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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leslie Feldman, et al.,

Plaintiffs,

v.

Arizona Secretary of State's Office, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

In their Response to Intervenor-Defendants' Motion to Dismiss ("ARP Motion" or "Motion"), Plaintiffs continue to posit a misunderstanding of Arizona election law and the independent, multi-layered approach to election administration in this State. Plaintiffs' attempt to minimize the scope of their Second Amended Complaint ("Complaint") is a thinly veiled effort to keep from this Court the necessary perspectives and presences of the officials that actually carry out elections in Arizona. It would yield only defective relief and should be rejected. Plaintiffs ignore fundamental procedural and jurisdictional grounds in their own allegations in bringing their Complaint, in addition to failing to state any proper claim for which relief can be granted. Plaintiffs' attempts at revisionist history not only in regard to the evolution of election law in Arizona law—but also in regard to these proceedings—should be rejected.

I. The Counties are the Proper Parties for Out-Of-Precinct Voting Claims.

A. Plaintiffs Lack Standing.

The Parties actually do not dispute the law in regard to the traceability and redressability required for standing. Under this requirement, the official that is responsible for implementing or enforcing a challenged law is the correct party. *North Carolina Right to Life Political Action Comm. v. Leake*, 872 F. Supp. 2d 466, 475 (E.D.N.C. 2012) (dismissing North Carolina Attorney General in election suit); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008) (proper party needs "authority to control" the local jurisdictions carrying out elections). But, in bringing their Complaint, Plaintiffs have simply chosen to not include those officials, who are the individual county election officers. Plaintiffs' misunderstanding of Arizona's multi-layered jurisdictional approach simply ignores a foundational element of United States' election law: local jurisdictions are best suited to coordinate local election activities. *See Public Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1021 (9th Cir. 2016) (recognizing the various benefits of allowing local jurisdictions to select diverse methods of administering elections).

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In their Response, Plaintiffs do not even attempt to address the established and well-defined Arizona statutes empowering counties with appropriate jurisdiction[1] to (1) choose between precincts or centralized voting methods and (2) determine how and when to count ballots. *See* A.R.S. §§ 16-411, 16-531; 16-584(E), 16-601; *Arizona Election Procedures Manual*, at 182 (Rev. 2014) ("*Manual*"). These are clear demarcations of responsibility. Any belief that local elected officials will automatically or "substantially likely" fall in line when a State official dictates matters outside their legal purview is one held by those who fail to understand Arizona history—both past and present.

Plaintiffs also cherry-pick and misinterpret other legal authorities about the administration of Arizona elections. First, Plaintiffs cite A.R.S. § 16-142, which is inapposite to this matter because it discusses responsibility to "coordinate" the "national voter registration act of 1993 (P.L. 103-31; 107 Stat. 77; 42 United States Code section 394) and under the uniformed and overseas citizens absentee voting act." Despite the fact that these federal laws are not at issue here,[2] the statute only references "coordination," not enforcement or authoritative direction.

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[1] Instead of concentrating on the separation of powers between local and state election officials, Plaintiffs allege that if their requested relief is granted, then "inequality in Arizona's system would be substantially reduced." (Response, Doc. 255, at 4.) This circular argument is irrelevant to the fact that Plaintiffs have failed to bring action against the correct parties actually entrusted with administering the system and the policies and procedures within it that Plaintiffs challenge. In addition, the argument completely ignores the balance of interests related to an orderly administration of elections and the need for voters to vote in the correct polling location to ensure they are able to vote in all candidate races, bond measures, and other purely local matters.

[2] Plaintiffs also cite *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *1 (D. Ariz. Nov. 3, 2016) for this same proposition about authority over voter "registration." The challenge in that case turned on advice from the Secretary of State to county election officials concerning the correct cutoff date for voter registration form acceptance. Such registration guidance is clearly within the Secretary's coordination responsibility under A.R.S. § 16-142. Second, some counties, specifically Mohave County, ignored the Secretary of State's guidance and accepted voter registration after the date recommended by the Secretary. *See* Brandon Messick, *Today's News-Herald*, "Lawsuit possible over Mohave County voter registration deadline" (Oct. 24,

Second, Plaintiffs cite A.R.S. § 16-1021, which is the *discretionary* enforcement provision that clearly divides the responsibilities of the Attorney General and the county attorneys between statewide and local elections. This statute actually supports the fact that Plaintiffs do not have standing because the Attorney General has no enforcement authority over those local elections. *See id.* To ensure that a county attorney complied with any requested relief, joinder of the county attorneys would be necessary. As with the county election officials and boards of supervisors, full relief cannot be had without their participation as parties.

