SUPREME COURT OF ARIZONA

JEANNE KENTCH; TED BOYD; ABRAHAM HAMADEH; and REPUBLICAN NATIONAL COMMITTEE,
Petitioners/Plaintiffs/Contestant,
v.

HON. LEE F. JANTZEN, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave,
Respondent,
and

KRIS MAYES, an individual;
Real Party in Interest/Contestee,
and

ADRIAN FONTES, in his official capacity as the Secretary of State, *et al.*,
Nominal Defendants.

Supreme Court No. CV-23-0205-SA

Court of Appeals Division One 1 CA-CV 23-0472

Mohave County Superior Court No. CV-2022-01468

[Proposed] Amicus Curiae Brief of America First Legal Foundation

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Introduction

It is this Court's "long established principle[] that it is a highly desirable legal objective that cases be decided on their merit." *Union Oil Co. of California v. Hudson Oil Co.*, 131 Ariz. 285, 288 (1982). There is no more important place to enshrine this principle than in election contests, because the people's trust in elections forms the bedrock of our system.

A majority of Arizona voters—55 percent—"believe it is likely that problems with the 2022 election ... affected the outcome."[1] If public trust in this State's electoral process is to be restored, then the outcome of election contests should be based on the merits, with full disclosure of the relevant evidence. Yet, in this case, the result was predetermined by the Defendants' decision not to disclose vital evidence. No court should ever countenance the "hide the ball" tactics the Arizona Secretary of State employed in the Superior Court election contest.

At the trial in this case, the Arizona Secretary of State's Office withheld material evidence essential to the fair and just adjudication of the election contest. The Petitioners were constitutionally and statutorily

[1] *Most Arizona Voters Believe Election 'Irregularities' Affected Outcome*, RASMUSSEN REPORTS, (Mar. 17, 2023), https://tinyurl.com/45j5pcnt.

entitled to use that evidence in their election contest. The Superior Court's denial of a new trial in this case was based on a misapplication of the law and constituted an abuse of discretion.

To deny relief to the petitioners sets up perverse incentives. The Superior Court's interpretation of Arizona's election statutes would empower government election officials to preordain the outcome of election contests by choosing which information to disclose to the contestant. And under the Superior Court's interpretation, an election contestant would have no remedy if election officials unlawfully withhold material information or ignore valid and lawful discovery requests.

Thus, the Superior Court's interpretation would give election officials the power to ensure that a disfavored candidate loses his election contest. If election officials get to decide whether to respond promptly or late to valid requests for ballot inspection, then election officials have the power to end election contests before they've even begun. The Superior Court's interpretation of the law would allow election officials, and not courts, to determine whether a candidate is forever foreclosed from getting relief on the merits in an election contest.

Such a system would violate the Arizona Constitution and basic principles of justice. This Court should therefore accept jurisdiction and grant relief to maintain the integrity of Arizona's election system.

Interest of Amicus Curiae

America First Legal Foundation ("AFL") is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Because of this case's implications for the integrity of the electoral process and its importance in protecting the essential constitutional principle that the winner of an election should always be the person with the most legal votes, AFL has a substantial interest.[2]

Argument

I. This Court Should Accept Special Action Jurisdiction and Order the Trial Court to Conduct a New Trial.

This Court should accept jurisdiction of the Petition because "[t]he case presents novel constitutional issues of statewide importance,"

[2] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the

because it "involves a dispute at the highest levels of state government," and because it "requires a swift determination." *League of Arizona Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 4 (2009) (cleaned up) (citations omitted).

This Court's order of August 4 identified three questions about the petition: "whether the petition meets the criteria of Rule 3, Ariz. R.P. Spec. Act; (2) whether the petition meets the criteria of Rule 7(b), Ariz. R.P. Spec. Act., and (3) whether there is an equally plain, speedy and adequate remedy by appeal, see Rule 8(a), Ariz. R.P. Spec. Act." Because the Petition meets the criteria of Rules 3 and 7(b), and because there is no equally plain, speedy, and adequate remedy by appeal, this Court should accept the Petition.

And because the Superior Court abused its discretion in denying the Petitioners' motion for a new trial, this Court should grant relief and order the Superior Court to conduct a new trial with proper discovery, including full disclosure of provisional ballot information, and a full inspection of all undervote ballots.

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preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

A. The Petition Meets the Criteria of Rule 7(b) Because the Unique Circumstances of This Case Render It Proper that the Petition Be Brought Here.

Arizona Rules of Procedure for Special Actions Rule 7 requires that when "an action might lawfully have been initiated in a lower court in the first instance," there must be sufficient circumstances to "render it proper that the petition should be brought in the particular appellate court to which it is presented." This case presents novel issues of statewide significance that must be resolved as expeditiously as possible.

Just about every aspect of this case makes it a unique circumstance making special action jurisdiction appropriate. This race was decided by the smallest margin of votes in Arizona history. The Petitioners have made a credible showing that highly relevant evidence (uncounted undervotes and provisional ballots) was improperly withheld during the election contest. And everything that can be discerned about that evidence points to one conclusion: Kris Mayes did not receive the highest number of lawful votes in this race.

In similar situations, and particularly in election cases, this Court has routinely accepted special action jurisdiction from cases arising in the Superior Court without requiring that parties first petition for special

action or file an appeal in the Court of Appeals. *E.g. Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 7 (2020) (in case regarding instructions to be included with mail-in ballots, granting motion to transfer special action from Court of Appeals to Supreme Court "[b]ecause this case involves election and statutory issues of statewide importance"); *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 206 ¶ 2 (2013) (in case challenging Secretary of State's description of initiative in voter information guide, accepting jurisdiction of special action directly from case decided in Supreme Court "because the purely legal issue raised is of statewide importance, and there is no equally plain, speedy, and adequate remedy by appeal" (quotation omitted)); *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 518 ¶ 1 (2000) (accepting jurisdiction of special action seeking direct review of a Superior Court order about the constitutionality of the Citizens Clean Elections Act because general election was five months away and the issue had "statewide importance"); *City of Flagstaff v. Mangum*, 164 Ariz. 395, 397 (1990) (accepting special action jurisdiction for direct review of superior court decision about local initiative petitions because "[t]he questions presented involve issues of law with statewide significance);

Huggins v. Superior Ct. In & For Cnty. of Navajo, 163 Ariz. 348, 349 (1990) (accepting special action jurisdiction directly from superior court decision "to reexamine the law that governs elections when illegal votes exceed the margin of victory").

