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ARIZONA SUPERIOR COURT
MOHAVE COUNTY

JEANNE KENTCH, an individual; TED
BOYD, and individual; ABRAHAM
HAMADEH, an individual; and
REPUBLICAN NATIONAL COMMITTEE, a
federal political party committee,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the
Secretary of State; et al.,

Defendants.

No. S8015CV2022-01468

**ARIZONA SECRETARY OF STATE
KATIE HOBBS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' (1)
VERIFIED PETITION TO
INSPECT BALLOTS AND (2)
MOTION FOR EXPEDITED
DISCOVERY**

(Assigned to Hon. Lee F. Jantzen)

Introduction

As detailed in the motion to dismiss filed yesterday by the Secretary of State, Plaintiffs' election contest fails to state any cognizable claims for relief and should be dismissed, thereby mooting Plaintiffs' petition to inspect ballots under A.R.S. § 16-677. Although Plaintiffs may attempt to evade dismissal by arguing that they should be afforded an opportunity to conduct discovery before the motions are heard, there is no basis in law for permitting discovery based on an invalid pleading. In addition, Plaintiffs' request in the alternative for production of the ballots pursuant to Rule 34 and Motion for Expedited Discovery directed to the counties must also be denied, not only because it is moot but also because ballot inspection in accordance with A.R.S. § 16-677 is the only discovery permitted under the election contest statutes.

The fact that Plaintiffs' petition is limited to ballots potentially relevant to Counts III and IV of their election contest makes their request particularly egregious. Plaintiffs have not identified a single instance of an Attorney General vote being affected by either errors in ballot duplication or electronic vote adjudication. [See Secretary's Motion to Dismiss at 7-9] Yet Plaintiffs request access to all ballots that may have been erroneously marked or adjudicated, with the apparent goal of "checking the work" of election officials. This attempt ignores the fact that the ballot duplication and adjudication processes Plaintiffs now challenge already required bipartisan participation and included opportunities for oversight by political party representatives:

- Each Ballot Duplication Board was required to include "at least two members who are registered voters not of the same political party." 2019 Election Procedures Manual ("EPM") at 201.
- Each Electronic Vote Adjudication Board consisted of two judges representing the "two largest political parties." See A.R.S. § 16-621; Electronic Adjudication Addendum to the 2019 Election Procedures Manual ("EPM Addendum") at 2-3.

- Political party representatives were invited to observe both the duplication of ballots by the Ballot Duplication Board and ballot adjudication by the Electronic Vote Adjudication Board, and had the opportunity to register any objections at that time. *See* 2019 Election Procedures Manual (“EPM”) at 141.

Thus, granting Plaintiffs the discovery they seek in connection with Counts III and IV would effectively create a third layer of partisan review and participation for these election processes, a result that the election contest statute cannot be read to require based on a deficient pleading.

For all these reasons, Plaintiffs’ request for discovery should be denied

Argument

I. No Discovery May Be Granted in Connection with an Invalid Election Contest

An election contest must meet threshold pleading requirements to proceed. *See Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (assessing election contest under Rule 8(a) notice pleading requirements); *Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959) (election contest subject to dismissal if it fails to state a claim upon which relief can be granted). For all the reasons detailed in the Secretary’s motion to dismiss, Plaintiffs’ election contest fails to clear that bar and should be dismissed.

A plaintiff is not entitled to use an invalid pleading as a springboard for discovery. *See Lakewood Cmty. Ass’n v. Orozco*, No. 1 CA-CV 19-0194, 2020 WL 950225, at *1 (Ariz. Ct. App. Feb. 27, 2020) (holding that “[a] motion to dismiss under Rule 12(b)(6) tests the allegations of a pleading by assuming the truth of the well-pleaded facts in the complaint *before* the parties engage in discovery” and “[t]hus, no discovery was necessary or appropriate” before a trial court rules on such a motion) (emphasis added).

Although Arizona appellate courts have not addressed the specific question of whether an election contest statement that fails to clear the pleading threshold may be used to justify a ballot inspection, many other courts have made amply clear that it cannot. For instance, the Minnesota Supreme Court recently denied a defeated candidate the opportunity to inspect ballots

1 under an inspection provision similar to Arizona’s because the contest allegations failed to state
2 a cognizable claim. *See Bergstrom v. McEwen*, 960 N.W.2d 556, 565-66 (Minn. 2021). The
3 candidate alleged that “irregularities” in the conduct of the election and in the absentee ballot
4 canvass “raised questions over who received the largest number of votes legally cast in the
5 election,” and argued that “transparency and public confidence in the integrity of the election
6 require[d]” that she be allowed to inspect the ballots. *Id.* at 558 & 566 (internal quotation marks
7 omitted). The court rejected the argument that the mere filing of an election contest an “absolute
8 right” to ballot inspection, holding that inspection was only allowed if the contest notice stated
9 a claim upon which relief could be granted. *Id.* at 565.

