

Snell & Wilmer
LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

1 Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
2 Derek C. Flint (#034392)
Ian R. Joyce (#035806)
3 SNELL & WILMER L.L.P.
One Arizona Center
4 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
5 Telephone: 602.382.6000
Facsimile: 602.382.6070
6 E-Mail: bwjohnson@swlaw.com
cahler@swlaw.com
7 dflint@swlaw.com
ijoyce@swlaw.com
8

9 Anni L. Foster (#023643)
General Counsel
Office of Arizona Governor Douglas A. Ducey
10 1700 West Washington Street
Phoenix, Arizona 85007
11 Telephone: 602-542-4331
E-Mail: afoster@az.gov
12

13 *Attorneys for Defendant Douglas A. Ducey,*
Governor of the State of Arizona

14 UNITED STATES DISTRICT COURT
15 DISTRICT OF ARIZONA
16

17 Tyler Bowyer, et al.,
18 Plaintiffs,
19 v.
20 Doug Ducey, et al.,
21 Defendants,
22 and
23 Maricopa County Board of Supervisors, et
24 al.,
25 Intervenor-Defendants
26
27
28

No. 2:20-cv-02321-DJH

**Defendant Governor Ducey’s
Combined: (a) Motion to Dismiss and
(b) Response to Plaintiffs’ Motion for
TRO and Preliminary Injunction**

Assigned to: Hon. Diane Humetewa

Hearing set: December 8, 2020 at 9:15
a.m.

Introduction

Arizona has strong election laws that prioritize accountability and that clearly lay out procedures for conducting, canvassing, and even contesting the results of an election. It is managed by dedicated and professional election administrators, with support from thousands of volunteer poll workers and poll observers that represent opposing political parties, as mandated by law. *See, e.g.*, A.R.S. §§ 16-531 (appointment of election board); 16-590(C) (appointment of poll observers); 16-615(B) (transporting the official returns envelop); *see also Elections Procedure Manual*, Ariz. Secy. of State, at 86, 96, 105, 133, 157, 178, 184, 197, 203 (2019).¹ Arizona also has clear deadlines that the Governor’s Office, in conjunction with the majority of the county recorders (from both parties), argued to the Ninth Circuit needed to be maintained this year, despite COVID-19, in order to ensure the sanctity and security of the election process. *See Mi Familia Vota v. Hobbs*, 977 F.3d 948 (9th Cir. 2020).

With this backdrop, Plaintiffs have brought suit alleging widespread fraud in Arizona’s election. In their Complaint, Plaintiffs fail in any way to link Governor Ducey’s ministerial duties in the elections process to their voter-fraud theories. The only allegations in the Complaint that even mention Governor Ducey are completely unrelated to Plaintiffs’ theories and legal claims. (*See* Doc. 1 at ¶¶ 33-35, 145). Furthermore, Plaintiffs’ requests for relief from the Governor are moot because Governor Ducey has already performed his non-discretionary, ministerial acts in connection with this election: observing the final state-wide canvass and transmitting a “certificate of ascertainment” to the National Archivist.

Accordingly, Governor Ducey moves for dismissal of all claims against him with prejudice under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Dismissal is appropriate for several reasons, including that: (1) the relief Plaintiffs seek against the Governor is moot; (2) the Eleventh Amendment bars Plaintiffs’ claims against the Governor; (3) Plaintiffs have failed

¹ The Secretary of State’s Election Procedures Manual has the force of law pursuant to A.R.S. § 16-452 and is available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

1 to allege any facts to support a plausible claim that Governor Ducey violated their
 2 constitutional rights or any other law; and (4) Plaintiffs lack Article III standing to sue the
 3 Governor. For similar reasons, this Court should also deny Plaintiffs’ request for a TRO or
 4 preliminary injunction as to Defendant Governor Ducey. (*See* Doc. 28). Plaintiffs will not
 5 be harmed by the dismissal of Governor Ducey because the Maricopa County Board of
 6 Supervisors—the party that has responsibility related to the conduct of elections,
 7 certification of election results and that retains custody of the equipment in question—has
 8 intervened in this case. In accordance with L.R. Civ. P 12.1(c), a Notice and Certification
 9 of Conferral has been filed contemporaneously with this Motion.