Third, Plaintiffs cite to the *Manual* for the Defendants' Arizona Secretary of State and Attorney General authority over the counties. Although it is undisputed that the *Manual* has the force of law, this force is solely relegated to consistency in "procedure," not compliance with laws or somehow overriding election discretionary decisions that are in the sole purview of the county officials. *See* A.R.S. § 16-1021(A). In addition, Plaintiffs conveniently ignore that Defendants must (1) draft the *Manual* in consultation with the counties and (2) include the Governor's review as another required approval. A.R.S. § 16-1021(A), (B). Of note, Plaintiffs do not take issue with the language contained in the *Manual* in their requested relief. And, as noted in the Motion, Plaintiffs continue to fail to plead a single instance where the Defendants have directed a county to carry out an action resulting in Plaintiffs' alleged injuries. Simply, the totality of Arizona law makes it clear that the Secretary of State is a coordinator and the county election officials, upon authority

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2016), at http://www.havasunews.com/news/lawsuit-possible-over-mohave-county-voter-registration-deadline/article_bf1f4aec-9a7b-11e6-978f-bf4769ebe647.html.

More recently, reports have surfaced of other Secretary of State "direction," also reportedly ignored by county officials. Evan Wyloge, Arizona Center for Investigative Reporting, "County recorders call relationship with Secretary of State 'dire'" (January 25, 2017), at http://azcapitoltimes.com/news/2017/01/25/county-recorders-call-relationship-with-secretary-of-state-dire. This non-compliance is the root of the concerns of the Motion and evinces the necessity of the counties to be parties here. Third, Plaintiffs' Counsel's own declaration includes an exhibit referencing an email from Arizona's State Elections Director that clearly references the discretion held by the county election officials in administering elections. (*See* Doc. 256-1.)

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from the boards of supervisors, are responsible for implementing and/or enforcing laws related to OOP voting.

B. The Counties Are Necessary Parties.

The Parties also do not dispute the legal standard associated with application of Rule 19 and 12(b)(7), Fed. R. Civ. P., which require dismissal or amendment of any action if missing parties are "necessary" because complete relief cannot be accorded in their absence or their interest may be impaired or impeded. (*See* Response, Doc. 255, at 1-2.) In their Response, in addition to ignoring clear statutory authority on election administration and the sole responsibility delegated to counties under Arizona law, Plaintiffs fail to provide any explanation as to *why* they chose not to include the counties in this matter. It is clear that Plaintiffs believe that the counties have the majority of the relevant records based on their extensive discovery requests to the counties. (Docs. 203, 233, 234; *see also* Motion (Doc. 244), at Ex. 1.)

Plaintiffs' strategic efforts to sideline the true election administrators are simply inappropriate. *Cf. Ash Grove, Texas, L.P. v. City of Dallas*, 3:08-cv-2114-O, 2009 WL 3270821, at *15 (N.D. Tex. Oct. 9, 2009) (dismissing claim for relief requiring nullification of contracts held by absent third parties under Rule 12(b)(7)). As Defendants are not charged with implementing or primarily enforcing the OOP laws at issue, they cannot be presumed to adequately represent the counties' interests in this matter. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (non-parties must be adequately represented by named parties to overcome Rule 19 challenge). Plaintiffs have been on notice since the beginning of this case of the necessity of the counties in this matter. The constant refusal to include them requires dismissal of Plaintiffs' OOP claims.