10 The highest courts of many other states agree. *See, e.g., Zahray v. Emricson*, 182 N.E.2d
11 756, 757-58 (Ill. 1962) (election contest “cannot be employed to allow a party, on mere
12 suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to
13 make a tangible charge”); *McClendon v. McKeown*, 323 S.W.2d 542, 545 (Ark. 1959) (“It is not
14 the duty, or within the power, of the Court within the scope of the allegations and prayer of the
15 Petition herein, to impound and open the ballot box or boxes, and, in effect *canvas* the votes cast
16 for Mayor in order to declare the nominee” merely on the allegation ““that after said cancellation
17 and retabulation, the Petitioner verily believes that he will have received more votes[.]””)
18 (Emphasis in original); *Cruse v. Richards*, 37 P.2d 382, 383–84 (Colo. 1934) (“In a contest
19 proceeding it is always necessary to allege facts which will enable the court to determine that a
20 different result would follow in the vote by reason of such alleged facts. . . . Courts cannot
21 properly embark on a mere fishing expedition by opening up ballot boxes when there is an utter
22 lack of specific allegations as to the distribution of the votes.”); *Gollmar’s Election, Case of*, 175
23 A. 510, 513 (Pa. 1934) (“The pleadings before us would seem only an effort to place the situation
24 in such a light as to justify a voyage of exploration into a large number of ballot boxes, in the
25 hope of an ultimate discovery. Such is not province of a contest[.]”)

1 These courts were all cognizant of the harm that would follow the too-careless
2 deployment of the election contest process, and the need to ensure that every election would not
3 involve the re-opening of ballot boxes and judicial review of the work performed by election
4 officials. As the Louisiana Supreme Court stated nearly a century ago:

5 It can not be disputed that elections are conducted by duly appointed and sworn
6 election officials and not by the courts. These officials are presumed to do their
7 duty. Their official acts are entitled to respect. In the absence of specific allegations
8 of fraud, mistake, error or misconduct, the returns which they make under oath,
showing the results of an election, will not be inquired into by the courts.

9 * * * * *

10 There is nothing in plaintiff's allegations that any defeated candidate could not set
11 up after his defeat and thereby throw an election into the courts. If this were
12 permitted it is easy to see that in every case in which a candidate was defeated by
a small margin of the votes, two elections would inevitably be held—one at the
polls and the other in the courts.

13 *Landry v. Ozenne*, 195 So. 14, 23 (La. 1940).

14 Because, as in *Landry*, Respondents cannot point to specific facts indicating that the
15 alleged irregularities changed the result of the Attorney General election, Respondents' motions
16 to dismiss should be granted, thus mooted Plaintiffs' petition. *See* 195 So. at 22 ("It is axiomatic
17 that the irregularities charged would in fact alter the result of the election before a contest can be
18 entertained.") (Internal citation and quotation omitted.)

19 **II. Plaintiffs Do Not Establish That Ballot Inspection Is Required to "Properly**
20 **Prepare for Trial."**

21 "Election contests are purely statutory. They are unknown to the common law. They
22 are neither actions at law nor suits in equity. They are special proceedings." *Grounds v.*
23 *Lawe*, 67 Ariz. 176, 186 (1948) (citation omitted). An election contest must proceed precisely
24 as the Legislature prescribed, which here means that a contestant can inspect ballots under certain
25 parameters if – and only if – the contestant "cannot properly prepare for trial without an
26 inspection of ballots." But a contestant shouldn't be able to simply declare that an inspection is

1 necessary without further scrutiny, and any request for inspection must be weighed against the
2 burden it would impose on counties and the timing of an expedited proceeding like this.

3 Here, Plaintiffs request to inspect the following:

4 (1) the original and duplicates of each ballot that underwent duplication in
5 connection with the November 8, 2022 general election, (2) all original ballots for
6 which there is a recorded undervote in the contest for Arizona Attorney General,
7 and (3) ballots on which the voter's putative selection for the office of Arizona
8 Attorney General in the November 8, 2022 general election was subjected to
electronic adjudication (to include records sufficient to identify the disposition of
each ballot during electronic adjudication

9 Plaintiffs want these made available in all 15 counties.

10 To repeat, Plaintiffs don't need these ballots "to prepare for trial" because there should
11 be no trial, and they "need" them because they have no proof whatsoever for their allegations.
12 But beyond that, Plaintiffs' request presumes that the categories of ballots they request exist in
13 a form that allows them to be readily identified by a county and made available. County election
14 departments are already occupied with conducting a statewide recount, and should not be made
15 to do additional work that is completely unnecessary because Plaintiffs' legal claims will
16 ultimately fail.