10 Background

11 The U.S. Constitution provides that “[e]ach State shall appoint, in such Manner as
 12 the Legislature thereof may direct, a Number of Electors” for the Office of the President.
 13 U.S. Const. Art. II § 1. The Arizona Legislature has established such procedures. *See* A.R.S.
 14 § 16-212. In addition, the Legislature has established a comprehensive election system,
 15 based on checks and balances, that is largely organized and conducted by the Secretary of
 16 State, independent county boards of supervisors, and other local election officials. *E.g.*,
 17 A.R.S. §§ 16-442(A) (requiring the Secretary of State to approve the “types, make, model,
 18 or models” of vote tabulating equipment); 16-411(B) (requiring Board of Supervisors to
 19 establish polling locations); 16-531(A) (requiring Board of Supervisors to appoint requisite
 20 poll workers twenty days before a primary or general election).

21 After an election for a president, or any other federal, statewide, or legislative office,
 22 the county board of supervisors canvass their results and report those results to the Secretary
 23 of State. A.R.S §§ 16-642(A); 16-645(B). The Secretary of State must then canvass those
 24 county results “[o]n the fourth Monday following” the general election. A.R.S. § 16-648(A).
 25 After the completion of the statewide canvass, the Secretary of State issues a “Certification
 26 of Election” to each legislative, statewide, and federal candidate who received the highest
 27 number of votes for each office. A.R.S. § 16-650. Furthermore, “after the secretary of state
 28 issues the statewide canvass containing the results of a presidential election, the presidential

1 electors of this state shall cast their electoral college votes for the candidate for
2 present...[who] received the highest number of votes in this state...” A.R.S. § 16-212(B).

3 By statute, the Governor performs two non-discretionary, ministerial tasks in this
4 process. *First*, he (along with the Attorney General and the Chief Justice of the Arizona
5 Supreme Court) is required by state law to be “in the presence of” the Secretary of State
6 when she conducts the official statewide canvass. A.R.S. § 16-648. *Second*, he is required
7 by federal law to send a Certificate of Ascertainment (“Certificate”) that identifies the
8 names of Arizona’s electoral college electors to the Archivist of the United States. 3 U.S.C.
9 § 6.² These statutes do not confer discretion to the Governor.

10 On November 30, 2020, the Secretary of State conducted the statewide canvass and
11 certified the election in the presence of Governor Ducey. (Ex. A (excerpts from the
12 statewide canvass)). That same day, Governor Ducey transmitted the Certificate to the
13 National Archivist. (Ex. B (copy of the Certificate of Ascertainment)).³

14 Argument

15 This Court may grant a motion to dismiss under Rule 12(b) where a complaint does
16 not demonstrate that the plaintiff is entitled to relief against a particular defendant. To
17 survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual
18 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
19 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
20 (2007)). Those “[f]actual allegations must be enough to raise a right to relief above the
21 speculative level.” *Twombly*, 550 U.S. at 555.

22
23
24 ² In addition, for initiated and referred ballot measures (which are not at issue in this case),
the Governor must issue a proclamation “declaring the amendments or measures which are
approved by a majority of those voting thereon to be law.” A.R.S. § 16-651.

25 ³ Governor Ducey’s attendance of the statewide canvass and his issuance of the Certificate
26 are all facts appropriate for judicial notice because they “can be accurately and readily
27 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
201(b); *see also Santa Monica Food Not Bombs v. Santa Monica*, 450 F.3d 1022, 1025 n.2
28 (9th Cir. 2006) (taking judicial notice of public records that “can be accessed at Santa
Monica’s official website”). Courts may consider judicially noticeable facts in ruling on
motions to dismiss. *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001).

