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9 *Attorneys for Maricopa County Defendants*

10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12 David Isabel, individually and on behalf of all  
others similarly situated,

13 Plaintiff,

14 v.

15 Michele Reagan, in her individual capacity;  
Maricopa County; Adrian Fontes, in his official  
16 capacity as Maricopa County Recorder,

17 Defendants.

No. CV 18-3217-PHX-DWL

**MARICOPA COUNTY'S REPLY IN  
SUPPORT OF ITS RULE 12(b)(1)  
MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT**

(Honorable Dominic W. Lanza)

18 Maricopa County hereby respectfully reasserts its request for an Order from the  
19 Court denying Plaintiff's Complaint in its entirety, with prejudice. This lawsuit is an  
20 attempt to sidestep Judge Logan's 2016 ruling denying *all relief* requested regarding the  
21 exact same issue and the exact same electors (indeed, filed by the verifier of the 2016  
22 Complaint) by adjusting the relief sought. Judge Logan's ruling required no action or  
change on the part of the Secretary nor the counties, as it denied all relief requested.

1 Therefore, the Secretary (and the counties, by proxy) were not ordered to make any  
 2 change. Accordingly, any claim any potential plaintiff may have had, including this  
 3 Plaintiff, was known at the time of Judge Logan’s Order way back in 2016. Nevertheless,  
 4 the Court need not reach a decision on this ground because Plaintiff lacks standing against  
 Maricopa County as Plaintiff’s alleged injury is not fairly traceable to Maricopa County.

5 Maricopa County hereby respectfully submits this Reply for the Court’s  
 6 consideration. In sum, Maricopa County’s conduct – abiding by the Secretary’s express  
 7 instruction to accept registrations filed by October 10, 2016 – is not “fairly traceable” to  
 8 Plaintiff’s injury. Plaintiff’s argument essentially reduces to this: Maricopa County is  
 9 responsible in-part for Plaintiff’s claimed injury because Maricopa County: is the final  
 10 policymaker for Maricopa County, adopted a policy invalidating certain votes, and,  
 11 counted the votes in the election at issue. These factors, while inaccurate, do not establish  
 12 that Maricopa County – *or any county* – had the power to override the Secretary – i.e. State  
 13 Chief Election Officer – on a matter of statewide concern. Thus, since Maricopa County’s  
 conduct is not fairly traceable to Plaintiff’s alleged injury, Plaintiff has no standing as  
 related to Maricopa County. Maricopa County stands by its Motion to Dismiss and will  
 focus its Reply on this point.

14 **I. PLAINTIFF STILL FAILS TO ESTABLISH STANDING BECAUSE HIS  
 15 ALLEGED INJURY IS NOT “FAIRLY TRACEABLE” TO MARICOPA  
 16 COUNTY’S CHALLENGED CONDUCT.**

17 The conduct challenged is Maricopa County’s compliance with the State Chief  
 18 Election Officer’s state-wide directive setting the voter registration deadline to October 10,  
 19 2016 in light of the holiday and in the absence of legislative clarity, and *subject to criminal*  
 20 *penalty for noncompliance*. Plaintiff is correct, Maricopa County’s action need not be the  
 21 immediate or proximate cause of Plaintiff’s injuries. Rather, Plaintiff’s injuries must be  
 22 “fairly traceable” to Maricopa County’s action. Herein lies the issue; Maricopa County’s  
 conduct of complying with the State Election Officer’s state-wide mandate establishing the  
 voter registration deadline as October 10, 2016 – *subject to criminal penalty for*  
*noncompliance* – is not “fairly traceable” to Plaintiff’s alleged injury. If an injury is not  
 fairly traceable, there is no standing and the court cannot hear the case.

**A. Judge Logan’s Ruling Squarely Quashed Any Argument that Plaintiff’s Alleged Injury is Fairly Traceable to Maricopa County or the Secretary.**

This is the predominate missing link in Plaintiff’s case for standing. Judge Logan squarely addressed this issue regarding all electors in this claimed class, which includes this Plaintiff:

*The holiday deadline did not limit the methods of voter registration; it merely imposed a timeframe in which voters had to act in order to register to vote in the general election. Nor did the deadline impose restrictions in a disproportionate manner because only certain methods for voter registration were available on Columbus Day...The voters at issue here could have registered in time for the general election, but unfortunately did not do so...these circumstances, while unfortunate, were not the result of the Secretary’s holiday deadline. Circumstances like these could arise at any time an individual registers to vote at the last moment to do so.*

(2016 Order at 16-17) (emphasis added.) Here, Judge Logan squarely eliminates any claim that Plaintiff’s alleged injury is “fairly traceable” to the Secretary (thus, also to Maricopa County). Indeed, the voters could have registered in time but did not do so. While unfortunate, circumstances like these may arise any time an individual waits until the last moment to register, *but* this is “not the result of the Secretary’s holiday deadline.” As can be seen, Judge Logan does not even address the counties because it is the Secretary’s duty, not the counties, including Maricopa County.

