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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' CONSOLIDATED RESPONSE TO PETITION TO INSPECT BALLOTS AND MOTION TO EXPEDITE DISCOVERY

ORAL ARGUMENT REQUESTED

(Assigned to the Hon. Lee F. Jantzen)

Introduction

Having failed to allege facts to support their request to overturn Arizona's November 8, 2022 general election, Plaintiffs now ask this Court to allow them to engage in a wild fishing expedition to search for a factual basis for their claims that appears nowhere in their complaint. They seek permission to inspect every ballot that (a) underwent duplication or electronic adjudication and (b) shows an undervote for the Arizona Attorney General contest. By their own admission, this requested inspection would cover well over 50,000 ballots. [Compl. ¶ 47] In addition, and based only on their own conclusory allegations, they seek to throw open the discovery doors to serve the County Defendants with several requests for production of documents focused on "check-in" and "check-out" procedures and ballot verification policies.

Plaintiffs have no right to their requested discovery. As explained in Kris Mayes's motion to dismiss, their complaint fails to state a claim on which relief can be granted. That alone shuts the door on their effort to inspect ballots and serve requests for production of documents. But even if they had alleged facts that stated a claim for relief, election contests are "purely statutory and dependent upon statutory provisions for their conduct," *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966), and the statutes authorize one (and only one) form of discovery: an inspection of ballots by three persons appointed by the Court for the narrow purpose of allowing a party to "prepare for trial." A.R.S. § 16-677(B). These principles bar Plaintiffs' requests for production of documents, and their effort to inspect over 50,000 ballots exceeds what A.R.S. § 16-677 allows. This Court should deny the petition to inspect ballots and motion to expedite discovery.

Argument

I. Plaintiffs have no right to any discovery because their complaint fails to state any claim on which relief can be granted.

An election contestant, like any other plaintiff, does not have an unfettered right to conduct discovery. A statement of contest must contain "factual allegations" establishing that

the contestant has a right to the requested relief, not just "[c]onclusory statements" and "legal conclusions." *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *2 ¶ 10 (Ariz. Ct. App. July 22, 2019) (quoting *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008)).

A statement of contest, like any other complaint, that fails to meet these requirements must be immediately dismissed. A motion to dismiss for failure to state a claim assumes "the truth of the well-pleaded facts in the complaint *before the parties engage in discovery*." *Lakewood Cmty. Ass'n v. Orozco*, No. 1 CA-CV 19-0194, 2020 WL 950225, at *1 ¶ 6 (Ariz. Ct. App. Feb. 27, 2020) (emphasis added). Such a motion "attacks the legal sufficiency of the complaint." *Logan v. Forever Living Prods. Int'l, Inc.*, 203 Ariz. 191, 192 ¶ 2 (2002) (citation omitted). Because it shows "as a matter of law" that the plaintiffs "would not be entitled to relief under *any* interpretation of the facts susceptible of proof," a plaintiff has no right to discovery when the complaint fails to meet Arizona's pleading standards. *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 391 ¶ 18 (App. 2005) (citation omitted) (emphasis added).

These principles apply with even greater force in election contests, given that Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). In rejecting an election contestant's argument that "an inspection of ballots . . . must be allowed when an election is contested," the Minnesota Supreme Court held, consistent with the Arizona cases above, that "whether the allegations" in an election contest "state a claim upon which relief could be granted . . . must be answered *before* moving forward" with a ballot inspection. *Bergstrom v. McEwen*, 960 N.W.2d 556, 565 (Minn. 2010) (emphasis added). That's because an election contestant has no "absolute right" to "a ballot inspection." *Id.* (citation omitted). And because the contestant there failed to allege facts showing that she had any right to relief under the election contest statutes, the Court affirmed the trial court's dismissal of the contest and the denial of the requested ballot inspection. *Id.* at

566. Other courts agree. *See, e.g.*, *Zahray v. Emricson*, 182 N.E.2d 756, 758 (Ill. 1962) ("Equally certain is the principle that [election contests] cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge."); *Cruse v. Richards*, 37 P.2d 382, 384 (Colo. 1934) (dismissing an election contest when the petition failed to "state facts sufficient to constitute a cause of action" and holding that courts cannot "embark on a mere fishing expedition by opening up ballot boxes when there is an utter lack of specific allegations" that would state a claim for relief); *In re Gollmar's Election*, 175 A. 510, 513 (Pa. 1934) ("The pleadings before us would seem only an effort to place the situation in such a light as to justify a voyage of exploration into a large number of ballot boxes, in the hope of an ultimate discovery. Such is not province of a contest[.]").

