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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al., Plaintiffs, v. Arizona Secretary of State's Office, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The underlying lawsuit may be complicated, but this motion is not. It involves two simple questions with straightforward answers. First, have the Plaintiffs sued the right defendants, so that the Court can award them the relief they seek? They have not. Second, have the Plaintiffs sued state officers that they should not have sued? They have.

The Plaintiffs ask the Court to order out-of-precinct ("OOP") ballots be counted. But the only ones with the authority to count or reject ballots, including OOP ballots, are certain county officials—and they are not before this Court. Further, none of the State Defendants[1] has authority to compel those county officials to count OOP ballots. The Plaintiffs have not named the defendants necessary to receive their requested OOP relief.

The Plaintiffs also seek an order prohibiting enforcement of H.B. 2023, and they have sued the Attorney General, who has enforcement power. But county attorneys also have power to enforce that law, independent of the Attorney General, and they are not defendants. Additionally, none of the State Defendants have supervisory authority over the county attorneys, so an order enjoining the Attorney General from enforcing H.B. 2023 will not prevent its enforcement. Once again, the Plaintiffs have not named the defendants necessary to receive their requested relief.

But Plaintiffs have also improperly named State Defendants in some of their claims.[2] They named the Secretary as a defendant for their H.B. 2023 claims, even

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[1] The State Defendants are Arizona Secretary of State Michele Reagan and Arizona Attorney General Mark Brnovich. Plaintiffs have conceded that the Secretary of State's Office, a non-jural entity, should be dismissed. (Doc. 254, at 1, n.1).

[2] Plaintiffs' improper conflation of Defendants was fully explained in the State Defendants' Motion to Dismiss (Doc. 254 at 10), and went largely unrefuted by Plaintiffs. Plaintiffs argue that the Secretary's informal email communication with the counties equates to "enforcement power over HB2023" (Doc. 254 at 6), but this argument

though the Secretary has no role in enforcing H.B. 2023. And they named the Attorney General as a defendant to their OOP claims, even though the Attorney General has no role in counting ballots or overseeing the voting process.

Accordingly, the Plaintiffs' Second Amended Complaint should be dismissed for failing to name necessary parties. Even if that were not so, certain State Defendants should be dismissed from certain counts in the Second Amended Complaint, and as Plaintiffs have conceded, the Secretary of State's Office should be dismissed entirely.

ARGUMENT

I. The Court Should Dismiss This Action Because Plaintiffs Failed to Name Indispensable Defendants.

A. Plaintiffs Failed to Name Indispensable Defendants (OOP Challenge).

In their Response in Opposition to State Defendants' Motion to Dismiss, the Plaintiffs correctly note that those challenging state laws must name as the defendant "the state official designated to enforce that rule." (Doc. 254, at 2 (quoting *Am. Civil Liberties Union v. Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993)). The problem for the Plaintiffs is they did not do that: they failed to sue those with authority to count OOP ballots, and they sued no one with authority to order their counting. (Doc. 245, at 4-7).

The Plaintiffs first seek to overcome this fatal shortcoming by citing Arizona law describing the Secretary's various election-related duties. (*Id.* at 2-3). But Plaintiffs did not cite a single statute giving the Secretary authority to count OOP ballots. Nor did they cite a single statute giving the Secretary power to order the county officials charged with counting ballots to count OOP ones. There is a reason for those omissions: Arizona law does not give the Secretary that authority. As a consequence, the Secretary does not have the equipment or staff to count ballots. This task falls on the counties, who understand

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fails because that informal communication does not carry the force of law and cannot be enforced by the Attorney General.

their voting procedures and equipment and are the only parties in a position to count OOP ballots. Indeed, the parties and the courts have relied upon the testimony of county defendants to explain how the parties would count OOP ballots. (*See, e.g.*, Doc. 180-1, at 55-56, ¶¶ 24-29 (explaining Pima County's process and the additional resources required to process OOP ballots)). Thus, the counties are indispensable parties who must be afforded the opportunity to respond to the Plaintiffs' claims in this lawsuit because the Plaintiffs are ultimately seeking an order to control the ballot-counting process at the county level.[3]

