IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Democratic National Committee, DSCC, and Arizona Democratic Party, Plaintiffs, v. Arizona Secretary of State's Office, Michele Reagan, and Mark Brnovich, Defendants.	No. CV-16-01065-PHX-DLR **ORDER**

In their Second Amended Complaint, Plaintiffs the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party allege that two aspects of Arizona's election regime violate § 2 of the Voting Rights Act (VRA) and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution. First, Plaintiffs challenge Arizona's prohibition on counting out-of-precinct (OOP) provisional ballots, which derives from the collective effect of A.R.S. §§ 16-122, -135, -584, and related rules prescribed by the Arizona Secretary of State in the Election Procedures Manual. Second, Plaintiffs challenge H.B. 2023, codified at A.R.S. § 16-1005(H)-(I), which makes it a felony for third parties to collect early ballots from voters unless the collector falls into a statutorily enumerated exception. Plaintiffs seek a declaration that the challenged election rules are unlawful, and an order enjoining the Arizona Secretary of State's Office, Arizona Secretary of State Michele

Reagan, and Arizona Attorney General Mark Brnovich (State Defendants) from:

> a. Implementing, enforcing, or giving any effect to A.R.S. § 16-122, § 16-135, or § 16-584 to the extent that they require Defendants to reject provisional ballots in their entirety solely because they were cast in the wrong precinct;
>
> b. Requiring Defendants to count OOP ballots for races for which the voter was otherwise eligible to cast a vote;
>
> c. Implementing, enforcing, or giving any effect to H.B. 2023.

(Doc. 233 at 41-42.)

The Court permitted the Arizona Republican Party, Maricopa County Board of Supervisors member Bill Gates, Scottsdale City Council member Suzanne Klapp, and Arizona state lawmakers Debbie Lesko and Tony Rivero to intervene as defendants. Intervenor-Defendants now move to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), (6), and (7). (Doc. 244.) The motion is fully briefed. For the following reasons, the Court denies the motion. [1]

I. Rule 12(b)(7)

Intervenor-Defendants argue that Plaintiffs' complaint is barred by Rules 12(b)(7) and 19(a) because Plaintiffs have failed to name necessary and indispensable parties. (Doc. 244 at 7.) The Court previously denied the State Defendants' motion to dismiss, which asserted an identical argument. (Docs. 245, 267.) For the reasons stated in the Court's March 3, 2017 order denying the State Defendants' motion to dismiss, the Court likewise rejects Intervenor-Defendants' arguments.

II. Rule 12(b)(1)

Rule 12(b)(1) allows a party to raise lack of subject-matter jurisdiction in a pre-answer motion. Intervenor-Defendants assert two jurisdictional defenses. First, they contend that Plaintiffs lack standing to assert their OOP ballot claims because their alleged injuries are not fairly traceable to the State Defendants' conduct and therefore

[1] Intervenor-Defendants' request for oral argument is denied because the issues are adequately briefed and oral argument will not assist the Court in resolving the matters before it. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

cannot be redressed by a favorable decision. (Doc. 244 at 3-6.) Second, Intervenor-Defendants' contend that laches bars Plaintiffs' Fifteenth Amendment claim. (*Id.* at 8-10.) The Court addresses each in turn.

A. Standing

Standing derives from Article III of the United States Constitution, which limits federal courts to resolving "Cases" and "Controversies." To have standing, a plaintiff "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, --- U.S. ---, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Intervenor-Defendants contend that Plaintiffs lack standing because they have not sued the parties to whom their alleged injuries are fairly traceable and subject to redress—namely, the individual counties. In this respect, Intervenor-Defendants' standing argument largely mirrors their Rule 19 argument, which the Court has already rejected. For reasons stated in the Court's March 3, 2017 order denying the State Defendants' motion to dismiss, the Court finds that Plaintiffs' alleged injuries are fairly traceable to the State Defendants, and that the State Defendants likely can redress these injuries if ordered to do so by a decision favorable to Plaintiffs.

B. Laches

"Laches is an equitable time limitation on a party's right to bring suit." *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993) (internal quotation and citation omitted). The defense applies where "(1) there was inexcusable delay in the assertion of a known right and (2) the party asserting laches has been prejudiced." *Id.* "In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Ariz. Pub. Integrity Alliance Inc. v. Bennett*, No. CV-14-01044-PHX-NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014) (internal quotation

and citation omitted). Intervenor-Defendants have established neither element here.

