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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, *et al.*,
Plaintiffs/Contestants,
v.

No. CV2022-01468

**NOTICE REGARDING
INSPECTION OF BALLOTS IN
MARICOPA COUNTY**

1 KRIS MAYES,

2 Defendant/Contestee

(Election Challenge)

3 and

(Hon. Lee F. Jantzen)

4 KATIE HOBBS, *et al.*,

5 Official Capacity Defendants.

6 Consistent with this Court’s December 21, 2022 Order (“Order”), the Maricopa
7 County Defendants address, in writing, the Parties’ failure to reach an agreement on the
8 issue of the Inspection of Ballots. (*See* Order, at 4.) The Maricopa County Defendants also
9 respond to Contestants’ “Response to Court’s Order Requiring Written Submissions
10 Regarding Issues On Which No Agreement Has Been Reached”; this Court should deny
11 Contestants’ requests because they lack any basis under the election contest statutes and
12 any harm is the result of Contestants’ dilatory conduct.

13 **Background**

14 At roughly 2:20 p.m. on December 21, 2022, this Court issued the Order. This Court
15 allowed “a limited inspection of ballots.” (Order, at 4.) This Court also ordered the parties
16 to “meet and confer and choose the parties to do the inspection” by noon today. (*Id.*)

17 **A. Maricopa County Defendants’ proposal**

18 After this Court’s entry of the Order, counsel for the Maricopa County Defendants
19 discussed the inspection of ballots on a call that occurred at roughly 3:30 p.m. on December
20 20. (*See* Exh. 1.) To expedite the process, Co-Director of Elections Scott Jarrett attended
21 the call. In substance, the Maricopa County Defendants proposed the following terms:

22 1. As an initial matter, the Maricopa County elections official needed to
23 orchestrate the inspection of ballots—Jarrett—is a defendant and under subpoena for trial
24 on December 21 and 22 in *Lake v. Hobbs*, CV2022-095403 (Maricopa Cnty. Super. Ct.).
25 *Cf.* A.R.S. § 16-677 (“The inspection of the ballots shall be made in the presence of the
26 legal custodian of the ballots . . .”). Preparing for the inspection takes a significant amount
27 of time. As a result, prior to trial in this matter on Friday, December 23, 2022, the Maricopa
28 County Elections Department would only be available to proceed with the inspection of

1 ballots on Wednesday, December 21.

2 **2.** The Maricopa County Defendants proposed to begin the inspection of ballots
3 at 9:00 a.m. on December 21. The inspection would proceed until 5:00 p.m., when Jarrett
4 would need to prepare for testimony the following day in *Lake*.

5 **3.** The inspection of ballots would include the following items:

6 • Digital images of ballots with undervotes for the Attorney General's
7 contest would occur from 9:00 a.m. to 11:00 a.m. The Elections Department
8 would work with the Parties to review as many digital images as possible
9 during the 2-hour timeframe and allow input into what ballot images to
review.

10 • Digital images of ballots that had the Attorney General's contest
11 adjudicated would occur from 11:00 a.m. to 12:00 p.m. The Elections
12 Department would work with the Parties to review as many digital images as
possible during the one-hour timeframe and allow input into what ballot
images to review.

13 • Lunch would occur from 12:00 pm to 12:45 p.m.

14 • Inspection of a random sample of eight to twelve batches of ballots
15 (approximately 2,000 total ballots / approximately 70 ballots with the
16 Attorney General contest under voted) would occur from 12:45 p.m. to 5:00
p.m.

17 ○ This inspection could allow for a comparison of the ballots with
18 the results of how they were reported.

19 On the call, Counsel for the Contestants rejected this proposal and told counsel for
20 the Maricopa County Defendants that he would put forth a counterproposal.

21 At 6:00 p.m., counsel for Maricopa County reached out to counsel for Contestants
22 because they had not heard from Contestants about a counterproposal; counsel for Maricopa
23 County Defendants reiterated the urgency of the matter. Counsel for Contestants stated he
24 would email the counterproposal.

25 **B. Contestant's counterproposal**

26 At roughly 7:15 p.m., counsel for Contestants set out a counterproposal via email:

27 • Contestants requested an unredacted copy of the Recount Cast Vote
28 Record to include both RecordId and ImageMask fields intact but not ballot

1 images. Contestants stated they would use this information to ascertain which
2 ballot images would be reviewed.

3 • Then, the Maricopa County Elections Department would load the
4 requested ballot images for review by the inspectors at Maricopa County
Tabulation and Election Center.

5 • From this review, Contestants would narrow the request for physical
6 ballots to inspect.

7 (Exh. 1.)

