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10 ARIZONA SUPERIOR COURT

11 MOHAVE COUNTY

12 TED BOYD, et al.,

13 Plaintiffs/Contestants,

14 v.

15 KRIS MAYES,

16 Defendant/Contestee,

17 and

18 KATIE HOBBS, et al.,

19 Defendants.
20
21
22
23
24

No. S8015CV202201468

**DEFENDANT KRIS MAYES' REPLY IN
SUPPORT OF MOTION TO DISMISS**

(Assigned to the Hon. Lee F. Jantzen)

Introduction

Plaintiffs’ response to Kris Mayes’ motion to dismiss only confirms that this Court should dismiss this election contest. More than five weeks have passed since the November 8, 2022 general election. In those five weeks, Plaintiffs have failed to identify a single voter by name in support any of their claims—much less produce a supporting declaration. Instead, in their own words, they base their claims on “information and belief.” But Plaintiffs fail to provide the information that underlies those beliefs, instead relying on speculative and conclusory allegations devoid of any actual facts. That is not sufficient for any complaint to survive beyond the pleading stages. For this reason, and for all the other reasons in Kris Mayes’ motion to dismiss and below, this Court should dismiss this election contest with prejudice.

Argument

I. The Republican National Committee lacks authority to bring an election contest.

The motion to dismiss explained (at 5) that the RNC lacks statutory authority to bring an election contest because only an “elector of the state” may bring an election contest. A.R.S. § 16-672(A). In response, Plaintiffs do not even try to argue that any statute authorizes the RNC to bring an election contest. Instead, they raise a separate issue, asserting (at 7) that the RNC has standing in this case. But whether a party has “standing” is “different” than whether a party possesses “statutory authority to take a particular action.” *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 ¶ 11 n.2 (2020). Here, the RNC lacks statutory authority to bring an election contest, and the Court should therefore dismiss it from this suit.

II. The complaint fails to state a claim on which relief can be granted.

Plaintiffs filed a complaint in search of a factual basis, pure and simple. As Kris Mayes established in the motion to dismiss (at 5–13), all the claims in the complaint fail to state any claim on which relief can be granted. Far from alleging *facts* to support their extraordinary

1 request to overturn Arizona’s November 8, 2022 general election, Plaintiffs allege only
2 speculation and conclusions. Indeed, despite having over five weeks since the election, Plaintiffs
3 have identified no voter and produced no declaration to support any of their claims. In ruling on
4 a motion to dismiss, this Court does not “accept as true allegations consisting of conclusions of
5 law, inferences or deductions that are not necessarily implied by well-pleaded facts,
6 unreasonable inferences or unsupported conclusions from such facts, or legal conclusions
7 alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005). Because the
8 complaint lacks any “well-pleaded facts,” and instead relies only on “legal conclusions” and
9 “unreasonable inferences,” this Court should dismiss all the claims with prejudice. *Id.*

10 Moreover, Plaintiffs had the burden of alleging facts that show their case “falls within the
11 terms of the statute providing for election contests.” *Henderson v. Carter*, 34 Ariz. 528, 534
12 (1928). They do not come close to carrying their heavy burden. The claims based on purported
13 “misconduct” (Counts I and II) fail because Plaintiffs allege facts showing, at most, “honest
14 mistakes” and “mere omissions.” *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). The “erroneous
15 count of votes” claims (Counts I, II, III, and IV) fail because Plaintiffs allege no facts establishing
16 that anyone counted any votes wrong. And the “illegal votes” claims (Counts IV and V) fail
17 because Plaintiffs allege no facts demonstrating that any illegal vote was actually “cast” in the
18 election for Arizona Attorney General. *Moore v. City of Page*, 148 Ariz. 151, 156 (App. 1986).

19 That’s not all. As the chart below shows, which recites the sum total of the complaint’s
20 factual allegations that are conceivably relevant to Plaintiffs’ election contest, Plaintiffs’ claims
21 also fail because they allege no facts establishing that any purported issue under any of their
22 claims made any difference at all to “the result of the election.” *Id.* at 159. They acknowledge
23 that Kris Mayes received 511 more votes than Abraham Hamadeh. [Compl. ¶ 2] The factual
24

allegations in their complaint—whether analyzed individually or collectively—do not close that gap. Plaintiffs fail to state a claim on which relief can be granted. *See Moore*, 148 Ariz. at 159.¹

Claim	Allegations	Response
<u>Count I:</u> Provisional and early ballots allegedly not counted	Plaintiffs allege 126 voters were not properly “checked out” at their initial Maricopa County polling location and were thus required to vote a provisional ballot at their second polling location. On “information and belief,” Plaintiffs allege these votes were “not counted.” [Compl. ¶¶ 34(a), 60]	Plaintiffs have not identified a single concrete example, let alone 126, of an actual voter whose provisional ballot was not counted under these circumstances.²
	Plaintiffs allege 269 voters were not properly “checked out” at their initial Maricopa County polling location and later deposited an early ballot at a polling location. On “information and belief,” Plaintiffs allege these votes were “voided.” [<i>Id.</i> ¶¶ 34(b), 70]	Plaintiffs have not identified a single concrete example, let alone 269, of an actual voter whose provisional ballot was not counted under these circumstances.

