

Introduction

¶1 Arizona successfully administered a fair and secure general election with near-record turnout. After the election, county officials worked hard to tabulate, verify, and certify the results.

¶2 Plaintiff didn't like the outcome in the presidential race, so she and her allies filed multiple lawsuits trying to undo it. But "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections."¹ And the people of Arizona made their choice, electing a slate of presidential electors by a margin of 10,457 votes. It's time for this litigation to end and for Arizonans to have finality.

¶3 Election contests are serious business. As the trial court recognized, "to nullify an election that State election officials have declared valid is an extraordinary act to be undertaken only in extraordinary circumstances." It requires a contestant to come forward with specific allegations and proof. Plaintiff did neither.

¶4 First, the trial court correctly held that laches bars Plaintiff's claims related to insufficient observation. Plaintiff should have raised

¹ *Donald J. Trump for President, Inc. v. Sec'y Commonwealth of Penn.*, No. 20-3371 (3d. Cir. Nov. 27, 2020), <https://www2.ca3.uscourts.gov/opinarch/203371np.pdf>.

that issue when it was still possible to remedy it, not after her preferred candidate lost.

¶5 Second, because Plaintiff alleged only insufficient observation as the basis for an election contest in her Complaint, the trial court's laches ruling should have ended the case.

¶6 Third, though the Court need not reach the merits, Plaintiff failed to meet her burden of proof. At most, Plaintiff showed that a few unintentional errors caused President Trump to lose a handful of votes, but nowhere near enough to close President-Elect Biden's margin of victory. Plaintiff didn't establish misconduct, fraud, illegal votes, or erroneous vote counts, much less enough to change the election's outcome. The trial court correctly rejected these claims, and this Court should too.

Statement of the Case & Statement of Facts

¶7 On November 9, Maricopa County completed its hand count audit, which included 5,000 early ballots and a five percent sampling of

all Election Day ballots.² That audit revealed no discrepancies in the tabulation of votes. *Id.* On November 23, the County completed its canvass, certifying that the Biden Electors received 1,040,774 votes and the Trump Electors received 995,665 votes.³ Plaintiff does not challenge the outcome in any other race.

¶8 On November 30, the Secretary certified the statewide canvass under A.R.S. § [16-648](#),⁴ and the Secretary and Governor signed certificates of ascertainment for presidential electors confirming that the Biden Electors received 10,457 more votes than the Trump Electors.

A. Early Ballot Verification.

¶9 When a voter returns an early ballot, the county recorder compares the signature on the ballot affidavit to the voter's signature(s) and other information on file in the voter's registration record. A.R.S.

² Ariz. Sec'y of State, Maricopa County 2020 General Election Hand Count Audit Report, https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf.

³ Ariz. Sec'y of State, Maricopa County 2020 General Election Canvass, https://azsos.gov/sites/default/files/2020.11.23-Maricopa-General_Election_Canvass_Summary.pdf.

⁴ Ariz. Sec'y of State, 2020 General Election Canvass, https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf.

§ [16-550](#)(A). If election officials are satisfied that the registered voter signed the affidavit, they send the ballot for tabulation. If not, they contact the voter to verify the voter's identity.

B. Ballot Duplication.

¶10 When a ballot is damaged or defective and cannot be read by tabulation machines, a bi-partisan duplication board duplicates the voter's choices onto a new ballot. A.R.S. § [16-621](#)(A); [EPM](#) Ch. 10 § II.D. The county then tabulates the duplicated ballot. Maricopa County duplicated 27,869 ballots in this election. [APP42]

C. Plaintiff's "Election Contest."

¶11 Plaintiff filed a Rule 27 Petition for discovery, then later filed an Amended Complaint for an election contest. Plaintiff contested the presidential election on these grounds: (1) "misconduct"; (2) "illegal votes"; and (3) because of an "erroneous count of votes," the Biden Electors "did not in fact receive the highest number of votes." [¶¶ 30-31] Her claims stem from two issues.

