Exhibit A

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, *et al.*,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, *et al.*,

Defendants.

No. CV-2022-01468

BRIEF OF *AMICI CURIAE* ARIZONA SENATE PRESIDENT WARREN PETERSEN AND SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA

(Before the Hon. Lee F. Jantzen)

Warren Petersen, in his capacity as President of the Arizona Senate, and Ben Toma, in his capacity as the Speaker of the Arizona House of Representatives, respectfully submit this brief as *amici curiae*.

INTRODUCTION

Our system of government depends on the accurate tabulation of every legal vote. This imperative does not lapse on Inauguration Day; it imparts to the courts an enduring obligation to guarantee a full and fair adjudication of every *bona fide* dispute that may be

material to the determination of an election. The nearly unprecedented circumstances surrounding this proceeding underscore the judiciary's indispensable role in ensuring that the certified winner of an election did, in fact, receive the highest number of lawful votes.

At the time this election contest began, the Contestee had mustered a lead of just 511 votes out of more than 2.5 million cast, which already qualified this election as the closest for statewide office in Arizona's history. The ensuing weeks saw a barrage of indignant fulminations and obstructive machinations from the Contestee and at least some of the governmental defendants, seeking to block any searching judicial examination of the election's administration. Undaunted by (or oblivious to) the fallacy of circular reasoning, they argued that the Contestants could not access ballots unless and until they could prove that such ballots had been improperly excluded or tabulated, and therefore the Court was bound to conclude that the results canvassed by the Secretary of State on December 5, 2022 were accurate in all material respects (and, for good measure, should slap sanctions on the Contestants).

Reality, of course, rebutted these logically discordant propositions. As the recount revealed—and as at least some of the Defendants and/or their counsel allegedly were aware during the trial in this case—Pinal County's initial canvass was afflicted with substantial errors. The aggregated recount returns slashed the Contestee's already miniscule lead by 45%, to merely 280 votes. The unanswered questions engulfing this abrupt and belated recalculation of vote totals warrant judicial consideration.

At the very least, the notion that the Contestants should be sanctioned for timely raising reasonable and plausible questions concerning the accuracy of the certified results is itself an unseemly and inappropriate effort to wield judicial processes for political retribution.

INTEREST OF THE *AMICI*

Warren Petersen is the President of the Arizona Senate, and Ben Toma is the Speaker of the Arizona House of Representatives. The *amici* proffer this brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on

important issues bearing on the application—and underlying aspirations—of statutes it has enacted. The *amici* take no position on the question of which candidate received the highest number of votes for the office of Arizona Attorney General in the November 8, 2022 general election. Rather, they urge the Court to follow the well-established legal principles discussed below and afford the parties a full and fair opportunity to adduce the facts necessary to answer that pivotal question.

ARGUMENT

I. The Legislature Has Designed a Robust Process to Uncover and Correct Material Mistakes in Election Administration

In contrast to our federal government of limited, enumerated powers, "the power of the [Arizona] legislature is plenary . . . unless that power is limited by express or inferential provisions of the Constitution," *Whitney v. Bolin*, 85 Ariz. 44, 47 (1958). Notably, the Framers of the Arizona Constitution not only authorized but affirmatively instructed the Legislature to "enact[] registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." ARIZ. CONST. art. VII, § 12. Recognizing that this directive must entail post-election mechanisms to verify the accuracy of ballot processing and tabulation, the First Legislature devised an election contest regime, the key attributes of which remain intact today. *See* 1913 Ariz. Statutes, Title XII, Chapter XIV, §§ 3060-3064. While it is true that election contests are "purely statutory," *Grounds v. Lawe*, 67 Ariz. 176, 185 (1948), those statutes provide expansive and multifaceted predicates for probing the accuracy of canvassed election returns, to include an alleged "erroneous count of votes," and "misconduct" by elections officials. A.R.S. §§ 16-672(A)(1), (A)(5). Importantly, willful wrongdoing or knowing malfeasance by those overseeing elections is unnecessary; even good faith or unintentional deviations from controlling law are actionable if "they affect the result, or at least render it uncertain." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). The allegations here, *i.e.*, Pinal County's recent disclosures and the dilatory production of relevant evidence relating to uncounted provisional ballots and ballot formatting errors in Maricopa County, *see* Motion for New Trial at 12–14, give rise to

"uncertain[ty]" about the accuracy of the certified recount results in this extraordinarily close race.