¹ Citing *Findley*, Plaintiffs contend (at 12) that they alleged facts that—even if insufficient to “affect the result” of the election—at least “render it uncertain.” 35 Ariz. at 269. But *Moore* makes clear that this language from *Findley* means that a plaintiff must establish in an election contest that “the result would have been different.” 148 Ariz. at 156. And in any event, as the chart here demonstrates, even accepting Plaintiffs’ factual allegations as true, there is nothing “uncertain” about the result. Kris Mayes won, and Abraham Hamadeh lost. No factual allegation in the complaint casts any doubt on that outcome. Plaintiffs rely only on bare conclusions, but this Court doesn’t treat those as true in ruling on a motion to dismiss. *See Jeter*, 211 Ariz. at 389 ¶ 4.

² Every voter in Maricopa County can check the status of their ballots on the county government website, which would inform anyone whose vote was not counted of that fact. *See* <https://recorder.maricopa.gov/Elections/BeBallotReady/>. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 403 ¶ 12 n.1 (2020) (stating that a court may take judicial notice of government website). Notwithstanding the availability of this information, Plaintiffs have not identified in their complaint a single voter to support their allegation that any provisional ballot was not counted under these circumstances.

Claim	Allegations	Response
<u>Count II:</u> Alleged denial of provisional ballots	- On “information and belief,” Plaintiffs allege a “material number” of voters who were not properly “checked out” at their initial polling location were denied a provisional ballot at their second polling location. [<i>Id.</i> ¶¶ 34(b), 77-80] - Plaintiffs allege a “material number” of voters had to vote a provisional ballot because voting records revealed that they were not registered to vote, even though they “had voted in past Arizona election (sic) and had done nothing to invalidate their registration.” On “information and belief,” a “material number” of these provisional ballots were “rejected.” [<i>Id.</i> ¶¶ 58-59, 77]	- Plaintiffs have not identified a single example of an actual voter who was denied a provisional ballot under those circumstances (or any other circumstances). Plaintiffs thus have no factual basis for this claim. - Plaintiffs have not identified a single example of an actual voter who was told they were not registered to vote, let alone one who “had done nothing to invalidate their registration” and whose vote was not counted. Plaintiffs thus have no factual basis for this claim.
<u>Count III:</u> Alleged Ballot Duplication Errors	Plaintiffs allege two years ago, in the 2020 presidential election, the Maricopa County Ballot Duplication Board erroneously transposed 0.37% of sampled ballots designated for duplication. [<i>Id.</i> ¶¶ 41, 85]	Plaintiffs allege no facts regarding the 2022 election for Arizona Attorney General and no factual basis for their speculation that there were duplication errors in that election.
<u>Count IV:</u> Alleged Electronic Adjudication Errors	Plaintiffs allege a hand audit of the Governor’s race revealed a single instance where a vote was allegedly tabulated for one candidate for Governor, when the “ostensible intent” of the voter indicated it should have been	Plaintiffs allege no facts regarding the 2022 election for Arizona Attorney General and no factual basis for their speculation that there were adjudication errors in that election.

Claim	Allegations	Response
	tabulated for a different candidate for Governor. [<i>Id.</i> ¶¶ 49, 91-92] - Plaintiffs allege Maricopa County reported 50,246 undervotes in the Attorney General race. [<i>Id.</i> ¶ 47] - Plaintiffs allege the recount in Navajo County revealed two votes that allegedly “should have been referred” to Electronic Adjudication but were not because of issues with tabulators on Election Day. [<i>Id.</i> ¶ 52]	- Plaintiffs do not—and cannot—allege that the designations as undervotes were improper, let alone that those voters actually cast votes for Mr. Hamadeh.³ - Plaintiffs do not allege why these two votes should have been referred to Electronic Adjudication or that they were improperly tabulated in the first instance, let alone that they were tabulated for Ms. Mayes but should have been tabulated for Mr. Hamadeh.
<u>Count V:</u> Alleged signature verification errors	On “information and belief,” Plaintiffs allege that the voter’s signature on a “material number” of ballots matched the signature of a previous early ballot affidavit or other record on file or an early ballot request form, but allegedly did not match the signature on the voter’s “registration record.” [<i>Id.</i> ¶¶ 55, 98]	Plaintiffs already previously signed and filed papers with the Court agreeing to dismiss this claim in the first version of this suit. Regardless, Plaintiffs do not allege that the signature verification method affected the outcome of the election and do not identify a single ballot that was allegedly illegal counted on this basis.

In short, ignoring that Plaintiffs’ conclusory allegations rest on wild speculation that cannot be credited, even accepting them as true, Plaintiffs’ claims—whether considered

³ Indeed, according to Plaintiffs, undervotes are recorded when less than 14% of the selection filled is in. [Compl. ¶¶ 4(f), 43] Thus, when a voter chooses not to cast a vote for any candidate in a particular race—a common and uncontroversial occurrence—and thus leaves the selection blank, it is designated as an “undervote.”

