SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-002889 04/27/2016

HONORABLE DAVID B. GASS

CLERK OF THE COURT
L. Stogsdill
Deputy

JOHN BRAKEY

MICHAEL KIELSKY

v.

MICHELE REAGAN, et al.

JAMES DRISCOLL-MACEACHRON

KENNETH A ANGLE
R GLENN BUCKELEW
COLLEEN CONNOR
JEFFERSON R DALTON
BRITT W HANSON
DANIEL JURKOWITZ
CHRISTOPHER C KELLER
WILLIAM J KEREKES
CHARLENE A LAPLANTE
JASON MOORE
DEREK D RAPIER
THOMAS M STOXEN
ROBERT A TAYLOR
ROSE WINKELER
JOSEPH YOUNG

RULING

This case arises out of plaintiff's challenge to the official canvass of Arizona's 2016 Presidential Preference Election (PPE) held on March 22, 2016. Plaintiff timely filed the challenge to the official canvass of the PPE. Arizona law requires that plaintiff file the action within five days of the official canvass of the election. *See* A.R.S. § 16-673.A. The filing deadline is jurisdictional and requires strict compliance. *See Bd. of Sup'rs of Maricopa County v.*

Superior Court, Maricopa County, 103 Ariz. 502, 504, 446 P.2d 231, 233 (1968). The deadline to file was April 8, 2016. Plaintiff met that deadline.

1. Merits

At the close of plaintiff's case, the Court granted oral motions for judgment as a matter law on the merits in favor of the Secretary of State, the Pima County defendants, and the Santa Cruz defendants.

At the close of the Maricopa County defendants' case, the Court granted judgment as a matter law on the merits in favor of the Maricopa County defendants.

On the Court's own motion, the Court grants judgment as a matter of law in favor of all remaining defendants.

A. Plaintiff bears the burden of proof

Plaintiff alleges that the results from the official canvass were either the product of fraud, the product of improper procedures, or the product of illegal votes. Plaintiff bears the burden of proof. *See Moore v. City of Page*, 148 Ariz. 151, 159, 713 P.2d 813, 821 (App. 1986). The Court must draw all reasonable presumptions in favor of validity of an election. *See id.* Plaintiff must prove fraud or that if proper procedures had been used, the result would have been different. *See id.*

In an election challenge, the challenger must prove fraud by clear and convincing evidence. *See Buzard v. Griffin*, 89 Ariz. 42, 50 (1960). Plaintiff cannot rely on speculation or conjecture. *See id.* Long standing precedent establishes that the Court must not infer fraud in an election from slight irregularities, unconnected with incriminating circumstances. *See Hunt v. Campbell*, 19 Ariz. 254, 264 (1917). Mere suspicion is insufficient. *See id.* The Court will not "destroy the credit of the official returns [absent] positive and unequivocal evidence of the fraud, and if the circumstances of a case can be explained upon the hypothesis of good faith, that explanation will prevail." *Id.* at 276.

With regard to allegations of illegal votes, plaintiff bears some additional burdens. First, to establish an illegal vote, the challenger must prove that the vote was cast by a person who was not eligible to vote in the election. *See Babnew v. Linneman*, 154 Ariz. 90, 94, 740 P.2d 511, 515 (App. 1987). Second, "[w]here an election is contested on the grounds of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, and of showing for whom or for what they were cast." *See Clay v. Town of Gilbert*, 160 Ariz. 335, 338, 773 P.2d 233, 236 (App. 1989) (quoting *Moore v. City of Page*, 148 Ariz. 151, 156, 713 P.2d 813, 818 (App. 1986). *See also Morgan v. Board of Supervisors*, 67 Ariz. 133, 143, 192

P.2d 236, 243 (1948); *Millet v. Board of Supervisors*, 6 Ariz. App. 16, 19, 429 P.2d 508, 511 (1967). If the challenger cannot show for whom the illegal votes were cast, the Arizona Supreme Court has established the challenger's burden as follows:

> [Illegal votes] are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each.

Grounds v. Lawe, 67 Ariz. 176, 183–85, 193 P.2d 447, 451–53 (1948). *See also Clay v. Town of Gilbert*, 160 Ariz. 335, 338-39, 773 P.2d 233, 236-37 (App. 1989).