Frantic to halt any additional unearthing and exposition of relevant facts, the Contestee relies on a conjunction of two independently flawed arguments.

A. The Court Should Consider Recently Discovered Evidence of Tabulation Errors

First, the Contestee assails the Contestants for not adducing sufficient evidence that a new trial will result in a different outcome. But the exploitation of informational asymmetries that inhere in election litigation is statutorily unsupported and logically unsound. Arizona law sensibly attaches strict confidentiality protections to voted ballots and renders them virtually inaccessible to non-governmental third parties. *See* A.R.S. §§ 16-624, 16-625. If the Contestee's evidentiary paradigm—namely, that election contestants must effectively point to specific ballots that were improperly or incorrectly tabulated ***before*** they can pursue fact development in litigation—were correct, then no person could ever assert a viable election contest claim that is grounded in anything other than publicly known misconduct. Seeking to avoid that untenable dilemma, the Legislature has for more than a century afforded contestants a nearly unqualified right to inspect ***all*** voted ballots upon a minimal threshold showing of good cause. *See* A.R.S. § 16-677. To make errors or omissions uncovered during this inspection amenable to remediation, the Legislature has instructed the courts to "hear and determine ***all issues*** arising in contested elections," A.R.S. § 16-676(B) [emphasis added], and correct the certified tallies accordingly.

This Court correctly perceived the "heads I win, tails you lose" machination that infected the Contestee's conception of election contests; the same rationale that animated the Court's denial of the motions to dismiss extends equally to this procedural posture. Pinal County's own revelations of errors embedded in the processing of certain ballots and information elicited in other proceedings regarding other errors in Maricopa County are—given the negligible vote margin separating the two candidates—objectively reasonable

grounds for granting a new trial or, at the very least, allowing the Contestants to fully vindicate their statutory right to a plenary inspection of ballots.

B. The Court Can and Should Adjudicate Material, Unresolved Factual Questions Concerning the Accuracy of the Certified Recount Returns

Second, the Contestee contrives a crisis of timing to short-circuit the right of ballot inspection secured by A.R.S. § 16-677. While inflexible timing strictures certainly govern the ***initiation*** of an election contest, *see generally Brown v. Superior Court in and for Santa Cruz Cty.*, 81 Ariz. 236, 239–40 (1956); *Hunsaker v. Deal*, 135 Ariz. 616, 618 (App. 1983), they do not constrain its ***conclusion***. While courts must endeavor to resolve election contests within fifteen days of their commencement, *see* A.R.S. § 16-676(A), this endpoint is merely directory and not jurisdictional. *See Babnew v. Linneman*, 154 Ariz. 90, 92 (App. 1987); *see also Brousseau v. Fitzgerald*, 138 Ariz. 453, 456 (1984) (holding that similar temporal benchmark in statute governing nomination petition challenges "is directory and not mandatory"). Further, as another division of the Superior Court recently held, the "Arizona Rules of Civil Procedure 'govern procedure in all civil actions **and proceedings in the superior court of Arizona.'** An election contest is a 'proceeding in the superior court of Arizona.'" Under Advisement Ruling, *Finchem v. Fontes*, Maricopa County Superior Court No. CV2022-053927, (Dec. 16, 2022) at 3 (quoting Ariz. R. Civ. P. 1; emphasis in original). Even assuming it could do so, the Legislature has never purported to abrogate in election contest proceedings the Rule 59 standard for a new trial.[1]

