Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000252-001 DT

09/04/2020

HONORABLE JAMES D. SMITH

CLERK OF THE COURT
D. Tapia
Deputy

ARIZONA PUBLIC INTEGRITY ALLIANCE INC
TYLER MONTAGUE

ALEXANDER M KOLODIN

TYLER MONTAGUE

v.

ADRIAN FONTES
FRAN MCCARROLL
CLINT HICKMAN
JACK SELLERS
STEVE CHUCRI
BILL GATES
STEVE GALLARDO
MARICOPA COUNTY

JOSEPH EUGENE LA RUE

COURT ADMIN-CIVIL-ODR
DOCKET-CIVIL-CCC
REMAND DESK-LCA-CCC

MINUTE ENTRY

Plaintiff asked the Court to enjoin the Maricopa County Recorder and the Maricopa County Board of Supervisors from including particular instructions with mail-in ballots for the 2020 general election.

The parties agreed at the return hearing on September 3, 2020, that the Court may decide the preliminary injunction and motion to dismiss based on the existing papers. They also agreed that the Court need not hold an evidentiary hearing.

Preliminary Injunctions

The standard for preliminary injunctive relief is:

> A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction.

Ariz. Ass'n of Providers for Persons With Disabilities v. State, 223 Ariz. 6, 12, ¶ 12, 219 P.3d 216, 222 (App. 2009).

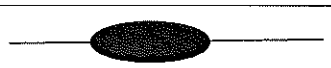
The evidentiary rules are relaxed somewhat at the preliminary injunction stage. For example, the Court may "consider hearsay in deciding whether to issue a preliminary injunction." *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009). "The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). "[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had." 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2949 (3d ed. Apr. 2020 Update).

Arizona courts may evaluate a preliminary injunction on a sliding scale. The moving party may establish either (1) probable success on the merits and the possibility of irreparable injury or (2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10, 132 P.3d 1187, 1190 (2006). The notion of "serious questions" relates to questions going to the merits of the legal claim, not the gravity of the issue. *Id.* ¶ 13.[1]

[1] Arizona courts adopted the sliding scale approach from Ninth Circuit authority. The United States Supreme Court rejected that Ninth Circuit approach in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). This Court is not aware of authority indicating that Arizona will abandon the sliding scale approach following *Winter*.

Background

County Defendants included an instruction on early ballots for the 2020 primary election and intend to include that instruction on 2020 general election early ballots. Plaintiffs refer to it as the "New Instruction," so the Court will, too. The New Instruction tells voters that they may strike through a mistaken vote and complete the oval for the correct selection. Following the New Instruction could lead to this type of vote:

~~Washington, George~~	
Lincoln, Abraham	

That voter mistakenly selected George Washington when she intended to choose Abraham Lincoln. Allowing the voter to over vote for this office means the counting machine will reject the ballot and lead to a manual inspection. The manual inspection must try to determine the voter's intent.

Early ballots did not include the New Instruction before the 2020 primary election. Instead, ballots before 2020 told voters to request a new ballot if they over voted or otherwise spoiled a ballot. The New Instruction first appeared with ballots for the March 2020 presidential preference election. The County Defendants again included the New Instruction with primary election early ballots mailed July 8, 2020. That primary election occurred August 4, 2020, and at least 808,572 voters used early ballots with the New Instruction.[2] Plaintiffs contended that they did not know of the New Instruction until early August 2020; they then tried to resolve the issue with the County Defendants before filing suit. The Attorney General avowed (at 2:22-23) that his office "received several complaints from Arizona voters surrounding the Recorder's early ballot instructions in the Primary Election on August 4, 2020." As this order explains, the delay bringing the issue to the Court affected the analysis.

Plaintiffs argued that including the New Instruction violates Arizona law. Our law directs what instructions may appear on a ballot, but the statute is silent about over votes or spoiled ballots. A.R.S. § 16-502(A). County boards of supervisors, however, must prepare voter instructions that follow the Secretary of State's Election Procedures Manual. A.R.S. § 16-513. The required instructions in the EPM include:

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[2] The Court takes judicial notice of data that the County Recorder makes available to the public as part of that office's duties. Maricopa Cty. Recorder, *Final Official Results Primary Election Maricopa County August 4, 2020*, https://recorder.maricopa.gov/media/Final_Summary_0804.pdf (Sept. 3, 2020, 6:17 a.m.).

> Inform voters that no votes will be counted for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote[.]

[EPM (2019) at 56.] Nothing in the EPM refers to the New Instruction. The Governor and Attorney General approved the EPM as the law requires.