B. <u>Plaintiff did not establish fraud and did not establish misconduct by any election board member or by any officer making or participating in the canvass</u>

With regard to election board workers, plaintiff was able to point to a few issues that occurred to one election poll worker who served as a clerk. There was no evidence that the issues the poll worker identified were widespread. One voter identified a polling place issue when she went to vote early; her issue was resolved within 30 minutes and she voted a regular ballot. With regard to voters who alleged problems with their voter registration on election day, the county elections departments in Maricopa County and Pima County were able to show the trail of the registration changes. Moreover, most of the witnesses ultimately had their votes counted.

In addition, the credibility of at least several of the witnesses was impeached by the registration trail maintained by the Maricopa County Elections Department (MCED).

- One witness recounted his registration history as a Democrat and a short period as no party designated. He ultimately had to concede his voter registration showed a very different history, including a majority of the time being registered as a Republican. To the extent the witness complained that the Arizona Department of Transportation delayed in processing his voter registration change, he offered no evidence of the timing of his request beyond his own testimony and offered no evidence that if there was a delay in transmitting the information, it was the fault of any election official. His ballot was not counted. This witness expressed concern that the poll worker who was helping put his provisional ballot package together at first did not include the "pink" provisional sheet, but he conceded that

another poll worker told her what to do and she did it. Further, the poll worker had just taken over that position.

- One witness complained that her voter registration was changed without her authorization. She conceded that she did go to the Arizona Department of Transportation to address a traffic citation issue on the same day that her registration was updated. The evidence established that the change was made through the Arizona Department of Motor Vehicles, not MCED. Further, Mr. Valenzuela from MCED established that MCED would have sent the witness an updated voter registration card within 48 hours of the change. The witness offered no evidence beyond her own testimony that any unauthorized change was the fault of any election official.

- One witness who felt that she had been disenfranchised conceded that she was allowed to vote a regular ballot. She went to vote early because she realized that she had moved during the election period. Her early ballot had been sent to her previous address. MCED was able to confirm that her ballot had been returned and allowed her to vote a regular ballot. Her ballot was counted.

- Another witness from Pima County experienced some issues, but the evidence also established that her ballot ultimately was counted.

The poll worker identified an issue that she occasionally experienced when she tried to give out a provisional ballot. She said that sometimes the ePollbook would not allow her to select any option other than Republican for voters who wanted a Democratic ballot. She wrote "Dem" on the provisional ballot slip and allowed them to vote a Democratic provisional ballot. As Mr. Valenzuela explained, the information sheet that accompanies the provisional ballot contains a failsafe that would address such a situation. The sheet shows whether the person voted Democratic or Republican ballot. If the party designation and the other information match the information in the voter's registration file, the voter's provisional ballot will be counted. In short, if the voter was correct about his or her voter registration and voted the provisional ballot, it counted.

The above evidence is anecdotal. It does not establish fraud on behalf of any election board members or any officer making or participating in the canvass. *See* A.R.S. § 16-672.A.1. It also does not establish misconduct on the part of any election board members or any officer making or participating in the canvass. *See id.* To the contrary, it shows that when problems

arose, MCED and the Pima County Elections Department did what they could to correct any issues and ensure that each person's ballot was counted if it was appropriate to do so.

C. Plaintiff did not establish that illegal votes were cast, for whom such alleged illegal votes were cast, or that if the alleged illegal votes were deducted proportionally among the candidates, it would have changed the outcome

With regard to the allegations of illegal votes, the only potential evidence presented was that in Maricopa County, some voters were permitted to vote a regular or provisional ballot from a congressional district different from the voter's home congressional district. The poll worker had some ballots that she gave out in this manner. MCED acknowledged that voters did vote ballots from congressional districts other than their home congressional district because of ballot shortages at some polling places. Earlier in the day, MCED was able to get additional ballots to at least one polling place that had this problem. Later in the day, MCED did not have sufficient staff to distribute more ballots.

The ballots cast in this manner are not illegal votes, though those ballots would have impacted the tabulation by congressional districts. Voters in that situation, and who received a regular ballot, would have been eligible to vote in the PPE. Voters in that situation and who received a provisional ballot would have their ballots counted only if they were eligible to vote in the PPE. Under either scenario, the votes counted would have been cast by voters eligible to vote in the PPE. Except for the congressional district designation, the PPE ballots were the same depending on the party affiliation.