1 Additionally, a preliminary injunction⁴ “is an extraordinary and drastic remedy, one
2 that should not be granted unless the movant, by a clear showing, carries the burden of
3 persuasion.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation omitted). A
4 court may only grant a plaintiff this “extraordinary remedy” if it establishes, as to the
5 particular defendant: (1) it is “likely to succeed on the merits” of its claims; (2) it is “likely
6 to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of the
7 equities tips in [its] favor”; and (4) “an injunction is in the public interest.” *Winter v. Nat.*
8 *Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008).

9 Here, Plaintiffs’ claims against Governor Ducey cannot survive the Rule 12(b)(1) or
10 12(b)(6) standard, let alone satisfy all four *Winter* factors. Even if the factual allegations in
11 the Complaint are accepted as true, their claims against Governor Ducey fail as a matter of
12 law due to: (1) mootness; (2) Eleventh Amendment immunity; (3) an inability to state any
13 plausible claim against Governor Ducey because their Complaint identifies no acts
14 performed by the Governor other than the two ministerial acts described above; and (4) a
15 lack of Article III standing. For these same reasons, Plaintiffs are highly unlikely to succeed
16 on the merits against Governor Ducey, and the Court should deny Plaintiffs’ requested
17 preliminary relief as to him.

18 **I. Plaintiffs’ Claims Against Governor Ducey Are Moot.**

19 Plaintiffs’ claims against Governor Ducey are moot because the action they seek to
20 enjoin has already occurred and cannot be undone. A case must be dismissed as moot
21 against a particular defendant when “the issues presented are no longer ‘live.’” *L.A. Cty. v.*
22 *Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).
23 In the context of election matters, courts have consistently held that a case is moot when
24 the challenged procedure has already been performed. For example, in *Jones v. Montague*,
25 the plaintiffs sued the Virginia governor and the Secretary of the Commonwealth,
26

27 ⁴ The standard for issuing a TRO is the same as the standard for issuing a preliminary
28 injunction. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347
n.2 (1977).

1 requesting an injunction of an election canvass. 194 U.S. 147, 153 (1904). The Court
 2 rejected their challenge, holding that the case was moot because “the thing sought to be
 3 prohibited has been done...” *Id.*

4 Here, after Governor Ducey attended the Secretary of State’s statewide canvass and
 5 issued the Certificate to the National Archivist (both of which occurred on November 30),
 6 his ministerial duties related to the General Election concluded.⁵ Plaintiffs unfortunately
 7 filed this lawsuit on December 2, 2020—two days *after* Governor Ducey observed the
 8 canvass and issued the Certificate—and asked this Court to order Governor Ducey to “de-
 9 certify” the election results and enjoin him “from transmitting the currently certified
 10 election results to the Electoral College.” (Doc. 1 at ¶ 145). Governor Ducey does not have
 11 the authority to do either of these things, and Plaintiffs cite no authority otherwise. Because
 12 Governor Ducey’s statutory duties related to the General Election have already been
 13 performed, Plaintiffs’ claims against the Governor must be dismissed as moot. *See*
 14 *Montague*, 194 U.S. at 153.

15 **II. Plaintiffs’ Claims Against Governor Ducey Are Barred by the Eleventh**
 16 **Amendment.**

17 The Eleventh Amendment prevents a state from being sued in federal court without
 18 its consent. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). This bar applies “regardless of
 19 whether [the suit] seeks damages or injunctive relief.” *Pennhurst State Sch. & Hosp. v.*
 20 *Halderman*, 465 U.S. 89, 102 (1984). The Eleventh Amendment’s protections are at their
 21 apex where, as here, a plaintiff asks a federal court to “order state actors to comply with
 22 state law.” *Hale v. Arizona*, 967 F.2d 1356, 1369 (9th Cir. 1992); *see also Pennhurst*, 465
 23 U.S. at 106 (noting that “[i]t is difficult to think of a greater intrusion on state sovereignty
 24 than when a federal court instructs state officials on how to conform their conduct to state
 25 law”).

26
 27 ⁵ The National Archivist has already received and publicly posted the Certificate. *2020*
 28 *Electoral College Results*, National Archives, <https://www.archives.gov/electoral-college/2020> (last visited Dec. 4, 2020).

