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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.

KRIS MAYES,

No. S8015CV2022-01468

**MARICOPA COUNTY DEFENDANTS'
RESPONSE OPPOSING MOTION TO
EXPEDITE DISCOVERY**

1 Defendant/Contestee
2 and
3 KATIE HOBBS, *et al.*,
4 Official Capacity Defendants.

(Expedited Challenge Matter)
(Honorable Lee F. Jantzen)

5 **INTRODUCTION**

6 Plaintiff has asked this Court to expedite discovery in this matter and has identified a
7 voluminous amount of production it hopes to obtain. But as explained below, discovery is
8 not available in election contests, for two reasons. First, election contests are purely
9 statutory, governed by their statutory framework, which does not authorize discovery. *See*
10 *infra*, Argument, Part I. Second, the Arizona Supreme Court held that the Rules of Civil
11 Procedure have no application to election contests. *See infra*, Argument, Part II. Allowing
12 this unauthorized discovery will heavily burden the Maricopa County Elections Department,
13 which is busy with other statutorily-required responsibilities. *See infra*, Argument, Part III.
14 Accordingly, the Maricopa County Defendants ask this Court to deny the Motion to Expedite
15 Discovery.

16 **ARGUMENT**

17 **I. Election Contests are Purely Statutory, Governed by their Statutory** 18 **Framework, Which Does Not Authorize Discovery.**

19 Plaintiff moves this Court for a discovery order based on the Arizona Rules of Civil
20 Procedure (“Ariz. R. Civ. P.”) Rule 26. But that rule and general discovery principles do
21 not apply in Election Contests.

22 “Election contests are **purely statutory**. They are unknown to the common law.
23 They are neither actions at law nor suits in equity. They are special proceedings.” *Grounds*
24 *v. Lawe*, 67 Ariz. 176, 186 (1948), *quoting McCall v. City of Tombstone*, 21 Ariz. 161, 185
25 (1919) (emphasis added). Consequently, election contests are “dependent upon statutory
26 provisions for their conduct” and are “**not** governed by the general rules of chancery
27 practice.” *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966) (emphasis added); *Grounds* 67
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1 Ariz. 184. Importantly, discovery evolved out of equitable procedures in the English Court
2 of Chancery. *See* Alan K. Goldstein, “A Short History of Discovery” (1981) 10 Anglo-
3 American Law Review 257, 258-59 (explaining that common law rules of evidence had no
4 power to compel discovery, but those rules developed in chancery). As a result, discovery
5 tools are unavailable to election contests absent express authorization from the Legislature
6 through statute. And the Legislature has made the policy decision to forego authorizing
7 such rules for election contests. In meticulously crafting Title 16, Chapter 4, Article 13, the
8 Legislature created the election contest universe and in it prescribed the way the contests
9 are conducted. A.R.S. §§ 16-672-677.

10 The only discovery vehicle the Legislature granted a court to authorize is the
11 inspection of ballots in preparation for trial. A.R.S. § 16-677(A). Discovery outside of
12 ballot inspection is therefore implicitly prohibited. *See* Antonin Scalia & Bryan A. Garner,
13 Reading Law: The Interpretation of Legal Texts 107 (2012) (explaining the interpretive
14 negative-implication canon: “The expression of one thing implies the exclusion of others
15 (*expressio unius est exclusio alterius*).”). While at first blush this appears harsh, it is
16 necessary. **First**, there is “strong public policy favoring stability and finality of election
17 results.” *Ariz. City Sanitary Dist v. Olson*, 224 Ariz. 330 ¶ 12 (App. 2010) (cleaned up).
18 Discovery outside the inspection of ballots would only further they delay in the democratic
19 transition from one elected official to the next by allowing for fishing expeditions that
20 would subject the finality of election results to turmoil. **Second**, discovery violently
21 disrupts the perfect harmony between the grounds of an election contest (A.R.S. § 16-672),
22 other election statutes, and applicable case law. To wit, A.R.S. § 16-672(A) provides the
23 grounds upon which an elector can contest an election. Meanwhile, A.R.S. § 16-677 (ballot
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1 inspection) harmonizes A.R.S. § 16-672(A)(4),(5)¹ with A.R.S. § 16-1018(4)² by allowing
2 a contestant access to information not otherwise available to prove their claim. The
3 remaining election contest ground relevant to this case, A.R.S. § 16-672(A)(1)—which
4 must be premised on “misconduct”³—must lie on facts known to a movant at the time the
5 election contest is filed and not untethered speculation and theories. *See* MISCONDUCT,
6 Black’s Law Dictionary (11th ed. 2019) (“A dereliction of duty; unlawful, dishonest, or
7 improper behavior, esp. by someone in a position of authority or trust.”); *cf. Cafasso v. Gen.*
8 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (“a pleading must identify the
9 who, what, when, where, and how of the misconduct charged”). Consequently a party filing
10 an election contest under A.R.S. § 16-672(A)(1)-(3) must possess the necessary facts and
11 details supporting their claims *before* filing the election contest, thereby obviating the need
12 for discovery.

13 The Legislature’s thoughtful consideration of election contests directed them to
14 construct statutes that allow for inspection of documents otherwise prohibited by law while
15 protecting the fragile political transition of power from baseless and speculative claims not

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17 ¹ A. Any elector of the state may contest the election of any person declared elected to a
18 state office, or declared nominated to a state office at a primary election, or the declared
19 result of an initiated or referred measure, or a proposal to amend the Constitution of
20 Arizona, or other question or proposal submitted to vote of the people, upon any of the
21 following grounds: 4. On account of illegal votes. 5. That by reason of erroneous count of
22 votes the person declared elected or the initiative or referred measure, or proposal to amend
the constitution, or other question or proposal submitted, which has been declared carried,
did not in fact receive the highest number of votes for the office or a sufficient number of
votes to carry the measure, amendment, question or proposal. A.R.S. § 16-672(A)(4),(5).

