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*Attorneys for Plaintiffs/Contestants*

**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

No. CV-2022-01468

**CONSOLODATED REPLY IN  
SUPPORT OF  
PLAINTIFFS/CONSTESTANTS'  
PETITION TO INSPECT BALLOTS  
AND MOTION TO EXPEDITE  
DISCOVERY**

1 KATIE HOBBS, in her official capacity as the  
2 Secretary of State; LARRY NOBLE, in his  
3 official capacity as the Apache County  
4 Recorder; APACHE COUNTY BOARD OF  
5 SUPERVISORS, in their official capacity;  
6 DAVID W. STEVENS, in his official capacity  
7 as Cochise County Recorder; COCHISE  
8 COUNTY BOARD OF SUPERVISORS, in  
9 their official capacity; PATTY HANSEN, in  
10 her official capacity as the Coconino County  
11 Recorder; COCONINO COUNTY BOARD  
12 OF SUPERVISORS, in their official capacity;  
13 SADIE JO BINGHAM, in her official  
14 capacity as Gila County Recorder; GILA  
15 COUNTY BOARD OF SUPERVISORS, in  
16 their official capacity; WENDY JOHN, in her  
17 official capacity as Graham County Recorder;  
18 GRAHAM COUNTY BOARD OF  
19 SUPERVISORS, in their official capacity;  
20 SHARIE MILHEIRO, in her official capacity  
21 as Greenlee County Recorder; GREENLEE  
22 COUNTY BOARD OF SUPERVISORS, in  
23 their official capacity; RICHARD GARCIA,  
24 in his capacity as the La Paz County Recorder;  
25 LA PAZ COUNTY BOARD OF  
26 SUPERVISORS, in their official capacity;  
27 STEPHEN RICHER, in his official capacity as  
28 the Maricopa County Recorder; MARICOPA  
COUNTY BOARD OF SUPERVISORS, in  
their official capacity; KRISTI BLAIR, in her  
official capacity as the Mohave County  
Recorder; MOHAVE COUNTY BOARD OF  
SUPERVISORS, in their official capacity;  
MICHAEL SAMPLE, in his official capacity  
as Navajo County Recorder; NAVAJO  
COUNTY BOARD OF SUPERVISORS, in  
their official capacity; GABRIELLA  
CAZARES-KELLY, in her official capacity  
as the Pima County Recorder; PIMA  
COUNTY BOARD OF SUPERVISORS, in  
their official capacity; DANA LEWIS, in her  
official capacity as the Pinal County Recorder;  
PINAL COUNTY BOARD OF

1 SUPERVISORS, in their official capacity;  
2 SUZANNE SAINZ, in her official capacity as  
3 the Santa Cruz County Recorder; SANTA  
4 CRUZ COUNTY BOARD OF  
5 SUPERVISORS, in their official capacity;  
6 MICHELLE M. BURCHILL, in her official  
7 capacity as the Yavapai County Recorder;  
8 YAVAPAI COUNTY BOARD OF  
9 SUPERVISORS, in their official capacity;  
10 RICHARD COLWELL, in his official  
11 capacity as the Yuma County Recorder; and  
12 YUMA COUNTY BOARD OF  
13 SUPERVISORS, in their official capacity,

14 Defendants.

15 Defendant Secretary of State Katie Hobbs’ (“Secretary of State”),  
16 Defendant/Contestee Kris Mayes’ (“Contestee”), the Maricopa County Defendants  
17 (“Maricopa”), and the Yavapai County Defendants (“Yavapai”) (collectively,  
18 “Defendants”) response briefs to Plaintiffs/Contestants (“Plaintiffs”) Petition to Inspect  
19 Ballots and Motion to Expedite Discovery break little new ground. Instead, the Secretary  
20 of State and Contestee each spend a significant portion of their Response briefs rehashing  
21 their respective Motions to Dismiss. For the reasons set forth in Plaintiffs’ Consolidated  
22 Response to Defendants’ Motions to Dismiss, we fundamentally disagree with Defendants’  
23 contentions.

24 With respect to the putative subject of their Response briefs, Plaintiffs’ Petition to  
25 Inspect Ballots and Plaintiffs’ Motion to Expedite Discovery, Defendants raise two basic  
26 arguments: that any discovery should be limited to that specifically described in A.R.S. §  
27 16-677 and that Plaintiffs’ discovery requests go beyond what is authorized by that section.  
28 On both counts, Defendants miss the mark.