¶12 First, Plaintiff alleged that observers were not close enough to properly observe signature validation for early ballots. [*Id.* ¶¶ 11-23]

¶13 Second, she alleged that election workers and observers had to "catch" errors in Maricopa County's "highly inaccurate" duplication

software [¶ 27], that the county sent duplicated ballots to a third-party vendor for printing, and observers were “unable to observe” whether the vendor “print[ed] the correct ballots.” [¶ 26].

¶14 Based on this, Plaintiff sought to invalidate the election of the Biden Electors or declare the Trump Electors the winners instead.

D. Plaintiff’s Ballot and Envelope Inspection.

¶15 Over the Defendants’ objections, the trial court granted Plaintiff’s Rule 27 request, allowing her to inspect a “sampling” of: (1) 100 ballot affidavits to compare them to the voter’s registration file; and (2) 100 duplicated ballots to compare them to the original ballot.⁵ [APP20] During the signature review, Maricopa County confirmed that all 100 ballot affidavits were properly verified. After the initial inspection, Plaintiff filed a motion to compel further inspection of more duplicated

⁵ Plaintiff wasn’t entitled to this inspection, and the trial court erred in granting it. The Court can affirm on this alternative ground, because Plaintiff obtained her only evidence through unlawful discovery. The Legislature authorizes the inspection of “ballots” only through a petition procedure filed after the statement of contest, A.R.S. § [16-677](#)(A), and only if the petitioner satisfies certain conditions. The trial court granted this discovery before Plaintiff filed her election contest, Plaintiff didn’t comply with any other procedural conditions, and she inspected ballot return envelopes and voter registration files, neither of which is a “ballot.” The trial court erred by allowing inspection in violation of A.R.S. § [16-677](#), setting dangerous precedent and risking ballot confidentiality.

ballots. [APP22] The Maricopa County Board of Supervisors permitted inspection of up to 2,500 more duplicated ballots, but the trial court did not continue the hearing. The next day Plaintiff inspected 1,526 more duplicated ballots.

¶16 The parties inspected 1,626 duplicated ballots and identified nine errors. [APP42] Six ballots originally cast for Trump had no vote or an overvote (two bubbles filled) on the duplicated ballot, and two ballots originally cast for Biden had no vote or an overvote on the duplicate. [Tr. Ex. 35] One ballot had a vote for Trump, but the duplicated ballot was erroneously marked as a vote for Biden. [Tr. Ex. 14]

II. The Evidentiary Hearing.

¶17 The trial court held a two-day hearing. On the first day, the trial court dismissed Plaintiff's claims "based on laches as to any claim of misconduct based on insufficient opportunity to observe[.]" [APP30]

¶18 Although Plaintiff's Complaint rests only on "insufficient opportunity to observe," the trial court allowed Plaintiff (over the Secretary's objection) to present evidence on two other unalleged claims: that election officials (1) failed to properly verify signatures on mail-in ballots; and (2) made errors when duplicating ballots.

A. Ballot Affidavit Signatures.

¶19 The trial court found that Maricopa County “faithfully” followed Arizona’s signature verification requirements. [APP40-41] It also found that Plaintiff’s expert “found no sign of forgery or simulation as to any of these ballots,” and the Biden Elector’s expert “found no basis for rejecting any of the signatures.” [APP41] And it further held that there was no “misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots.” [APP41]

B. Duplicated Ballots.

¶20 The trial court found that “there were mistakes in the duplication process, and that the mistakes were few.” [APP42] The trial court recognized that ballot duplication has a risk of “human error,” but that “there is no evidence that the inaccuracies were intentional or part of a fraudulent scheme.” It also held that “the evidence does not show any impact on the outcome” of the presidential election. [APP42]

C. This Appeal.

¶21 Delaying this case, as Plaintiff requests, threatens Arizona’s ability to participate in the Electoral College. The electors will meet on December 14 to cast their votes for President and Vice President, 3 U.S.C.