**B. Maricopa County Had No Power or Authority to Cause Plaintiff’s Alleged Injury.**

Furthermore, an injury is *not* fairly traceable – i.e. does not stem from – a defendant’s action if the defendant has no authority or power to act otherwise. In other words, a defendant’s action cannot cause a plaintiff’s alleged injury if the defendant has no authority or power to act. *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987) (plaintiff has no standing to challenge refusal of [defendants-chaplains] to [act] since the [defendants-chaplains] had no discretion to grant such a request). In the absence of an allegation of power or authority to act, the court cannot conclude a defendant “caused” a plaintiff’s

1 injury or that a plaintiff's injury is fairly traceable to a defendant's act. *Kurtz v. Baker*, 829  
2 F.2d 1133, 1142 (D.C. Cir. 1987) ("In the absence of an allegation that the [defendants]  
3 had the power to permit [plaintiff's request], the court could not conclude that [defendants]  
4 "caused" [plaintiff's injury].").

5 While not binding, the United States Court of Appeals for the District of Columbia  
6 addressed this very issue and its analysis proves persuasive here. In *Kurtz v. Baker*, a  
7 professor sought to deliver secular remarks during morning prayer before the United States  
8 House and Senate. The chaplains refused stating they had no authority to act, citing House  
9 and Senate rules as the authority. When refused by the chaplains, the professor sued the  
10 chaplains for refusal to invite nontheists to deliver secular remarks during morning prayer.  
11 The professor did not allege that the chaplains had "discretionary authority" to act. *Kurtz v.*  
12 *Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987) ("[Plaintiff] does not even allege that each  
13 house has granted its [chaplain-defendants] discretionary authority such that, with the  
14 [chaplain-defendant's] assent, there would have been a "substantial probability" of  
15 [plaintiff] addressing either house.").

16 The district court affirmed plaintiff-professor's standing, which the appeals court  
17 reversed. The appeals court held that chaplains who refused to invite nontheists to deliver  
18 secular remarks during morning prayer *did not have authority* to invite or terminate anyone  
19 from the prayer, so that the inability of the plaintiff-professor to deliver secular remarks  
20 *was not fairly traceable* to the defendant-chaplains' conduct – the rejection of the plaintiff-  
21 professor's requests – and thus, plaintiff-professor did not have Article III standing.

22 Here, as in *Kurtz*, Maricopa County did not have authority to act in the manner  
demanded by the plaintiffs in the 2016 Lawsuit addressing the same nucleus of facts as  
Plaintiff here. While Maricopa County does indeed oversee elections in Maricopa County  
and does have broad authority to carry out elections, this authority is not limited. Indeed,  
one of the limitations of this authority is the setting of the *state-wide* voter registration  
deadline, which is a matter of statewide concern, which goes beyond Maricopa County's  
authority into the Secretary's purview. Indeed, Judge Logan addressed this in his Order:  
"[t]he Secretary has the authority to promulgate rules and procedures for elections, such as

1 voter registration, *which encompasses determining voter registration deadlines ...*” (2016  
 2 Order at 9-10) (internal quotations and citations omitted).<sup>1</sup> To now conclude in this related  
 3 matter that Maricopa County – not the Secretary – determines voter registration deadlines  
 4 would be to render Judge Logan’s opinion void. Nor can it be concluded that both  
 5 Maricopa County and the Secretary have authority to set the deadline, for if both had the  
 6 authority to set the deadline, as a practical matter, each agency could effectively choose  
 7 and establish *different* deadlines. That is clearly not the intent of the statutes at issue,  
 8 including establishing the Secretary as the Chief Election Officer for Arizona.

9 The Secretary did not delegate this authority to Maricopa County or any other  
 10 county. Rather, the Secretary retained authority and directed all counties to follow the  
 11 October 10, 2016 deadline. In fact, *Plaintiff* even alleges this fact: “[n]otably, on August  
 12 25, 2016, the Director of the Office of the Secretary of State’s Elections Division...emailed  
 13 all of Arizona’s county recorders notifying them that October 10, 2016 was the correct  
 14 deadline and that the deadline could not be lawfully moved to October 11th.” Compl. ¶ 20  
 15 (emphasis added).

16 Not only did the Secretary not delegate the power to set the registration deadline to  
 17 Maricopa County (or any other county), Plaintiff does not allege so. Instead, Plaintiff  
 18 alleges something more ambiguous: “Defendant Fontes is the chief official responsible for  
 19 overseeing elections in Maricopa county, and is empowered with broad authority to carry  
 20 out that responsibility. Defendant Fontes is the final policymaker for Maricopa County on  
 21 matters relating to elections, including the verification, processing, and tabulation of ballots  
 22 at issue in this lawsuit.” Compl. ¶ 11. This is not an allegation that Maricopa County has  
 authority over the specific duty at issue: to set the voter registration deadline. Indeed,

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<sup>1</sup> Plaintiff erroneously characterizes Maricopa County’s conduct in following the Secretary’s directive as a “policy.” This is a mischaracterization. Rather, Maricopa County carried out its *duty* and *followed the law*. To the extent this court characterizes Maricopa County’s conduct as a policy, the judicial system prefers to steer clear of opining on policy ramifications.