The voter's use of a ballot with a congressional district designation that did not match the voter's home congressional district did not result in any vote being cast by a person who was not eligible to vote in the PPE. It did result in some votes being tabulated as having been cast in a different congressional district, but that does not make the vote itself illegal because the person was eligible to vote. *See* *Babnew*, 154 Ariz. at 94, 740 P.2d at 515 (illegal vote is one cast by a person who is not eligible to vote in the election). Moreover, at that point on election day, the two other options would have been to have all people who needed an alternative ballot use the Edge machine, which generally is reserved for persons needing additional assistance to vote independently, or to deny those voters any opportunity to vote at all, which would have been a greater harm under the circumstances.

As a final matter on the issue of illegal votes, plaintiff offered no evidence establishing for whom the alleged illegal votes were cast. *See* *Babnew*, 154 Ariz. at 94, 740 P.2d at 515. Plaintiff offered no evidence that the illegal votes, if eliminated, would have changed the outcome of the election. *See Clay*, 160 Ariz. at 338, 773 P.2d at 236. Plaintiff further did not offer evidence to establish that "if illegal votes would be deducted proportionately from both

candidates, according to the entire vote returned for each" the outcome would have been different. *See Grounds,* 67 Ariz. at 183-85, 193 P.2d at 451-53. As such, even if the votes cast using a ballot from the incorrect congressional district were illegal votes, plaintiff did not meet his burden of showing it would have changed the outcome. *See id.*

D. <u>Plaintiff did not establish that the violation of any best practices amounted to fraud or misconduct</u>

Plaintiff offered testimony from Douglas W. Jones. The Court conditionally admitted his testimony regarding voter registration database vulnerabilities and election tabulation vulnerabilities. Plaintiff maintained that the evidence might establish that failure to follow best practices could rise to the level of fraud or misconduct.

The Court will allow the testimony to be admitted based on some concerns presented regarding the ePollbooks.

Mr. Valenzuela from MCED testified in response to those allegations. Mr. Valenzuela's testimony established that MCED followed many of the best practices that Mr. Jones identified, including the following:

1. MCED considers and takes into account best practices, looking at a variety of resources.

2. MCED maintains a trail of all voter registration changes for each voter.

3. MCED's voter database is not connected to Wi-Fi. The only connection to the Internet is indirect and is through a secure VPN (Virtual Private Network).

4. For paper ballots, vote tabulations are printed, signed, and secured at the end of the election day and are maintained along with the memory pack. The paper ballots also were secured and preserved.

5. For the touchscreen voting (the Edge), the memory pack and the paper tally are preserved.

6. MCED's tabulation machines (Insight and Edge) are not Wi-Fi enabled and are not connected to the Internet.

7. All MCED databases are encrypted to protect the data.

8. MCED and all counties use hand counts to verify electronic tabulation results using 2% for ballots cast at the polls and 1% for other ballots. Third parties, people appointed by the political parties, are responsible for actually conducting the hand counts. As for the PPE, the hand count of MCED's ballots showed a 0% variation between the hand count and the electronic tabulation by the voter equipment.

9. Provisional ballots provide a failsafe to ensure voters are able to vote. The procedures appear at page 57 of the Board Worker Training Manual. *See* Exhibit 34. Any concern about the ePollbooks is addressed by the failsafe put in place by the provisional ballots.

Some of the other best practices that Mr. Jones recommended, such as same day voter registration at the polls, would require statutory changes.

Given the above, MCED uses many of the best practices highlighted by Mr. Jones. The above cuts against plaintiff's argument that MCED's practices support a finding of fraud or misconduct. They do not.

E. <u>Issues regarding the number of polling places and the locations, as with all election procedures, are not the proper subject of a post-election challenge</u>

Plaintiff's claims of misconduct based on the number of voting centers at the PPE are untimely. A person must challenge procedural violations in the election process before the actual election. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶¶ 9-11, 45 P.3d 336, 339 (2002). (citing *Tilson v. Mofford,* 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987) and *Kerby v. Griffin*, 48 Ariz. 434, 444–46, 62 P.2d 1131, 1135–36 (1936)).