1  
2 **I. Plaintiffs' Petition to Inspect Ballots Should be Granted**

3 As a preliminary matter, there is an irreconcilable tension between Defendants'  
4 continued opposition to Plaintiff's Petition to Inspect Ballots and their position that section  
5 16-677 sets the parameters for discovery in an election contest. Even if Defendants are  
6 correct in their claim that section 16-677 is the exclusive means of conducting fact-finding  
7 (they are not, for the reasons set forth in the Motion to Expedite Discovery and below),  
8 Plaintiffs' Petition to Inspect Ballots should be granted. There is no question that inspection  
9 of the ballots is permitted.

10 Section 16-677 states "[a]fter the statement of contest has been filed and the action  
11 is at issue, either party may have the ballots inspected before preparing for trial," provided  
12 the requesting party "shall file with the clerk of the court a verified petition stating that he  
13 cannot properly prepare for trial without an inspection of the ballots and shall file with the  
14 petition a bond" described in statute. A statement of contest has been filed. Plaintiffs have  
15 requested to inspect the ballots. Plaintiffs have filed a verified petition stating that they  
16 cannot properly prepare for trial without inspecting the ballots. And Plaintiffs have posted  
17 the required \$300 sum. Therefore, Plaintiffs have satisfied the statutory criteria to inspect  
18 the ballots.

19 Defendants do not seriously question Plaintiffs' assertion that they need to inspect  
20 ballots to prepare for trial. Instead, Defendants seek to preempt discovery by claiming, in  
21 the words of the Secretary of State, "there should be no trial." Secretary of State Response  
22 at 5. This is nothing more than a reassertion of Defendants' Motions to Dismiss and does  
23 not impugn Plaintiffs' statement of necessity.

24 Contestee claims that even if Plaintiffs have a right to inspect ballots under section  
25 16-677, Plaintiffs' request "exceeds what A.R.S. § 16-677 authorizes." Contestee Response  
26 at 5. But Contestee provides no support for this claim, and quickly engages in a rhetorical  
27 bait and switch by reiterating her Motion to Dismiss arguments as limitations on section 16-  
28 677. And on that point, the Contestee and the Defendants ignore the actual law on election



1 contests. Just to set the record straight, “honest mistakes or mere omissions on the part of  
2 election officers, or irregularities in directory matters, even though gross, if not fraudulent,  
3 will not void an election, unless they affect the result or at least render it uncertain.”

4 *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986)(quoting *Findley v. Sorenson*, 35  
5 Ariz. 265, 269 (1929). Plaintiffs have been clear that they have not alleged fraud, so the  
6 standard this Court should look to is whether the allegations support a finding that would  
7 “render...[the result] uncertain.” *Id.* That is the test, and clearly the closer the election, and  
8 the more votes cast, the less it takes to show such uncertainty.

9 Read most charitably, Contestee appears to be implicitly claiming that section 16-  
10 677 places some numerical limit on the number of ballots contestants can inspect, and that  
11 Plaintiffs’ request exceeds this limitation. But this limit is found nowhere in the statute.<sup>1</sup>

12 Contrary to Contestee’s claim, Plaintiffs do identify the need for the “specific ballots  
13 in question,” *i.e.* those that underwent duplication or electronic adjudication and those that  
14 show an undervote in the Attorney General Race: there is a documented history of errors in  
15 the duplication process, there is a documented record of errors in the electronic adjudication  
16 process, and there are good reasons to believe undervotes may be the result of technological  
17 constraints rather than true, intentional undervotes, as outlined in the Verified Statement of  
18 Election Contest.

19 Maricopa actually demonstrates exactly why Plaintiffs need to examine the ballots.  
20 Maricopa’s objection to inspection states that “adjudication is a **subjective** process  
21 conducted by a bi-partisan board.” (Maricopa Response 4: 1-2)(emphasis added). That is  
22 precisely why a party to an election contest is permitted to inspect the ballots—those  
23 tabulating the ballots do not always arrive at the correct conclusion, especially in light of  
24 the inherently subjective nature of some of tabulating, including adjudication, as the County  
25 points out.

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26  
27 <sup>1</sup> On at least one occasion, when facing the prospect of inspecting a large number of  
28 ballots, the Court authorized the inspection of a randomly drawn sample to assess the  
likely error rate. See *Ward v. Jackson*, Arizona Supreme Court No. CV-20-0343, 2020  
WL 8617817 (2020).

1  
2 Plaintiffs filed a valid election contest and have satisfied the elements of section 16-  
3 677. Their Petition to Inspect Ballots should be granted.