True, the Secretary is "[t]he chief state election officer" of Arizona. (*See* Doc. 245, at 6; Doc. 254, at 2). But that role is statutorily limited to the Secretary's duties regarding NVRA and UOCAVA. The relevant Arizona statute provides that the Secretary is "[t]he chief state election officer who is responsible for coordination of state responsibilities under the national voter registration act of 1993 (P.L. 103-31; 107 Stat. 77; 42 United States Code § 394) and under the uniformed and overseas citizens absentee voting act (42 United States Code § 1973)." A.R.S. § 16-142(A). That Arizona designates a chief election officer for these two federal statutes is unsurprising: both statutes require that the states designate a state officer or employee as the chief election official for implementing and overseeing these federal laws. 52 U.S.C. § 20509 (NVRA); 52 U.S.C. § 20302(b)(1) (UOCAVA). But whereas some states have chosen to

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[3] There is precedent for including county officials responsible for conducting elections as defendants in constitutional challenges to Arizona election procedures. *See Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (naming all fifteen county boards of supervisors, recorders, and elections directors as defendants in challenge to Proposition 200's voter registration and voter identification provisions). At oral argument on their Motion for Preliminary Injunction on the OOP claims, Plaintiffs' counsel told the Court that "In a voter ID case . . . [y]ou'd still sue the Secretary of State because that's who's ultimately in charge of oversight for the law." [9/2/2016 Hr'g Tr., at 8:3-8]. But in the Arizona voter ID case, plaintiffs sued all the county elections officials who were responsible for overseeing the poll workers checking voters' identification.

designate their secretary of state as the chief election officer for all election related matters, Arizona has not. *See, e.g.*, Fla. Stat. Ann. § 97.012. It has designated a chief election officer *only* for those federal statutes—NVRA and UOCAVA—requiring it to do so. *See* A.R.S. § 16-142(A). But those federal statutes, and the Secretary's role and duties pursuant to them, are not at issue in this lawsuit. As a result, the Secretary's designation as chief election officer for NVRA and UOCAVA has no bearing on this litigation.

Next, the Plaintiffs argue that because the Secretary publishes the Election Procedures Manual, which has the force of law, the counties are not indispensable. (Doc. 254, at 2-3). But the Secretary does not have authority to unilaterally issue the rules found within the Procedures Manual. Rather, the Secretary can only issue those rules "[a]fter consultation with" the county officials who are charged with counting ballots—the very county officials that the Plaintiffs have steadfastly refused to name as defendants.[4]

The requirement of consultation with the counties before changing the Procedures Manual demonstrates the necessity of their participation in this lawsuit. The counties are responsible for procuring and maintaining ballot counting equipment. Because of the different needs and resources of the various counties, they do not all use the same equipment. For example, La Paz County has approximately 9,000 active registered voters, while Maricopa County has nearly 2.2 million active registered voters. *See* http://apps.azsos.gov/election/voterreg/2017-01-01.pdf. The counties who may need to

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[4] In addition, the Procedures Manual requires approval from both the Governor and Attorney General. A.R.S. § 16-452(B). Yet, Plaintiffs have not named the Governor as a defendant. There is no reason to name the Attorney General as a Defendant on the OOP claims when his role is the same as the Governor's—a ministerial act to approve the Procedures Manual.

procure new equipment to facilitate OOP ballot counting must be before the Court so that their interests can be considered. Even if no new equipment is purchased to count OOP ballots, the additional human resources to do so could have a substantial impact on the counties, who must hire and compensate election boards responsible for duplicating OOP ballots to permit their counting. (*See* Doc. 180-1, Ex. 4, ¶¶ 24-29; Doc. 181-09, Ex. C, ¶¶ 17-27). Essentially, Rule 19 and A.R.S. § 16-542's requirement of consultation with the counties serve the same interest—to ensure that those affected by a decision have the opportunity to be a part of the decision-making process. *See, e.g., Paiute-Shoshone Indians of Bishop Community v. City of Los Angeles*, 637 F.3d 993, 1001 (9th Cir. 2011) (discussing the policies served by Rule 19).