II. <u>Plaintiffs New Fifteenth Amendment Claim Is Barred By Laches.</u>

Due to the rather unique procedural postures of these proceedings at every level, Plaintiffs have had more than ample time to meet and confer with the other parties or bring to the attention of the Court that they intended to raise a new 15th Amendment claim. There are two parts to Plaintiffs' delay. First, Plaintiffs' dilatory conduct and

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attempt to sneak in a new claim without first seeking permission from this Court should not be rewarded. Second, Plaintiffs' illogical link regarding allegations and claims related to S.B. 1412 in **2011** to H.B. 2023's passage in **2016** is the underpinning of the rationale for the doctrine of laches, which the Parties agree requires (1) unreasonable delay and (2) prejudice.

Unreasonable delay is clearly reflected in Plaintiffs' Complaint, which interestingly does not rely on factual claims of intentional discrimination concerning H.B. 2023. Instead, Plaintiffs' Complaint relied on allegations surrounding S.B. 1412. (Doc. 233, at ¶¶ 69-70.) Plaintiffs do not even attempt to provide any factual linkage between S.B. 1412 to H.B. 2023. Instead, there merely allege that S.B. 1412 was intentionally discriminatory and, since H.B. 2023 deals with the same subject matter, the new law *ipso facto* must have an intentional discriminatory foundation. Such a tenuous factual linkage between the two events highlights the delay. If Plaintiffs had issues with the intent of the Arizona Legislature in passing S.B. 1412, they had substantial time to develop the facts, complain to the Department of Justice or other agency with investigatory power into such civil rights allegations, or take other action.

Delay also exists in regard to how Plaintiffs snuck the new allegations into their Complaint. Plaintiffs were authorized by the Court to, in essence, 'clean up' earlier versions of the Complaint due to the dismissal of claims and Maricopa County. At no point did Plaintiffs inform the Court that they were unilaterally adding new claims and dismissing Plaintiffs. Under this scenario, the Parties and the Court were entitled to Rule 15, Fed. R. Civ. P., procedural protections. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 910-11 (D. Ariz. 2005) (dismissing case, including on grounds that Fifteenth Amendment claim was barred by laches).

Plaintiffs actually highlight the prejudice that exists in their dilatory conduct. (*See* Response, Doc. 255, at 5.) Specifically, by concentrating solely on the events surrounding S.B. 1412 and without any link to H.B. 2023, the "typical" prejudice that exists is that

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"witnesses or evidence" are simply unavailable. *See Wauchope v. U.S. Dept't of State*, 985 F.2d 1407, 1412 (9th Cir. 1993). Even if a party could state a claim based on events totally unrelated to the transaction or matter at issue, allowing such a delay in raising such claims is inherently prejudicial, is unreasonable, and significantly prejudices the administration of justice. *See Ariz. Libertarian Party v. Reagan*, --- F. Supp. 3d ---, 2016 WL 3029929, at *2 (D. Ariz. May 27, 2016) (quoting *Ariz. Pub. Integrity All. Inc. v. Bennett*, CV-14-01044-PHX-NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014)).

III. Plaintiffs' Claims are Not Cognizable.

A. Plaintiffs' Counts I and III Fail to State a Valid § 2 Claim.

There is no dispute that Plaintiffs have made factual allegations related the counties' OOP practices and the sensible prohibition on ballot harvesting under H.B. 2023. However, Plaintiffs fail to appreciate that the facts alleged are simply not enough to state a claim for which they are entitled to relief under the VRA.

First, Plaintiffs do not even challenge the legal authority highlighting that the alleged restrictions on voting do not deny or abridge a voter's equal opportunity to vote, which is a necessary element of § 2. *See* 52 U.S.C. § 10301(a); *see also Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 583-84 (E.D. Va. 2015) (dismissing § 2 claim when "there is no plausible contention that" election practice that may have inconvenienced voters "denied the opportunity to vote"). Voters can have their vote counted by simply traveling to the correct polling place. Voters who go to the wrong location are not denied an equal opportunity to participate in the political process. *See id.*; *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (rejecting § 2 claim when Wisconsin "extend[ed] to every citizen an equal opportunity to get a photo ID," leaving no "'denial' of anything by Wisconsin, as § 2(a) requires").

Second, Plaintiffs continue to fail to show how state action has led to the burden for which they seek relief. Allegations that some voters may be inconvenienced by limiting who can collect early ballots or requesting that voters go to a correct polling place

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do not give rise to § 2 claims. *See Lee*, 155 F. Supp. 3d at 583-84 (dismissing § 2 claim based on alleged inconvenience to voters).