Here, the number and location of polling places "generally involves the manner in which an election is held." *See id.* (quoting *Tilson*, 153 Ariz. at 470, 737 P.2d at 1369). Long standing precedent from the Arizona Supreme Court establishes that "courts should review alleged violation of election procedure prior to the actual election." *See id.* To do otherwise would require the courts to overturn the will of the people after the election. *See id.*

Plaintiff's allegations of voter disenfranchisement as a result of issues related to the number and location of polling places similarly is not subject to post election judicial review. *See*

Zajac v. City of Casa Grande, 209 Ariz. 357, 360, ¶ 15, 102 P.3d 297, 300 (2004) (allegations of harm as a result of procedural defects raise procedural, not substantive, issues). "[A] duty is imposed upon one who would question the correctness or regularity of an election to act promptly, and, if he has information before the election of any defects in the proceedings, he must take steps to prevent the election . . ., or he will be regarded as having waived them." *See id.* at 360, ¶ 14, 102 P.3d at 300 (quoting *Abbey v. Green*, 28 Ariz. 53, 68, 235 P. 150, 155 (1925)).

*2. **Preliminary Motions As Of April 25, 2016**:*

The various defendants filed preliminary motions. Some raised multiple issues. Some raised just one. Other defendants joined in some of the motions. The preliminary motions are as follows:

- Secretary Reagan's Motion To Reconsider Order Requiring The Secretary to Produce All "Questioned Ballots" (Docket 8).
    - With regard to this motion, based on a stipulation of the parties, the court granted the motion as to the April 19, 2016 return hearing.
    - Plaintiff did not raise the issue again before the conclusion of the evidentiary hearing. The balance of the motion, therefore, is moot at this time.
- Maricopa County's Motion To Dismiss Election Contest (Docket 9).
    - Pinal County's Notice Of Limited Appearance To Contest Jurisdiction And Joinder in Maricopa County's Motion To Dismiss (Docket 12).
        - Pinal County's Reply To Plaintiff's Combined Response To Defendants' Pleadings And Reassertion Of Motion To Dismiss (Docket 36).
- Yavapai County Defendants' Motion To Dismiss Or Vacate Hearing (Docket 10).

- Defendants Coconino County Board of Supervisors And Coconino County Recorder's Joinder With Yavapai County Defendants [*sic.*] Motion To Dismiss Or Vacate Hearing (Docket 15).

- Secretary Of State Michelle Reagan's Motion For Judgment On The Pleadings (Docket 11).

- Pima County Defendants' Motion To Dismiss (Docket 16).

  - Pima County Defendants' Reply In Support Of Motion To Dismiss (Docket 34).

- Attorney General Mark Brnovich's Motion To Quash And Motion To Dismiss (Docket 18).

  - The Attorney General's Reply Brief Re Motion To Quash And Motion To Dismiss (Docket 37).

- Maricopa County's Motion In Limine And Motion To Strike Declarations Of Witnesses John Brakey, Jim March Simpson, and Richard Charnin (Docket 20).

  - Secretary of State Michelle Reagan's Notice Of Joinder In Maricopa County's Motion In Limine And Motion To Strike Declarations Of Witnesses John Brakey, Jim March Simpson, and Richard Charnin (Docket 23).

  - With regard to this motion, the Court held any ruling in abeyance to abide voir dire during the evidentiary hearing. During the evidentiary hearing, the Court granted the motion with regard to John Brakey and Richard Charnin. Plaintiff did not offer testimony from Jim March Simpson.

- Yavapai County Defendants' Motion To Dismiss For Failure To Join A Party Needed For Just Adjudication (Docket 29).

- Santa Cruz County's Motion To Dismiss (Docket 38).

- Secretary Reagan's Motion To Vacate Hearing For Lack Of Good Cause And Combined Replies To Motions Regarding Election Contest (Docket 39).

Plaintiff filed Plaintiff's Combined Response to Defendant's [*sic.*] Pleadings (Docket 24) in response to the above.

1. Motions To Dismiss

Most of the preliminary motions were in the form of a motion to dismiss for failure to state claim for which relief could be granted. Defendants offered several bases on which they argued the Court should grant relief, which the Court will group and address in the following order. Their arguments in summary are as follows:

a. The PPE is not subject to challenge under A.R.S. § 16-672.

b. Good cause did not exist to extend the hearing beyond the directive in A.R.S. § 16-676 to hold a hearing within ten days of the filing of the complaint.

c. Service was not timely because plaintiff did not properly serve the defendants at least five days before the ten-day hearing directive in A.R.S. § 16-676.

d. Plaintiff did not adequately plead his claim for fraud.

e. Plaintiff did not adequately plead his claim in the absence of fraud because plaintiff did not allege that any violations under A.R.S. § 16-672 would have changed the outcome of the election.

f. The Attorney General was not a proper party under A.R.S. § 16-672.B and A.R.S. § 16-675.A.

g. Plaintiff failed to name necessary and indispensable parties under Rule 19, Arizona Rules of Civil Procedure.

a. The PPE Is Subject To Challenge Under A.R.S. § 16-672.A.