Whatever credibility the Contestee and Secretary's timing objections otherwise might carry dissipates in the light of their own past positions. When the Contestants initiated this action immediately after the statewide tally was complete (presumably to forestall a

[1] The Contestee insists that when the election contest statutes "conflict[]" with a procedural rule, the former controls. *See* Response to Mot. for New Trial at 3. But there is neither a facial nor an implicit inconsistency between the election contest statutes and Rule 59. While the enactments prescribe particular filing deadlines and pleadings specifications, to the exclusion of those found in the Rules of Civil Procedure or other generally applicable laws, they say nothing whatsoever about the availability of post-trial remedies. As the court in *Finchem* recognized, the Legislature has never displaced a Rule of Civil Procedure by mere silence.

laches defense), the Contestee and Secretary succeeded in deferring the claims until after the preliminary, pre-recount certification. *See* Minute Entry, *Hamadeh v. Mayes*, Maricopa County Superior Court No. CV2022-015445 (Nov. 29, 2022). Then, when Contestants re-filed their claims well within A.R.S. § 16-673(A)'s statute of limitations, the Secretary—who now, it bears emphasis, impugns ***the Contestants'*** good faith—backflipped and demanded that the action be dismissed as time-barred. *See* Sec'y of State's Motion to Dismiss at 1, 4–5. When the Court rejected that ploy, the same parties fought vigorously to run out the clock and thwart the Contestants' efforts to fully and effectively exercise their statutory right to inspect all the ballots. Now, when precisely the kind of salient evidence that the Defendants argued the Contestants must supply finally emerges, the Contestee insists it is too late to do anything about it.

This opportunistic oscillation of mutually inconsistent arguments could not be more contrary to the rigorous, robust and comprehensive fact-finding process codified in Arizona's election contest statutes and supplemented by the Rules of Civil Procedure. And the Contestee cannot unilaterally extinguish otherwise viable claims and unresolved evidentiary questions merely by assuming the contested office. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435–36, ¶¶ 9–11 (App. 2013) (holding that the contestee's inauguration did not necessarily moot election contest, given the pleaded facts).

II. The Defendants' Sanctions Requests are Inappropriate and Abusive

Even if the Court decides not to grant Contestants a new trial, their claims and conduct in these proceedings were not sanctionable. Not even close. The Contestee and Secretary bear the burden of proving an entitlement to fee-shifting under A.R.S. § 12-349, and "[t]he mere fact that a party is ultimately unable to sustain its claims . . . does not automatically equate to a determination that the complaint itself was frivolous, unjustified, or put forth for an improper purpose." *Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Services*, 244 Ariz. 205, 216, ¶ 37 (App. 2018).

The gravamen of the Contestee's and the Secretary's sanctions demands is that the Contestants proceeded to trial without having previously identified a dispositive number of

wrongfully excluded or miscounted votes. But this argument, which posits that the Contestants acted in bad faith, elides the glaring fact that the Contestants ***could not have known*** what number of disputed ballots would be dispositive because the recount results—while apparently known to at least some of the Defendants—remained under seal on the day of trial. *See Goldman v. Sahl*, 248 Ariz. 512, 531, ¶ 66 (App. 2020) (reiterating that "a subjective standard determines . . . bad faith" (citation omitted)). The Contestants moved forward on the quite reasonable assumption that discrepancies identified during the recount would substantially narrow the Contestee's already negligible lead in the vote count. Sure enough, events validated that assumption, at least in part. Had the Contestants abandoned their claims before trial and had the recount reduced the Contestee's margin to, say, ten votes, these same Defendants no doubt would be lobbing all manner of *res judicata*, laches or other obstructive defenses to prevent the Contestants from pursuing their claims at that juncture as well. More broadly, the Contestants were at all times forthcoming and transparent with other parties and the Court concerning the trajectory of fact development and the quantum of proof they were able to furnish at trial. *Contrast Greenbank v. Vanzant*, 250 Ariz. 644, 651, ¶ 29 (App. 2021) (pointing to party's "lack of candor" as a justification for sanctions).

