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ARIZONA SUPERIOR COURT

MOHAVE COUNTY

TED BOYD, et al.,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, et al.,

Defendants.

No. S8015CV202201468

**DEFENDANT KRIS MAYES' TRIAL
BRIEF**

(Assigned to the Hon. Lee F. Jantzen)

Introduction

Courts must apply “all reasonable presumptions” in “favor [of] the validity of [the] election.” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). Additionally, they must apply a presumption of “good faith and honesty of the members of the election board.” *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917).

Against this backdrop, Plaintiffs cannot prove their claims for (1) “misconduct on the part of election boards” or “any officer making or participating in a canvass for state election” (Claims 1, 2); (2) “illegal votes” (Claim 4); and (3) that “by reason of erroneous count of votes” Kris Mayes “did not in fact receive the highest number of votes” for Arizona Attorney General (Claims 1, 2, 3, 4). A.R.S. § 16-672(A) (1), (4), (5).

Argument

I. The legal standards for each claim are well-established.

To establish their claims, Plaintiffs bear a heavy burden. *Ward v. Jackson*, No. CV2020-015285, 2020 WL 13032880, at *2 (Ariz. Dec. 4, 2020) (plaintiff has the burden of proof and it is a “high burden”). As this Court has recognized, “Plaintiff has a high burden to meet in order to have an election overturned.” [Dec. 20, 2022 Order at 3] In addition to this high burden, Arizona courts apply “all reasonable presumptions” in “favor [of] the validity of an election.” *Moore*, 148 Ariz. at 159.

In this case, only three grounds for an election contest are at issue: (1) “misconduct” by election boards, (2) “illegal votes,” or (3) that because of an “erroneous count of votes,” the elected official did not “receive the highest number of votes.” A.R.S. § 16-672(A)(1), (4), (5). The elements that the Plaintiffs must prove for each claim are clear.

1. Misconduct (Claims 1 and 2). To establish a claim for “misconduct” under A.R.S. § 16-672(A)(1), Plaintiffs must show two things.

1 First, they must show “misconduct,” which courts have described as ““intentional conduct
2 [that] the [person] knows to be improper and prejudicial.”” *State v. Lapan*, 249 Ariz. 540, 549 ¶
3 25 (App. 2020) (citation omitted); *see id.* (defining misconduct in case of prosecutorial
4 discretion). “Misconduct” does not include “honest mistakes or mere omissions on the part of
5 the election officers.” *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929).

6 Second, they must make a “showing of fraud or . . . a showing that had the proper
7 procedures been used, the result would have been different.” *Moore*, 148 Ariz. at 159.

8 **2. Illegal votes (Claim 4).** Next, “[w]here an election is contested on the grounds of
9 illegal voting [under A.R.S. § 16-672(A)(4)], the contestant has the burden of showing” two
10 things. *Moore*, 148 Ariz. at 156.

11 First, they must show that there were illegal votes. Illegal votes are votes that are against
12 the law. *Illegal*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Forbidden by law.”). Indeed,
13 Arizona law establishes a specific offense for “illegal voting,” under the election statutes,
14 enumerating specific instances of prohibited conduct. *See* A.R.S. § 16-1016. Illegal voting
15 includes, for example, a voter “[n]ot being entitled to vote, [who] knowingly votes.” A.R.S. §
16 16-1016(1); *see also Moore*, 148 Ariz. at 156 (observing that “illegal voting” includes voters
17 who should have been “purge[d] from the registration lists”).

18 Second, they must show “that sufficient illegal votes were cast to change the result.” *Id.*

19 **3. Erroneous Count of Votes (Claims 1, 2, 3, 4).** Finally, Plaintiffs must prove two
20 things to establish an “erroneous count of votes” under A.R.S. § 16-672(A)(5).

21 First, they must show that a count of votes was “erroneous,” *id.*, meaning votes were
22 counted wrongly. According to its plain and ordinary meaning, “erroneous” means “containing
23 or characterized by error.” *Erroneous*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam->
24

1 webster.com/dictionary/erroneous?src=search-dict-hed. An “erroneous count of votes” thus
2 requires not just an error in an individual vote, but in the vote count itself.