23 ² Prohibiting anyone “[s]how[ing] another voter’s ballot to any person after it is prepared
for voting in such a manner as to reveal the contents”. A.R.S. § 16-1018(4)

24 ³ A. Any elector of the state may contest the election of any person declared elected to a
25 state office, or declared nominated to a state office at a primary election, or the declared
26 result of an initiated or referred measure, or a proposal to amend the Constitution of
27 Arizona, or other question or proposal submitted to vote of the people, upon any of the
28 following grounds: 1. For misconduct on the part of election boards or any members thereof
in any of the counties of the state, or on the part of any officer making or participating in a
canvass for a state election.

1 grounded in fact. The Legislature’s decision to keep the equitable discovery principles at
2 bay prevent fishing expeditions for meritless contests.

3 **II. The Arizona Supreme Court Held that the Rules of Civil Procedure Do Not**
4 **Apply to Election Contests.**

5 While statutory construction prohibits discovery in election contests, there is a
6 second reason that the discovery rules cannot apply: the Arizona Supreme Court ruled that
7 the Civil Rules of Procedure have no application to election contests. *Grounds*, 67 Ariz.
8 176. In that case, William F. Grounds contested the election of W.D. Lawe as county
9 supervisor in District No. 3 of Mohave County. *Id.* at 178. After the official canvass, Lawe
10 was declared the elected official and Grounds filed an election contest, which proceeded to
11 trial. *Id.* After the trial court submitted a written decision, Grounds moved to amend the
12 election contest complaint under the Arizona Rules of Civil Procedure Rule 15; the trial
13 court denied the amendment. *Id.* at 180. Grounds appealed and cited the amended denial as
14 one of the issues in the appeal. *Id.* at 180.

15 The Arizona Supreme Court affirmed the trial court’s decision to deny Grounds’
16 amendment. It held that the statutory code provisions for election contests were “intended
17 to be a comprehensive code relating to this special statutory proceeding.” *Id.* at 186.
18 Because “there is no section” in the statutory provisions “relating to amendments[,]”
19 amendments to complaints are not allowed. *Id.* The Court further noted that the fact that
20 the Arizona Rules of Civil Procedure authorized amendments made no difference for its
21 analysis. Relying on *Kitt v. Holbert*, 30 Ariz. 397 (1926), the Court found that the Rules of
22 Civil Procedure have “no application in jurisdictions such as ours where election contests
23 are not governed by the general rules of chancery practice but rather are considered to be
24 purely statutory.”

25 In the seventy-eight years since *Grounds*, the Legislature has not statutorily created a
26 right to discovery or expressly incorporated the Arizona Rules of Civil Procedure to support
27 a motion such the one before the Court. *Grounds* remain good law, and following it leads
28 this Court to only one outcome: denying Plaintiff’s Motion.

1 Addressing Plaintiff's "good cause" arguments are unnecessary. The Legislature, in
2 creating the election statutes, and the Arizona Supreme Court, in construing those statutes,
3 firmly established that discovery is not allowed in election contests like this one.

4 **III. Allowing the Unauthorized Discovery Will Heavily Burden the Maricopa**
5 **County Elections Department.**

6 The unauthorized discovery that Plaintiff requests includes four categories with
7 eleven subparts, for a total request of thirteen different types of production. While some of
8 the requests would likely be relatively simple to compile, others are far more extensive. For
9 example, Request for Production Number 4 asks for "[a]ll early ballot affidavits containing
10 a signature that the County Recorder determined did not match or correspond to the signature
11 on the voter's registration card or registration form, but that the County Recorder or his/her
12 designee determined did match or correspond to a signature contained in some other
13 document on file with the County Recorder." [Plaintiff's Motion to Expedite Discovery,
14 Exhibit A.] Responding to that Request for Production will take considerable research on
15 the part of the Elections Department personnel. And, that Request is not an outlier: many of
16 the Requests will take a considerable amount of research.

17 Parties to regular civil litigation expect that they will be subject to discovery requests.
18 But those requests operate on the normal timeline authorized by the discovery rules. Here,
19 because of the compressed nature of election contests, the timeline for responding—if,
20 contrary to fact, discovery were allowed—would be severely compressed. Indeed, Plaintiff
21 asks for production to occur seven days prior to the evidentiary hearing in this matter, which
22 is set for Friday, December 23. Were the Court to grant Plaintiff's motion, the Elections
23 Department would have to produce documents by tomorrow, December 16. Even if the
24 Court extended the deadline for production to sometime next week, the upshot would be that
25 the Elections Department would have at most *five* business days to complete production if it
26 is to do so before the day of the evidentiary hearing. Meanwhile, the Elections Department
27 is currently busy fulfilling its statutory duties related to the Recount of three election
28 contests, as well as preparing for hearings related to two election contest that will occur next

1 week, in which their testimony will be necessary for the courts (including this court) to rule
2 on the contests before them.

3 Because discovery is not allowed in election contests, this Court should not impose
4 that burden on the Maricopa County Elections Department. Instead, it should deny
5 Plaintiff's motion.

6 **CONCLUSION**

7 For the foregoing reasons this Court should deny the Plaintiff's Motion to Expedite
8 Discovery.

9
10 RESPECTFULLY SUBMITTED this 15th day of December, 2022.

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1 ORIGINAL of the foregoing E-FILED
2 this 15th day of December 2022 with
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