

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

No. 2:20-cv-02321-DJH

**Reply in Support of Governor Ducey’s
Motion to Dismiss**

Assigned to: Hon. Diane Humetewa

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

27
28

Introduction

1
2 Plaintiffs have failed to fully address Defendant Governor Douglas A. Ducey’s
3 arguments for dismissal of the specific claims against him in their response. (Doc. 43). For
4 instance, Plaintiffs do not respond to Governor Ducey’s arguments that (1) they have failed
5 to allege any facts to support a plausible claim that he violated their constitutional rights or
6 any other law; or that (2) they cannot meet the traceability or redressability elements of
7 Article III standing for purposes of their claims against him. Having failed to respond,
8 Plaintiffs have essentially conceded that Governor Ducey should be dismissed from this
9 case. *See* L.R. Civ. 7.1(I).

10 To the extent Plaintiffs do respond, their rationales for including Governor Ducey as
11 a Defendant are misguided. Plaintiffs appear to raise a new form of relief that was not in
12 the Complaint (which sought to enjoin the issuance of a Certificate of Ascertainment to the
13 National Archivist, even though that non-discretionary ministerial act had already been
14 completed). (*See* Doc. 1 at ¶ 145). Now, Plaintiffs contend that under 3 U.S.C. § 6, Governor
15 Ducey is a necessary party in this litigation in order to send the National Archivist a separate
16 certificate concerning the eventual outcome of this litigation. But, this statute does not save
17 Plaintiffs’ claims against Governor Ducey because it was not part of their original
18 Complaint. Moreover, the “capable of repetition, yet evading review” exception to
19 mootness is not applicable here, particularly when Arizona statutes expressly allow for
20 expedited decisions of election contests. *See* A.R.S. § 16-671 *et seq.* Lastly, Plaintiffs fail
21 to distinguish *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, 2020
22 WL 6821992 (M.D. Penn. Nov. 21, 2020), on any relevant ground. It is settled that Article
23 III standing requires that an alleged injury be “fairly traceable” to a defendant’s conduct.
24 (Doc. 38 at 8). *Boockvar*’s references to other forms of standing do not grant Plaintiffs
25 standing to raise claims against Governor Ducey here.

26 All claims against Governor Ducey should be dismissed with prejudice.¹

27
28 ¹ Governor Ducey has not requested oral argument on his Motion to Dismiss, and does not
object to the Court deciding that Motion on the papers.

Argument

I. Plaintiffs’ Claims Against Governor Ducey Are Moot and Not Subject to any Mootness Exception.

Plaintiffs do not dispute that Governor Ducey has two non-discretionary ministerial roles in Arizona’s electoral process (observing the statewide canvass and transmitting a Certificate of Ascertainment to the National Archivist), and that both of these duties have been performed. Plaintiffs raise two arguments against the mootness doctrine, both of which fail. *First*, Plaintiffs cite 3 U.S.C. § 6 for the proposition that the Court can somehow require Governor Ducey to effectively undo the State’s transmission of the Certificate to the National Archivist on November 30. (*See* Doc. 44 at 11, 13). More specifically, Plaintiffs note that under 3 U.S.C. § 6:

if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination

At the outset, Plaintiffs did not request that Governor Ducey issue a “final determination” certificate in their Complaint or their injunctive request. (*See* Doc. 1 at ¶ 145.) As such, this request is not properly before the Court and cannot be granted. *See Rental Dev. Corp. of Am. v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962).

Moreover, Plaintiffs’ reliance on 3 U.S.C. § 6 is misplaced because an order from this Court order does not constitute a “determination” within the meaning of that statute. The statutory text relied on by Plaintiffs instead concerns *state court* election contests decided under state law. That is apparent from the text itself, which discusses a “final determination *in a State in the manner provided for by law* of a controversy or contest concerning the appointment of all or any of the electors *of such State.*” (Emphasis added).