3 *Second*, they must show that, as a result, Kris Mayes “did not in fact receive the highest
4 number of votes.” *Id.*

5 **II. Plaintiffs will fail to prove each claim.**

6 **A. Plaintiffs will fail to prove Count I.**

7 Plaintiffs allege that, on Election Day, some ballot tabulation machines at various
8 Maricopa County voting centers failed to properly process ballots. As even Plaintiffs admit,
9 voters had multiple options that would have allowed their votes to be counted. [Compl. ¶ 30]
10 Some of those options, however, required poll workers to “check out” voters before they could
11 “check in” again and vote at a different voting center or vote their early ballot. [*Id.* ¶ 31] Plaintiffs
12 allege that some voters were not properly “checked out” of the voting centers, resulting in their
13 votes not being counted. Specifically, and as to Count I, they allege that (1) 126 of these voters
14 voted uncounted provisional ballots; (2) 269 of these voters voted uncounted early ballots.
15 Plaintiffs will fail to prove that this was either (1) misconduct; or (2) “erroneous votes.”

16 **Misconduct.** As to the misconduct claim, Plaintiffs will first fail to adduce any evidence
17 that the failure to count any such provisional ballots or early ballots was “misconduct,” or
18 intentional, improper conduct. *Lapan*, 249 Ariz. at 549 ¶ 25.

19 Second, they will fail to show that the result would have been different because of these
20 errors. Even as alleged, and even assuming all these 369 votes were for Mr. Hamadeh (which
21 the court cannot assume), the result would not have been different. *See Babnew v. Linneman*,
22 154 Ariz. 90, 93 (App. 1987) (citation omitted) (“[I]t would be an uncertain and dangerous
23 experiment to attempt the task of ascertaining and giving effect to their intentions, as ballots
24 actually cast and returned.”). Kris Mayes leads by more than 369 votes.

1 In any event, the evidence will establish that the number of ballots involved is smaller
2 than even alleged in the Complaint.

3 **Erroneous Count of Votes.** Plaintiffs also will not be able to prove an erroneous count
4 of votes based on these facts.

5 *First*, Plaintiffs cannot prove that any count was “erroneous.” *Id.* Even as alleged, no
6 votes were wrongly counted at all.

7 *Second*, and for the same reasons, they will fail to show that any such votes changed the
8 outcome of the race.

9 **B. Plaintiffs will fail to prove Count 2.**

10 As to Count 2, Plaintiffs allege two underlying factual scenarios. First, on “information
11 and belief,” they allege that a “material number” of voters who presented at voting centers on
12 Election Day were “told by election workers that they were not registered to vote” and therefore
13 had to vote a provisional ballot. [Compl. ¶ 58] Plaintiffs also allege that 1,942 provisional votes
14 in Maricopa County were not counted because they were cast by unregistered voters, and that a
15 “material number” of those unregistered voters “had voted in past Arizona election[s] and had
16 done nothing to invalidate their registration.” [*Id.* ¶ 59]

17 Second, some poll workers in Maricopa County refused to “furnish provisional ballots to
18 certain voters, on the grounds that they had previously cast a ballot at another polling location
19 earlier in the day. [*Id.* ¶ 77]

20 **Misconduct.** As to the misconduct claim, Plaintiffs will first fail to adduce any evidence
21 either that not counting ballots of voters who were not registered was “misconduct,” or
22 intentional, improper conduct. *Lapan*, 249 Ariz. at 549 ¶ 25. Election officials in Maricopa
23 County followed the proper procedures. Further, the evidence will establish that voters were not
24 denied provisional ballots.

1 Second, as a matter of law, they will fail to show that the result would have been different
2 because of these allegations. This Court cannot guess about whom voters voted for. *See Babnew*,
3 154 Ariz. at 93 (citation omitted) (“[I]t would be an uncertain and dangerous experiment to
4 attempt the task of ascertaining and giving effect to their intentions, as ballots actually cast and
5 returned.”).