None of the court decisions that Plaintiffs cite support their position that suing the Secretary is sufficient. Plaintiffs' citations fall into one of two categories: NVRA cases and general authority cases. Neither type of case provides guidance here. While the Secretary is the chief elections officer for the purposes of the NVRA, that is inapposite because the Plaintiffs' claims do not arise from the NVRA. Similarly, while some states provide their Secretary of States very broad authority to administer elections, Arizona's Secretary has intentionally limited powers.

One of the NVRA cases Plaintiffs cite is a recent Arizona district court decision, in which the judge found that the Secretary was the state's chief election officer who had responsibility for overseeing and administering Arizona elections for NVRA purposes. (*See* Doc. 254, at 4 (citing *Ariz. Dem. Party v. Reagan*, No. CV-16-036118-PHX-SPL, 2016 WL 6523427, at *6 (D. Ariz. Nov. 3, 2016)). But, as explained above, the NVRA is one of the two federal statutes for which the Secretary is the State's chief election officer, and therefore that decision does not provide any guidance on the issue before this Court.

None of the other NVRA cases cited by Plaintiffs support their assertion in this case that they can avoid naming the counties as defendants by naming the Secretary. In *U.S. v. Missouri.*, 535 F.3d 844, 846 (8th Cir. 2008), the Eighth Circuit found that Missouri's secretary of state was the proper defendant for an elections related challenge, even though the enforcement power rested with local officials. (*See* Doc. 254, at 5). But that was only because the challenge arose under the NVRA, and Missouri's law—like Arizona's—made the secretary of state the chief elections officer for NVRA purposes. *U.S. v. Missouri*, 535 F.3d at 846, n.1 (citing Mo. Rev. Stat. § 115.136(1). The same is true for other cases that the Plaintiffs cited. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (finding that plaintiffs suing for NVRA violations had alleged injury traceable to the Georgia secretary of state's actions); *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 699 (E.D. Va. 2010) (finding that Virginia's chief election officer for NVRA matters was a proper defendant for a NVRA lawsuit).

Plaintiffs also rely on *Florida Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016), which found that the secretary of state was the necessary defendant, when Florida law entrusted county officials with the responsibilities that the plaintiffs sought to enjoin. But the Plaintiffs' reliance upon this case is similarly misplaced. Florida law is very different from Arizona law. It makes the secretary of state the chief election officer of the state for all purposes, not just for NVRA and UOCAVA purposes. Fla. Stat. Ann. § 97.012. The court found that the Florida secretary of state could not claim an inability to direct county officials, when the law made the secretary the final authority for *all things* election related. *Fla. Dem. Party*, 2016 WL 6090943 at *5. Indeed, Florida law provides its secretary of state with explicit authority to bring an action for mandamus or injunction against local elections officials in

violation of state law or the department of state's rules. Fla. Stat. Ann. § 97.012(14). Arizona does not provide its secretary of state with such broad power.

Next, the Plaintiffs cite numerous other decisions that address the role of elections officials in states outside of Arizona. (Doc. 254, at 4). But none of those decisions support the Plaintiffs' contention that suing the Secretary is sufficient to maintain their OOP challenge. For example, in the challenges to Florida's election procedures in *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153 (11th Cir. 2008), and *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012), the secretary of state was the proper defendant because, as just explained, Florida law makes the secretary of state the chief election officer for all matters related to elections, and gives him or her broad powers to control the actions of local officials. Similarly, in *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011), the Eleventh Circuit found that Georgia's secretary of state was the proper party, even though he could not directly carry out the requested relief, because "as a member and the chairperson of the State Election Board, *he has both the power* and the duty to ensure that the entities charged with those responsibilities comply with Georgia's election code in carrying out those tasks." *Id.* (emphasis added).[5] In contrast, the Arizona Secretary does not have that same power to command obedience from the county officials charged with counting (or rejecting) ballots because her role is constrained by the specific duties spelled out in statute. Ariz. Const. Art. V, § 9; A.R.S. § 41-121(A). The Secretary does not have any common law powers; her power is limited to the authority explicitly provided to her by the legislature. *Ariz. State Land Dep't v. McFate*, 87 Ariz. 139, 142 (1960).