§ 7, and any determination of a “controversy or contest concerning the . . . electors” made by December 8 “shall be conclusive.” 3 U.S.C. § 5. To give Arizonans the finality they deserve, the Court should decide this appeal by December 8.

Statement of Issues

1. Did the trial court correctly hold that laches bars Plaintiff’s claims that election observers were unable to sufficiently observe signature verification and ballot duplication procedures?

2. Did the trial court’s laches ruling dispose of Plaintiff’s Complaint because the only ground set forth in her election contest was the lack of observation?

3. Did the trial court correctly hold that Plaintiff failed to meet her burden of proving misconduct, illegal votes, or an erroneous vote count that would change the outcome of the presidential election?

Argument

I. Plaintiff’s Claims over Inadequate “Observation” Are Barred by Laches.

¶22 This Court “review[s] a trial court’s ruling on laches for an abuse of discretion.” *In re Indenture of Tr. Dated Jan. 13, 1964*, 235 Ariz.

40, 48 ¶ 21 (App. 2014). The trial court properly dismissed Plaintiff's claims based on laches.

¶23 Laches “will bar a claim if a party’s unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). And in election matters, parties must raise “alleged violations of election procedure prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 11 (2002). They cannot sit on their hands until the only “remedy” is to “essentially ask [the court] to overturn the will of the people as expressed in the election.” *Id.* Yet Plaintiff did just that.

¶24 During this election, political party observers observed signature verification and the ballot duplication process. [¶¶ 23, 27] Even so, Plaintiff claims for the first time that observers could not stand as close as they wanted during the signature verification process [¶¶ 22-23], and observers were not present at an “offsite printing company” that printed duplicated ballots [¶¶ 25-26].

¶25 Plaintiff's delay in raising these complaints is unreasonable. Plaintiff concedes that observers complained that they couldn't see the signature verification process and asked to use “binoculars” [¶ 23], yet

did nothing more to remedy the issue. If Plaintiff believed she had a valid legal objection (which she doesn't), then she should have filed an emergency lawsuit to correct this supposed "misconduct" in real time.

¶26 Instead, Plaintiff waited to sue until after her preferred candidate lost the election, when she could do the most damage to voter confidence in our elections system. Plaintiff cannot "subvert the election process by intentionally delaying a request for remedial action to see first whether [she] will be successful at the polls." [*McComb v. Superior Court In & For Cty. of Maricopa*](#), 189 Ariz. 518, 526 (App. 1997) (quotation omitted). The trial court correctly held that Plaintiff's claims over observation procedures are barred by laches. [APP40]

II. The Trial Court's Laches Ruling Disposed of Plaintiff's Election Contest, Which Alleged Lack of "Observation."

¶27 Though the trial court dismissed Plaintiff's "observation" claims on laches grounds, it allowed Plaintiff to present evidence in support of other vague and unarticulated theories. [APP30-31] The Secretary objected, because Plaintiff's election contest only raised allegations that election observers didn't get to sufficiently observe certain steps in the process. [¶¶ 21-23, 26, 32-38] The trial court allowed

Plaintiff to present evidence over the Secretary's objection, but Plaintiff never asked to amend her Complaint under Ariz. R. Civ. P. 15(b)(1).

¶28 Thus, Plaintiff is limited to the allegations in her Complaint, the trial court's laches ruling disposed of her only claim, and the Court may affirm on that ground. [*Leflet v. Redwood Fire & Cas. Ins. Co.*](#), 226 Ariz. 297, 300 ¶ 12 (App. 2011) (appellate courts may "affirm a trial court on any basis supported by the record") (quotation omitted).

III. The Trial Court Correctly Held That Plaintiff Failed to Meet Her Burden of Proof.

¶29 If the Court reaches the merits, it should affirm the trial court's holding that Plaintiff failed to prove her case.

¶30 Arizona has a "strong public policy favoring stability and finality of election results." [*Ariz. City Sanitary Dist. v. Olson*](#), 224 Ariz. 330, 334 ¶ 12 (App. 2010) (quotation omitted). For that reason, the "legislature has enacted specific statutes governing the method for challenging an election, . . . and those provisions must be strictly followed." *Id.*; see also [*Griffin v. Buzard*](#), 86 Ariz. 166, 168 (1959) (election contests are "purely statutory").