The meaning of the phrase “controversy or contest” is further elucidated by 3 U.S.C. § 5, which explains that such matters shall be decided in accordance with *state* law. *See* 3 U.S.C. § 5 (“If any State shall have provided, by laws enacted prior to the day fixed for the

1 appointment of the electors, for its final determination of any controversy or contest
 2 concerning the appointment of all or any of the electors of such State . . .”). Reading these
 3 statutes together, as the Court must, it is apparent that the “determination” of a “controversy
 4 or contest” for purposes of 3 U.S.C. § 6 is one made pursuant to *state* law in a *state* forum.
 5 *See California v. Trump*, 963 F.3d 926, 947 n.15 (9th Cir. 2020) (“[S]tatutes addressing the
 6 same subject matter should be construed *in pari materia*.”) (internal quotations omitted).
 7 Because 3 U.S.C. § 6 imposes no duty on Governor Ducey to issue another certificate to
 8 the National Archivist, Plaintiffs have no live case or controversy claim against him. *See*
 9 *Wood v. Raffensperger*, ---F.3d---, 2020 WL 7094866 (11th Cir. Dec. 5, 2020) (holding that
 10 the plaintiffs’ claims were moot “[b]ecause Georgia has already certified its results” and
 11 because the court “cannot turn back the clock and create a world in which the 2020 election
 12 results are not certified”) (internal quotations and citations omitted).²

13 *Second*, Plaintiffs argue that this case is not moot because election cases fall within
 14 the “capable of repetition, yet evading review” exception. (Doc. 44 at 11-12). But that
 15 exception does not apply. A case is only “capable of repetition, yet evading review” when
 16 (1) the challenged action is too short in duration to be fully litigated prior to its cessation or
 17 expiration; and (2) there is a reasonable expectation that the same complaining party will
 18 be subjected to the same action again. *See Ill. State Bd. of Elections v. Socialist Workers*
 19 *Party*, 440 U.S. 173, 187 (1979); *see also Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir.
 20 2018) (explaining that the first factor applies when expedited review is unavailable).

21 _____
 22 ² Even if a federal court order could constitute a “determination” under 3 U.S.C. § 6 (it
 23 cannot), that statute only allows Governor Ducey to send an alternative slate of electors in
 24 the event that an election outcome is altered after the initial Certificate was sent. *See Richard*
 25 *D. Friedman, Trying to Make Peace with Bush v. Gore*, 29 Fla. St. U. L. Rev. 811, 821
 26 (2001) (noting that in 1960 Hawaii sent “two competing slates” to the electoral college
 27 because it “first certified the Republican slate as the winners” but later “reversed itself after
 28 . . . the completion of a recount ordered by a state court . . .”). Here, Plaintiffs do not ask
 the Court for mandamus relief requiring Governor Ducey to send an alternative slate of
 electors to the National Archivist. Instead, they seek to enjoin him from sending *any*
 certificate of ascertainment to the National Archivist. (See Doc. 1 at ¶ 145 (requesting an
 “order enjoining Governor Ducey from transmitting the currently certified election results
 to the Electoral College”). Indeed, Plaintiffs maintain that if their requested relief is granted,
 “the question of the choice of electors” will be “revert[ed] to the legislature.” (*Id.* at ¶ 17
 (emphasis added)).

1 Plaintiffs have not identified how either factor is met here, and the allegations in their
 2 Complaint focus on the 2020 General Election. (*See, e.g.*, Doc 1 at ¶¶ 1-4, 48-62, 65-66,
 3 79, 83, 97-102, 111, 116-23, 139-45); *see also Wood*, 2020 WL 7094866 (holding that the
 4 mootness doctrine applied when a plaintiff did not have “a ‘reasonable expectation’ that he
 5 will again seek to delay certification,” and that the “possibility of a recurrence is purely
 6 theoretical”). Plaintiffs’ claims against the Governor should therefore be dismissed because
 7 they are moot.³

8 **II. Plaintiffs’ Claims Against Governor Ducey are Barred by the Eleventh**
 9 **Amendment.**

10 Plaintiffs do not dispute that the Eleventh Amendment bars their claims against
 11 Governor Ducey unless Governor Ducey has a requisite *Ex Parte Young* connection to this
 12 action. Plaintiffs also do not dispute that Governor Ducey lacks a connection to any of the
 13 allegations, speculative or otherwise, made in the Complaint or that he lacked authority to
 14 oversee, correct, or prevent these alleged issues. (*See* Doc. 38 at 7). Plaintiffs nevertheless
 15 assert that *Ex Parte Young* applies due to the provision in 3 U.S.C. § 6 requiring a state’s
 16 chief executive to issue a certificate to the National Archivist regarding the determination
 17 in a “controversy or contest concerning the appointment of all or any of the electors of such
 18 State.” (Doc. 44. at 13.) This argument fails for the same reasons described above. Again,
 19 the “controversy or contest” referenced in 3 U.S.C § 6 refers to a *state law* election contest
 20 in a state forum, such as the type of election challenged authorized by A.R.S. § 16-672(B).
 21 Moreover, because Plaintiffs did not raise this issue in their Complaint or provide any other
 22 grounds for applying *Ex Parte Young*, all claims against the Governor should be dismissed
 23 based on Eleventh Amendment immunity.