Maricopa County uses automatic vote tabulating equipment. The equipment must reject ballots with over votes. A.R.S. § 16-446(B)(2). Our law mandates a testing protocol to ensure the equipment rejects those over votes, too. A.R.S. § 16-449(A). So if a voter votes for too many candidates for a race—whether because of the New Instruction or otherwise—the equipment will reject her ballot. But that does not mean the ballot is uncounted. Instead, it leads to a manual review of the ballot to try to determine her intent. Plaintiffs are not challenging the propriety of manually reviewing ballots if a voter erroneously over votes; instead, they challenge the propriety of *instructing* voters to do so. [Pls.' Mot. Prelim. Inj. & Perm. Inj. (filed 08/25/2020) at 6:19-24.]

The New Instruction differs from the EPM—it tells voters to over vote rather than request a new ballot. County Defendants indicated that this process will capture the voters' intended result during a manual hand count when the automated equipment rejects the ballot. In counties using automated equipment, hand counts typically serve as a quality control check. *See* A.R.S. § 16-602(B). "During any hand count of early ballots, the county officer in charge of elections and election board workers shall attempt to determine the intent of the voter in casting the ballot." A.R.S. § 16-602(G).

County Defendants pointed to the EPM's requirement for a board to review ballots with over votes. [EPM (2019) at 201-02.] That is true. And "[i]f voter intent can be determined, the ballot shall be duplicated and counted." [*Id.* at 202.] Indeed, that is true for *any* error in the ballot—smudges, crayon, erasing, tears—that prevent automated equipment from reading the ballot. The equipment will note the error so the board may review the ballot (or an image of the ballot) to determine voter intent.

The Secretary of State also created an Electronic Adjudication Addendum to the EPM, which the Governor and Attorney General approved in February 2020. The 2020 Addendum allows for a board, comprising two judges and an inspector, to try to determine voter intent on over votes. The same is true for ballots that a machine reads as "blank" or "unclear." This is consistent with the EPM's general approach to problem ballots. But the 2020 Addendum does not change the instructions for counties to give voters.

In that way, it is essential to note what this dispute is *not* about. Over votes, smudged ballots, ballots with coffee stains—every county must try to determine the voter's intent if the equipment cannot read a portion of the ballot. That will happen, and today's decision does not affect that practice. The only issue this decision addresses is if County Defendants may instruct early ballot voters to correct mistakes via the New Instruction. If someone mistakenly voted for George Washington, struck that name, and completed the circle for Abraham Lincoln, the process will try to count that vote *even without the New Instruction appearing.* And that is true whether the voter made that mistake on an early ballot or a ballot at a polling place. There is nothing untoward about it. We expect nothing less, whether votes are by handwritten X's or computer-scanned ballots.

Plaintiffs suggested that voters striking through and correcting erroneous votes on early ballots risks fraud. [*E.g.*, Verified Compl. ¶ 36.] There is no evidence of this occurring or a reasonable likelihood of it occurring. Federal authorities disclaim the notion of foreign adversaries sabotaging mail-in voting.[3] The Director of the National Counterintelligence and Security Center explained on August 7, 2020, that foreign states will continue to "increase discord in the United States," which could include "calling into question the validity of the election results. However, it would be difficult for our adversaries to interfere with or manipulate voting results at scale."[4] Nothing in today's order implies that the Court accepts Plaintiffs' risk-of-fraud argument.

One could ask if Plaintiffs have standing. *See Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16, 961 P.2d 1013, 1017 (1998); *see also McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 195 ¶¶ 11-12, 337 P.3d 557, 560 (App. 2014) (discussing lack of private cause of action to enforce an election statute). County Defendants did not raise that argument, so the Court does not address it.

I. LIKELIHOOD OF SUCCESS ON THE MERITS.

This is a nonstatutory special action. The Court's jurisdiction in those actions is limited. "The plaintiff must demonstrate that the government agency or officer failed to perform acts or exercise discretion that it was duty-bound to perform or exercise; acted outside its jurisdiction or

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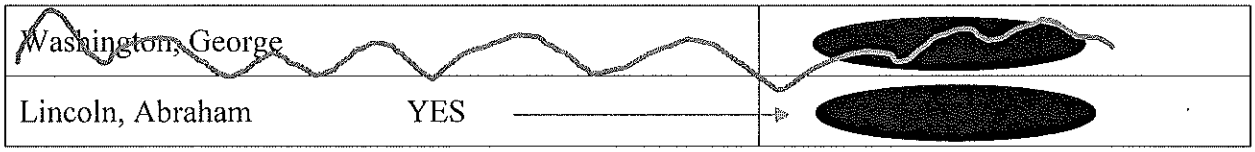
[3] *E.g.*, Alexa Corse & Dustin Volz, *U.S. Intelligence Agencies Don't See Evidence of Foreign Sabotage of Mail-in Voting*, WALL STREET JOURNAL, Aug. 26, 2020 (describing comments by senior official with Office of the Director of National Intelligence).