Election contests should be decided expeditiously, yet nearly one-sixth of the attorney general's term has already passed without resolution of this contest. *See* Ariz. Const. art. V, § 1(A) (Attorney General serves a four-year term that begins on the first Monday in January). If this Court declines jurisdiction and requires the Petitioners first to seek relief in the Court of Appeals (whether through a special action or an appeal), as Ms. Mayes and Secretary Fontes urge, then this case will inevitably be appealed here anyway, but only after many long months of delay. Because of the critical issues of statewide concern raised here, it is difficult to imagine a scenario in which this Court would not end up accepting jurisdiction and making the ultimate decision in this case. This Court should thus accept special action jurisdiction now to avoid "the resulting cost and delay to all parties if normal appellate procedures were utilized." *Univ. of Arizona Health Scis. Ctr. v. Superior Ct. of State In & For Maricopa Cnty.*, 136 Ariz. 579, 581 (1983).

This contest "involves a matter of statewide importance, great public interest, and requires final resolution in a prompt manner." *Ingram v. Shumway*, 164 Ariz. 514, 516, 794 P.2d 147, 149 (1990) (granting special action jurisdiction to determine whether impeachment of governor disqualified him from holding future office). This Court should accept special action jurisdiction to ensure that the final resolution of this contest happens as soon as possible.

B. Because the Superior Court Has Not Issued a Final Judgment, This Case Is Still Not Yet Ripe for Appeal, and There Is Therefore Not an Equally Plain, Speedy and Adequate remedy by Appeal.

The Superior Court has still not issued a final judgment. The Petitioners, therefore, cannot yet appeal. Even Ms. Mayes and Secretary Fontes acknowledge this fact. Out of an abundance of caution, the Petitioners filed an appeal in the Court of Appeals. (Petition at 3 n. 3.) And in that appeal before the Court of Appeals, Secretary Fontes, acting in his official capacity, jointly filed with Kris Mayes, acting in her capacity as a political candidate, filed a joint Motion to Dismiss in which they argue that "[b]ecause no final order in the case has been issued, this appeal is premature." (Appx247.)

Yet, before this Court, Mayes argues that "[a]n appeal would be similarly speedy if Petitioners would only undertake the basic steps to advance their appeal. Petitioners could have appealed the denial of their Motion for a New Trial.... To the extent Petitioners want to appeal the entire case, they could simply ask the superior court to issue its final judgment and then notice their appeal." (Mayes Response to Petition at 14.) This argument presupposes that the Superior Court would grant such a motion in a timely manner.

Yet, Ms. Mayes herself filed just such a motion (jointly with Secretary of State Fontes) on August 4. (Appx249-257.) The Superior Court, however, has not granted it. And if the Superior Court takes a full sixty days to consider and grant the motion, the Petitioners would not even be able to *start* their appeal until October 4. Assuming a successful outcome for Petitioners, and a brisk schedule in which the appeal is resolved in three months, and that it also takes just three months for each of the inevitable appeal in this Court and new trial on remand, then this contest would not be resolved until July 2024. At that point, three-eighths of the Attorney General's term would have passed. Assuming a longer timeline of six months for each stage would mean this contest

would not be resolved until February 2025. At that point, more than half of the Attorney General's term would have expired.

In an election context, it is hard to understand how Ms. Mayes and Secretary Fontes can argue with a straight face that this protracted timeline could ever be an "equally plain, speedy, and adequate remedy."

C. The Petition Meets the Criteria of Ariz. R.P. Spec. Act. Rule 3.

As further explained *infra* in Section II, the Petition meets the criteria of Ariz. R.P. Spec. Act. Rule 3 because the Superior Court's denial of the new trial motion was an abuse of discretion and arbitrary and capricious.

II. The Superior Court's Denial of the Petitioners' Motion for a New Trial Was Arbitrary and Capricious and an Abuse of Discretion.

The Superior Court's denial of the Petitioners' motion for a new trial was arbitrary and capricious and an abuse of discretion. Accordingly, this Court should grant relief and remand this case to the Superior Court for a new trial.

A. The Superior Court's Denial of a New Trial Was an Abuse of the Discretion Because the Secretary of State Appears to Have Committed Misconduct.

One of the grounds for a new trial is "misconduct of the ... prevailing party" "materially affecting [the moving party's] rights." Ariz. R. Civ. P. 59(1)(B). During the original trial in this contest, the official vote total showed Ms. Mayes having a 511-vote lead over Mr. Hamadeh. (*See, e.g.*, Appx162 (counsel for Mr. Hamadeh stating, "We have a case here where it was decided by 511 votes.")) However, the mandatory recount had already determined that the actual margin of victory was only 280 votes.[3] And even though those results were only released on December 29, 2023, after this election contest had concluded, those results were known well in advance by the Secretary of State and by counsel for the Secretary in this election contest. (*See* Appv2-006.)[4]

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[3] Ariz. Sec'y of State, *2022 General Election Recount Summary Results by County*, at 2, https://tinyurl.com/3kfwh3mv (last accessed Aug. 16, 2023). The Court may take judicial notice of these records, which are publicly available on the Secretary of State's website. *See* Ariz. R. Evid. 201; *Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012).

[4] *See also* ABC 15, *Arizona election recount results revealed following Abe Hamadeh lawsuit*, stream of December 29. 2022 Superior Court recount hearing at 5:53, available at https://tinyurl.com/eda2jzb2. (last accessed Aug. 16, 2023) (statement from counsel for Secretary of State in this election contest affirming during recount proceeding that he was "one of

And yet, even though the Secretary and counsel for the Secretary very well knew that the margin of victory was only 280 votes, they made deceptive arguments to the Superior Court that presupposed the margin was instead 511. For example, in the Secretary's Reply in Support of Motion to Dismiss Statement of Election Contest (which was signed by the same counsel who affirmed at the recount hearing that he knew in advance the recount vote totals), the Secretary argued that the Petitioners had no evidence to support their election contest because "[t]he only 'support' that Plaintiffs seemingly muster shows that 395 votes may be affected. Even if the Court were to assume these votes would all favor Hamadeh, which the Court cannot do, this is simply insufficient under the applicable standard." (AFL_appx_005.) And yet, under the actual 280-vote margin of victory, this argument was entirely fallacious, as the alleged 395 votes *would* be enough to change the election result.

