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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

ADRIAN FONTES, *et al.*,

Defendants.

No. S8015CV202201468

PLAINTIFFS' CONSOLIDATED REPLY TO NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR A NEW TRIAL

(assigned to Hon. Lee F. Jantzen)

(ORAL ARGUMENT REQUESTED)

Plaintiffs submit this consolidated reply to their Notice of Supplemental Authority in Support of Plaintiffs' Motion for a New Trial.

Although the Arizona Supreme Court's March 22nd Order in *Lake v. Hobbs* ("Order") may not be *binding* precedent, any decision from the Supreme Court certainly provides *significant* guidance concerning the election contest still pending in this Court and how the State's highest court may consider issues on appeal.

1. The Order Evidences A New Trial Is Not Barred By The Time Provisions of A.R.S. § 16-676

Defendants assert that this Court has been divested of its jurisdiction and that election contest proceedings can only continue following a "timely-taken appeal[.]" Maricopa Resp. to Notice (Mar. 27, 2023) at 2; *see also* Mayes Resp. to Mot. New Trial (Jan. 17, 2023) at 5. This convoluted claim lacks statutory and precedential support.[1] In fact, Arizona courts have long held that the Arizona Rules of Civil Procedure apply in election contests where they don't conflict with express statutory provisions. *See* Pl.'s Reply ISO New Trial at 12-14. Critically, the Order remanded to the trial court a previously dismissed election contest claim for further proceedings – which no one disputes could result in an evidentiary hearing. Defendants' continued assertion that A.R.S. § 16-676's time provisions bar Plaintiffs' motion now that the Supreme Court has reinstated an election contest claim for a possible new trial is plainly wrong.

2. A New Trial Is Appropriate Because Evidence Was Withheld, Not "Properly Denied"

Secretary Fontes argues that his predecessor, Secretary Hobbs, was simply complying with a court order when she withheld material evidence to this case. Secretary Hobbs was aware at trial that the recount confirmed tabulators had misread validly cast

[1] Regardless, lacking a final order and entry of judgment as required under Rule 54(b), an appeal is not yet ripe. *See* Ariz. R. Civ. App. P. ("ARCAP") 9(a). Furthermore, even if Plaintiffs could have filed an appeal before the entry of judgment under ARCAP 9(c), Plaintiffs can still file a "timely-taken appeal" under ARCAP 9(e)(1)(D). But more to the point, nothing in the election contest statutes grants the right to appeal nor prohibits a new trial; suggesting that an appeal is authorized while a new trial is barred is nothing more than self-serving argumentation.

votes as undervotes – votes that were mistakenly excluded from the official canvass. Critically, Plaintiffs litigated that precise issue at trial while Secretary Hobbs kept this critical finding under lock-and-key.

To be clear, the recount order prevented the *counties* from "releas[ing] to the public the results of the recount, including daily vote totals" and required all parties (including the Secretary) to "keep confidential any information they may acquire that would *disclose the vote of any elector*" (emphasis added). *See In the Matter of the November 8, 2022, General Election for Attorney General; Superintendent of Public Instruction; and State Representative for District 13*, Maricopa County Superior Court, CV2022-015915, Order to Conduct Recount (Dec. 5, 2022), available at https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4103/638058565099630000 (last accessed Apr. 3, 2023) at 2 (attached as Exhibit A). Disclosing to this Court and to the parties that the recount confirmed tabulator errors specifically at issue at trial would not have contravened the Maricopa County order. Plainly, confirming tabulators improperly recorded valid votes as undervotes is neither a "daily vote total" nor information that would "disclose the vote of an elector[.]" *Id*. Defendants' suggestion the Secretary was judicially prohibited from disclosing this critical revelation until *after* the trial is, at best, disingenuous.

Further, Secretary Fontes appears to argue that Maricopa County's decision to withhold provisional ballot information until 8 days after trial (a public record that is electronically stored, readily accessible, and available to Maricopa County as soon as the election was canvassed) amounted to "discovery previously requested that was properly denied." Fontes Resp. at 2. Secretary Fontes says that consideration of that evidence constitutes "another bite of the apple." *Id.* That is both incorrect as a legal principle and would directly undermine congressional intent behind fundamental election safeguards.