[4] Office of the Director of National Intelligence, *Statement by NCSC Director William Evanina: Election Threat Update for the American Public*, (Sept. 3, 2020, 9:27 p.m.), https://www.dni.gov/index.php/newsroom/press-releases/item/2139-statement-by-ncsc-director-william-evanina-election-threat-update-for-the-american-public.

exceeded its legal authority; or acted arbitrarily and capriciously or abused its discretion." 2 ARIZONA APPELLATE HANDBOOK § 25.3.2, at 25-6 (4th ed. 2011); RPSA 3. A court may enjoin a public officer from "enforc[ing] a public statute in a manner that exceeds the office's power . . . ." *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 616 ¶ 16, 399 P.3d 686, 691 (App. 2017); *see also Hess v. Purcell*, 229 Ariz. 250, 252 ¶ 4, 274 P.3d 520, 522 (App. 2012) (trial court issued writ of mandamus directing county to follow EPM).

Many of County Defendants' arguments and much of the evidence addressed the propriety of trying to count over votes. Plaintiffs did not challenge that process. In fact, the record has ample evidence of stringent quality control steps for counting ballots electronically and counting ballots with errors. For example, one could not doubt the intent of a voter who made these marks, which the equipment would reject for further review:



Nothing in this case questions the propriety of determining voter intent when the equipment cannot read a ballot. Indeed, the law and the EPM require such efforts. And some voters will make those types of marks regardless of whether the New Instruction appears.

Instead, Plaintiffs' challenge is narrower. They raised only whether early ballot instructions may include the New Instruction. The law requires county boards of supervisors prepare voter instructions that follow the EPM. A.R.S. § 16-513. And the EPM does not allow the New Instruction; just the opposite, the EPM commands boards of supervisors to tell voters to ask for another ballot if they over vote. Plaintiffs are likely to succeed on the merits of whether the County Defendants may include the New Instruction.

The County Defendants suggested that the EPM inadvertently included the instruction about over votes. "[T]his instruction was only left because of an oversight, and it should have been revised consistent with the change to the law, requiring the counting of overvotes, brought about by the 2019 EPM." [Cty. Defs.' Resp. at 8:17-19.] But the Court cannot speculate about what the authors may have intended but did not include. That would also implicate speculating about what the Governor and Attorney General intended when they approved the EPM. That suggests a "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 349 (2012).

II. POSSIBILITY OF IRREPARABLE HARM.

Arizona deviates from federal authority by not requiring a *likelihood* of irreparable harm. Rather, Arizona court examine whether there is a *possibility* of irreparable harm. But a *probability* of success on the merits must accompany that possibility of irreparable harm. If a moving party shows likelihood of success on the merits—that is, a statutory violation is happening—"irreparable harm to the public is presumed. This presumption is rebuttable, however, by evidence that the threatened injury is not irreparable." *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427 (E.D. Mo. 1985).

A case that Plaintiffs cited helps understand the type of harm to voters that courts may enjoin. In *Chavez v. Brewer*, 222 Ariz. 309, 214 P.3d 397 (App. 2009), the plaintiffs challenged whether voting machines complied with "statutes that clearly benefit individuals with disabilities. . . . [T]he focus of these statutes is protecting the rights of individuals." *Id.* at 318 ¶ 28, 214 P.3d at 496. And those plaintiffs were individuals with disabilities and non-English speakers. Voting equipment that did not meet statutory requirements could effectively deny those plaintiffs' right to vote. "[A]ppellants are not 'incidental' beneficiaries of the statutes, but members of 'the class for whose especial benefit' the statutes were adopted." *Id.* The non-compliant machines arguably were "not accessible to individuals with disabilities in a manner that provides them the same opportunity for access and participation, including privacy and independence, as nondisabled voters." *Id.* ¶ 30.[5]

The harm to Plaintiffs is a generalized concern about the election process. That is, the County Defendants should follow the EPM, which calls for a specific instruction about over votes. The Court agrees—we expect public officials to follow the law and to have procedurally correct elections. So the Court is not minimizing the importance of that concern. But there is not a harm particular to Plaintiffs that is irreparable. Plaintiffs are able to vote—by mail or at a polling place. They are able to vote for any candidate who qualified for the ballot. That essential liberty remains for Plaintiffs. The inchoate concerns about someone altering ballots is speculative and not an irreparable harm.