24
 25
 26
 27 ³ Plaintiffs argue that their claims are not moot because they have asked for a court order
 28 impounding Dominion voting machines. (Doc. 44 at 11). But Plaintiffs do not (and cannot)
 allege that the impound of Dominion voting machines has anything to do with Governor
 Ducey. (*See id.*).

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

3 Plaintiffs did not respond to Governor Ducey’s argument that he should “be
4 dismissed because Plaintiffs’ Complaint is devoid of any ‘factual content that allows the
5 court to draw the reasonable inference that the defendant’ at issue—Governor Ducey—‘is
6 liable for the misconduct alleged.’” (Doc. 38 at 7 (citing *Ashcroft v. Iqbal*, 556 U.S. 662,
7 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). When a party
8 fails to respond to an argument in a motion to dismiss, a district court “may dispose of the
9 motion summarily.” *See* L.R. Civ. 7.2(I); *see also Owner-Operator Independent Drivers*
10 *Assoc., Inc. v. Swift Transp. Co., Inc.*, No. CV 02-1059-PHX-PGR, 2004 WL 5376210, at
11 *5 (D. Ariz. July 28, 2004) (a party’s “failure in its response to set forth any argument in
12 opposition to such a dismissal to be a consent on its part to the requested dismissal”).

13 In addition, Plaintiffs’ response to the arguments made by other Defendants confirms
14 they have no plausible claim for relief against Governor Ducey. Plaintiffs assert that the
15 crux of their Complaint is alleged “systematic violations of procedural safeguards designed
16 to prevent ‘fraud’ and ‘ballot tampering.’” (Doc. 44 at 24). At no point, however, do
17 Plaintiffs suggest that Governor Ducey has any involvement in these alleged systemic issues
18 in election administration. Indeed, the Complaint does not contain any specific factual
19 allegations against him at all. (*See* Doc. 38 at 7). Thus, all that remains is Governor Ducey’s
20 non-discretionary ministerial role (along with the Arizona Attorney General, who is not
21 named as a Defendant) in observing the certification of the official statewide canvass and
22 transmitting the names of Arizona’s electoral college electors to the National Archivist. *See*
23 A.R.S. § 16-648; 3 U.S.C § 6. That alone cannot be sufficient to state a plausible claim
24 against Governor Ducey for violations of equal protection or due process rights or any other
25 law.

1 **IV. Plaintiffs’ Lack Standing to Bring Claims Against Governor Ducey Because**
2 **They Cannot Show that Their Alleged Injuries Are Traceable to, or**
3 **Redressable by, the Governor.**

4 As stated above, Plaintiffs do not address Governor Ducey’s argument that their
5 alleged injuries are not traceable to or redressable by him. Instead, they attempt (in a
6 footnote) to distinguish one of the cases cited regarding standing—*Donald J. Trump for*
7 *President, Inc. v. Boockvar*, ---F. Supp. 3d---, 2020 WL 6821992 (M.D. Penn. Nov. 21,
8 2020)—on the ground that *Boockvar* addressed certain standing theories “that are not
9 present here.” (Doc. 44 at 7 n.6). This argument misses the point. *Boockvar* is relevant here
10 because, as in that case, Plaintiffs’ injuries are neither traceable to nor redressable by the
11 government official they sued. (Doc. 38 at 9); *see Boockvar*, 2020 WL 6821992, at *6-7.
12 Critically, Plaintiffs do not explain how they meet either of these standing elements.
13 Governor Ducey did not, under any factual scenario, “actually cause[] their [alleged]
14 injuries” related to systemic election fraud and cannot redress those alleged injuries. *See*
15 *Boockvar*, 2020 WL 6821992, at *6-7; *see also Barnum Timber Co. v. U.S. E.P.A.*, 633
16 F.3d 894, 897 (9th Cir. 2011). Because Plaintiffs are unable to explain how their claims
17 against Governor Ducey satisfy two fundamental elements of standing, the Court should
18 dismiss their claims against him. *See* L.R. Civ. 7.2(I).

19 **Conclusion**

20 Plaintiffs’ claims against Governor Ducey should be dismissed with prejudice under
21 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because those claims are moot,
22 barred by the Eleventh Amendment, unsupported by factual allegations, and Plaintiffs lack
23 standing to bring them against Governor Ducey.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 6th 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*

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on December 6, 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/ Tracy Hobbs

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