Whether the PPE is subject to an election contest under A.R.S. § 16-672 is an issue of first impression. The specific issue is whether the PPE is an election that constitutes a "question

or proposal submitted to a vote of the people" and for which a result has been declared. Plaintiff argues that it is. Defendants argue that it is not.

Election challenges are statutory. *See Harles v. Lockwood*, 85 Ariz. 97, 332 P.2d 887 (1958); *Katan v. City of Prescott*, 223 Ariz. 179, 181-82 ¶ 8, 221 P.3d 370, 372-73 (App. 2009); *Barrera v. Superior Court*, 117 Ariz. 528, 573 P.2d 928, 573 P.2d 928 (App. 1977). The court therefore must strictly construe the statutory requirements. *Donaghey v. Attorney General*, 120 Ariz. 93, 95, 584 P.2d 557, 559 (1978). Longstanding precedent establishes that the person bringing an election challenge bears the burden of proving the statute applies to the challenged election. *See Henderson v. Carter*, 34 Ariz. 528, 534, 273 P. 10, 12 (1928).

This Court, however, must interpret statutes, including election statutes, in accord with the drafters' intent, with the plain language being the best indicator of that intent. *See Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996); *In re Estate of Winn*, 225 Ariz. 275, 277, ¶ 9, 237 P.3d 628, 630 (App. 2010). If the statute is clear and unambiguous, this Court need not employ other methods of statutory construction. *State ex rel. Romley v. Hauser*, 209 Ariz. 539, ¶ 10, 105 P.3d 1158, 1160 (2005); *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997).

The Court presumes "the legislature expressed itself in as clear a manner as possible and that it accorded words their natural and obvious meanings unless stating otherwise." *See State v. Johnson*, 171 Ariz. 39, 42, 827 P.2d 1134, 1137 (App. 1992) (internal citations omitted); *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992); *Deatherage v. Deatherage*, 140 Ariz. 317, 320, 681 P.2d 469, 472 (App. 1984). "Whenever possible, a statute will be given such an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant." *See Johnson*, 171 Ariz. at 42, 827 P.2d at 1137 (quoting *State v. Arthur*, 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980)). In that regard, the statute must be read as a whole. *See id.*

If the Court finds that the statute is ambiguous and the intent is unclear, the Court must consider the context of the statute, "its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose." *See Courtney v. Foster ex rel. Maricopa*, 235 Ariz. 613, 615, 334 P.3d 1272, 1274 (App. 2014) (quoting *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994)) (internal quotations omitted).

Plaintiff relies on the plain language of the statute. Plaintiff takes the position that the PPE involved a statewide question that was submitted to a vote of the people and for which a result was declared.

Defendants point out that A.R.S. § 16-672.C and A.R.S. § 16-675.A both use narrower language, referring to a "question or proposal, which has been declared carried . . .." However, those subsections address when the Attorney General (A.R.S. § 16-672.C and A.R.S. § 16-675.A) and the Governor (A.R.S. § 16-675.A) must be served and may intervene in an election challenge. That very language was the subject of the Attorney General's motion to quash. The statute authorizing the challenge, section 16-672.A, uses broader language, allowing a challenge to a question or proposal submitted to a vote of the people for which a result has been declared. Subsection A does not require that the question or proposal "be declared carried." Other statutes to which defendants pointed similarly involved unique language that made them simply inapplicable. Further, to the extent A.R.S. § 16-672.C and A.R.S. § 16-675.A use narrow language, A.R.S. § 16-673 uses very broad language, talking about "contesting a state election." *See* A.R.S. § 16-673.A. In other words, the Court can find examples of broader and narrower language in the relevant article, but the controlling language is in A.R.S. § 16-675.A.

