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21 *Attorneys for Maricopa County Defendants*

22 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

23 **IN AND FOR THE COUNTY OF MOHAVE**

22 JEANNE KENTCH, *et al.*,
23 Plaintiffs/Contestants,
24 v.

25 KRIS MAYES,
26 Defendant/Contestee
27 and

28 KATIE HOBBS, *et al.*,
Official Capacity Defendants.

No. S8015CV202201468

**MARICOPA COUNTY DEFENDANTS'
RESPONSE TO PLAINTIFFS' NOTICE
OF SUPPLEMENTAL AUTHORITY**

(Expedited Challenge Matter)

(Assigned to the Hon. Lee F. Jantzen)

1 On March 23, 2023, Plaintiff filed a Notice of Supplemental Authority concerning
2 the Arizona Supreme Court's March 22, 2023 Order in *Lake v. Hobbs*, No. CV-23-0046-PR
3 (the "Order"). Because Plaintiff significantly misrepresented the Order and its application
4 to the matter before this Court, the Maricopa County Defendants file this short Response.

5 As a preliminary matter, an order of the Arizona Supreme Court is not binding
6 precedent. *See* Ariz. R. S. Ct. 111; *see also* ARCAP 28. Indeed, it does not even suggest
7 persuasive value. *See* Ariz. R. S. Ct. 111(c)(1)(C) (describing when memorandum
8 decision—not order—has persuasive value). Had the Arizona Supreme Court intended its
9 determination to carry precedential or persuasive value it would not have issued an order.
10 *Cf.* ARCAP 17(a) (limiting supplemental citation of legal authority to "Pertinent and
11 *significant* legal authority").

12 The Order related to Kari Lake's Petition for Review of the Court of Appeals decision,
13 which affirmed the trial court's rejection of Lake's election contest. [Ex. 1, Order, at 1-2.]
14 Plaintiff falsely claimed that "[t]he Supreme Court's Order supports Plaintiffs' argument in
15 this case that the rules of civil procedure not only apply to election contests, but that the time
16 provisions in A.R.S. § 16-676 do not conflict to prevent this Court from granting a new trial."
17 [Pl.s' Ntc. of Supp. Auth. at 2.] But this is incorrect: the Order does not say anything about
18 those things. Neither the extent to which the Rules of Civil Procedure apply in election
19 contests, nor § 16-676's time provisions, nor the question of new trials, was at issue in the
20 Lake Petition for Review. Unlike Lake, Plaintiff in this matter chose not to appeal, but
21 instead asked for a "do over" of his trial. The Rules for election contests, set out in statute,
22 do not allow a do over. Contrary to Plaintiff's assertion, the Order does not change that fact.

23 Specifically, the Order denied Lake's Petition as it related to six of the seven items she
24 asked the Court to review, but granted it as it related to one item that concerned signature
25 verification of early ballot affidavit envelopes. The Supreme Court remanded that one item
26 to the trial court as follows:

27 IT IS FURTHER ORDERED remanding to the trial court to determine whether
28 the claim that Maricopa County failed to comply with A.R.S. § 16-550(A) fails

1 to state a claim pursuant to Ariz. R. Civ. P. 12(b)(6) for reasons other than laches,
2 or, whether Petitioner can prove her claim as alleged pursuant to A.R.S. § 16-672
3 and establish that “votes [were] affected ‘in sufficient numbers to alter the
4 outcome of the election’” based on a “competent mathematical basis conclude
that the outcome would plausibly have been different, not simply an untethered
assertion of uncertainty.”

5 [*Id.* at 3-4 (*citation omitted*).]

6 In his Notice of Supplemental Authority, Plaintiff quoted only the second part of the
7 sentence (*i.e.*, “whether Petitioner can prove her claim”) and did not quote the first part of
8 the sentence related to Rule 12(b)(6). [Pl.’s Ntc. of Supp. Auth. at 2.] This cherry-picking
9 gave the impression that the Supreme Court either (1) ordered a new trial on that issue, or
10 (2) ruled that contestants may bring election contests or “new evidence” whenever they
11 believe they can prove mathematically that the outcome of the election plausibly should have
12 been different, regardless of the A.R.S. § 16-676’s time bars and the long-settled doctrine
13 concerning the need for finality in elections. But the Court ruled neither of those things.
14 Rather, it ruled on a timely-taken *appeal*, and remanded one issue raised on appeal to the
15 trial court for additional consideration *of that issue*.