The Defendants' cries of groundlessness and unreasonable delay likewise find little to sustain them. The Contestants continued to trial on the entirely plausible theory that the confluence of A.R.S. §§ 16-676(B) and 16-667 permit a judicial adjustment of the vote tabulations upon adequate proof, given the possibility that such a recalibration could be dispositive when reconciled with revised tallies produced by the recount. While the Court declined to adopt the remedial approach urged by the Contestants, their argument was reasonably grounded in the statutory text and applicable case law. *See Fund Manager, Pub. Safety Pers. Ret. Sys. v. Corbin*, 161 Ariz. 348, 355 (App. 1988) (concluding that while non-moving party's position was "without merit," it was not "frivolous"); *SolarCity Corp. v. Ariz. Dep't of Revenue*, 242 Ariz. 395, 408, ¶ 43 (App. 2017) (declining to impose sanctions

where "the parties clearly did not act unreasonably or abusively, but instead strongly advocated for their adverse positions"), *vacated on other grounds*, 243 Ariz. 477 (2018).

Similarly, the Contestants' trial presentation was short in duration, narrowly focused and efficiently executed. There is no basis for finding that this already extraordinarily expedited litigation would have resolved materially sooner had the Contestants acquiesced to the Defendants' demand that they forfeit their case on the eve of a trial that ultimately consumed less than a day. *Cf. Donlann v. Macgurn*, 203 Ariz. 380, 387, ¶ 36 (App. 2002) (finding that redundant motions did not "*unreasonably* delay[] the proceedings" (emphasis in original)); *contrast Solimeno v. Yonan*, 224 Ariz. 74, 81, ¶ 32 (App. 2010) (finding unreasonable expansion where party's failures to disclose caused a mistrial and necessitated a new trial). In short, the Contestants and their counsel acted with care, caution and candor in the face of an unenviable Catch-22.

In context, the Defendants' sanctions demands evince a noxious admixture of political vengeance and—in the case of the Secretary of State—abuse of power. Notably, the Secretary (and Contestee) immediately began brandishing sanctions threats in their motions to dismiss—well before the Contestants even had an opportunity to undertake pre-trial discovery. *See* Contestee's Mot. to Dismiss at 17; Sec'y of State's Mot. to Dismiss at 17. By conferring a statutory right to contest elections, the Legislature entrenched mechanisms for transparency, factfinding and an independent judicial inquiry whenever there are credible questions surrounding the accuracy of certified election results. It falls, however, to private individuals—voters—to invoke this vital oversight function. *See* A.R.S. § 16-672(A). Citizens should not be threatened by their own government officials with punitive penalties for raising measured and modest questions in the ***closest election for statewide office in Arizona history***. Defendants' abusive litigation tactic impedes those legislative objectives and risks rendering the election contest statutes effectively a dead letter.

It is understandable that the governmental parties would zealously defend their actions and practices in the 2022 election. But the churlish imperiousness with which the

Secretary and certain county officials greet even narrowly tailored questions regarding the extent and repercussions of undeniable mistakes suggests they have forgotten that they serve ***all*** Arizona electors—including Mr. Hamadeh and his supporters. They are answerable to the Contestants and all other voters—not the other way around.

The Court of course need not (and should not) suffer litigants and attorneys who prevaricate, mislead, or distort facts to the tribunal. But this case was and remains a textbook example of a proper election contest in an exceedingly close race: modest in its scope, restrained in its rhetoric, and responsible in the prosecution of its claims. Win or lose, it would be unjust to punish the Contestants solely for raising and pursuing questions of enduring public importance to the voters of this State and the integrity of its elections.

CONCLUSION

For the foregoing reasons, the Court should carefully consider the new evidence cited by the Contestants and deny the Contestee's and Secretary of State's respective motions for attorneys' fees.

RESPECTFULLY SUBMITTED this 25th day of January, 2023.

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