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10 ARIZONA SUPERIOR COURT

11 MOHAVE COUNTY

12 TED BOYD, et al.,

13 Plaintiffs/Contestants,

14 v.

15 KRIS MAYES,

16 Defendant/Contestee,

17 and

18 KATIE HOBBS, et al.,

19 Defendants.

No. S8015CV202201468

**CONTESTEE KRIS MAYES' RESPONSE
TO PLAINTIFFS' RESPONSE TO
COURT'S WRITTEN ORDER
REGARDING ISSUES ON WHICH NO
AGREEMENT HAS BEEN REACHED**

(Assigned to the Hon. Lee F. Jantzen)

20
21 Attorney-General Elect Kris Mayes hereby responds to Plaintiffs' response to the Court's
22 written order regarding issues on which no agreement has been reached.
23
24

1 **I. Plaintiffs are only entitled to look at “ballots.”**¹

2 This Court issued an Order granting Plaintiffs “a *limited* inspection of ballots” under
3 A.R.S. § 16-377. [12/20/22 Order at 4 (emphasis added)] This Court further mandated that for
4 this limited ballot inspection, “the Statute must be followed.” [*Id.*] Now, rather than seeking to
5 inspect ballots in conformity with Arizona law and the Court’s express order, Plaintiffs instead
6 request “an unredacted electronic copy of the Cast Vote Record (CVR) for the November 8,
7 2022 General Election for Plaintiffs’ expert to search on his own computer system.” [Pl.
8 Response to Court’s Order (“Response”) at 3] The election contests do not permit this.

9 Election contests are “purely statutory and dependent upon statutory provisions for their
10 conduct.” *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966). Here, Plaintiffs’ request goes far
11 beyond the statutory grant for ballot inspection authorized by the legislature. Indeed, A.R.S.
12 § 16-677 authorizes one form of discovery: an “inspection of ballots” by three persons appointed
13 by the Court for the narrow purpose of allowing a party to “prepare for trial.” A.R.S. § 16-
14 677(B). It does not authorize any other form of discovery, as Judge Thompson recognized earlier
15 this week. [12/19/2022 Order from Thompson, J.] (“[T]he Court could not grant the request [to
16 photograph or copy ballots] because the statute authorizing [plaintiff’s] ballot inspection
17 provides only for an ‘inspection of ballots’ ‘made in the presence of the legal custodian of the
18 ballots.’”) (quoting A.R.S. § 16-677(B)).

19 Plaintiffs vaguely assert that “access to the unredacted CVR is properly viewed as part of
20 the ballot inspection process,” because it will allow for a “more targeted ballot inspection
21 process . . . rather than shooting in the dark through 1.5 million ballots.” [Response at 6] But,
22 again, this argument is plainly inconsistent with the text of § 16-677, which provides only for
23

24 ¹ The Attorney-General Elect incorporates by reference the County’s response for an
order compelling them to comply with the contestant’s schedule.

1 “the inspection of the ballots” in the “presence of the legal custodian of the ballots.” A.R.S. §
2 16-677(C). Access to confidential voter information and other ballot data on an expert’s personal
3 computer is not an “inspection of the ballots,” and is thus not authorized by the election statutes.
4 *Id.* As set forth below, it is also not authorized by any other rules and is expressly prohibited by
5 statute.

6 **II. Plaintiffs are not entitled to additional discovery.**

7 Plaintiffs nevertheless rely on general civil discovery rules as (1) an alternative basis to
8 inspect the CVR and (2) as grounds to gather information about the names of provisional voters.
9 The Court should quickly dismiss of these requests.

10 Again, election contests are “purely statutory” proceeding and they are strictly limited to
11 the procedures set forth by statute. *Donaghey v. Att’y Gen.*, 120 Ariz. 93,95 (1978). There
12 Arizona’s election contest statutes authorize one (and only one) form of discovery: an inspection
13 of ballots by three persons appointed by the Court for the narrow purpose of allowing a party to
14 “prepare for trial.” A.R.S. § 16-677(B). Because election contests are “dependent upon statutory
15 provisions for their conduct,” that’s all the discovery that an election contestant who has stated
16 a claim for relief could conduct. *Fish v. Redeker*, 2 Ariz. App. 602, 605, 411 P.2d 40, 43 (1966);
17 *see also O’Farrell v. Landis*, 985 N.E.2d 458, 460–61 (Ohio 2013) (rejecting an election
18 contestant’s effort to “invoke” the Rules of Civil Procedure to “obtain discovery” and holding
19 that an election contest is “a special statutory procedure,” and so the ballot inspection statute
20 “governs discovery” because “the expeditious and special nature of the election[]
21 contest . . . does not admit the strict application” of the Rules of Civil Procedure); *Rodriguez v.*
22 *Cuellar*, 143 S.W.3d 251, 260 (Tex. Ct. App. 2004) (“[E]lections are politically time sensitive,
23 and legislative remedies for contested elections are to be strictly followed. . . . This case is on a
24 legislatively mandated fast track, and the election code sets out the accelerated procedures for

1 the trial and appeal of this election contest.”).