1 Plaintiff cannot expressly allege so because there is no source for this proposition because  
2 it is not true.

3 *Arguendo*, Maricopa County could have ignored the limits of its authority and – in  
4 direct disobedience of the Secretary – counted Plaintiff’s ballot filed after the established  
5 deadline. However, in that realm, while Plaintiff’s personal desire would have been  
6 satisfied, Maricopa County would have placed itself squarely in the path of the possibility  
7 of criminal prosecution. (2016 Order at 9-10) (“Any person who does not abide by the  
8 Secretary’s rules is subject to criminal penalties.”). Even further – *arguendo* – there is no  
9 guarantee the Secretary would *not* have exercised its authority to override such an act by  
10 Maricopa County. This is therefore unreasonable and the result tenuous at best. Article III  
11 requires a chain of causation less ephemeral than a chance or possibility. Of note, while  
12 Plaintiff relied on Judge Logan’s Order in support of some of his arguments, Plaintiff *does*  
13 *not* address the portion of Judge Logan’s Order recognizing “criminal penalties” for “any  
14 person who does not abide by the Secretary’s rules.” (*See*, Compl., generally.) Thus,  
15 implicit in Plaintiff’s argument is, even though Maricopa County was in danger of criminal  
16 penalties for disregarding the Secretary’s deadline, Maricopa County *should have*  
17 subjected itself to criminal penalties. Since it did not, Maricopa County is now liable to  
18 Plaintiff for compensatory and punitive damages for adhering to the Secretary’s direction.

19 In the absence of an allegation that Maricopa County had the power to set the voter  
20 registration deadline, the court cannot conclude Maricopa County caused Plaintiff’s vote to  
21 be untimely. *Accord Kurtz v. Baker*, 829 F.2d 1133, 1142 (D.C. Cir. 1987) (internal  
22 quotations omitted) (emphasis added) (“In the absence of an allegation that the [defendant-  
chaplains] had the *power* to permit [plaintiff] to address the House and Senate in the  
manner [plaintiff] sought, the court could not conclude that the [defendant-chaplains]  
caused appellant’s exclusion.”). Notwithstanding, this court cannot direct Maricopa County  
to alter its actions when Maricopa County had no authority to do so. In other words, this  
court lacks jurisdiction to order Maricopa County to break the law and subject itself to  
criminal penalty, the criminality of which was noted by Judge Logan in the 2016 Lawsuit.

1 Accordingly, Plaintiff's alleged injury is not fairly traceable to Maricopa County  
2 and has therefore failed to establish standing.

3 **C. Maricopa County's Action is Not "Fairly Traceable" to Plaintiff's**  
4 **Claimed Injury Because Maricopa County's Action Was legal.**

5 Although standing does not rise or fall on the illegality of a defendant's behavior as  
6 it is a prudential rather than a constitutional consideration, it is worth a brief note since  
7 Plaintiff raise a similar point in his Response. To be "fairly traceable," the defendant's  
8 conduct at issue must be illegal. It is well-settled: "[a] federal court's jurisdiction therefore  
9 can be invoked only when the plaintiff himself has suffered some threatened or actual  
10 injury resulting from the *putatively illegal action* [of the defendant]." *Warth v. Seldin*, 422  
11 U.S. 490, 499 (1975) (internal quotations omitted) (emphasis added). Maricopa County did  
12 not act illegally.

13 Maricopa County did not fail to comply with Judge Logan's Order. Judge Logan's  
14 Order denied all of plaintiff's requested relief, save granting a motion to supplement the  
15 record. (2016 Order at 34.) Judge Logan did not order Maricopa County to perform any  
16 act. Accordingly, there is no illegality here.

17 Maricopa County complied with the Secretary's instruction at issue. To the extent  
18 Plaintiff argues Maricopa County violated state or federal law by following the registration  
19 deadline set by the Secretary, Maricopa County did not have the authority to usurp the  
20 Secretary to establish another date. *See, supra*, Section I.B.

21 Accordingly, in the absence of illegally, Plaintiff has not established the "fairly  
22 traceable" irreducible element of standing.

**II. CONCLUSION**

Accordingly, Maricopa County respectfully requests that this Court find a lack  
subject matter jurisdiction over the allegations in Plaintiff's Complaint and dismiss  
Plaintiff's Complaint in its entirety, or alternatively, dismiss those individual claims that

/ / /



1 fail to set forth a proper cause of action against any Defendant and issue an Order  
2 accordingly.

3 **RESPECTFULLY SUBMITTED** this 14th day of January, 2019.

4 WILLAM G. MONTGOMERY  
5 MARICOPA COUNTY ATTORNEY

6 By: /s/Talia J. Offord

7 TALIA J. OFFORD  
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11 *Defendants*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of January 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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