Plaintiffs' attempts to rely on the dissenting opinion[3] issued by the Chief Judge of the Ninth Circuit Court of Appeals in this matter are unavailing (Doc. 255, at 10), especially after the United States Supreme Court's unanimous decision to overturn the *en banc* panel's hours-old injunction and allow H.B. 2023 to remain in force for the 2016 General Election. *See Arizona Sec'y of State's Office, et al. v. Feldman, et al.*, 137 S. Ct. 446 (Mem.) (2016). The reality is that this Court has already ruled on Plaintiffs' legal theories, determined that the claims did not exist, and the facts now alleged are unchanged. The law of the case has taken root in this matter, discovery will not overcome the faults in Plaintiffs' legal theories, and Plaintiffs cannot ignore that their allegations fail to state a claim based on this Court's previous rulings.

B. Plaintiffs' Counts II and V Do Not State a "Severe Burden" Claim.

There is no dispute about the *Anderson-Burdick* balancing test sliding standard. What Plaintiffs refuse to acknowledge is that similar attempts based on parallel allegations of violations of the First and Fourteenth Amendment have failed as a matter of law. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197-200 (2008). Appearing at the proper polling location is in some way always inherent to in-person voting, whether a precinct-based or vote-centers model is used. *See Colo. Common Cause v. Davidson*, 2004 WL 2360485, at *14 (D. Colo. Oct. 18, 2004) ("[I]t does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place."); *see also Service Emps. Int'l Union Local v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (finding it illogical to

[3] Documented cases of election fraud involving absentee or mail-in ballots during the 2016 General Election belie that Ninth Circuit dissents' sweeping pronouncements. *See* https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?tid=a_inl&utm_term=.940fc92eb8b9 (December 1, 2016) (citing two documented instances and two possible instances of mail-in or absentee ballot fraud).

absolve voters "of all responsibility for voting in the correct precinct or correct polling place by assessing voter burden solely on the basis of outcome—i.e., the state's ballot validity determination").

Furthermore, Plaintiffs' Response actually highlights the reality that it is not OOP policies that "burden" voters, but rather alleges it is other actions including voting polling place relocation or poll worker error that actually causes such a burden. (Response, Doc. 255, at 11-12.) In regard to H.B. 2023, Plaintiffs allege transportation and elderly issues as causing such a burden. (Response, Doc. 255, at 12-13.) Although not targeting the correct burden, Plaintiffs continue to fail to allege how such burdens outweigh the impact the election administration and the reality that some burdens are naturally going to exist. *See Crawford*, 553 U.S. at 197-200. Under Plaintiffs' proposed theories, there could not be any limits to ensure the orderly administration, security, and integrity of elections. Requiring voters to cast ballots within their designated precinct and not authorizing the wholesale collection of ballots do not severely burden the right to vote and the minimal burden imposed satisfies the relaxed standard. Therefore, Plaintiffs fail to state a claim under the *Anderson-Burdick* test.

C. Plaintiffs' Count V Bears an Invalid Associational Rights Theory.

Plaintiffs' claim that H.B. 2023 infringes on their associational rights is a matter of first impression. Therefore, Plaintiffs have fundamental issue in overcoming Rule 12(b)(6) by asserting the right to ballot harvest is "expressive activity" that actually states a claim under the First Amendment. Instead of addressing the reality that ballot harvesting is a clerical exercise not entitled to protection, Plaintiffs instead reargue that ballot harvesting is akin to registration. This Court has already rejected such a novel theory and, as such, Plaintiffs' claim must fail. (*See* Doc. 204, this Court's order denying Plaintiffs' requested preliminary injunction, at 22-23.)

Even if ballot harvesting is considered "express activity" and taking Plaintiffs' factual allegations as true, Plaintiffs have not alleged a sufficient burden to overcome the applicable balancing test to state a valid claim. *See Green Party of Ark. v. Daniels*, 733 F.