At oral argument the day before trial, counsel for the Secretary repeated the same argument, claiming "that the Plaintiffs had no

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the two people in this courtroom who know what is actually in this envelope" [of recount results]).

evidence to support their claims." (Appx076.) At that same oral argument, counsel for the Secretary even went so far as to incorporate the Secretary's knowingly made, and factually false, contentions from the motion to dismiss: "plaintiffs, had no evidence, none, to support their remarkable claim. The Secretary echoed this argument in her motion to dismiss filed here." (Appx159-60.) Again at trial, counsel for the Secretary claimed that "the plaintiffs have no evidence to prove their claim." (Appx025.)

By relying on vote count totals that the Secretary and the Secretary's counsel knew were incorrect, counsel for the Secretary of State appears to have committed misconduct that tainted the trial's outcome.

Ethical Rule 3.3(a)(1) of Arizona's Rules of Professional Conduct states that "[a] lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Rule 3.3(a)(3) states that a "[a] lawyer shall not knowingly ... offer evidence that the lawyer knows to be false." Comment 5 to ER 3.3 explains that "Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer

knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence."

Thus, even if the Superior Court's order in the separate recount proceeding prohibited disclosure of the actual vote totals during the Petitioners' election contest, ER 3.3 imposed an absolute prohibition on the Secretary of State's counsel from relying on, referring to, introducing into evidence, or arguing on the basis of, the incorrect vote totals. Thus, regardless of whether Secretary was required to disclose the correct vote totals during Mr. Hamadeh's contest, counsel for the Secretary was absolutely prohibited by the Ethical Rules from relying on, referring to, and making arguments based on, vote totals that he knew were wrong.

Counsel for the Secretary of State did precisely what ER 3.3 forbids, and that conduct had a material impact on the outcome of the proceedings. For example, under ER 3.3, counsel for the Secretary was barred from arguing that the Petitioners' claim about 395 votes was not enough to swing the election result. Rather, the counsel's duty of candor to the tribunal would have required him to concede exactly the opposite: that 395 votes *were* enough to swing the outcome of the election. This

concession certainly would have changed how the Petitioners conducted their ballot inspections and how they argued their case at trial. The final outcome of the trial is thus in significant doubt, and Rule 59 requires that a new trial be granted.

B. The Superior Court Erred in its Determination that the Election Contest Statute Does Not Allow for a New Trial or for the Discovery that Petitioners Seek.

The trial court denied the Petitioners' request related to the inspection of provisional ballots and for the information necessary to conduct those inspections. This was an abuse of discretion.

Ballot inspection in election contests is governed by A.R.S. § 16-677, which establishes the procedures for ballot inspections. Notably, the statute itself sets *no limit* on the number of ballots that may be inspected. Rather, the statute only states that "either party may have *the ballots* inspected before preparing for trial." A.R.S. § 16-677(A) (emphasis added).

Furthermore, under the statute's plain language, Section 16-677 allows for inspecting provisional ballots. The statute itself imposes no limitations on what types of ballots may be inspected. Arizona's election statute defines "ballot" broadly in a way that includes provisional ballots:

"'Ballot' means a paper ballot on which votes are recorded." A.R.S. § 16-444(A)(1). Indeed, the provisional ballot statute makes clear that a "provisional ballot" is just a ballot placed in a special provisional ballot envelope. A.R.S. § 16-584(D) ("On completion of the ballot, the election official shall place the ballot in a provisional ballot envelope and shall deposit the envelope in the ballot box").

It is "a common principle that the rules of discovery are to be broadly and liberally construed to facilitate identifying the issues, promote justice, provide a more efficient and speedy disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a 'guessing game.'" *Cornet Stores v. Superior Ct. In & For Yavapai Cnty.*, 108 Ariz. 84, 86 (1972).

What this Court held about the rules of discovery in general should apply even more strongly to election contests, which go to the heart of maintaining the legitimacy of our electoral system. Therefore, any doubt about the scope of Section 16-677 should be resolved in favor of greater and more complete disclosure. If this Court holds that the only forms of allowable discovery in an election contest are what is permitted by Section 16-677, then this Court should give that section the most

expansive reading possible. This Court should therefore hold that the scope of ballot inspection covered by Section 16-677 also allows for inspection of the records necessary to identify relevant ballots for inspection, including the inspection of provisional ballots, the cast vote record, and undervote ballots.

The Petitioners submitted their Section 16-677 verified petition for inspection of ballots on December 13, 2022, at 10:27 a.m. (AFL_appx_014.) Later that same day, at 9:02 p.m., they submitted their Motion to Expedite Discovery, which included the requests related to provisional ballots and the Cast Vote Record. (APPV1-034-APPV1-054.) Section 16-677 does not explicitly prohibit a party from amending a petition to inspect ballots. Given Arizona's policy of broadly construing discovery procedures, the Petitioners' Motion to Expedite Discovery should be construed as an amendment of their petition for inspection of ballots. And because Section 16-677 should be construed as broadly as possible, this Court should hold that all of the materials the Petitioners requested fell within the statute's ambit.

In addition to Arizona's policy of broadly construing discovery rules, several other legal principles also demonstrate that the Superior Court's interpretation was an abuse of discretion.

1. The Superior Court's Interpretation Would Render the Election Contest Statute Unconstitutional.

"[W]hen the relevant text allows, [the Supreme Court] construe[s] statutes to comply with constitutional requirements." *Garcia v. Butler in & for Cnty. of Pima*, 251 Ariz. 191, 195–96 ¶ 18 (2021). Arizona's Constitution imposes clear requirements for elections: "In all elections held by the people in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected." Ariz. Const. art. VII, § 7.