1 To avoid the Eleventh Amendment, Plaintiffs here sued the Governor in his official
2 capacity, in an attempt to take advantage of the *Ex Parte Young* exception to the State’s
3 sovereign immunity. (Doc. 1). But, in order to use this exception, the state officer “must
4 have some connection with the enforcement of the act.” *Ex Parte Young*, 209 U.S. 123, 157
5 (1908); *see also Pennhurst*, 465 U.S. at 101 (noting that the Eleventh Amendment also “bars
6 a suit against state officials when ‘the state is the real, substantial party in interest.’”)
7 (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945)). Here, the
8 Governor has no connection to the factual allegations in the Complaint, much less a
9 connection strong enough to invoke the *Ex Parte Young* exception.

10 Indeed, while the Complaint makes various allegations about the General Election—
11 including that the vote tabulation machines used in Arizona are susceptible to manipulation
12 or are otherwise deficient, (Doc. 1 at ¶¶ 5-18, 67-102), that there were certain procedural
13 errors related to poll watching and vote counting, (*id.* at ¶¶ 48-62), and that there were
14 irregular voter turnout levels, (*id.* at ¶¶ 63-66)—the Complaint does *not* contain any
15 allegation that the Governor had any involvement in these alleged improprieties or had any
16 authority to oversee, correct, or prevent these issues. Instead, the Complaint only alleges
17 wrongdoing or errors by local county elections officials, poll workers, or the Secretary of
18 State.

19 Put simply, the Governor’s ministerial duties under A.R.S. § 16-648(A) and 3 U.S.C.
20 § 6 do not encompass investigating or rectifying assertions of election irregularities or fraud.
21 And, even if the Governor did have some generalized role in overseeing Arizona elections
22 (he does not), mere “[a]llegations of general oversight of State laws are insufficient to
23 establish the required nexus” under *Ex Parte Young*. *Young v. Hawaii*, 548 F. Supp. 2d
24 1151, 1164 (D. Haw. 2008), *overruled on other grounds by Dist. of Columbia v. Heller*, 554
25 U.S. 570 (2008); *see also* A.R.S. § 16-142(A)(1) (“The secretary of state or the secretary’s
26 designee is [t]he chief state election officer . . .”). As such, Plaintiffs’ claims against the
27 Governor must be dismissed.

28

1 **III. Plaintiffs Fail to Plead any Plausible Claim for Relief Against Governor Ducey**
 2 **under the *Iqbal/Twombly* Pleading Standard.**

3 The claims against Governor Ducey should also be dismissed because Plaintiffs’
 4 Complaint is devoid of any “factual content that allows the court to draw the reasonable
 5 inference that the defendant” at issue—Governor Ducey—“is liable for the misconduct
 6 alleged.” *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 556, 570. Indeed, the
 7 Complaint does not contain *any* specific factual allegations against the Governor. The *only*
 8 allegations in the Complaint that specifically reference Governor Ducey are Paragraphs 34
 9 and 35, which simply identify him as a Defendant to this action, and Paragraph 145, which
 10 asks this Court to direct an order requiring the Governor to “de-certify” the election (there
 11 is no provision in Arizona law that allows this or federal authority that supports this remedy)
 12 and an injunction prohibiting him from “transmitting the currently certified election results
 13 to the electoral college” (the results have already been “transmit[ed]” to the electoral
 14 college).

15 Given this, the Complaint has failed to make any allegation that would support a
 16 reasonable inference that the Governor violated Arizona law, deprived Plaintiffs of their
 17 equal protection or due process rights, or violated some other constitutional provision.
 18 Because the Complaint fails to state any claim against Governor Ducey that is “plausible
 19 on its face,” all claims against the Governor should be dismissed. *Iqbal*, 556 U.S. at 678
 20 (citing *Twombly*, 550 U.S. at 570).