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[5] In addition, Georgia's law makes the secretary of state "the chief election official" for all matters, without limiting that role to only matters related to NVRA and UOCAVA, as Arizona's law does. *See* Ga. Code Ann. § 21-2-50.

One case that the Plaintiffs cited, *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008), is especially instructive because it is a case that arises under the NVRA in a state where the secretary has sweeping powers over the administration of elections. (Doc. 254, at 5). The plaintiffs in *Harkless* alleged that the Ohio secretary of state and certain local officials had failed to comply with the NVRA's requirements. 545 F.3d at 447. The court stated that one question it must address was whether the secretary of state was a proper defendant, since the secretary was not the party directly responsible for the alleged violations. *Id*. at 449. It found that the secretary was a proper defendant for two reasons. *Id.* at 451. First and most obvious, the NVRA requires the states to designate a chief election officer for implementing the state's function and compliance with the law, and Ohio had designated the secretary for that role. *Id*. (citing Ohio Rev. Stat. § 3501.04). But the court also found that "*[s]ignificantly*, Ohio law empowers the [s]ecretary to 'compel the observance by election officers in the several counties of the requirements of the election laws[.]'" *Id*. (emphasis added) (citing Ohio. Rev. Stat. § 3501.05(N)(1)). The court found the fact that, in Ohio, the secretary has lawful power to *compel* compliance with the secretary's directives to be *significant*. This Court should likewise find it significant that Arizona has no statutory provision granting the Secretary power to "compel" the county officials to follow the Secretary's instructions.

The Plaintiffs' reliance on the cases they cited in their Response is misplaced. None stand for the proposition that the Secretary, alone, is sufficient to affect the relief requested for the OOP claims. The Plaintiffs have not sued the necessary defendants.

B. The Plaintiffs Failed to Name Indispensable Defendants (H.B. 2023).

In their Response, the Plaintiffs assert that the Attorney General has enforcement power for H.B. 2023. (Doc. 254, at 6-7). The proper question is not whether the Attorney General has such power, however, but whether others have such power, too, and, if so, whether suing the Attorney General is sufficient to bind them.

Arizona law is clear: for most elections, county attorneys have power to bring actions pursuant to H.B. 2023. A.R.S. § 16-1021. This power is concurrent with that of the Attorney General. *Id*. In addition, local prosecutors have exclusive authority to bring H.B. 2023 actions for elections that do not include a state office. A.R.S. § 16-204.

The Plaintiffs have offered no authority for the proposition that the State Defendants can bind these other officials with enforcement power for H.B. 2023. Instead, they have cited case law standing for the proposition that suing a state officer in his official capacity is sufficient to bring a suit against the state. (Doc. 254, at 6). While that is true, the lawsuit can only be effective, and relief can only be granted, when the state officer sued has exclusive enforcement power, or the authority to bind all others with such power.

For example, in *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486 (11th Cir. 1993), the plaintiffs sued both the Florida Bar and the Judicial Qualifications Commission, challenging the Code of Judicial Conduct for candidates for judicial office. *Id*. at 1487-88. The state bar argued that it was not a proper defendant, because the language of the code itself did not give it enforcement power. *Id*. at 1490. But the court disagreed, and refused to dismiss the bar. *Id*. Under state law, the bar *could* enforce the challenged code even though the commission was the one that the code designated as the enforcer. *Id*. at 1490-91. The court concluded that the bar was therefore a proper defendant. *Id*. From that conclusion, the court explained that "when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce the rule who is the proper defendant[.]" *Id*. at 1490. Because the plaintiffs were challenging the constitutionality of the code, and the state bar had enforcement power for the code, the bar was a proper defendant to the action. *Id*.