The only way to determine which candidate has the highest number of legal votes is for *all legal votes to be counted*. Thus, under Arizona's Constitution, no winner may be declared in an Arizona election until all legal votes have been counted. The Petitioners have presented a strong *prima facie* case that at least 1,000 lawful votes were *not* counted and that this failure is outcome-determinative in this race. If any election statute prohibits these legal votes from being examined and counted

(especially in a case where those votes may be outcome-determinative), then that statute is unconstitutional.

The Superior Court's construction of Section 16-677 (and the construction offered by Ms. Mayes and Secretary Fontes) would prohibit counting 1,000 or more legal votes. This is unconstitutional. To avoid this result, this Court should interpret Section 16-677 broadly to allow for the inspection of provisional ballots and the Cast Vote Record so that all lawful votes that have not yet been counted may be counted.

2. The Superior Court's Interpretation Limiting Discovery Violates the Presumption for Retaining the Common Law.

"[W]here the Legislature has not clearly manifested its intent to repeal the common law rule, it will not be abrogated." *United Bank v. Mesa N. O. Nelson Co.*, 121 Ariz. 438, 442 (1979); *see also Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 515 (1967) ("statutes are not deemed to repeal the common law by implication unless the legislative intent to do so is clearly manifested").

The common law rule in Arizona, as confirmed by this Court's decision in *Hunt v. Campbell*, is that, in election contests, *every* ballot is subject to inspection. 19 Ariz. 254, 297 (1917) ("Some 60,000 ballots have

been scrutinized and overhauled as thoroughly perhaps as any ballots have ever received").

Furthermore, *Hunt* also established that other related documents related to the electoral process are also subject to discovery and inspection. A central issue in *Hunt* was comparing the actual ballots with the election returns, which were documents maintained by election boards recording vote totals. *Id.* at 268 ("Coming now to the alleged fraudulent changing and counting of certain of the ballots cast in the precinct, the returns of the election officers are prima facie correct and free from the imputation of fraud… When a party seeks to overcome the prima facie case made by the returns of an election with the allegation that certain of the ballots have been fraudulently changed and counted by the election officers, he must produce the quantum of proof necessary to sustain the charge."). The modern equivalent of the election returns is the Cast Vote Record.

Because Section 16-677 does not manifest a clear intent to abrogate the prior common law rule, then it should be read as merely establishing procedures through which inspection of ballots may occur and not as a change to the rule in *Hunt* that *all* ballots are subject to inspection. Nor

should it be read as an abrogation of the rule recognized in *Hunt* that other documentary evidence of the election is also subject to inspection. Thus, the Cast Vote Record is subject to inspection because it is the modern-day equivalent of the election returns used in *Hunt*.

3. The Superior Court's Interpretation Violates the Absurdity Doctrine.

Under the Absurdity Doctrine, this Court will interpret statutes to avoid absurd results. *Perini Land & Dev. Co. v. Pima Cnty.*, 170 Ariz. 380, 383 (1992) (because "unambiguous language in this instance leads to an absurd result," "the court may look behind the bare words of the provision to discern its intended effect"). "A result is 'absurd 'if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.'" *State v. Estrada*, 201 Ariz. 247, 251 ¶ 17 (2001) (quoting *Perini*, 170 Ariz. at 383).

The Superior Court's interpretation of the election contest statute can lead to the absurd result that the candidate with the highest number of legal votes is *not* declared the winner of an election because the election contest was marred by irregularities, incomplete inspection of ballots, and potential misconduct. This Court should construe the election contest

statutes in a way that avoids this absurd result by ordering a new trial in which the provisional ballots, undercount ballots, and the Cast Vote Record are all subject to full inspection.

Conclusion

Therefore, for the preceding reasons, this Court should accept special action jurisdiction and grant the Petitioners their requested relief.

RESPECTFULLY SUBMITTED this 16th day of August 2023.

America First Legal Foundation
By: /s/ *James K. Rogers* .
James K. Rogers (No. 027287)

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CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. P. Spec. Act. 7, the undersigned counsel certifies that the proposed amicus brief is double spaced and uses a proportionately spaced typeface (i.e., 14-point Century Schoolbook) and contains 4,288 words according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 16th day of August 2023.

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By: /s/ *James K. Rogers* .
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SUPREME COURT OF ARIZONA

JEANNE KENTCH; TED BOYD; ABRAHAM HAMADEH; and REPUBLICAN NATIONAL COMMITTEE, Petitioners/Plaintiffs/Contestant, v. HON. LEE F. JANTZEN, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave, Respondent, and KRIS MAYES, an individual; Real Party in Interest/Contestee, and ADRIAN FONTES, in his official capacity as the Secretary of State, *et al.*,	Supreme Court No. CV-23-0205-SA Court of Appeals Division One 1 CA-CV 23-0472 Mohave County Superior Court No. CV-2022-01468

Appendix to Amicus Curiae Brief of America First Legal Foundation

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ARIZONA SUPERIOR COURT

MOHAVE COUNTY

JEANNE KENTCH, an individual; TED BOYD, and individual; ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the Secretary of State; et al.,

Defendants.

No. S8015CV2022-01468

ARIZONA SECRETARY OF STATE KATIE HOBBS' REPLY IN SUPPORT OF MOTION TO DISMISS STATEMENT OF ELECTION CONTEST

(Oral Argument Requested)

(Assigned to Hon. Lee F. Jantzen)

Introduction

Defendant Katie Hobbs, in her official capacity as Arizona Secretary of State ("Secretary"), submits this reply in support of her motion to dismiss. Plaintiffs seek to overturn the results of an election, disenfranchising Arizonans, in derogation of "the strong public policy favoring stability and finality of election results." *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 95 (1978). They allege speculative and unsupported claims to argue for the extraordinary relief of nullifying election results. This "election contest" must be dismissed.