First, "[t]o determine whether delay was unreasonable, a court considers the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence in preparing and advancing his case." *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016). Intervenor-Defendants attack the underlying merits of Plaintiffs' Fifteenth Amendment claim and argue that Plaintiffs did not properly seek leave to add it, but they do not squarely address Plaintiffs' knowledge of and diligence in advancing the claim. Plaintiffs state that they added their intentional discrimination claim in light of evidence obtained during the preliminary injunction phase of this litigation, including the preclearance file for S.B. 1412. The Court finds that Plaintiffs did not unreasonably delay the assertion of this new claim.

Second, "[t]o determine whether delay has prejudiced a defendant, a court considers only prejudice that stems from the plaintiff's delay in bringing suit, not difficulties caused by the fact of having been sued." *Id*. Further, "[t]o determine whether delay has prejudiced the administration of justice, a court considers prejudice to the courts, candidates, . . . election officials, and voters." *Id.* For example, "[u]nreasonable delay can prejudice the administration of justice by compelling the court to steamroll through . . . delicate legal issues in order to meet election deadlines." *Id.* (internal quotations and citation omitted). Here, Intervenor-Defendants identify no prejudice beyond the inconvenience of having to litigate an additional claim. Although they superficially claim that "'the voters of Arizona' will suffer significant prejudice if the Court were to proceed with Plaintiffs' Fifteenth Amendment claim and enjoin H.B. 2023 on intentional discrimination grounds" (Doc. 244 at 8), they fail to explain why this is so. For these reasons, the Court finds that Plaintiffs' Fifteenth Amendment intentional discrimination claim is not barred by laches.

II. Rule 12(b)(6)

The task when ruling on a motion to dismiss under Rule 12(b)(6) "is to evaluate

whether the claims alleged [plausibly] can be asserted as a matter of law." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When analyzing the sufficiency of a complaint, the well-pled factual allegations are taken as true and construed in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations, however, are not entitled to the assumption of truth, *Iqbal*, 556 U.S. at 680, and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2008).

Intervenor-Defendants contend that Plaintiffs fail to state plausible claims under the VRA and the First, Fourteenth, and Fifteenth Amendments. With the exception of Plaintiffs' newly added Fifteenth Amendment claim, the legal standards applicable to Plaintiffs' statutory and constitutional claims have been discussed at length in the Court's prior orders denying Plaintiffs' preliminary injunction motions. (Docs. 204, 214.) The Court will not flood the pages of this order with a duplicative recitation of these standards or the allegations underlying Plaintiffs' claims. Suffice it to say that, having reviewed Intervenor-Defendants' motion to dismiss, the Court finds that the arguments presented therein are best reserved for an ultimate decision on the merits with the benefit of a fully developed factual record. Though in ruling on Plaintiffs' preliminary injunction motions the Court found insufficient evidence to establish a likelihood of success on the merits, Plaintiffs' claims are not wholly implausible.

Moreover, though the Court's preliminary injunction orders were affirmed by a divided three-judge panel, the Court is not oblivious to the fact that a majority of active and non-recused judges on the Ninth Circuit voted to rehear the cases en banc, and that in issuing a shortly-lived stay the en banc panel necessarily concluded that Plaintiffs were likely to succeed at least on their appeal of this Court's order denying a preliminary injunction of H.B. 2023. It is axiomatic that a plaintiff cannot simultaneously fail to state plausible claims to relief and be likely to succeed on those claims.

The Court also finds telling that the State Defendants, who are the parties actually

accused of the statutory and constitutional violations, have not argued that Plaintiffs' Second Amended Complaint fails to state plausible claims to relief, nor have they sought dismissal under Rule 12(b)(6).

Intervenor-Defendants raise important legal arguments on the various statutory and constitutional claims, some of which were accepted by the Court at the preliminary injunction stage. But the Court is unwilling to dispose of Plaintiffs' claims entirely at this phase of the litigation, particularly in light of the substantial disagreement among the judges of the Ninth Circuit as to whether Plaintiffs are likely to succeed on the merits of those claims. Instead, full factual development and a hearing will ensure that the important issues raised in the Second Amended Complaint and in the instant motion receive due and fair consideration.

IT IS ORDERED that Intervenor-Defendants' Motion to Dismiss (Doc. 244) is **DENIED**.

Dated this 13th day of April, 2017.

Douglas L. Rayes
United States District Judge