2 The only authority that the Plaintiffs cite for the proposition that they are entitled to an
3 order from this Court for further discovery (at 6) is a recent case for the unsurprising rule that
4 the rules of civil procedure apply in election contests. But Plaintiffs miss the point. The general
5 rules of civil discovery do not apply.

6 As Judge Thompson ruled early this week in denying any request for discovery beyond
7 the inspection of ballots set forth in A.R.S. § 16-677, “[i]n the case of an election contest, the
8 timelines of which are compressed far beyond an ordinary civil contest, it is not merely difficult
9 to comply with both the [election contest] statute and civil rules – it is conceptually impossible
10 to do so. [12/19/2022 Order from Thompson, J.] The general discovery rules and the specific
11 confines of the election contests are in conflict—both in the timelines for discovery under the
12 general rule and the specific provision.

13 As Judge Thompson ruled “in a case,” as here “where a constitutionally enacted
14 substantive statute conflicts with a procedural rule, the statute prevails.” *Id.* at 2 (citing *Albano*
15 *v. Shea Homes Ltd. P’ship*, 227 Ariz. 121, 127, ¶ 26 (2011)). And, as he concluded, “the tight
16 timelines and absence of opportunity for discovery — without which a dispute of this type could
17 not conclude on-time — prevail over the ordinary civil rule of procedure.” *Id.*

18 In all events, any disclosure of CVR data is strictly prohibited by statute. A.R.S. § 16-625
19 provides that “[t]he officer in charge of elections shall ensure that electronic data from and
20 electronic or digital images of ballots are protected from physical and electronic access,
21 including unauthorized copying or transfer, and that all security measures are at least as
22 protective as those prescribed for paper ballots.” The information sought here is “electronic data
23 from and electronic or digital images of ballots,” and cannot be disclosed. The Plaintiffs and
24 their declarant (4) admit this, noting that the “information in the CVR directly correlates, row by

1 row with ballot images, that is, pictures of ballots.” (quoting Exhibit A (Declaration of Former
2 Arizona Secretary of State Kenneth R. Bennett) at ¶ 5)).

3 In the end, Plaintiffs are entitled to no discovery outside the bounds of what is specifically
4 authorized by the election contests. This Court should thus deny Plaintiffs requests for the CVR
5 and the names of voters, which fall outside the bounds of the election contest statutes.

6 **III. A.R.S. § 16-677 permits only one board.**

7 The Court should reject Plaintiffs’ attempt to rewrite A.R.S. § 16-677(B)’s unambiguous
8 language and expand the “three-person” inspection contemplated by the statute into a forty-five-
9 person fishing expedition.

10 Where a statute’s language is “clear and unambiguous,” it controls. *State v. Christian*,
11 205 Ariz. 64, 66 (2003). Here, the language of A.R.S. § 16-677(B) is unambiguous as to who
12 conducts the inspection of ballots. It mandates that the Court “appoint three persons” to make
13 “the inspection.” A.R.S. § 16-677(B). And it provides how those “three persons” are to be
14 selected (“one selected by each of the parties and one by the court”). *Id.* The Court should reject
15 Plaintiffs’ strained interpretation of this clear language.

16 Plaintiffs ask the Court to rewrite A.R.S. § 16-677(B) and insert “forty-five” where the
17 legislature wrote “three.” But this argument ignores basic principles of statutory interpretation,
18 defies common sense, and should be rejected.

19 First and foremost, there is no ambiguity. When courts “interpret statutes, [they] strive
20 ‘to effectuate the legislature’s intent.’” *4QTKIDZ, LLC v. HNT Holdings, LLC*, 253 Ariz. 382,
21 513 P.3d 1106, 1109 (2022) (quoting *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519,
22 523 (2021)). The starting point for any issue of statutory construction is always “the text of the
23 statute” because “the best and most reliable index of a statute’s meaning is the plain text of the
24 statute.” *State v. Christian*, 205 Ariz. 64, 66 (2003). Accordingly, “[w]hen the plain text of a

1 statute is clear and unambiguous there is no need to resort to other methods of statutory
2 interpretation to determine the legislature’s intent because its intent is readily discernable from
3 the face of the statute.” *State v. Huante*, 252 Ariz. 191, 194 (App. 2021), *review denied* (Apr. 5,
4 2022) (quoting *Christian*, 205 Ariz. at 66). That is precisely the case here.

