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**UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA**

Arizona Democratic Party and the)	Case No. CV-16-03618-PHX-SPL
Democratic National Committee,)	
)	
Plaintiffs,)	DEFENDANT’S RESPONSE TO
)	PLAINTIFFS’ MOTION TO
v.)	SUPPLEMENT THE RECORD
)	
Michele Reagan, Secretary of State,)	
)	
Defendant.)	

Defendant the Arizona Secretary of State (“Secretary”) does not oppose Plaintiffs’ motion to supplement the record. The Secretary disagrees with Plaintiffs’ mischaracterization of her position based on the proposed supplement. To be clear: the Secretary’s position with regard to the Plaintiffs’ requested relief has not changed.

In providing context to the Secretary’s public statement assuring the public of her ongoing efforts on citizens’ behalf, two crucial facts remain static. *First*, the potential harm to the counties and likely impossibility of compliance has only increased with the passage of time. Polls open less than eight days from now, and physical

1 delivery of polling materials has already commenced. Counties obligated to backtrack
 2 on their work of the past two weeks is certain to negatively impact the operation of the
 3 2016 General Election. The Secretary through her public statement on October 28,
 4 2016, intended to convey her recognition that, despite the delayed timing, the
 5 impossibility of achieving Plaintiffs' sought ends, and the substantial harm to non-party
 6 counties, this Court may nonetheless choose to issue an order granting Plaintiffs'
 7 request. Should that occur, the Secretary has "hope" that in response to her resulting
 8 advice the counties will be able to carry out the Court's order. In other words, the
 9 Secretary's intent was to make an aspirational statement that, should she receive an
 10 adverse ruling in this matter, she would do her utmost to comply.¹

11 **Second**, the evidence that Plaintiffs propose to introduce does not change the
 12 fact that the Secretary lacks authority to bind the county recorders, who actually control
 13 the voting registries for their counties. And because the Secretary lacks power to force
 14 the county recorders to admit voters to their rolls, she is not the necessary party and this
 15 Court is "powerless" to grant the relief the Plaintiffs request. *Citizens Alert Regarding*
 16 *the Env't v. U.S. E.P.A.*, 259 F. Supp. 2d 9, 17 (D.D.C. 2003), *aff'd sub nom. Citizens*
 17 *Alert Regarding Env't v. E.P.A.*, 102 F. App'x 167 (D.C. Cir. 2004).

18 As noted in the Secretary's sur-reply, Doc. 29, *Southern Pac. Transp. Co. v.*
 19 *Brown*, 651 F.2d 613, 614-15 (9th Cir.1980), is on all fours with this matter. The
 20 plaintiffs in that case failed to sue the parties who had power to enforce the law that
 21 they alleged caused them injury; and, absent those parties being joined, the court was
 22 powerless to grant relief. *Accord Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011) ("A
 23 court's judgment binds only the parties to a suit, subject to a handful of discrete and

24
 25 ¹ Given the narrow timeframe for preparation of this response, undersigned counsel did
 26 not obtain a sworn statement from the Secretary or her representative with regard to her
 27 intent in issuing the October 28, 2016, press release. Counsel instead avows to the Court
 28 through her signature on this document that all representations herein regarding the
 Secretary's intent, position, and beliefs are made after consultation with Elections
 Director Eric Spencer and his confirmation as to these representations.

1 limited exceptions.”); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41
2 (“a federal court (can) act only to redress injury that fairly can be traced to the
3 challenged action of the defendant”); *ESP Fid. Corp. v. Dep’t of Hous. & Urban Dev.*,
4 512 F.2d 887, 890 (9th Cir. 1975) (noting with approval that the court below declined
5 to issue an injunction against two non-parties because they “have not been named
6 parties herein and have not been served.”); *Citizens Alert Regarding the Env’t*, 259 F.
7 Supp. at 17 (federal courts are “powerless” to issue injunctions against non-parties).

8 As the Secretary noted in her sur-reply, Doc. 29 at 7, the County Recorders are
9 the officials charged with creating the official voter rolls and precinct lists, not the
10 Secretary. Arizona law gives the County Recorders, not the Secretary, the authority to
11 determine who is a registered voter. A.R.S. § 16-168(A). Even if this Court orders the
12 Secretary to admit voters to the voter registries, the Secretary has no authority to
13 guarantee compliance. She can ask the County Recorders to add names to the official
14 Election Day precinct lists; she can even tell the County Recorders that she “hopes”
15 they will do so. But she cannot force them to do so, because Arizona law does not
16 provide her that power. This was evident when Mohave County officials informed the
17 Plaintiffs that, despite the Secretary’s insistence that October 10, 2016 was the voting
18 registration deadline, Mohave County would comply with Plaintiffs’ demand and
19 accept registrations on October 11. Em. TRO, Doc. 2, 3. That could not happen if the
20 Secretary had power to force the County Recorders to abide by her instructions with
21 regard to who is, and is not, a registered voter.

22 Because the Secretary lacks that authority, her opinion is just like that of the
23 attorney general in *Southern Pacific*: it might be persuasive to the county recorders, but
24 it is not binding upon them. County Recorders can choose to ignore the Secretary’s
25 guidance—and they very well may do so since the Maricopa County Recorder’s office
26 has already provided testimony as to the logistical nightmare an adverse decision will
27 cause this close to the election. Doc. 29-4, Ex. D. As a result, an injunction against the
28 Secretary will not redress Plaintiffs’ injury.

1 Nothing about Plaintiffs' proposed supplement alters this fact.

2 RESPECTFULLY SUBMITTED this 31st day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

s/ Maureen Riordan

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