Defendants' reliance on *McCall v. City of Tombstone*, 21 Ariz. 161, 164, 185 P. 942, 943 (1919) is misplaced. The language is *McCall* is very specific. *McCall* simply says that based on other statutes in place at the time, for an "other question" to be challenged, it must involve (1) the same electorate and (2) the same canvassing board as a state office or a constitutional amendment. *See id.* ("'other question' refers to a state-wide proposition requiring the same electorate and the same canvassing board as a state office or a constitutional amendment before it would be subject to a contest thereunder."). The Court cannot read *McCall* as broadly as defendants ask. *See id. McCall* does not say that to constitute an "other question" under the statute, the election must be an election to state office or a constitutional amendment. *See id.* The issue in *McCall* was whether the state election challenge statute could apply to a county election. *McCall* said no, it had to involve a statewide election.

Here, the PPE is statewide, it involves the same statewide electorate, and it involves the same statewide canvassing board as an election to state office or an amendment to the state constitution. And A.R.S. § 16-672 bears the caption "state elections" just as the statute at issue in *McCall*. *See id.*

THE COURT THEREFORE FINDS that based on the above, the PPE is an election that is subject to challenge under A.R.S. § 16-672.A.

IT IS THEREFORE ORDERED denying the motions to dismiss on the grounds that the PPE is not subject to challenge under A.R.S. § 16-672.A.

b. & c. Good cause existed to extend the hearing beyond the time directed in A.R.S. § 16-676 and service, therefore, was timely because plaintiff properly served the defendants at least five days, excluding the date of service, before the April 25, 2016 hearing began.

The issue is whether the Court could extend the time for the evidentiary hearing to April 25, 2016. If the Court could extend the time for the evidentiary hearing, then service on the Defendants by April 19, 2016 was timely.

The timeline is as follows:

- Plaintiff timely filed the challenge to the official canvass of the PPE April 8, 2016.

- Plaintiff served defendants on Tuesday, April 19, 2016, which was five days before the April 25, 2016 evidentiary hearing. The service deadline also is jurisdictional. *See* A.R.S. § 16-675.A; *see also* *Diaz v. Superior Court, In and For Pinal County* 119 Ariz. 101, 102, 579 P.2d 605, 606 (App. 1978). Defendants must be given five days, not including the date of service, to answer the complaint. *See id.*

Under the circumstances, the Court acted within its discretion to continue the evidentiary hearing until Monday, April 25, 2016. Arizona law directs the Court to hold any evidentiary hearing on an election challenge within ten days of the challenge being filed. *See* A.R.S. § 16-676.A. It also allows the Court to extend the hearing deadline by five days for good cause shown. *See* A.R.S. § 16-676.A. These statutory directives are not jurisdictional. *See Brousseau v. Fitzgerald*, 138 Ariz. 453, 456, 675 P.2d 713, 716 (1984); *see also* *Babnew v. Linneman*, 154 Ariz. 90, 93, 740 P.2d 511, 514 (App. 1987).

In an election challenge, the Court may extend the evidentiary hearing beyond the statutory directive when the delay is necessitated by the court's failure to set a timely hearing. *See Babnew*, 154 Ariz. at 93, 40 P.2d at 513. Such a delay is appropriate to keep the courthouse doors open "to hearing charges of deception and fraud that in any way impedes the exercise of a free elective franchise." *See* *Diaz*, 119 Ariz. at 102, 579 P.2d at 606.

Defendants rely on the holding in *Klebba v. Carpenter*, 213 Ariz. 91, 93, ¶ 10, 139 P.3d 609, 611 (2006). *Klebba* is not applicable here. *Klebba* dealt with appellate jurisdiction based on the trial court's delay in issuing a written ruling. The appellate court's jurisdiction is not delayed in this case. Unlike *Klebba*, this Court is issuing its signed ruling within less than 24 hours of the

conclusion of the hearing. And the Court's ruling is being issued within the time period that would have been required had the Court not extended the hearing deadline by two additional days.

Here, the Court set a non-evidentiary, fifteen-minute return hearing for Tuesday, April 19, 2016, which was the eleventh day after the complaint was filed. At that point, through no fault of plaintiff or defendants, the Court could not conduct the evidentiary hearing within the statutorily directed ten-day period. By setting the non-evidentiary review hearing on the eleventh day, the Court had to extend the evidentiary hearing beyond the ten-day statutory directive.