8 **C. Maricopa County Defendants’ response to Contestant’s counterproposal**

9 Two hours later, counsel for Maricopa County explained why it could not agree to
10 Contestants’ counterproposal. (*See Exh. 1.*) The request for an unredacted Recount Cast
11 Vote Record is beyond the scope of the statutory scheme and the Order. The Order granted
12 “a limited inspection of ballots . . . but the statute must be followed.” (Order, at 4.) Under
13 A.R.S. § 16-677(B), the contestant and contestee may appoint one member of a three-person
14 panel to inspect ballots; no other discovery is permitted. Additionally, as the Maricopa
15 County Defendants had previously explained, they will not release the unredacted Cast Vote
16 Record. Importantly, the **Recount** Cast Vote Record is currently under seal so even a
17 redacted version could not be released.

18 At 5:24 a.m. this morning, counsel for Contestants disagreed with Maricopa County
19 Defendants’ position and the position advanced by Contestee’s counsel. (Exh. 1.)

20 **Argument**

21 **I. Contestants improperly seek to transform this Court’s Order about ballot**
22 **inspection into a license to obtain the Cast Vote Record.**

23 Contestants’ first request—fulfillment of their demand for an unredacted Cast Vote
24 Record—lacks merit. Simply put, a Cast Vote Record is not a ballot. *See* § 16-677(a)
25 (permitting inspection of “ballots . . . before preparing for trial”); (*see also* Order, at 4
26 (“[T]he Court finds a limited inspection of ballots is appropriate . . . but *the statute must be*
27 *followed.*”) (emphasis added)).

28 Importantly, election contests are creatures of statute and do not provide a

1 mechanism for discovery. *Cf. Donaghey v. Att'y General*, 120 Ariz. 93, 95 (1978) (“It is
2 commonly stated that election contests are purely statutory and dependent upon statutory
3 provisions for their conduct.”). Earlier this cycle of election contests, a superior court
4 rejected a Contestant’s request for expedited discovery because it is not permitted by statute
5 and the court could not reconcile the request for discovery with the time-compressed
6 statutory scheme. (Exh. 2.)

7 Here, Contestants are not entitled to the Cast Vote Record in an election contest. This
8 Court cannot judicially expand § 16-677(a) to cover the Cast Vote Record without violating
9 legislative intent. *See Mathews ex rel. Mathews v. Life Care Centers of Am., Inc.*, 217 Ariz.
10 606, 608, ¶ 6 (App. 2008) (“Our primary goal of statutory interpretation is to find and give
11 effect to legislative intent. . . . We first look to the plain language of the statute as the best
12 indicator of that intent. . . . When statutory language is clear and unambiguous, we give
13 effect to it and do not use other methods of statutory interpretation.”).

14 Contestants’ arguments about the availability of the Cast Vote Record in response to
15 a public records request are meritless. This is not a public records request action. *See* § 39-
16 121.02(A). And a declaration from a former government official that a record “should be”
17 a public record adds nothing to the best interest of the state analysis under a properly brought
18 public records lawsuit. *E.g., Hodai v. City of Tucson*, 239 Ariz. 34, 38, ¶ 7 (App. 2016)
19 (“[A] public officer may refuse release or inspection of a public record if such disclosure
20 “might lead to substantial and irreparable private or public harm.”) (internal quotation
21 marks omitted).

22 Under the election contest statutes, Contestants are not entitled to the Cast Vote
23 Record. This Court should deny Contestants’ improper request.

24 **II. Similarly, the statutory scheme does not entitle Contestants to the names of all**
25 **voters whose provisional ballots were rejected.**

26 Contestants’ argument that this list of names is “important” is inapposite. No doubt,
27 a contestant or contestee could determine that many documents collected or compiled by an
28 elections department might be “important” in a particular election contest. But the

1 legislature has clearly spoken: only one type of document—“ballots”—is important enough
2 to include in the statutory scheme. Contestants’ argument is better left for the legislature,
3 not the judiciary. *See Fremont Indem. Co. v. Indus. Comm’n of Ariz.*, 182 Ariz. 405, 409
4 (App. 1995) (“Arguments about the wisdom of the statute must be addressed to the
5 legislature, not to the courts.”).