Argument

I. Plaintiffs can't rely on incorrect standards to evade the specific requirements of an election contest.

Because they do not claim the election was tainted with fraud, Plaintiffs must make specific and exacting factual allegations to survive a motion to dismiss: They must plead facts "showing that had proper procedures been used, the result would have been different." *Moore v. City of Page*, 148 Ariz. 151, 159 (Ct. App. 1986).[1] *See also Hancock v. Bisnar*, 212 Ariz. 344, 348 ¶ 17 (2006) (Ariz. Rule 8(a) notice pleading requirements apply to election contests). This standard applies when, as here, there is alleged "misconduct" or an "erroneous count of votes" under A.R.S. § 16-672(A)(5). And Plaintiffs must make this showing regardless of their policy preferences or the merits of the procedures they prefer; if the purported errors could not have

[1] Plaintiffs claim that *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929) establishes that they can prevail so long as the outcome of the election is "uncertain," and that the Secretary misstates the law in citing the formulation of the standard in *Moore*. [Opp. at 12.] But *Moore*'s formulation is based on and interprets exactly the language from *Findley* that Plaintiffs cite. The Court of Appeals' interpretation of the relevant language from *Findley* is both more persuasive and more authoritative than Plaintiffs'. And although the "uncertainty" language appears in these cases, it cannot – and should not – be that a contestant simply declaring that the results of an election are "uncertain" is enough to overturn an election. In any case, because Plaintiffs do not allege facts sufficient to show that the number of voters or ballots affected were greater than the margin of victory, they do not allege facts sufficient to show that the outcome was uncertain under any understanding of this term.

changed the results of this election, those disputes can be addressed in future actions that do not threaten the stability of elections or citizens' votes.

Plaintiffs try to resist the Secretary's Motion based on irrelevant and inaccurate characterizations of the relevant legal standards and the Secretary's arguments. They argue that "dismissal is appropriate under Rule 12(b)(6) only if as a matter of law, plaintiffs would not be entitled to relief under ***any*** interpretation of the facts susceptible of proof." [Opp. at 10 (cleaned up, emphasis original)] But they ignore that a plaintiff must offer facts to meet their burden, not conclusory statements or speculation: "courts are limited to considering the well-pled facts and all reasonable interpretations of those facts." *Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 420 (2008) (emphasis added). Here, there is a factual void at the heart of Plaintiffs' claims that no amount of interpretation can fill: whether Plaintiffs' allegations could impact the outcome of the election. Plaintiffs are required to answer that question with factual allegations, not vague suppositions and legal conclusions. They do not do so.

This is not, as Plaintiffs contend, a matter of requiring evidentiary proof. Rather, the law requires well-pled facts that, if proven, would meet the statutory standard. Plaintiffs have not supplied such facts. Instead, they have speculated about an unspecified number of ballots that might have been subject to various errors, including transposition observed in a totally different election, [Stmt. ¶¶ 39-42], and mis-tabulation based on the example of three ballots, [Stmt. ¶¶ 48-49, 52]. It is not enough to simply invoke the specter that some number of ballots could have been affected, with no factual indication of magnitude of affected votes. As a result, this matter must be dismissed. *See, e.g.*, *Moore*, 148 Ariz. at 159.

Finally, while motions to dismiss may be strongly disfavored in the context of wrongful termination matters, *see* Resp. at 10 (citing wrongful termination case for the proposition that motions to dismiss are disfavored), the calculus is different in election contests, where time is of the essence, s*ee Donaghey*, 120 Ariz. at 95, there is a "strong public policy favoring stability and finality of election results," *Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, 334 ¶ 12 (App.

2010) (cleaned up), and courts apply "all reasonable presumptions" in "favor [of] the validity of an election," *Moore*, 148 Ariz. at 159. Quick resolution serves public policy, *id*., while speculative fishing expeditions like this one inject significant delay and uncertainty into the process.

Once the correct standards for an election contest are applied, Plaintiffs' allegations are insufficient and each of their claims must be dismissed, as described below.

II. Under the Applicable Standard, Plaintiffs' Claims Must Be Dismissed.

A. Count I does not allege a viable election contest and must be dismissed.

Plaintiffs claim that various issues that arose on election day in Maricopa County amount to misconduct. But Plaintiffs again do not contend with the relevant caselaw, which states that "honest mistakes or mere omissions" cannot constitute "misconduct." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Plaintiffs cannot explain, for example, why some poll workers in Maricopa County who allegedly did not properly "check out" voters did not commit "honest mistakes" and unintentional errors, rather than something more sinister. And even if their claim that Chairman Gates's tweet, which gave voters several options in response to the printer malfunctions, "was incomplete because it omitted two of the solutions available to affected voters" [Stmt. ¶¶ 35-36] is taken to be true, they still don't explain why this is anything beyond a "mere omission."

The election day issues underlying Count I also do not amount to an "erroneous count of votes." While no Arizona decision explains precisely what an "erroneous count" claim encompasses, both its plain language and common sense make clear that this claim relates to the miscounting of votes on ballots by election officials. For example, if 100 ballots were cast and a correct count would have led to 48 votes for Candidate A, 46 votes for Candidate B, and 6 votes for Candidate C in the contested race but officials counted the votes on those 100 ballots incorrectly (because of, for example, an equipment or aggregation error that counted all 6 votes for Candidate C for one of the other candidates), that would constitute an "erroneous count."

Nothing suggests that this contest ground is implicated by Plaintiffs' allegations about Maricopa County election day issues.

More important, under either the misconduct or erroneous count theories, Plaintiffs still cannot show, as they admit they must [*see* Resp. 12], that these election day issues affected the result of the Attorney General race (or even that it rendered it uncertain). The only "support" that Plaintiffs seemingly muster shows that 395 votes may be affected. Even if the Court were to assume these votes would all favor Hamadeh, which the Court cannot do, this is simply insufficient under the applicable standard. *See Babnew v. Linneman*, 154 Ariz. 90, 93 (App. 1987). And Plaintiffs' vague allusions to "other mistabulations," [Resp. 12] none of which have any support (other than Plaintiffs' speculation that they led to a "material number of voters" being affected, *see, e.g.*, Stmt. ¶¶ 58-59), cannot magically lead to a showing that the election results would be different, such that Plaintiffs' extreme remedy of nullifying the will of the people is warranted.

B. Counts II-IV are speculative and must be dismissed.

Plaintiffs next insist that their vague and unsupported assertions about Counts II-IV are sufficient because they may be able to develop support for their wild speculation at trial. [Resp. 13] Plaintiffs therefore seem to concede that this action is nothing but a fishing expedition for them to gain access to discovery that may somehow "prove" their speculative claims. [*See* Resp. 10 ("Discovery and trial may or may not bear out the Statement's factual allegations.")]. This entirely ignores the proper legal standards to be applied to election contests (*see* Section I, *supra*), and their claims must be dismissed.