21 **IV. Plaintiffs Lack Standing to Bring Their Claims Against Governor Ducey.**

22 Finally, Plaintiffs cannot establish two of the three elements of Article III standing
 23 for purposes of their claims against Governor Ducey. To establish standing, Plaintiffs must
 24 demonstrate (1) injury in fact; (2) that is “fairly traceable” to the conduct complained of;
 25 and (3) that a favorable decision is “likely” to redress the injury-in-fact. *Barnum Timber*
 26 *Co. v. U.S. E.P.A.*, 633 F.3d 894, 897 (9th Cir. 2011); *see also Maya*, 658 F.3d at 1067
 27 (motion to dismiss for lack of standing proper under Fed. R. Civ. P. 12(b)(1)). An injury is
 28

1 not fairly traceable to a defendant’s conduct when that defendant did not cause the
 2 plaintiff’s injury. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078,
 3 2020 WL 6821992, at *6-7 (M.D. Penn. Nov. 21, 2020).

4 Here, even assuming *arguendo* that Plaintiffs have met the injury-in-fact
 5 requirement, they cannot establish that their injury is traceable to Governor Ducey or
 6 redressable by any action he could take. With respect to traceability, Plaintiffs do not (and
 7 cannot) claim that Governor Ducey played any part in the alleged election fraud that forms
 8 the basis of their Complaint. Indeed, Plaintiffs barely mention Governor Ducey’s actions at
 9 all, claiming only (and erroneously) that he and the Secretary of State “certified” the results
 10 of the General Election. (*See* Doc. 1 at ¶ 33). As discussed above, election certification is
 11 not one of Governor Ducey’s statutory duties. For all these reasons, Plaintiffs cannot
 12 establish that their injury is “fairly traceable” to Governor Ducey. *See Barnum*, 633 F.3d at
 13 897; *Boockvar*, 2020 WL 6821992, at *6.

14 Plaintiffs also cannot establish that their alleged injury is redressable by Governor
 15 Ducey. Plaintiffs ask this Court to order Governor Ducey to “de-certify” the election results
 16 and enjoin him “from transmitting the currently certified election results to the Electoral
 17 College.” (Doc. 1 at ¶ 145). Governor Ducey has already fulfilled his statutory duties related
 18 to the General Election by attending the canvass, *see* A.R.S. § 16-648(A), and issuing the
 19 Certificate to the Archivist of the United States, *see* 3 U.S.C. § 6. Governor Ducey does not
 20 have the power to certify (or de-certify) election results. Tellingly, Plaintiffs do not cite any
 21 authority explaining how (or under what authority) Governor Ducey would do take such
 22 action. Accordingly, Plaintiffs’ claims should be dismissed because they lack Article III
 23 standing as to Governor Ducey.⁶

24
 25
 26 ⁶ For the other *Winter* factors that balance the impact of the relief requested against the
 27 merits of the claims, Governor Ducey defers to Defendant Secretary Hobbs and Intervenor-
 28 Defendant Maricopa County Board of Supervisors, since the administration of the general
 election at the State and local levels are within those parties’ purview.

Snell & Wilmer
LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

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Conclusion

Governor Ducey should be dismissed because the claims against him are moot, barred by the Eleventh Amendment, unsupported by factual allegations, and Plaintiffs lack standing to even bring them against the Governor. These defects are fatal and incurable as to Governor Ducey. Accordingly, Plaintiffs’ claims against Governor Ducey should be dismissed with prejudice under Rules 12(b)(1) and 12(b)(6), and their Motion for Temporary Restraining Order and Preliminary Relief should be denied, as to Governor Ducey.

DATED this 4th day of December, 2020.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

Brett W. Johnson
Colin P. Ahler
Derek C. Flint
Ian R. Joyce
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Anni L. Foster
OFFICE OF ARIZONA GOVERNOR
DOUGLAS A. DUCEY
1700 West Washington Street
Phoenix, Arizona 85007

*Attorneys for Defendant Douglas A.
Ducey, Governor of the State of
Arizona*

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CERTIFICATE OF SERVICE

I certify that on December 4, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/ Richard Schaan _____

Snell & Wilmer
LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000