Secretary Fontes is Arizona's Chief Elections Officer for purposes of the National Voter Registration Act and the Help America Vote Act (*see* A.R.S. § 16-142) – federal Acts passed, in part, to *prevent* erroneous disenfranchisement. *See, e.g.*, 52 U.S.C. § 20501(b)

(express purpose of the NVRA is to "increase" voter registration and make it possible for State officials to "enhance[] the participation of eligible citizens as voters"); 52 U.S.C. § 20902 (providing funds to upgrade voting systems that ensure all lawful votes can be accurately counted). Yet Secretary Fontes suggests that this Court should not consider the withheld evidence, even if it not only *proves* voters were erroneously disenfranchised, but that Hamadeh in fact received the most votes. The Secretary's position undermines his state and federal responsibilities to "enhance[] the participation of eligible citizens" by asking this Court to not only ignore defective government systems and procedures that disenfranchised voters, but rewards Maricopa County for withholding critical, outcome determinative evidence, seemingly, in order to avoid scrutiny. Affirming this conduct sanctions State actions that put the thumb on the scales of justice; conduct that left undeterred could be discriminatorily administered to the benefit or determent of specific candidates in election contests.

Secretary Fontes further indicates Plaintiffs are "effectively amend[ing] their statement of election contest." *Id*. Not true. Paragraphs 58 and 59 of Plaintiffs election contest specifically identify registration errors that caused voters who have voted in past Arizona elections to have provisional ballots rejected. Stmt. of Election Contest at 17. And paragraph 51 deals specifically with undervotes. *Id.* at 15. Plaintiffs raised these issues in their complaint and preserved them throughout this litigation.

3. Plaintiffs' Count V Claim Is Virtually Identical To Lake's Count III Claim

Although Plaintiffs maintain that Count V is virtually identically to Lake's Count III, because Plaintiffs do not believe that Count V is necessary to prove Abraham Hamadeh received the most votes for Attorney General and for the sake of conserving judicial resources, Plaintiffs withdraw their request to have this Court reconsider its non-final order dismissing that claim on laches grounds. *Compare* Stmt. of Election Contest at 23-24 *with Lake v. Hobbs*, Maricopa County Superior Court, CV2022-095403, Complaint in Special Action and Verified Statement of Election Contest Pursuant to A.R.S. §16-672 (Dec. 9,

2022) at 59 (available at https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4151/638064516668500000 (last accessed Apr. 3, 2023)).

RESPECTFULLY SUBMITTED this 4th day of April, 2023.

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ORIGINAL efiled and served via electronic means
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EXHIBIT

A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

IN THE MATTER OF the November 8, 2022, General Election for Attorney General; Superintendent of Public Instruction; and State Representative for District 13	No. CV2022-015915 **ORDER TO CONDUCT RECOUNT** **Priority Case – A.R.S. § 16-663(A)**

The facts requiring a recount of the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Instruction, and State Representative for District 13 having been certified to this Court,

IT IS ORDERED pursuant to A.R.S. §§ 16-624(D) and 16-663 that:

A. A recount of the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Inspection, and State Representative for District 13 shall be conducted;

B. The Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties' Boards of Supervisors, as the designees of the Secretary of State, shall conduct the recount on an automatic tabulating system to be furnished and programmed under the authority of the respective Boards of Supervisors to electronically tabulate the ballots. The Boards of Supervisors shall satisfy A.R.S. § 16-664(C) by reprogramming the automatic tabulating system to recount only the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Inspection, and State Representative for District 13 (in Maricopa County);

C. The Secretary and the Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma

Counties' Boards of Supervisors shall conduct logic and accuracy testing on the automatic tabulating system in accordance with A.R.S. § 16-449;

D. If the ballots are not currently in the possession of the Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties' Boards Supervisors or their designees, the respective Counties' Treasurers shall deliver to the respective Counties' Boards of Supervisors the packages or envelopes containing the ballots cast in the November 8, 2022 General Election, pursuant to A.R.S. § 16-624(D);

E. The Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties' Boards of Supervisors shall certify, through their designees, their recount results to the Secretary of State by 5:00 p.m. on December 21, 2022, by e-mail to Elections Director Kori Lorick at klorick@azsos.gov;

F. Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties shall not release to the public the results of the recount, including daily vote totals, until the Court has certified the results;

G. All participants to the recount keep confidential any information they may acquire that would disclose the vote of any elector and destroy any notes that would disclose the same; and

H. Setting a hearing for December 22, 2022 at 9:00 a.m. for the presentation of the results under A.R.S. § 16-665(A) before Judge Timothy J. Thomason, 101 W. Jefferson, Phoenix, AZ 85003, 7th Floor, Courtroom 713.

DONE IN OPEN COURT this 5th day of December, 2022.

Timothy J. Thomason

Hon. Timothy J. Thomason

Judge of the Superior Court for Maricopa County