1 individually or collectively—wholly fail to demonstrate that any of the alleged issues regarding
2 the election would have altered its outcome. Thus, this Court should dismiss the complaint.

3 **III. Count V is also too late.**

4 The motion to dismiss demonstrated (at 13–15) that Count V comes far too late because
5 it’s premised on a challenge to procedures that were approved and finalized over three years
6 ago—well before the election—and allowing Plaintiffs to assert it now would significantly
7 prejudice Kris Mayes, Arizona’s election officials, and every voter who voted in this election.

8 Plaintiffs offer very little in response. They first suggest (at 16) they can raise Count V in
9 this election contest because it’s supposedly “intertwined with the processing and tabulation of
10 particular ballots.” This argument misses the mark because it ignores that the whole claim rests
11 on Plaintiffs’ challenge to the 2019 Elections Procedures Manual. As the Supreme Court held:
12 “Challenges concerning alleged procedural violations of the election process must be brought
13 prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002). *Sherman*
14 didn’t carve out an exception from that rule for Plaintiffs’ procedural challenge here.

15 But even if an election contestant could hypothetically assert a procedural challenge,
16 laches would bar Plaintiffs’ challenge in this case. Plaintiffs do not even try to justify their three-
17 year delay in bringing this claim or the extreme prejudice that their delay would cause were this
18 claim allowed to proceed. They cite (at 16) *Arizona Public Integrity Alliance v. Fontes* and argue
19 the Supreme Court “spurned a laches defense to a last-minute challenge to the lawfulness of
20 certain ballot instructions formulated by the County Recorder.” But there, the County was “able
21 to meet the deadlines for early ballots,” and so it “suffered no prejudice” from the plaintiffs’
22 delay. 250 Ariz. 58, 65 ¶ 30 (2020). Here, by contrast, the deadline for voting has passed, and so
23 every voter who cast a vote in this election that Plaintiffs now ask this Court to “exclude” would
24 be prejudiced by Plaintiffs’ three-year delay in bringing this claim. [Demand for Relief ¶ G]

1 **IV. The election contest statutes do not authorize most of the requested relief.**

2 As explained in the motion to dismiss (at 15–17), the election contest statutes bar most of
3 Plaintiffs’ requested relief. Election contests are “purely statutory and dependent upon statutory
4 provisions for their conduct.” *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966). As a result,
5 Plaintiffs may recover only relief that is “specifically set forth by statute.” *Id.* at 606.
6 Nonetheless, Plaintiffs request wide-ranging forms of relief that are not specifically set forth by
7 any statute. [See Compl. ¶¶ 74, 82, 88, 95; Demand for Relief ¶¶ A, B, C, D, E, F, H, I K] They
8 have no right to recover any of these relief requests as a matter of law.

9 Plaintiffs argue (at 8) that they can recover all their requested relief under A.R.S. § 16-
10 676(B) because that statute requires this Court to “determine all issues arising in contested
11 elections.” But this sentence does not in any way bear on the relief available in an election
12 contest. Other parts of the election contest statutes expressly specify the available relief. *See*
13 A.R.S. § 16-676(B) (requiring the Court to “pronounce judgment, either confirming or annulling
14 and setting aside the election”); A.R.S. § 16-676(C) (requiring the Court, when “it appears that
15 a person other than the contestee has the highest number of legal votes, to “declare that person
16 elected and that the certificate of election of the person whose office is contested is of no further
17 legal force or effect”). Allowing Plaintiffs to request any form of relief that they want under the
18 general language that requires this Court to “determine” issues in election contests would render
19 these specific remedies meaningless, violating the “cardinal principle of statutory interpretation”
20 that requires courts to “give meaning, if possible, to every word and every provision so that no
21 word or provision is rendered superfluous.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019).

22 Plaintiffs then pivot to suggest (at 9) that this Court could alternatively grant them
23 mandamus relief. But as Judge Randall Warner already held two weeks ago in dismissing this
24 election contest the first time, mandamus relief is “available only where there is no adequate

1 legal remedy.” [Motion to Dismiss Ex. A at 2] Here, Plaintiffs have an adequate remedy because
2 “the election contest statute provides the remedy and process for challenging an election.” [*Id.*
3 (citing *Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978) (rejecting a request for
4 “mandamus” relief when the “gravamen” of the complaint was an election contest))]⁴

5 **Conclusion**

6 At bottom, Plaintiffs appear to believe that the mere fact that the election results were
7 close is sufficient to contest the validity of those results and to engage in a fishing expedition
8 aimed at undermining Arizona’s elections. Plaintiffs are wrong, both legally and factually, and
9 this Court should dismiss their election contest with prejudice and enter an attorneys’ fees award
10 for Kris Mayes under A.R.S. § 12-349(A)(1).

22 ⁴ Plaintiffs cite *Arizona Public Integrity Alliance v. Fontes*, but that case was not a
23 statutory election contest. In this context, Plaintiffs have an adequate legal remedy—namely, the
24 remedies “specifically set forth” by the election contest statutes. *Fish*, 2 Ariz. App. at 606.

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