The Plaintiffs seek to have this Court declare H.B. 2023 unconstitutional and issue an order enjoining its enforcement. To obtain their desired relief, the Plaintiffs must sue

all those with enforcement power. Otherwise, the court must dismiss. In *Powers v. Mitchell*, 463 F.2d 212, 213 (9th Cir. 1972), the Ninth Circuit dismissed a college student's challenge to an order from a draft board that he report for military duty because, among other things, the student failed to name all the parties with enforcement power as defendants. 463 F.2d at 213. The student named the Arizona Attorney General and the Selective Service Director. *Id*. But the Ninth Circuit explained that it was the local draft board that had issued the order and that neither the Attorney General nor the Selective Service Director "have power to order a local board to rescind an induction order." *Id*. Accordingly, the student needed to sue the local draft board, too. Since he had not, his case must be dismissed for want of jurisdiction. *Id*. When plaintiffs challenge the enforcement of laws, all parties with the power to enforce the law against the plaintiff must be before the court.

This is true even when plaintiffs challenge state laws as unconstitutional. *McDermott v. Bryer*, 62 F.2d 297 (1st Cir. 1932). In *McDermott*, the court said that a judgment restraining the defendant before it from enforcing the law against the plaintiff would not preclude another, who was not a defendant but who shared enforcement power, from enforcing the law. *Id*. at 298. As a result, the court could not reach the question of the constitutionality of the law, but had to dismiss the matter for want of jurisdiction. *Id*.

In this case, the Plaintiffs sued the Attorney General, who has enforcement power for H.B. 2023. He is a necessary defendant. But so are the county attorneys, who share enforcement power with the Attorney General. So are the local prosecutors who have authority to bring H.B. 2023 actions for city and town elections. The Plaintiffs did not sue any of those necessary parties.

III. The Proper Remedy Is Not Joinder, But Dismissal.

The Plaintiffs argue that joinder of necessary defendants, not dismissal, is the proper remedy. (Doc. 254, at 7-8). But when plaintiffs *refuse* to amend their complaint to add necessary, indispensable parties, district courts should dismiss the lawsuit. *Green v. McIntire*, 39 App. D.C. 249, 251 (D.C. Cir. 1912) (explaining that because plaintiffs refused to amend their complaint to add indispensable parties dismissal was appropriate); *see also Walsh v. Centeio*, 692 F.2d 1239, 1243 (9th Cir. 1982) (explaining that the 1966 amendment to Rule 19 "remov[es] the court's discretion to proceed when the absent person is indispensable").

Indeed, Plaintiffs have known that their failure to name the proper parties made the relief they seek unavailable since no later than June 17, 2016, when the Intervenor-Defendants filed their Motion to Dismiss. (Doc. 108, at 4-5). The Court and the Defendants raised the issue repeatedly throughout the Preliminary Injunction phase of the case. (*See, e.g.*, Doc. 153, at 4 n.2; Doc. 178, at 6-7; Doc. 180, at 4 n.4; Doc. 207; 8/3/16 Hr'g Tr. at 11:20-12:18, 36:13-37:8; 9/2/16 Hr'g Tr. at 7:5-8:8, 63:17-64:12, 68:12-71:2). Nonetheless, the Plaintiffs have refused to add the indispensable parties and even moved to dismiss Maricopa County.[6] The proper remedy is to dismiss the Plaintiffs' Second Amended Complaint.

CONCLUSION

For the foregoing reasons, as well as the reasons discussed in the State Defendants' Motion to Dismiss, this Court should dismiss the Plaintiffs' Second Amended Complaint. In the alternative, the Court should dismiss the Secretary from the HB 2023 Claims and the Attorney General from the OOP claims.

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[6] Inexplicably, Plaintiffs assert that the Maricopa County Defendants' dismissal from this case "applies solely to [the polling place allocation] claims." Their Motion to Dismiss the County Defendants, however, was not so limited. (*See* Doc. 203, at 2).

RESPECTFULLY SUBMITTED this 14th day of February, 2017.

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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/ Maureen Riordan

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