## 4 **II. Plaintiffs' Motion to Expedite Discovery Should Be Granted**

5 In the first instance, it should be clarified what is actually involved in this request  
6 after it has been refined and reduced by the Plaintiffs. At the return hearing on Wednesday,  
7 Plaintiffs pledged to re-examine what was needed, Plaintiffs did just that and  
8 communicated this to the Maricopa County Defendants yesterday. (Exhibit A). Most  
9 importantly, the opposition to the request for expedited discovery should not pose an  
10 obstacle to the petition to request the ballots, as the latter is clearly allowed under section  
11 16-677.

12 Maricopa County's points about the breadth of the discovery are no longer valid.  
13 The precise request is as follows, as stated in the amended draft Request for Production sent  
14 yesterday to Maricopa County:

15 1. Records reflecting or sufficient to identify, for **each** vote center operated in  
16 Maricopa County on November 8, 2022, the following:

17 A. All persons who cast a provisional ballot on Election Day that was not tabulated,  
18 the reasons why their provisional ballot was not counted, including any lists of such  
19 persons.

20 B. All persons who cast a mail-in ballot that was not counted, the reasons why their  
21 mail-in ballot was not counted, including any lists of such persons.

22 2. The unredacted CVR<sup>2</sup>.  
23

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24 <sup>2</sup> The unredacted CVR, or cast vote record, contains images of the ballots, though given  
25 the constraints of technology limited resort to actual physical ballots may be needed. This  
26 clearly falls under Section 16-677. And the CVR will greatly aid in review of the ballots  
27 because it can be used to quickly identify the universe of ballots that is sought, including  
28 where that physical ballot can be located if resort must be made to that actual ballot.  
Redactions are unnecessary to preserve the right of a voter to vote by secret ballot and  
would eviscerate the ability of Plaintiffs to utilize the data on the extremely compressed  
timeframe. Moreover, while unnecessary, they do not object to the entry of a protective  
order concerning this matter.

1  
2 Defendants do not seriously contest that any discovery in this case will need to be  
3 expedited. Nor could they given the hearing schedule the Court has set, with a hearing on  
4 these motions on Monday and an evidentiary hearing four days later on Friday. To the  
5 contrary, Defendant claims the opposite: that the timing of the election contest makes  
6 discovery impossible.

7 Defendants contest Plaintiffs' ability to obtain discovery at all. Specifically,  
8 Defendants claim that section 16-677 is the exclusive means of fact-finding, and that Rule  
9 34 is inapplicable to election contest actions. These assertions miss the mark.

10 There is nothing in section 16-677 that identifies it as *the only* means of obtaining  
11 information in an election contest. Instead, section 16-677 merely provides specific  
12 procedures for obtaining one type of information: information from the ballots themselves.

13 Looking beyond the statute, Maricopa claims that a 1948 case, *Grounds v. Lawe*, 67  
14 Ariz. 176 (1948) forecloses discovery. To do so, Maricopa extrapolates from language in  
15 the case indicating that the special nature of an election contest supersedes the Arizona  
16 Rules of Civil Procedure; since broader discovery is not explicitly authorized by the statute,  
17 Maricopa reasons, it is not permitted. The problem with this approach is that there are lots  
18 of things that the contest provisions do not spell out in detail that must be reasoned through  
19 by the court. There are nearly 80 rules of Arizona Civil Procedure; there are eight statutory  
20 provisions relating to election contests. The contest provisions are not nearly as  
21 comprehensive as Maricopa suggests. They do not, for example, specify procedures for  
22 conducting a "hearing of the contest" or even for filing a Motion to Dismiss, as Defendants  
23 have done. *See* A.R.S. § 16-676 (discussing timing for filing an "answer." While it may  
24 be reasonable to interpret "answer" to include a Motion to Dismiss, doing so relies on the  
25 same application of extratextual procedure Defendants would forbid in the context of  
26 discovery).

27 What the election contest provisions do describe in detail is how to initiate a contest.  
28 That was also the only question at issue in the cited portion of *Grounds*: whether the

1 contestee could file an amended statement of contest. Given the specificity with which the  
2 contest provisions describe timeframes for initiating a contest, it makes sense that the  
3 contest provisions would supplant the general rules of civil procedure concerning  
4 amendments. It thus makes sense that *Gounds* is better viewed as a case concerning the  
5 initiation of a contest, rather than a wholesale repudiation of general judicial procedure in  
6 an election contest. Any effort to apply *Grounds* more broadly would be the application of  
7 dictum rather than the more limited holding of the case.