5 Section 16-677(B) provides that “the court shall appoint **three** persons, **one** selected by
6 each of the parties and **one** by the court, by whom the inspection shall be made.” A.R.S. § 16-
7 677(B) (emphases added). These words are not ambiguous. The two parties each select “one”
8 person, and the court selects “one” person, which adds up to “three persons” total, who together
9 are to conduct “the inspection.” No more, no less. Plaintiffs’ proposed interpretation—that
10 somehow these words mean the Court can appoint a limitless number of persons to conduct
11 multiple inspections simultaneously across the State—“flies in the face of the normal use of the
12 word[s]” of the statute. *Christian*, 205 Ariz. at 67. Instead, this Court must give the “words their
13 usual and commonly understood meaning.” *Id.* “Three” means three. That ends the analysis
14 under well-established Supreme Court precedent. *E.g., id.*

15 Second, even if the Court were to resort to other, less probative indicia of legislative
16 intent, it is of no help to Plaintiffs. Plaintiffs argue that the sole purpose of the statute is to provide
17 “a procedural check against chicanery” and “ensure[] that anytime one party is examining a
18 ballot, a representative from the other party is there, along with a neutral representative selected
19 by the Court.” [Mot. at 8] To begin, Plaintiffs cite no support for this assertion. But even
20 assuming this were the legislature’s purpose, it does not support Plaintiffs’ interpretation. Surely,
21 there is a greater possibility for “chicanery” if fifteen groups of three individuals are deployed
22 simultaneously across the State in such a short timeframe. This is unworkable, and it belies
23 common sense that the legislature intended it.

1 Indeed, in every election contest under A.R.S. § 16-672 that Defendants are aware of,
2 courts have uniformly interpreted Section 16-677(B) exactly as it is written: to mandate the
3 appointment of three individuals to conduct “the inspection.” This system makes good sense.
4 The wide-ranging discovery procedures available in normal civil cases are not available in
5 election contests. Instead, likely given the time sensitivity and the presumption of validity
6 involved, the legislature has permitted only a narrow, statutorily defined process of ballot
7 inspection when necessary for the sole purpose of “properly prepar[ing] for trial” (on a heavily
8 expedited basis). A.R.S. § 16-677(B); *see also Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966)
9 (“Election contests are purely statutory and dependent upon statutory provisions for their
10 conduct.”). The idea that the legislature intended for courts to appoint a limitless number of
11 three-person boards to conduct an extensive statewide inspection of ballots makes little sense in
12 context. *See 4QTKIDZ, LLC*, 253 Ariz. 382, 513 P.3d at 1109 (“Statutory terms must be
13 considered in context.”) (alteration incorporated) (quoting *Est. of Braden ex rel. Gabaldon v.*
14 *State*, 228 Ariz. 323, 325 (2011)). Finally, Plaintiffs’ interpretation also fails to take account of
15 Arizona’s strong policy of protecting voter privacy, flowing directly from the Arizona
16 Constitution—a policy that would be furthered by interpreting Section 16-677 to allow just one
17 board of three persons. *See* Ariz. Const. art. VII, §1.

18 In sum, this Court should interpret A.R.S. § 16-677 according to its plain meaning, which
19 is evident from the text of the statute. The Court “shall appoint three persons. . . by whom the
20 inspection shall be made.” No more, no less.

21 **IV. Kris Mayes is prepared to comply with this Court’s order; but it is still not clear**
22 **what the Plaintiffs want.**

23 Since yesterday, the Attorney-General Elect has been ready to comply with this Court’s
24 Order granting Plaintiffs “a limited inspection of ballots” under A.R.S. § 16-677. Dec. 20, 2022

1 Order at 4. Now, Plaintiffs appear to be seeking a much more .

2 Plaintiffs appear to have conferred with Maricopa County about what, if any ballots, they
3 would like to inspect. But it is still not clear which ballots the Plaintiffs claim they need to
4 “properly preparer for trial” on which claims. As this Court knows, a party can apply to inspect
5 ballots when, among other things, the party asserts that she cannot “properly prepare for trial
6 without an inspection of the ballots. A.R.S. § 16-677(B). While unclear, Plaintiff seems only to
7 be seeking to inspect ballots to “prepare for trial” on their claim related to the fact that some
8 number of votes in the Attorney General race were undervotes (Count IV, in part).

9 Plaintiffs, by impermissibly seeking to appoint 16 ballot inspectors, seem to be asking
10 this court to authorize an expansive fishing expedition in support of evidence that they do not
11 have on the eve of trial. To date, Plaintiffs have not identified any actual vote that was marked
12 as an undervote that should have been counted for Contestant. In other words, Plaintiffs are
13 entitled to access ballots “in narrow circumstances for the purpose of memory refreshment, trial
14 preparation, or to ensure the availability of original documents previously disclosed by
15 discovery.” *Dennison v. Ryan*, No. CV-18-04539-PHX-SPL, 2022 WL 3134450, at *2 (D. Ariz.
16 Aug. 5, 2022) (highlighting the difference between discovery and trial preparation devices).
17 Arizona law does not permit broad review of ballots in a hopeful search for proof. It has long
18 been the rule that a party cannot engage in “fishing expeditions” when it has “no basis other than
19 gross speculation” to claim that discovery might turn up relevant information. *Webb v. Trader*
20 *Joe’s Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021).

21 22 CONCLUSION

23 For the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiffs’
24 various requests.

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2 Dated: December 21, 2022

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