¶31 A.R.S. § [16-672](#)(A) provides the only grounds on which an elector may contest the results of an election, and Plaintiff had the

burden to show that her contest “falls within” the statute. [Henderson v. Carter](#), 34 Ariz. 528, 534–35 (1928). Plaintiff also had the burden of proving that she is entitled to the extraordinary remedy of overturning election results. Arizona courts apply “all reasonable presumptions” in “favor [of] the validity of an election,” which control absent “a showing of fraud” or “a showing that . . . the result would have been different.” [Moore v. City of Page](#), 148 Ariz. 151, 159 (App. 1986).

¶32 Plaintiff contests the presidential election on three grounds: (1) “misconduct”; (2) “illegal votes”; and (3) an “erroneous count of votes.” [¶¶ 30-31] The trial court correctly rejected all three based on the record before it, and factual findings to which this Court must defer unless clearly erroneous. [Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.](#), 167 Ariz. 254, 257 (1991).

A. Plaintiff Failed to Prove Misconduct.

¶33 Arizona courts presume the “good faith and honesty” of election officials. [Hunt v. Campbell](#), 19 Ariz. 254, 268 (1917). “[M]ere suspicion and conjecture of wrongdoing” is not enough. *Id.* at 264.

¶34 Plaintiff argued that election officials engaged in “misconduct” by (1) failing to allow sufficient observation, (2) failing to

properly verify early ballot signatures, and (3) making nine ballot duplication errors. The trial court properly rejected these claims.

¶35 **First**, a failure to provide Plaintiff's preferred level of observation is not "misconduct." Arizona law doesn't grant any right to observe signature verification. Instead, the EPM (Ch. 8 § III) authorizes county recorders to allow observation of "processing procedures" (including signature verification) as a discretionary privilege, not a right. And even if observers had a statutory right to a front-row seat to every step of the election process (they don't), failure to allow adequate observation access can't upend the election. Unless an election statute "expressly provides that a failure to observe certain requirements invalidates the vote," courts will not "throw out" votes just because election officials "failed to comply with . . . statutory regulations." [Findley v. Sorenson](#), 35 Ariz. 265, 270 (1929).

¶36 **Second**, Plaintiff failed to prove misconduct in the signature verification process. Arizona law requires election officials to compare the signature on a ballot affidavit to the voter's registration records. A.R.S. § [16-550\(A\)](#); [EPM](#) Ch. 2 § VI.A.1. If satisfied that the registered voter signed the affidavit, the election officials send the ballot for processing

and tabulation. *Id.* Maricopa County did exactly that, and Plaintiff didn't prove otherwise. The trial court correctly held that there was no "misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots." [APP41]

¶37 **Third**, Plaintiff did not prove that any of the nine ballot duplication errors amounted to "misconduct." The trial court found "no evidence that the inaccuracies were intentional or part of a fraudulent scheme. They were mistakes." [APP42] And under Arizona law, "honest mistakes or mere omissions on the part of the election officers" are not enough to establish "misconduct." [Findley](#), 35 Ariz. at 269. Indeed, "a technical error, without more," cannot override the "constitutional right of the voters . . . to cast their vote and have their vote counted." [Witten v. Butcher](#), 238 W. Va. 323, 329 (2016).

B. Plaintiff Did Not Prove a Single "Illegal Vote."

¶38 Plaintiff had the burden of proving that (1) illegal votes were cast and (2) those illegal votes "were sufficient to change the outcome of the election." [Moore](#), 148 Ariz. at 156. She proved neither.