6 **III. Contestants’ dilatory conduct—not the Maricopa County Defendants’ other**
7 **obligations—have shortened the timeframe for ballot review.**

8 As this Court is well-aware, election contests are necessarily time restricted. *See*
9 A.R.S. § 16-673(A) (“The elector contesting a state election shall, within five days after
10 completion of the canvass of the election and declaration of the result thereof by the
11 secretary of state or by the governor, file in the court in which the contest is commenced a
12 statement in writing . . .”). Even lawsuits filed or appealed within the statutory timeframe
13 may suffer adverse consequences given the nature of these proceedings. *Cf. Lubin v.*
14 *Thomas*, 213 Ariz. 496, 498, ¶ 11 (2006) (“We caution, however, that a party’s failure to
15 diligently prosecute an election appeal may in future cases result in a dismissal for laches.”);
16 *see also id.* at 497, ¶ 10 (“Unreasonable delay can therefore prejudice the administration of
17 justice by compelling the court to steamroll through . . . delicate legal issues . . .”);
18 *Donaghey*, 120 Ariz. at 95 (“The rationale for requiring strict compliance with the time
19 provisions for initiating a contest is the strong public policy favoring stability and finality
20 of election results.”).

21 Here, Contestants waited several days after the certification to bring their election
22 contest. This after Contestants filed suit too early. (*See Exh. 3.*) Accordingly, the time
23 crunch with respect to ballot inspection is of Contestants’—not the Maricopa County
24 Defendants’—making. To be clear: the Maricopa County Defendants did not set the ballot
25 inspection schedule based on “staffing preferences and priorities.” (Contestants’ Resp., at
26 8.) Co-Director of Elections Scott Jarrett—the person responsible for orchestrating the
27 ballot inspection—is a defendant and under subpoena for trial on December 21 and 22 in
28 *Lake v. Hobbs*, CV2022-095403 (Maricopa Cnty. Super. Ct.). That is the reason ballot

1 inspection cannot occur on December 22.

2 Further, the Maricopa County Defendants moved with alacrity to set up the
3 inspection for December 21, 2022. (*See* Exh. 1.) In contrast, Contestants dragged their feet
4 and refused to work with counsel for the Maricopa County Defendants to reach an
5 agreement by insisting on non-ballot documents that are outside the scope of the statutory
6 scheme. Contestants made those documents a non-negotiable then refused to negotiate. This
7 Court should reject Contestants' efforts to pin the blame on the Maricopa County
8 Defendants.

9 **IV. Contestants are entitled to one inspector—not eight—in Maricopa County.**

10 Contestants are not entitled to nominate as many inspectors as they please. The
11 nomination of many inspectors is not contemplated in the controlling statutes. As noted
12 above, the election contest is purely a creature of statute. *See Grounds v. Lawe*, 67 Ariz.
13 176, 186 (1948). The legal processes and discovery allowed can go no further than the
14 boundaries of what is permitted by statute.

15 The language of § 16-677 makes clear that only one inspection panel is
16 contemplated. Under that statute, after the party applying for the inspection of the ballots
17 pays the required sureties then “the court shall appoint **three persons**, one selected by each
18 of the parties and one by the court, by whom **the inspection** shall be made. If either party
19 fails to name **a person** to act in making the inspection, the court shall make the
20 appointment.” A.R.S. § 16-677(B) (emphasis added).

21 Thus, the plain language only contemplates a single inspection panel to conduct the
22 inspection; if the statute allowed for multiple inspection panels it would read something
23 akin to “the court shall appoint three persons per inspection panel.” But the law does not
24 read this way. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 (2019) (“A cardinal principle
25 of statutory interpretation is to give meaning, if possible, to every word and provision so
26 that no word or provision is rendered superfluous.”). Further, the law contemplates this
27 Court appointing “a person” in the event a party fails to name an inspector—not multiple
28 persons if one side seeks to appoint multiple people.

Moreover, § 16-677(C) requires the inspection of the ballots to be done in the presence of “the legal custodian of the ballots.” Even with a team of elections workers, Jarrett is necessary to administer the inspection. Jarrett is one person. Observing twenty-four inspectors—eight for Contestants, eight for Contestee, and eight for the Court—is an order of magnitude more difficult than observing three people as the statute contemplates.

Finally, even if Contestant was entitled to conduct multiple simultaneous inspections, they needed to make that request earlier—at a time where the parties and the Court had a realistic opportunity to staff the requested inspection panels. At this late hour, it is likely impossible to accomplish that, meaning this newly requested multi-panel inspection should be rejected. *Cf. Lubin*, 213 Ariz. 497. And, from the County’s perspective, it is entirely impossible to conduct multiple inspections in a way that is satisfactorily observed by the custodian of the ballots.

Conclusion

As a result of the foregoing, the Parties are at an impasse over the inspection of ballots in Maricopa County. But the solution to this impasse is not found in Contestants' Response. This Court should reject Contestants' expansive set of requests without a hearing.

RESPECTFULLY SUBMITTED this 21st day of December, 2022.

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