17 There is also a separate issue of timing – as noted in the Secretary's Motion to Dismiss,
18 Plaintiffs waited until the last possible moment to refile this already-dismissed action knowing
19 they were going to request ballot inspection (they filed a document in Maricopa County Superior
20 court outlining as much, *see Exhibit A*), and then waited more than three days to request ballot
21 inspection. Meanwhile, A.R.S. § 16-676(A) provides that "the court shall set a time for the
22 hearing of the contest, not later than ten days after the date on which the statement of contest
23 was filed" (here, Monday, December 19), which can be continued for five days only "for good
24 cause shown." As a practical matter, it is impossible for the Plaintiffs to even complete their
25 requested inspection before Monday, and there is no "good cause" to continue the hearing date
26 because Plaintiffs chose to re-file this case at the last moment instead of at 11:00 AM on

1 December 5 (*i.e.*, immediately upon certification of the statewide canvass) as they easily could
2 have done given that their Statement is essentially a carbon copy of the prior action.

3 For these additional reasons, the trial court should not permit Plaintiffs to inspect ballots.

4 **III. Section 16-677 is the Only Avenue for Inspecting Ballots in an Election Contest.**

5 As an alternative to ballot inspection pursuant to § 16-677, Plaintiffs also request access
6 to the ballots pursuant to Rule 34 on an expedited basis. Verified Petition to Inspect Ballots at 8.
7 No such request may be granted. As a “purely statutory” proceeding, election contests are strictly
8 limited to the procedures set forth by statute. *Donaghey v. Att’y Gen.*, 120 Ariz. 93, 95 (1978)
9 (in banc).

10 Section § 16-677 sets forth the process and requirements for ballot inspection:

11 The party applying for the inspection of ballots shall file with the clerk of the court
12 a verified petition stating that he cannot properly prepare for trial without an
13 inspection of the ballots and shall file with the petition a bond, approved by the
14 clerk, with two sureties, in the principal amount of three hundred dollars,
15 conditioned that he will pay the costs and expenses of the inspection if he fails to
16 maintain the contest. Thereupon the court shall appoint three persons, one selected
17 by each of the parties and one by the court, by whom the inspection shall be made.
18 If either party fails to name a person to act in making the inspection, the court shall
19 make the appointment.

[] The inspection of the ballots shall be made in the presence of the legal custodian
of the ballots, and the compensation of the inspectors shall be fixed by the court
and taxed as costs against the losing party.

20 A.R.S. § 16-677(B)-(C). This provision demonstrates a clear legislative intent to avoid
21 introducing additional doubt or uncertainty into the vote-counting process. It requires, among
22 other things: 1) inspection of the actual ballots at issue, 2) by three inspectors, two preferably
23 named by the parties and a third by the court, and 3) that the inspection occur in the presence of
24 the legal custodian of the ballots. All of those requirements would serve to reduce or eliminate
25 the opportunity for confusion, mistakes, or deliberate wrongdoing in the course of the inspection.
26

1 The ballot discovery Plaintiffs request under Rule 34 would presumably include none of
2 these safeguards and thus would fail to comply with the requirements of the election contest
3 statutes. Thus, the request must be denied.

4 **IV. Plaintiffs' Request for Expedited Discovery Should Be Denied.**

5 Similarly, Plaintiffs' additional request for expedited discovery through their Motion to
6 Expedite Discovery – in the form of requests for production – should also be denied. As noted
7 above, nothing in the election contest statutes authorizes the use of Rule 34 as an alternative to
8 the limited ballot inspection procedure outlined in A.R.S. § 16-677, and in this purely statutory
9 proceeding, this Court cannot re-write the statute to give contestants carte blanche to conduct
10 traditional civil discovery. Doing so would render the specific restrictions in A.R.S. § 16-677
11 entirely superfluous. Further, the timing of an election contest simply cannot accommodate that
12 reality. Much of Plaintiffs' requested discovery is also burdensome and irrelevant; for example,
13 they seek “images of the signature specimens used to verify early ballot affidavits,” which they
14 say relates to their Count V. Not only should Count V be dismissed, but it is simply impossible
15 in the compressed timelines at issue here to require all 15 counties – currently running a statewide
16 recount, no less – to re-review all the affidavits for early ballot cast in the 2022 General Election
17 to identify those meeting Plaintiffs' criteria and then to assemble all signature specimens for the
18 voters who cast those early ballots.

19 **Conclusion**

20 For all the reasons discussed above, the Court should deny Plaintiffs' Petition and
21 Motion to Expedite Discovery.

22 Respectfully submitted this 14th day of December, 2022.

23 **COPPERSMITH BROCKELMAN PLC**

24 By /s/ D. Andrew Gaona

25 D. Andrew Gaona

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