¶39 Plaintiff's own expert testified that she saw no evidence of fraud when she reviewed ballot signatures. [APP41] And Plaintiff offered

no evidence that any duplication boards intentionally changed votes. [APP42] “In no case is it more imperative than in election contests that . . . the burden of proving fraud is upon him who alleges it.” *Hunt*, 19 Ariz. at 264 (quotation omitted). The Court cannot infer fraud “from slight irregularities, unconnected with incriminating circumstances.” *Id.*

¶40 Even if Plaintiff had shown that the duplication errors were “illegal votes,” it wouldn’t change the outcome. Plaintiff had to prove that there were enough mis-duplicated ballots to make up Biden’s 10,457-vote margin. But Plaintiff’s own inspection of sampled ballots showed an error rate of only .37% in Trump’s favor, and if applied across the entire universe of duplicated ballots in Maricopa County (which is improper), Trump would net only 103 votes. Plaintiff needed an “error rate” more than 100 times higher than that. *Moore*, 148 Ariz. at 157 (election contest failed because “the outcome of the election could not have differed”).

¶41 The trial court correctly held that Plaintiff “did not prove illegal votes, much less enough to affect the outcome of the election.”

[APP42]

C. Plaintiff Failed to Prove That the Biden Electors Did Not in Fact Receive the Highest Number of Votes.

¶42 Finally, for the same reason, Plaintiff failed to prove that the Biden Electors “did not in fact receive the highest number of votes” in the presidential race. A.R.S. § 16-672(A)(5). Plaintiff established nine ballot duplication errors. That’s not enough to change the outcome.

Rule 21(a) Notice

¶43 The Secretary requests her attorneys’ fees and costs on appeal. A.R.S. §§ 12-349, 341, 342. This was Plaintiff’s and her allies’ fifth frivolous lawsuit aimed at undermining the integrity of the election in Arizona, and the Secretary has spent significant time and resources defending them.

Conclusion

¶44 The people of Arizona have spoken, and the Court should affirm the judgment below.

RESPECTFULLY SUBMITTED this 7th day of December, 2020.

COPPERSMITH BROCKELMAN PLC

By /s/ Roopali H. Desai

Roopali H. Desai
D. Andrew Gaona
Kristen Yost

*Attorneys for Appellee
Secretary of State Katie Hobbs*

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015285

11/30/2020

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
C. Ladden
Deputy

KELLI WARD

DENNIS I WILENCHIK

v.

CONSTANCE JACKSON, et al.

ROOPALI HARDIN DESAI
SARAH R GONSKI
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE WARNER

MINUTE ENTRY

East Court Building – Courtroom 414

10:35 a.m. This is the time set for a Hearing on Plaintiff’s Verified Petition for Rule 27 Discovery. Plaintiff is represented by counsel, John D. Wilenchik. Biden Elector Defendants Constance Jackson, Felicia Rotellini, Fred Yamashita, James McLaughlin, Jonathan Nez, Luis Alberto Heredia, Ned Norris, Regina Romero, Sandra D. Kennedy, Stephen Roe Lewis, and Steve Gallardo (collectively, the “Biden Elector Defendants”), are represented by counsel, Sarah R. Gonski, Roy Herrera, and Bruce Spiva (pending *pro hac vice*). Proposed Intervenor Katie Hobbs (in her official capacity as the Arizona Secretary of State), is represented by counsel, Roopali Desai. All parties appear via GoToMeeting.

A record of the proceedings is made digitally in lieu of a court reporter.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015285

11/30/2020

Discussion is held regarding Arizona Secretary of State Katie Hobbs' Motion to Intervene, filed November 30, 2020, and the pending application for Bruce Spiva to appear in as *pro hac vice*.

IT IS ORDERED granting the Motion to Intervene and allowing the Arizona Secretary of State to intervene in this matter.

IT IS FURTHER ORDERED granting the application, on a temporary basis, to associate Bruce Spiva as *pro hac vice* counsel for the Biden Elector Defendants.

Further discussion is held regarding upcoming election deadlines and setting an Evidentiary Hearing.

Further discussion is held regarding the discovery that Plaintiff is seeking.

LET THE RECORD REFLECT that it is 11:09 a.m. and County Deputy Attorney, Joseph La Rue is now present on behalf of Adrian Fontes (in his official capacity as Maricopa County Reporter) and the Maricopa Board of Supervisors.