6 **Erroneous Count of Votes.** Plaintiffs also will not be able to prove an erroneous count
7 of votes based on these facts.

8 *First*, Plaintiffs cannot prove that any count was “erroneous.” A.R.S. § 16-672(A)(5).
9 Even as alleged, no votes were wrongly counted at all; the allegations is that votes weren’t
10 counted.

11 *Second*, and for the same reasons, they will fail to show that any such votes changed the
12 outcome of the race.

13 **C. Plaintiffs will fail to prove Count 3.**

14 In their complaint Plaintiffs alleged on “information and belief,” that an unspecified
15 number of damaged ballots were “erroneously transposed,” which resulted in “the unlawful
16 mistabulation of a ballot.” [Compl. ¶¶ 4, 85] In support, they cite a purported statistic from a
17 different election (in 2020). [*Id.* ¶ 41] They allege no facts and cite no evidence of any issues
18 from this election.

19 **Erroneous Count of Votes.** Plaintiffs also will not be able to prove an erroneous count
20 of votes based on these facts.

21 Plaintiffs will fail to prove any count of votes based on duplication errors, were
22 “erroneous,” *id.*, meaning votes were counted wrongly.

23 *Second*, and in all events, they certainly cannot show that any identified duplication errors
24 would result Kris Mayes not having “receive[d] the highest number of votes.” *Id.*

1 **D. Plaintiffs will fail to prove Count 4.**

2 Fourth, and finally, Plaintiffs, and while less than clear, make several allegations with
3 respect to Electronic Adjudication, the process by which unclear ballots are evaluated. Generally,
4 they seem to claim that the “Electronic Adjudication Boards . . . have incorrectly recorded a
5 material number of voter sections” in the race for Attorney General. [Compl. ¶ 91] But,
6 specifically, Plaintiffs seem to make two allegations.

7 *First*, the counties allegedly “erroneously tabulat[ed] votes that should have been
8 disqualified and invalid overvotes,” resulting in “illegal votes.” [*Id.* ¶ 92]

9 *Second*, the Plaintiffs allege that the counties have “designat[ed] or mischaracteriz[ed]
10 voter’s manifested intent as undervotes,” resulting in an erroneous count of votes. [*Id.*]

11 **Illegal votes.** Plaintiffs simply cannot meet their burden of showing that there were
12 erroneously counted over votes. Plaintiffs, thus far, have offered no evidence of this. And, in any
13 event, overvotes are not illegal votes. Again, Arizona law identifies what votes are “illegal.”
14 Under these definitions, undervoting or overvoting are not prohibited as “illegal voting.” *See*
15 A.R.S. § 16-1016.

16 *Second*, assuming there were any illegal votes, Plaintiffs cannot show that the votes were
17 would have changed the result.

18 **Erroneous Count of Votes.** Plaintiffs also will not be able to prove an erroneous count
19 of votes based on undervotes *or* the overvotes.

20 *First*, Plaintiffs cannot prove that any count was “erroneous,” or counted wrongly under
21 Arizona law. *Id.* Again, it is now clear that the Plaintiffs are not claiming that any election official
22 wrongly followed Arizona law regarding the designating overvotes. Instead, they seem to be
23
24

1 complaining that election officials are not manually reviewing undervotes. Votes counted
2 pursuant to current law cannot be “erroneous.”¹

3 *Second*, and for the same reasons, they will fail to show that any such votes were in a
4 sufficient number to have changed the outcome of the race.

5 **III. This Court should enter an order confirming the election.**

6 Because Plaintiffs will fail to meet their burden of proof, the Court must enter an order
7 “confirming . . . the election.” A.R.S. § 16-676(B). The Court should also enter an order
8 awarding Defendant/Contestant Kris Mayes her attorneys’ fees and costs pursuant to A.R.S. §
9 12-349 and any other applicable statute or rule.

10
11 Dated: December 22, 2022

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23
24 ¹ This claim is also barred by laches for the reasons set forth in the Secretary of State’s
Bench Memorandum.

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