8 Finally, even if the Arizona Rules of Civil Procedure were inapplicable in an election  
9 contest, Defendants pointedly ignore that Plaintiffs have purposefully invoked this Court's  
10 special action jurisdiction, *see* Statement of Contest ¶ 6, and requested a writ of mandamus  
11 as an alternative remedy with respect to each of their claims, *id.* ¶¶ 74, 82, 88, 95, 102. *See*  
12 *also* Consolidated Response to Motions to Dismiss at 9. And these are public records  
13 anyway, and subject to prompt production under A.R.S. § 39-121 *et. seq.*, and mandamus  
14 relief on that basis alone, even absent this Court action. Thus, there are separate grounds,  
15 apart from the statutory contest procedures, for granting discovery.

16 Lastly, Yavapai, Santa Cruz and Graham Counties have objected to ballot inspection.  
17 Plaintiffs seek no ballots from those Counties.

### 18 **III. CONCLUSION**

19 The object of this contest is not to rubberstamp an election regardless of the merits;  
20 it is to conduct a fair proceeding to determine the will of Arizona's voters. Doing so requires  
21 discovery. Nothing in the rules governing this contest forbid discovery. To the contrary,  
22 the statute explicitly authorizes the inspection of ballots. Accordingly, the Court should  
23 grant Plaintiffs' Petition to Inspect Ballots and Motion to Expedite Discovery.

1 RESPECTFULLY SUBMITTED this 16th day of December, 2022.

2  
3  
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25  
26  
27  
28

# EXHIBIT A

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December 15, 2022

**Via email to:**

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**Re: Your letter of December 14, 2022**

Dear Ms. Craiger:

Thank you for your letter of December 14, 2022.

Unfortunately, due to time concerns I cannot response to everything you state in the letter, but suffice it to say we disagree with your claim of the futility of our election contest/mandamus action. And I did want to make the following points.

You cite a 2020 Superior Court case to counter our argument about allowing certain voters to submit a ballot after the election. We disagree with your contention. As you know, Superior Court cases are not binding, and the Arizona Constitution contains an explicit right to suffrage. Art. VII, Sec. 2. If someone was denied the right to vote due to a wrongful act of your client, and that person can be identified, we think that vote should count.

You also go through a ballot counting exercise that I find difficult to follow, and I certainly do not agree with your calculations. It also omits some of our claims in order to produce a number that is lower than the 511-vote current difference. But even so, our Complaint also asks for mandamus relief. If there are additional votes that are lawful and have not been counted, they should be, even if does not make the difference in any particular race.

This is one of the reasons why it is difficult for us to understand Maricopa County's decision to "weigh in" on the overall merits of our claims, including our mandamus claims. It represents a significant departure from past practices, and we believe is completely unwarranted, especially in light of the closeness of this race.

Ms. Craiger  
December 15, 2022

I believe you have missed our point completely on the votes that the County's machines have wrongly tabulated as an "undervote". Undervotes do not typically go to adjudication. That explains why there are 50,000 undervotes in the Attorney General's race in Maricopa County, but only 3,639 adjudications (with 267 undervotes) in this race.

We are reviewing what you stated about the check in and check out procedures, the total number of voters impacted, and what it means for our case. Assuming this is accurate (and I am not suggesting you would intentionally provide inaccurate information), this is the type of information that, while it may not favor my client, is actually helpful in terms of resolving certain questions.

I have also attached a much smaller Request for Production to reflect our current plans to utilize the two potential trial days that were provided and our review of the documents the County has already provided pursuant to the public records request submitted by Kory Langhofer. That will be provided to you shortly

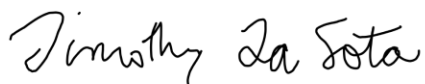
I would note that we would like the cast vote record (CVR) in unredacted form. That is, it should have the ballot identification number and ballot images. We disagree with any contention that this would disclose personally identifying information, and we would be willing to agree to a protective order if need be. And this was already turned over, albeit redacted, so it should not be at all burdensome.

This data is critical as we believe it would resolve any potential ballot access issues for the duplication, adjudication and undervote issues we have raised.

The technology allows these comparisons in electronic format. You probably saw the court filing from Contestee Mayes arguing that it would be too difficult to examine the ballots. These would seem to solve the issues raised while allowing our client to access the materials he needs.

Very truly yours,

**TIMOTHY A. LA SOTA PLC**

A handwritten signature in cursive script that reads "Timothy La Sota".

Timothy A. La Sota