Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-000815 09/09/2024

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
C. Lockhart
Deputy

RON GOULD

DENNIS I WILENCHIK

v.

KRIS MAYES

EMMA H MARK

DAVID ANDREW GAONA
BRIAN RICHARD GIFFORD
DANIEL COHEN
JULIE ZUCKERBROD
JUDGE ASTROWSKY

RULING RE: THE STATE'S MOTION TO DISMISS

The Court considered the Arizona Attorney General's ("A.G.") Motion to Dismiss First Amended Complaint ("FAC"), Plaintiff's Response to the State's Motion to Dismiss, and the A.G.'s Reply. The Court finds that oral argument is not necessary as the parties have adequately briefed the issues. See Mar.Co.Loc.R. 3.2(d). For the reasons stated herein, the Court grants the A.G.'s Motion to Dismiss.

In a November 2023 letter, the Arizona Attorney General advised the Mohave County Board of Supervisors (the "Board") that conducting a full hand count of ballots cast in the 2024 election is illegal under Arizona law—ballots must be counted using electronic tabulating equipment. After receipt of that letter, the Board rejected a proposal to approve a full hand-count of cast ballots. Now, Plaintiff—suing in his individual capacity—seeks a determination from this Court that the Attorney General's legal opinion is wrong. Plaintiff asks this Court to declare that (1) the Board has the legal authority to authorize a full hand count, and (2) Plaintiff is immune from criminal prosecution for voting to authorize a hand count in any future (hypothetical) vote.

In doing so, Plaintiff asks this Court for an advisory opinion concerning an issue that is not yet ripe.

Arizona's Declaratory Judgment Act ("DJA") does not permit a party to obtain an advisory opinion, particularly when neither Plaintiff's rights nor his behavior will be affected by anything this Court says. Put differently, Arizona law requires a present controversy between the parties, not just a difference of opinion about what the law permits or requires. Here, Plaintiff has no present rights or interests under any of the statutes for which he seeks a declaration. Nor has he alleged an actual controversy between the parties which is ripe for review. Therefore, Plaintiff's FAC must be dismissed.

On a Rule 12(b)(6) motion, the Court takes the well-pleaded allegations as true. *Cao v. PFP Dorsey Invs., LLC*, 516 P.3d 1, 4 ¶ 12 (App. 2022). Without converting the motion to one for summary judgment, the Court can consider "matters that, although not appended to the complaint, are central to the complaint," *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64 ¶ 14 (App. 2010), as well as documents the complaint "incorporate[s] by reference," *Diaz v. BBVA USA*, 252 Ariz. 436, 438 ¶ 2 (App. 2022), and "public records concerning matters referenced in the complaint," *AUDIT-USA v. Maricopa Cnty*., 254 Ariz. 536, 538 ¶ 6 (App. 2023), review denied (Aug. 4, 2023).

The DJA permits "[a]ny person . . . whose rights, status or other legal relations are affected by a statute" to "obtain a declaration of rights, status or other legal relations." A.R.S. § 12-1832. "Although a declaratory judgment action is remedial and should be liberally construed and administered, a plaintiff must have an actual or real interest in the matter for determination." *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (cleaned up). Because Plaintiff cannot demonstrate a legally cognizable interest to be adjudicated, or even a conceivable, palpable injury, he does not have standing to bring a claim under the DJA. Plaintiff identified no rights that belong to him in his individual capacity.

Here, the declaration Plaintiff asks of this Court concerns the ability of the County (acting through the Board) to conduct a full hand count of all ballots cast in an election. "Plaintiff [ ] asks this Court to declare . . . that the Mohave County Board of Supervisors has the legal authority to decide whether to hand count ballots as an initial matter." [FAC ¶ 41; see also id. ¶ 33 (asking the court to declare whether the election statutes "bar a County from utilizing a hand count of votes as the initial method of tabulation of the vote"), ¶ 39 (asking the court to declare that the "use of vote tabulating machines in the first instance, rather than hand counting ballots, is not mandatory, but rather optional")]. Supervisor Gould cannot seek relief that can only be sought through collective action of the Board, if it can be sought at all.

The remaining statutes Plaintiff cites pertain to ballot tabulating machines generally, and duties belonging to the Secretary of State. [FAC ¶¶ 40–41, citing A.R.S. §§ 16-441, -442, -443, -444, -468, -602, and -663]. Not a single one of the statutes Plaintiff cites involves any rights or legal interests belonging to him, either as an individual or as a Board member. Plaintiff does not claim that he has been denied the ability to vote on any board action, only that his ability to "vot[e] according to his conscience" has been chilled by the Attorney General's advice that the Board risks legal penalties if it—acting as a Board—violates the law.13 [FAC ¶¶ 6, 18]. This is not a threat of injury to any legal right that Plaintiff possesses, and he has cited no authority to the contrary. Cf. *Bennett v. Napolitano*, 206 Ariz. 520, 526 ¶ 26 (2003) (holding individual legislators who voted against an act that passed in the legislature lacked standing to challenge the act because "no legislator's vote was nullified by interference") (citing *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (finding individual legislators lacked standing because they had not claimed they were "deprived of something to which they personally are entitled—such as their seats as Members of Congress" and that their "claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete")).

Plaintiff has not plead that there is an imminent threat of prosecution. The Attorney General's letter also stated that if the Board were to violate the law, such action "may result" in criminal penalties, and the Attorney General's Office would "consider whether criminal prosecution is warranted." [FAC, Ex. A at 3]. This is not a specific threat of prosecution. Furthermore, it is a violation of the Separation of Powers for the judicial branch to tell the executive branch what it can and cannot do concerning an act that has yet to occur. The executive branch enjoys discretion when it carries out its functions. The judicial branch cannot eliminate that discretion. *See* A.R.S. Const. Art. 3; *Cook v. State*, 230 Ariz. 185 (2012).

The DJA requires that there "be adverse claims asserted by the plaintiff upon present existing facts, which have ripened for judicial determination." *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149, 152 (App. 1990). The parties must have a "real interest in the questions to be resolved" based on "an existing state of facts, not those which may or may not arise in the future." Id. (internal citations omitted). Plaintiff's claims are not based on any existing justiciable controversy between the parties and are purely speculative—they are not ripe for adjudication. The question of whether the Attorney General's letter was "correct as a matter of law" is not a justiciable controversy.

IT IS ORDERED granting the A.G.'s Motion to Dismiss Plaintiff's FAC.

IT IS FURTHER ORDERED the A.G., as the successful party is entitled to its allowable costs. The A.G. shall submit its Statement of Costs no later than **fifteen (15) days** after the entry

of this Order. Plaintiff may file an Objection to same no later than **five (5) days** after receipt of the Statement of Costs.

IT IS FURTHER ORDERED denying the A.G.'s request for an award of attorneys' fees. The A.G.'s request is premised upon A.R.S. § 12-348.01, which requires the Court to award fees to the "successful party" when, as here, one government official sues another. Here, however, as the A.G. noted several times in its filings, Plaintiff filed his FAC in his individual and not official capacity. Accordingly, A.R.S. § 12-348.01 does not apply here.