The Court statutorily could extend the deadline by five days, but that would have put the hearing on Saturday, April 23, 2016. *See* A.R.S. § 16-676.A. Five days from the review hearing would have been Sunday, April 24, 2016. If the Court has set the hearing one of those two days, it would have deprived plaintiff of a hearing through no fault of plaintiff. The Court instead set the evidentiary hearing for the seventeenth day after the hearing, which was Monday, April 25, 2016.

By extending the hearing for two additional days beyond the statutory directive, this Court does not deprive itself of jurisdiction to resolve the matter. *See Brousseau v. Fitzgerald*, 138 Ariz. 453, 456, 675 P.2d 713, 716 (1984); *see also Babnew v. Linneman*, 154 Ariz. 90, 93, 740 P.2d 511, 514(App. 1987). The delay was caused by this court's failure to set a timely hearing. *See Babnew*, 154 Ariz. at 93, 40 P.2d at 514. To rule otherwise would defeat the rights of the plaintiff because of this Court's failure to set a timely review hearing. *See id.*

Because the Court appropriately set the evidentiary hearing on Monday, April 25, 2016, service on Tuesday, April 19, 2016 was timely. Defendants' answers were due five days after service, which was Sunday, April 24, 2016, the day before the evidentiary hearing.

IT IS THEREFORE ORDERED denying the motions to dismiss on the grounds that the evidentiary hearing had to be held no later than April 17, 2016 , or April 23, 2016 if the Court had found good cause and extended the deadline for the evidentiary hearing by five days.

IT IS FURTHER ORDERED denying the motions to dismiss on the grounds that service on April 19, 2016 was untimely.

d. & e. Plaintiff adequately plead his claims.

The issue with regard to the sufficiency of pleading is whether plaintiff gave "sufficient information, time, and opportunity before the hearing to alert the other parties to the . . . grounds for his challenges so that they would have a meaningful opportunity to prepare to rebut them."

See McClung v. Bennett, 225 Ariz. 154, 156, ¶ 10, 235 P.3d 1037, 1039 (2010). *McClung* involved a nomination petition challenge in which the plaintiff's theory shifted as the evidentiary hearing began.

Here, the complaint when read as a whole, including the attachments, sufficiently put defendants on notice of plaintiff's claims based on fraud, misconduct, and illegal votes. These issues also came up during the review hearing and the subsequent teleconference. With the review hearing and the teleconference, the information was sufficient to alert defendants. Indeed, Defendants here were sufficiently alerted that they filed the motion three days before the evidentiary hearing. *McClung* cannot be read to stand for the proposition that no evidence beyond that expressly and completely contained in the complaint can be considered. *See id.* Even in election law cases, Arizona is a notice pleading state.

Throughout the case, plaintiff conceded that he likely could not show that the allegations, if true, would have changed the outcome of the election. However, plaintiff also did not completely concede that point. Indeed, at the conclusion of the evidentiary hearing, after the testimony by Ms. Tunnell from MCED, plaintiff suggested that alleged fraud and misconduct might have changed the allocation of delegates to the national convention by congressional district based on the Arizona Democratic Party's bylaws. However, even if adequately proven, it was not proof that it would have changed the outcome of the election itself.

When appropriate, the Court did not allow the introduction of evidence that would have denied defendants the information, time, and opportunity to mount a meaningful defense. Though the Court was not called upon to resolve the issue of whether Richard Charnin could provide mathematical analysis based on the official canvass of the PPE, the parties discussed the issue and plaintiff offered no further evidence by Mr. Charnin.

IT IS THEREFORE ORDERED denying the motions to dismiss for failure to adequately plead claim under Rule 12(b)(6), Arizona Rules of Civil Procedure.

f. The Attorney General need not be served in a PPE challenge and may not intervene in a PPE challenge.

The Attorney General and the Governor were served on April 18, 2016. The Governor has not made an appearance, limited or otherwise.

The Attorney General has made a limited appearance to challenge service of the summons on the Attorney General under A.R.S. §§ 16-672.C and16-675.A.

Section 16-772.C says:

> In a contest of the election of a person declared elected to a state office or of an initiated or referred measure, constitutional amendment, or other question or proposal, which has been declared carried, the attorney general may intervene, and upon demand, the place of trial of the contest shall be changed to Maricopa county, if commenced in another county.

Section 16-675.A says:

> If the contest is on an initiative or referred measure, a proposed constitutional amendment, or other proposition or question submitted, which has been declared carried, the summons shall be served upon the governor and attorney general who may appear and answer the statement of contest, or, by leave of court, an elector of the state may intervene and defend the contest."