16 Plaintiff suggests that because it was error to dismiss Lake’s challenge in Count III of
17 her Complaint to signature verification based on the doctrine of *laches*, it was likewise error
18 for this Court to dismiss Plaintiff’s challenge in Count V of his Complaint to signature
19 verification. But Plaintiff is incorrect: while Plaintiff’s Count V is similar to Lake’s Count
20 III, it does not raise the particular challenge that the Supreme Court deemed could not be
21 dismissed on *laches*. This suggestion is incorrect.

22 The Lake challenge to signature verification, brought in Count III of her Complaint,
23 contained two separate allegations. First, that the Recorder’s signature-verification *policies*
24 violated state law. (Plaintiff makes that same allegation in his Count V). The Supreme
25 Court’s Order did not find that the trial court erred in dismissing that part of the claim on the
26 basis of *laches*; indeed, under binding precedent such claims *must* be brought prior to the
27 election. *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002). If the Supreme Court
28 had intended the Order to disturb the holding of *Sherman*, it would have said so. It did not.

1 But Lake also made a second allegation in her Count III, which Plaintiff does not make
2 in his Count V. Lake claimed that, in the 2022 general election, the Recorder failed to follow
3 his policy to exclude ballots from tabulation that were transmitted in affidavit envelopes
4 containing an affidavit signature that did not match the signature in the voter's registration
5 record, resulting in a material number of early ballots being tabulated that should have been
6 excluded. [Ex. 1, Order at 3.] The Supreme Court explained that such challenges, which
7 allege malfeasance *during* the election, could not have been brought prior to the election.
8 [Id.] Thus, the trial court erred by dismissing Lake's Count III on the basis of *laches*. [Id.]

9 Plaintiff, however, did not allege that the Recorder failed to follow his signature-review
10 policies during the 2022 general election. Rather, Plaintiff's allegation was *only* that the
11 Recorder's signature-review policies *failed to comply with the requirements of state law*,
12 because the Recorder used voters' prior early ballot affidavits or early ballot request forms
13 to verify their signatures whereas Plaintiff's understanding of state law is that only the
14 signature on the voters' registration forms may be used.¹ Plaintiff's challenge was thus
15

16 ¹ Compare Lake's allegation, found in Paragraph 151 of Lake's Complaint and cited in the
17 Order at 3 ("Upon information and belief, a material number of early ballots cast in the
18 November 8, 2022 general election were transmitted in envelopes containing an affidavit
19 signature that the Maricopa County Recorder or his designee determined did not match the
20 signature *in* the putative voter's 'registration record.' The Maricopa County Recorder
21 nevertheless accepted a material number of these early ballots for processing and tabulation
22 because the affidavit signature ostensibly matched a signature on an election-related
23 document *that was not the voter's "registration record," such as a prior early ballot
24 affidavit or early ballot request form.*" To the extent the Elections Procedures Manual
25 purports to authorize the validation of early ballot affidavit signatures by reference to a
26 signature specimen that is not found in the voter's "registration record," it is contrary to
27 the plain language of A.R.S. § 16-550(A), and hence unenforceable.") (emphasis added).
28 The Recorder's policy, consistent with the Elections Procedures Manual, is to compare the
affidavit envelope signature with all signatures in the registration record, including prior
early ballot affidavit signatures and early ballot request form signatures. See Elections
Procedures Manual (2019) at 68 (available at
https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf). Plaintiff in this case challenged the legality of the Recorder's policy, while
Lake alleged that the Recorder failed to follow his policy during the 2022 general election.

1 solely to the legality of election procedures, which *must* be brought prior to the election.
2 *Sherman*, 202 Ariz. at 342 ¶ 9. Accordingly, this Court properly dismissed Plaintiff's Count
3 V on the basis of laches, and the Arizona Supreme Court's remand in Lake provides no basis
4 for this Court to revisit that sound decision.

5 The upshot of all of this is that the Supreme Court Order that Plaintiff cites as
6 supplemental authority has no application to whether this Court should grant Plaintiff's
7 motion for a new trial.

8 RESPECTFULLY SUBMITTED this 27th day of March, 2023.

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