III. BALANCE OF HARDSHIPS.

"The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be

[5] The *Chavez* plaintiffs included factual allegations "that a significant number of votes cast on the Diebold or Sequoia DRE machines will not be properly recorded or counted." *Id.* at 320 ¶ 34, 214 P.3d at 408. Thus, the trial court improperly dismissed that complaint. But this case is at the preliminary injunction stage, so the Court focuses on the evidentiary record.

burdensome." 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2948.2. Courts weighing the balance of hardships often consider whether the preliminary injunction "would give plaintiff all or most of the relief to which plaintiff would be entitled if successful at trial and whether mandatory relief is being sought." *Id.* (footnote omitted). The balance of hardships favors a party seeking a preliminary injunction if it establishes probable success on the merits and the possibility of irreparable harm. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1991).

The County Defendants argued that it will cost at least $125,000.00 to print new instruction sheets. [First Decl. Reynaldo Valenzuela, Jr. (dated 09/01/2020) ¶ 33.] The County's vendor told Mr. Valenzuela that "it is too late for the vendor to order and obtain sufficient paper to print new Early Ballot Instructions to meet the various mailing deadlines." [*Id.* ¶ 35.] Plaintiffs disputed that assertion and suggested in the hearing September 3 that a vendor could fill an order for 2.5 million pieces in one week.[6] The mailing deadlines include September 19 to send ballots and instructions to citizens and service members overseas. Understandably, the County Defendants began printing materials well before that deadline.

IV. PUBLIC POLICY.

"A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citations and quotations omitted). A statute "prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction." 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2948.4.

The EPM has the force of law and requires instructing voters to request new ballots if they over vote. But that instruction in the EPM also directs election officials to "[i]nform voters that no votes will be counted for a particular office if they overvote . . . ." That is incomplete and perhaps incorrect. Over votes *will* count if election officials can determine voter intent. And election officials must try to determine voter intent when automated equipment rejects a ballot. That does not mean that election officials should encourage over voting or ignore the EPM. But the County Defendants' approach is understandable, and nothing suggests improper motives behind it.

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[6] This was an unsworn statement based on information purportedly received from an unknown vendor. But Plaintiffs also did not have the Valenzuela Declaration before the hearing due to County Defendants' clerical error. The Court cannot fault Plaintiffs for not having the information in another format.

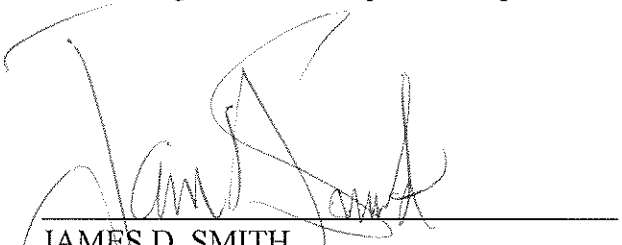
Another concern is that greater than 800,000 voters received primary election early ballots with the New Instruction. Neither side presented data showing how many early ballots over voted as the New Instruction directed. Nonetheless, the Court is uneasy with altering instructions from one 2020 election to the next.

The County Recorder unilaterally attempted to send early ballots to every Maricopa County voter for the March 2020 presidential preference primary. This Court stopped that effort, which contradicted election law. But that also was a different situation. Stopping that act did not risk an inability to timely deliver early ballot instructions to voters. In contrast, the County Defendants pointed to considerable logistical difficulties to print new instructions. Granting the preliminary injunction would mean (1) not sending the New Instruction *and* (2) printing 2.5 million corrected instruction documents when the County's vendor suggested that is not feasible in this short time frame.

Although Plaintiffs showed a likelihood of success on the merits, the lack of irreparable harm, balance of hardships, and public policy countenance against a preliminary injunction.

IT IS ORDERED denying Plaintiffs' application for a preliminary injunction and denying the County Defendants' motion to dismiss.

This is not a final, appealable judgment. Nonetheless, orders granting or dissolving an injunction, or refusing to grant or dissolve an injunction, are orders from which a party may appeal. A.R.S. § 12-2101(F)(2). The Court signs this order to ensure that all involved know it is the order resolving Plaintiffs' request for a preliminary injunction.



JAMES D. SMITH
JUDGE OF THE SUPERIOR COURT

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