Service on the Attorney General and the Governor under both is to permit them to intervene in the action if they choose to do so. They are not necessary and indispensable parties. Moreover, both statutes allow the intervention in narrower circumstances. In short, the Attorney General and the Governor need not be served in every election challenge under § 16-672.A and they cannot intervene in every challenge.

In other words, election contests as described in section 16-672.A are not limited to contests regarding an "initiative or referred measure, a proposed constitutional amendment, or other proposition or question submitted**, which has been declared carried**." *See* A.R.S. § 16-675.A (emphasis added). Also, election contests as described in section 16-672.A are not limited to "the election of a person declared elected to a state office or of an initiated or referred measure, constitutional amendment, or other question or proposal, **which has been declared carried**." *See* A.R.S. § 16-672.C (emphasis added).

When the election contest involves issues not listed in section 16-675.A, the Attorney General is not a proper party. *See Katan v. City of Prescott*, 223 Ariz. 179, 181, ¶ 8, 221 P.3d 370, 372 (App. 2009). As *Katan* explained, "Because a court's jurisdiction over election contests is purely statutory and not a matter of common law, if no statute exists granting jurisdiction, the court has no jurisdiction to act." *See id.*

Even if section 16-675.A did apply, the Attorney General has the discretion to decline to appear. The motion establishes that the Attorney General has elected not to exercise his discretion to "intervene and defend that action" in this case even if he had discretion to do so.

IT IS THEREFORE ORDERED granting Attorney General Mark Brnovich's Motion to Quash (Docket 18).

IT IS FURTHER ORDERED denying Attorney General Mark Brnovich's Motion to Dismiss (Docket 18).

g. Plaintiff did not fail to name necessary and indispensable parties.

Yavapai County asks that the matter be dismissed because plaintiff failed to name necessary and indispensable parties. Specifically, Yavapai County argues that plaintiff should have included as parties, the three political parties that had candidates in the challenged election (Democratic, Libertarian, and Republican). Yavapai also asserts that the individual candidates on the ballot also should have been made parties. Yavapai relies on the language in A.R.S. § 16-243.B, which purports to control how delegates to the parties' national conventions are required to vote based on the PPE results. Subsection A provides that selection of delegates is controlled by the party's bylaws. The litigants before the Court conceded that the political parties honor subsection B more in the breach and that there is no enforcement mechanism to compel compliance.

To determine whether the political parties and the candidates are necessary and indispensable, the Court must engage in a three-part analysis. First, this Court must determine whether they are necessary to the action. They are necessary if they have an interest relating to the subject of this lawsuit (the canvass of the PPE) and that interest may be impaired or impeded as a practical matter if the matter is disposed of in their absence. In short, they are necessary parties. The political parties and the candidates each may have an interest relating to the outcome of this action that may be impaired or impeded in their absence.

Second, the Court must consider whether they can be joined in the present lawsuit. At this stage in an election contest, new parties cannot be added.

Third, the Court must consider whether they are indispensable. To make that determination, the Court must consider several factors. First, given the statutory structure, it is unclear whether rendering a decision in the absence of the political parties and the candidates will prejudice them; it will not prejudice the parties before the Court.

Fourth, the Court cannot fashion a result to lessen the impact on the political parties or the candidates. The Court has two options, which are to grant plaintiff's relief by striking the official canvass or to deny plaintiff's relief, and in so doing, allowing the official canvass to stand.

Fifth, the judgment either way will be adequate.

Sixth, the plaintiff will not have any other adequate remedy if this action is dismissed.

THE COURT FINDS that based on the above, though the political parties and candidates are necessary parties, they cannot be joined, and they are not indispensable parties.

IT IS THEREFORE ORDERED denying the motion to dismiss for failure to name necessary and indispensable parties under Rule 19, Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED that any motion or request for relief not expressly granted or denied above is deemed denied**.**

IT IS FURTHER ORDERED signing this minute entry as a final written Order of the Court. **The Court notes that no further matters remain pending and the order is entered pursuant to Rule 54(c) of the Arizona Rules of Civil Procedure.**

Dated: April 27, 2016

/s/ David B. Gass
HONORABLE DAVID B. GASS
JUDICIAL OFFICER OF THE SUPERIOR COURT