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Supp. 2d 1055, 1059-60 (W.D. Ark. 2010). Simply, Plaintiffs' alleged burden associated with H.B. 2023 is minimal and easily justified by the State's regulatory interests. *See Feldman*, 843 F.3d at 418 (Smith, N.R., J., dissenting from order enjoining H.B. 2023) (order stayed by 137 S. Ct. at 446). Just because Plaintiffs argue it is not minimal does not make it true or avoid appropriate dismissal by this Court.[4] As the Complaint is facially flawed and a claim does not exist, Count V should be dismissed as a matter of law.

D. Plaintiffs Do Not Have a Valid 15th Amendment Claim in Count IV.

The Parties agree that to sustain a Fifteenth Amendment allegation, Plaintiffs are required to plead "sufficient facts" that H.B. 2023 was passed with discrimination intended. (Response, Doc. 255, at 14); *see also Arizona Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 911, 911 n.23 (dismissing plaintiffs' Fifteenth Amendment claim as both "barred by laches" and "not cognizable" under Rule 12(b)(6)). Plaintiffs' Complaint fails to plead any facts to show that *H.B. 2023* was passed with a *current* discriminatory intent. Instead, in their Response and despite this Court's already questioning any connectivity, Plaintiffs continue to solely rely on past historical inferences of discriminatory intent related to other matters, including S.B. 1412, passed five years prior to H.B. 2023, which never took effect.[5] (Doc. 204, 12-14 (noting Plaintiffs' tendency to isolate quotes and take items out of context).)

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[4] Plaintiffs are not afforded deference on alleged conclusions of law. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("If, based on the allegations raised, Plaintiffs' claims fail as a matter of law, dismissal is appropriate. Factual allegations must be enough to raise a right to relief above the speculative level, *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."

[5] Plaintiffs cite to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977), for the proposition that a court can look to "historical background and sequence of events" in determining discrimination. (Response, Doc. 255, at 17.) Although such review is appropriate in most cases, the clear demarcation of time between S.B. 1412 and H.B. 2023, without any evidentiary allegations of causal link, renders Plaintiffs' claim a failure. Plaintiffs' broad view would make any law suspect if in

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In doing so, Plaintiffs fail to provide a claim that "has facial plausibility" to allow this Court "to draw the reasonable inference" that H.B. 2023 was actually passed with a discriminatory purpose. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is simply inappropriate to rely on the opposition's speculation as to a proponent's motives in advancing legislation. *Veasey v. Abbott*, 830 F.3d 216, 233 (5th Cir. 2016) (*cert. denied* 137 S. Ct. 612 (Mem.) (2017)) ("To ascertain the Texas Legislature's purpose in passing SB 14, the district court mistakenly relied in part on speculation by the bill's opponents about proponents' motives (rather than evidence of their statements and actions)"). Furthermore, Plaintiffs fail to even attempt to distinguish *Arizona Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 911, 911 n.23, where the Court dismissed a Fifteenth Amendment because it "applies only to practices that directly affect access to the ballot." *See id*. (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). Here, Plaintiffs do not dispute that H.B. 2023 does not affect an elector's access to a ballot, because without such access Plaintiffs would have nothing to harvest.

Without more connection between Plaintiffs' historical allegations and H.B. 2023, Plaintiffs remain on a fishing expedition, while at the same time demanding an expedited case schedule. *See DM Research Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (in evaluating Rule 8, Fed. R. Civ. P., issues and acknowledging that a complaint need not provide evidentiary detail, the First Circuit held "the price of entry, even to discovery, is for plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."). As the Complaint is facially flawed and a claim does not exist, Count IV should be dismissed as a matter of law.

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the history of a state legislature similar proposals were made and those past proposals were speculatively linked to discrimination. Such conclusory allegations fail to support discrimination claims, and dismissal is appropriate.

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IV. Conclusion

Intervenor-Defendants respectfully request that their Motion be granted and that the Complaint be dismissed in its entirety and with prejudice. The defects in Plaintiffs' claims are not of the sort that may be cured by amendment under Rule 15(a)(2), Fed. R. Civ. P., and Plaintiffs have already been provided extensive opportunity to make such amendment. Plaintiffs have failed to take advantage of multiple opportunities to correct their Complaint and, therefore, it should be dismissed in its entirety with prejudice.

DATED this 14th day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

/s/ Tracy Hobbs

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