As to Count II, Plaintiffs assert, with no support, that some unknown but "material" number of voters were denied provisional ballots "as a result of poll worker error." Resp. 14. This bare claim cannot stand, as it doesn't reasonably allege misconduct or show how the election results would have been different without this supposed error. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005) (stating courts must reject "inferences or deductions

that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts"). The same goes for Counts III and IV about ballot duplication and adjudication, where Plaintiffs point to an apparent error rate from an entirely different election two years ago[2] or to less than a handful of instances of supposed errors (none of which they allege relate to the Attorney General race). The illogical jump from these reed-thin facts to Plaintiffs' claim that the election results must be nullified is an "unreasonable inference" that must be rejected.

C. Count V is barred by laches, meritless, and must be dismissed.

First, laches bars Plaintiffs' claim about ballot signature matching. Plaintiffs do not argue in response, nor can they, that they were unaware of the EPM provision and the practice of not narrowly limiting a voter's "registration record" to just the registration form for signature matching purposes. Waiting (years) to bring a challenge to this until after the election results are made known and Hamadeh has lost is precisely the type of dilatory tactic that has been squarely addressed and rejected by Arizona courts. *See McComb v. Superior Court In & For Cty. Of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (rejecting similar attempt to "intentionally delaying a request for remedial action to see first whether [a candidate] will be successful at the polls"). Plaintiffs could have brought a challenge to the relevant EPM provision years ago, but do so now, in this election contest context where they ask this Court "to overturn the will of the people," *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002), thereby prejudicing both voters and the Court.

At best, Plaintiffs respond [at 15] by citing a 1986 court of appeals decision that rejected an "estoppel" claim in an election contest. *See Moore v. City of Page*, 148 Ariz. 151, 155-56

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[2] An example in a less politically charged context proves the point. Imagine a breach of contract action where X has a contract with Y. X has no evidence that Y has breached the contract, but sues alleging that they did because two years ago, Y breached a separate contract with Z. On that allegation, it would be patently unreasonable to infer that Y breached their contract with X. The Court would not hesitate to dismiss such a farcical claim, and it should do the same here.

(App. 1986). But whatever the court of appeals said in 1986, it confirmed in 1997 that known "violations in the elections *process*," meaning "the manner in which an election is held" must be brought before the election. *McComb*, 189 Ariz. at 526. The Arizona Supreme Court drew this same distinction – that is, requiring challenges to "the manner in which an election is held" be brought before the election – in 2002. *Sherman*, 202 Ariz. at 342 ¶ 10. And how counties verify early ballots, which constitute the vast majority of all ballots cast in Arizona, is most certainly a "manner in which the election is held."

Plaintiffs' claim also fails on the merits. Plaintiffs make no attempt to engage with the Secretary's arguments that there is a difference between a voter registration form and the voter registration record. Instead, Plaintiffs merely conflate the two to suit their theory. [Resp. 17] Their argument that "any purported distinction between 'forms' and 'records' is immaterial," Resp. 17 n.3, disregards the plain text and legislative history, as the Secretary has extensively explained in her Motion. Plaintiffs ignore this, highlighting the baselessness of their claim.

D. Plaintiffs' requested relief for Count II is unavailable.

Plaintiffs' Count II asks this Court to permit a select group of voters to vote after election day. Contest ¶ 82. Even if Plaintiffs' substantive allegations were enough to justify some relief on Count II, which they are not, *see supra* Section II.B, Plaintiffs cannot obtain a partial re-vote after election day. That request conflicts with both statute and precedent. *See* Mot. at 9-10 (citing sources including *Babnew v. Linneman*, 154 Ariz. 90, 93 (Ct. App. 1987), holding that votes not cast cannot be counted in an election contest).

Indeed, Plaintiffs do not even attempt to argue that this relief is permitted in an election contest. *See* Resp. at 8-9. Instead, they contend that they can evade the carefully selected remedies available under A.R.S. § 16-676 by resort to mandamus. As the Secretary's Motion explains, that is wrong. Mot. at 9 (citing *Donaghey v. Attorney Gen.*, 120 Ariz. 93 (1978)). But Plaintiffs neither address the controlling precedent on this point nor cite any contest case permitting such a procedural end-run. Instead, they cite *Ariz. Pub. Integrity Alliance v. Fontes*,

250 Ariz. 58, 62, ¶¶ 11–12 (2020). But this case stands for the unobjectionable proposition that election decisions can be challenged by a mandamus – not an election contest like this – *before the votes are counted*, when doing so does not risk the integrity of the election or disenfranchise voters. As the Arizona Supreme Court held as far back as 1917, "[i]t is no part of the functions of the writ of mandamus to determine contested elections, or settle the ultimate title to a public office when disputed.. . . [T]he remedy provided therefor is a statutory contest or the writ of quo warranto." *Campbell v. Hunt*, 18 Ariz. 442, 449 (1917).[3]

III. Laches bars Plaintiffs' election contest.

Finally, this entire election contest is barred by laches. Plaintiffs claim laches should not apply here because they filed the contest within the statute of limitations. [Resp. 5] But Arizona courts have repeatedly recognized that laches can apply to bar a suit even when it is filed within the statute of limitations. *See Harris v. Purcell*, 193 Ariz. 409, 413 ¶ 18 (1998) ("While plaintiff met the ten-calendar-day deadline to challenge certification, he failed to exercise diligence in preparing and advancing his case."); *id.* 413 ¶ 23 (rejecting as "without merit" an argument like Plaintiffs', to collapse laches analysis with timeliness of filing under statute); *see also Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006).