Here, as explained in Kris Mayes's motion to dismiss, Plaintiffs failed to state any claim on which relief can be granted. Thus, they have no right to any discovery at all. For this reason alone, this Court should deny the petition to inspect ballots and the motion to expedite discovery.

II. Even if Plaintiffs had stated a claim on which relief could be granted, an inspection of ballots under A.R.S. § 16-677 is the only discovery that would have been allowed.

A contestant who has alleged sufficient facts in the complaint to survive a motion to dismiss (unlike the contestants here) would have the right to only limited discovery under Arizona's election contest statutes. "Election contests are purely statutory and dependent upon statutory provisions for their conduct." *Fish*, 2 Ariz. App. at 605. The statutes impose a highly accelerated timeline for resolving contests. After a contestant files a complaint, the contestee must respond "within five days after service of the summons, exclusive of the day of service." A.R.S. § 16-675(A). And the Court must set a "hearing of the contest, not later than ten days after the date on which the statement of contest was filed." A.R.S. § 16-676(A).[1]

[1] In the motion to expedite discovery, Plaintiffs suggest (at 3) that the contestee "must answer a statement within five days of service" and the hearing "must conclude no later than 15

Given this accelerated timeline, it's no surprise that the election contest statutes significantly restrict the discovery that the parties may conduct. Arizona's election contest statutes authorize one (and only one) form of discovery: an inspection of ballots by three persons appointed by the Court for the narrow purpose of allowing a party to "prepare for trial." A.R.S. § 16-677(B). Because election contests are "purely statutory and dependent upon statutory provisions for their conduct," that's all the discovery that an election contestant who has stated a claim for relief could conduct. *Fish*, 2 Ariz. App. at 605; *see also O'Farrell v. Landis*, 985 N.E.2d 458, 460–61 (Ohio 2013) (rejecting an election contestant's effort to "invoke" the Rules of Civil Procedure to "obtain discovery" and holding that an election contest is "a special statutory procedure," and so the ballot inspection statute "governs discovery" because "the expeditious and special nature of the election[] contest . . . does not admit the strict application" of the Rules of Civil Procedure); *Rodriguez v. Cuellar*, 143 S.W.3d 251, 260 (Tex. Ct. App. 2004) ("[E]lections are politically time sensitive, and legislative remedies for contested elections are to be strictly followed. . . . This case is on a legislatively mandated fast track, and the election code sets out the accelerated procedures for the trial and appeal of this election contest.").

Here, even if Plaintiffs had stated a claim, they would have the right only to inspect ballots for the purpose of "preparing for trial." A.R.S. § 16-677(A). They have no right to serve the requests for production that they propose, which implicate a wide array of documents, including, for instance, information about signature specimens and documents related to the "checking-out" of voters. What's more, these requests further evidence that they have no facts in support of their speculative claims. As a result, this Court should deny the motion to expedite discovery.

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days after that." That's wrong. The hearing must conclude "not later than ten days *after the date on which the statement of contest was filed*." A.R.S. § 16-676(A) (emphasis added).

III. Plaintiffs' requested ballot inspection exceeds what A.R.S. § 16-677 authorizes.

In their petition to inspect ballots, Plaintiffs ask this Court to allow them to inspect every ballot that (a) underwent duplication or electronic adjudication and (b) shows an undervote for the Arizona Attorney General contest. As Plaintiffs themselves admitted in their complaint, this requested inspection would cover well over 50,000 ballots. [Compl. ¶ 47] Plaintiffs have no right to *any* inspection because their complaint fails to state a claim on which relief can be granted, but even if they had stated a claim, A.R.S. § 16-677 would not authorize *this* inspection.

