposed restriction on the right to vote and then weighs various factors that could potentially justify the restriction. Unless Defendants are admitting that they restricted Plaintiffs' access to the franchise, their entire argument on federal jurisprudence is irrelevant and should be rejected out of hand.

Defendants also allege that Defendant Aguilera seeks as a remedy for the violation of her constitutional rights, the ability to vote, contrary to law, after election day. To the

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contrary, on the facts as pled, Defendant Aguilera voted on election day and her vote was not counted.

Finally, Defendants' string of citations regarding what federal courts may or may not do to address violations of state election law is inapposite, this is a state court case.

IV. Defendants' Motion To Dismiss Does Not Address Plaintiffs' Sixth Cause of Action

Defendants provide no reason why Plaintiffs' Sixth Cause of Action, for violation of the EPM's provisions regarding public observation of the electronic adjudication process should be dismissed. Nor could they, the law is clear in requiring that the public be permitted to observe the electronic adjudication process in-person.

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted this 17th day of November, 2020.

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I CERTIFY that a copy of this document will be served upon any opposing parties in conformity with the applicable rule of procedure.

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