Moreover, the Secretary's arguments about prejudice are not "speculation," as Plaintiffs assert. [Resp. 6] Plaintiffs do not deny that the substance of their claims in this contest are near-identical to the one they filed 17 days earlier. These dilatory actions necessarily prejudice both

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[3] Plaintiffs also argue that Defendants "cannot have it both ways": either Plaintiffs' claims are "cognizable and redressable under the election contest statutes," or Plaintiffs "necessarily lack any plain, speedy and adequate remedy at law" and may pursue a mandamus claim. Op. at 9. Here, however, the election contest statues provide the right framework for evaluating Plaintiffs' claims. The dispute is whether Plaintiffs are entitled to their preferred remedy for those claims. Plaintiffs essentially argue that they have no adequate remedy because the governing statutory regime does not contain their preferred remedy. But Plaintiffs do not have a right to their preferred remedy; the Legislature has selected the remedies set out in A.R.S. § 16-676 as both adequate and exclusive remedies for claims such as Plaintiffs'. *Donaghey v. Attorney Gen.*, 120 Ariz. 93 (1978).

the Secretary and this Court, leaving them with a far shorter time period to properly review, respond to, and decide Plaintiffs' claims, including their burdensome discovery demands.[4] Plaintiffs know about the hearing, in less than a week, to determine the recount results and the January 2, 2023 date for new officials to take office yet inexplicably chose to sit on their filing. Laches applies here.

Conclusion

For the reasons stated above and in the Secretary's Motion to Dismiss, the Court should dismiss Plaintiffs' "election contest" with prejudice.

RESPECTFULLY SUBMITTED this 16th day of December, 2022.

COPPERSMITH BROCKELMAN PLC

By /s/ D. Andrew Gaona
D. Andrew Gaona

STATES UNITED DEMOCRACY CENTER
Sambo (Bo) Dul

Attorneys for Defendant Arizona Secretary of State Katie Hobbs

[4] Plaintiffs briefly raise arguments relevant to their Verified Petition to Inspect Ballots, arguing they must be permitted discovery. [Resp. 4] The Secretary has opposed Plaintiffs' Verified Petition and incorporates those arguments by reference. Because Plaintiffs fail to state any cognizable claims for relief, there is no basis in law to permit discovery. Nor have Plaintiffs established that discovery is necessary and their burdensome discovery demands are not in accordance with A.R.S. § 16-677. Indeed, by stating that "[d]iscovery or trial may or may not bear out the Statement's factual allegations," [Resp. 10] and that "Plaintiffs need not produce evidence of anything at this juncture—nor can they" without discovery [Resp. 11], Plaintiffs apparently concede that their claims are based on pure speculation. This Court should deny Plaintiffs' request for a fishing expedition.

ORIGINAL efiled and served via electronic means this 16th day of December, 2022, upon:

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, an individual; TED BOYD, an individual; ABRAHAM HAMADEH, an individual; and REPUBLICAN NATIONAL COMMITTEE, a federal political party committee

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the Secretary of State; LARRY NOBLE, in his official capacity as the Apache County Recorder; APACHE COUNTY BOARD OF SUPERVISORS, in their official capacity; DAVID W. STEVENS, in his official capacity as Cochise County Recorder; COCHISE

No. CV-2022-01468

VERIFIED PETITION TO INSPECT BALLOTS

COUNTY BOARD OF SUPERVISORS, in their official capacity; PATTY HANSEN, in her official capacity as the Coconino County Recorder; COCONINO COUNTY BOARD OF SUPERVISORS, in their official capacity; SADIE JO BINGHAM, in her official capacity as Gila County Recorder; GILA COUNTY BOARD OF SUPERVISORS, in their official capacity; WENDY JOHN, in her official capacity as Graham County Recorder; GRAHAM COUNTY BOARD OF SUPERVISORS, in their official capacity; SHARIE MILHEIRO, in her official capacity as Greenlee County Recorder; GREENLEE COUNTY BOARD OF SUPERVISORS, in their official capacity; RICHARD GARCIA, in his capacity as the La Paz County Recorder; LA PAZ COUNTY BOARD OF SUPERVISORS, in their official capacity; STEPHEN RICHER, in his official capacity as the Maricopa County Recorder; MARICOPA COUNTY BOARD OF SUPERVISORS, in their official capacity; KRISTI BLAIR, in her official capacity as the Mohave County Recorder; MOHAVE COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHAEL SAMPLE, in his official capacity as Navajo County Recorder; NAVAJO COUNTY BOARD OF SUPERVISORS, in their official capacity; GABRIELLA CAZARES-KELLY, in her official capacity as the Pima County Recorder; PIMA COUNTY BOARD OF SUPERVISORS, in their official capacity; DANA LEWIS, in her official capacity as the Pinal County Recorder; PINAL COUNTY BOARD OF SUPERVISORS, in their official capacity; SUZANNE SAINZ, in her official capacity as the Santa Cruz County Recorder; SANTA CRUZ COUNTY BOARD OF SUPERVISORS, in their official capacity; MICHELLE M. BURCHILL, in her official capacity as the Yavapai County Recorder; YAVAPAI COUNTY BOARD OF

SUPERVISORS, in their official capacity; RICHARD COLWELL, in his official capacity as the Yuma County Recorder; and YUMA COUNTY BOARD OF SUPERVISORS, in their official capacity,

Defendants.

Pursuant to A.R.S. § 16-677, Plaintiffs/Contestants aver that they cannot properly prepare for trial without an inspection of the ballots and respectfully petition the Court to authorize them, through their attorneys and agents, to inspect (1) the original and duplicates of each ballot that underwent duplication in connection with the November 8, 2022 general election, (2) all original ballots for which there is a recorded undervote in the contest for Arizona Attorney General, and (3) ballots on which the voter's putative selection for the office of Arizona Attorney General in the November 8, 2022 general election was subjected to electronic adjudication (to include records sufficient to identify the disposition of each ballot during electronic adjudication).

GROUNDS FOR THE PETITION

DUPLICATED BALLOTS

1. If a voted ballot is returned in a damaged or defective form that renders it unreadable by an electronic tabulator, it is referred to a Ballot Duplication Board appointed by the County Recorder. The Ballot Duplication Board manually transposes each of the voter's selection to a new ballot, which is then electronically tabulated. Both the original and duplicated ballots are assigned a shared unique serial number. *See* A.R.S. § 16-621(A);

Ariz. Sec'y of State, 2019 ELECTIONS PROCEDURES MANUAL (rev. Dec. 2019) [EPM] at pp. 201–02.