When a party cannot "properly prepare for trial without an inspection of the ballots," it may petition the Court to appoint three persons (one selected by each of the parties and one by the Court) to inspect ballots. A.R.S. § 16-677(B).[2] But Plaintiffs cannot seriously suggest that they signed a complaint under Arizona Rule of Civil Procedure 11 that they believe alleges sufficient facts to state a claim on which relief can be granted that somehow still requires that they have access to over 50,000 ballots to "properly prepare" for a trial that must be held within 10 days of when they filed their complaint. Given the accelerated timeline that applies to election contests, this Court should interpret A.R.S. § 16-677 narrowly to authorize ballot inspections only when a party actually demonstrates that it *needs* the ballot inspection to "prepare for trial"—*i.e.*, presents *facts* explaining the need for the specific ballots in question rather than baldly asserting a need to inspect tens of thousands of ballots in the short window to conduct discovery.

It has long been the rule that a party cannot engage in "fishing expeditions" when it has "no basis other than gross speculation" to claim that discovery might turn up relevant information. *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021) (citation omitted);

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[2] Plaintiffs petitioned the Court (at 3) to "authorize them, through their attorneys and agents," to inspect ballots. That's not how it works. Under A.R.S. § 16-677(B), the Court must appoint three persons (one selected by each of the parties and one by the Court) to inspect ballots. Plaintiffs have no right to have multiple "attorneys and agents" at any ballot inspection.

see also Green v. Nygaard, 213 Ariz. 460, 466 ¶ 18 (App. 2006) (noting that parties cannot use discovery for "wild fishing expeditions") (citation omitted); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 425–26 (1st Cir. 2007) (holding that plaintiffs cannot "conduct fishing expeditions in hopes of discovering claims that they do not know they have" and rejecting a party's requested discovery when it was based only on "sheer speculation") (citation omitted).

Here, Plaintiffs fall far short of carrying their burden of justifying any need for a ballot inspection in support of any of their claims. With respect to ballots that underwent duplication, they identify (at 3–4) zero (0) votes that were wrongly duplicated in the election for Arizona Attorney General. *See* Count III. Likewise, with ballots that underwent electronic adjudication, they identify (at 6) only one (1) instance in which the Maricopa County Electronic Adjudication Board allegedly wrongly characterized a voter's intent in the election for Arizona Governor and zero (0) instances in the election for Arizona Attorney General. And as for their request to inspect every ballot that shows an undervote for the Arizona Attorney General contest, they cite (at 7) an unproduced "report" from an unidentified observer that "tabulation and electronic adjudication equipment have been unable to clearly capture the ballot markings" of unnamed voters.[3] *See* Count IV. They then use these vague complaints—unsupported by any declaration from any voter or observer, including the observer who supposedly provided the "report" that they rely on—to justify a request to inspect over 50,000 ballots within the next five days. This is a naked effort to engage in a "fishing expedition[]" based on no more than "gross speculation." *Webb*, 999 F.3d at 1204 (citation omitted). This Court should deny the requested ballot inspection because Plaintiffs failed to establish that they need it to prepare for trial.

[3] They also complain about two (2) ballots that they allege "should have been sent to adjudication." But they do not even try to explain the basis on which they assert that these two ballots were wrongly not adjudicated. Nor do they even assert that these two ballots had issues in the election for Arizona Attorney General. This is precisely the type of "gross speculation" that leads courts to deny requested discovery. *Webb*, 999 F.3d at 1204 (citation omitted).

Conclusion

Plaintiffs filed a complaint in search of a factual basis. Now, they ask this Court for permission to engage in a wild fishing expedition to search for facts to support the claims that they've already filed. But their claims all fail to state a claim on which relief can be granted, and so they have no right to any discovery at all. Even if they had alleged facts that stated a claim, however, they still would have lacked authority under the election contest statutes to serve any requests for production of documents, and their effort to inspect over 50,000 ballots would have far exceeded what A.R.S. § 16-677 allows. This Court should deny all their requested discovery.

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