2. Ballots in which one or more selections is determined by a tabulation device to be ambiguous or indeterminate are electronically examined by an Electronic Adjudication Board appointed by the County Recorder. To the extent the voter's "clear" intent can be ascertained, the ballot is marked and tallied accordingly. *See* A.R.S. § 16-621(B); Ariz. Sec'y of State, Electronic Adjudication Addendum to the 2019 Elections Procedures Manual (Feb. 2020) at pp. 2–3.

3. A sampling of duplicated ballots cast in the 2020 presidential election revealed an error rate that was at least 0.37% and may have been as high as 0.55%. *See Ward v. Jackson*, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020).

4. Upon information and belief, no county has materially altered its ballot duplication or electronic adjudication processes since the 2020 general election.

5. The margin separating Contestant Abraham Hamadeh and Contestee Kris Mayes in the race for Arizona Attorney General is 0.02%, or 510 votes.

6. There is a substantial probability that a recurrence of a similar error rate in connection with the November 8, 2022 general election would either independently or in conjunction with other tabulation errors and irregularities alleged in the Statement of Contest—be material to the outcome of the race for Arizona Attorney General.

7. In order to prove that there are material errors in tabulation of ballots resulting from errors in the ballot duplication process, Plaintiffs/Contestants need to be able to inspect the

original and corresponding duplicate ballot for each ballot that underwent the ballot duplication process.

8. Without such inspection, Plaintiffs/Contestants will be unable to properly prepare for trial on this matter.

ELECTRONIC ADJUDICATION

9. Voters sometime mark their ballots in a manner that precludes an accurate electronic tabulation. Two frequent causes of impeded electronic tabulation are (a) apparent "over-votes," in which the tabulator detects that a voter may have marked more than the permissible number of selections for a given office or ballot measure, and (b) ballots that the tabulator has identified as containing unclear markings. When the first of these circumstances is present, the ballot is referred for electronic adjudication.

10. Electronic adjudications are carried out on a secure computer application and are conducted by an Electronic Adjudication Board that is appointed by the County Recorder and consists of one inspector and two judges who are members of different political parties. *See* A.R.S. § 16-621(B)(2).

11. The Electronic Adjudication Board examines a digital image of the ballot and assesses voter selections that the tabulator was unable to definitively ascertain. If the voter's intent is "clear," the Electronic Adjudication Board ensures that the voter's intended selections are properly indicated and tabulated. If the voter's intent cannot be sufficiently verified, the ambiguous selections are not tabulated. *See id.*; Ariz. Sec'y of State, ELECTRONIC ADJUDICATION ADDENDUM TO THE 2019 ELECTIONS PROCEDURES MANUAL (Feb. 2020) at pp. 2–3, *available at*

https://azsos.gov/sites/default/files/Electronic_Adjudication_Addendum_to_the_2019_Elections_Procedures_Manual.pdf.

12. Actual "over-votes" are invalid and may not be counted. *See* A.R.S. § 16-610.

13. By statute, the County Recorder must conduct a hand count audit of selected candidate races across a randomly generated sample of (a) 5,000 of early ballots and (b) ballots cast at 2% of vote centers in the county. *See* A.R.S. § 16-602(B), (F). The purpose of the hand count is to verify the accuracy of tallies generated by tabulator devices and determinations by various ballot processing boards.

14. The hand count audit following the November 8, 2022 general election revealed at least one instance in which the Maricopa County Electronic Adjudication Board incorrectly characterized the voter's ostensible intent. Specifically, the Electronic Adjudication Board had tabulated the disputed ballot as a vote for gubernatorial candidate Katie Hobbs. As the hand count audit found, however, the ballot contained both an indicated preference for Hobbs and an accompanying write-in vote for a different candidate, Kari Lake. The Electronic Adjudication Board was required by law to designate the gubernatorial contest as over-voted and not to tabulate a vote for any candidate in that race. *See* Statement of Election Contest, Exhibit B p. 32.

15. The Attorney General contest was not among the races randomly selected for inclusion in Maricopa County's hand count audit but, upon information and belief, a similar and proportionate rate of erroneous determinations afflict the broader corpus of all ballots that underwent electronic adjudication.

16. Additionally, an observer of the ballot adjudication process has reported that tabulation and electronic adjudication equipment have been unable to clearly capture the ballot markings made by some voters who did not use the writing implements recommended by elections officials. Although it is likely that such markings can be assessed and correctly tabulated by a manual inspection of the affected ballots, elections officials have not undertaken a manual inspection of such ballots and therefore have failed to correctly tabulate the votes marked on such ballots, and instead tabulated them as undervotes. The Contestors petition for access to all ballots containing an undervote.

17. Furthermore, an observer in Navajo County is currently observing the Recount of votes. On December 7, 2022, Navajo County re-tabulated 3% of the county's ballots. On election day, a large portion of the ballots processed were tabulated using the central count tabulator. However, during this recount, the county is using the smaller precinct tabulators. These small precinct tabulators identified two ballots that should have been sent to adjudication. It appears that the faster central count tabulators were not functioning or set up entirely properly and that they failed to flag ballots for adjudication that might not contain a valid vote for the Attorney General race.

18. In order to prove that there are material errors in electronic adjudication and tabulation of apparent "over" or "under" votes in the race for Attorney General,

Plaintiffs/Contestants need to be able to inspect the original ballot for each ballot that was flagged for electronic adjudication as a potential under or over vote.

19. Without such inspection, Plaintiffs/Contestants will be unable to properly prepare for trial on this matter.

20. The Plaintiffs/Contestants will post the statutorily required sum of $300 with the Court. A.R.S. § 16-677.

In the alternative, Plaintiffs/Contestants request that the Court permit them to access or obtain the ballot images requested in this Petition on an expedited basis pursuant to Arizona Rule of Civil Procedure 34.

RESPECTFULLY SUBMITTED this 12th day of December, 2022.

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VERIFICATION

Pursuant to A.R.S. § 16-673(B), I, Abraham Hamadeh, hereby verify that the allegations contained in the foregoing Petition to Inspect Ballots are true and correct to the best of my knowledge.

Executed under penalty of perjury, this 12th day of December, 2022.

Abraham Hamadeh