Ms. Desai requests that the parties have an opportunity to have the court decide the procedural issue as a threshold matter before ruling on the discovery matter.

IT IS FURTHER ORDERED denying Ms. Desai's request to have the parties have an opportunity to have the court decide the procedural issue as a threshold matter before ruling on the discovery matter.

IT IS FURTHER ORDERED setting an Evidentiary Hearing regarding Plaintiff's anticipated election contest petition on **Thursday, December 3, 2020 at 10:30 a.m. to 4:30 p.m.** in this division. This matter will be heard by video/audio conference using GoToMeeting. Counsel are strongly urged to appear by video instead of audio alone so that counsel and the court can see each other. **Division staff will email parties with the GoToMeeting link before the hearing.**

IT IS FURTHER ORDERED that an exhibit and witness list be exchanged, filed with the clerk of the court, and emailed to division staff **no later than 4:00 p.m. on December 2, 2020.** The parties shall email the division's Judicial Assistant, Michelle McBride, at Michelle.McBride@JBAZMC.Maricopa.Gov and Courtroom Assistant, Rebekah Richardson, at Rebekah.Richardson@jbazmc.maricopa.gov. (See **LATER:** for additional instructions)

IT IS FURTHER ORDERED granting the Rule 27 petition in part as follows:

Docket Code 056

Form V000A

Page 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015285

11/30/2020

1. Plaintiff may review 100 mail-in ballot envelopes (or images of them), selected at random by election officials, and compare them to voter signatures on file, subject to the following confidentiality order. Only counsel, their staff, and retained experts may view those documents. They may NOT be viewed by the parties or any party representative without leave of the court.
2. Plaintiff may review 100 duplicate ballots and the original ballots from which they were duplicated, selected at random by election officials.

IT IS FURTHER ORDERED that if any document identifying a voter is filed as an exhibit, it shall be filed under seal and will not be presented or discussed publicly.

IT IS FURTHER ORDERED that by **Thursday, December 3, 2020 at 10:30 a.m.**, Plaintiff shall lodge proposed findings of fact and conclusions of law. Defendants and Intervenor may do so as well, but it is not required.

11:41 a.m. Matter concludes.

LATER:

For electronic and in-person exhibit submission, please visit, <https://www.clerkofcourt.maricopa.gov/services/exhibits-submission>. The webpage will provide instructions and guidance for electronic submission as well as locations for in-person submission of exhibits.

If filing paper exhibits, please adhere to the following guidelines:

1. Exhibits will be marked consecutively. *The clerk cannot reserve numbers for exhibits that will be provided at a later date.* Any missing exhibits will not be considered and the numbers of all following exhibits will be moved up. If Defendant's exhibits are received prior to Plaintiff's exhibits, the clerk may mark them first with Plaintiff's exhibits following.
2. Original Depositions will not be marked as an exhibit. **Original** depositions to be used for impeachment purposes shall be provided to the clerk on the first day of trial to be hand-filed.
3. Do not submit duplicate exhibits, **it is essential that the parties confer to avoid submitting duplicate exhibits.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015285

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4. If large charts or blow-ups are anticipated to be used, please include a small version (or photo) which can be marked as the exhibit. The charts and blow-ups are used for demonstrative purpose only, are not marked as the exhibits, and are returned.
5. Each multiple page exhibit **MUST** be securely fastened together by staple or pronged fasteners. **DO NOT use paper clips, rubber bands, binder clips or submit loose sheets of paper.**
6. Do not put numbers on the exhibits themselves; instead, **use a COLORED sheet with the exhibit number on it.** Place the colored sheet in front of each exhibit, however, **DO NOT staple or paper-clip it to the exhibit itself** (this should be the only loose sheet).
7. The parties are to provide a workable list of exhibits. The list should include a title or description of each exhibit. (See blank sample of the following table as a reference).

Exhibit No.	Identified By	Description <i>Should be verifiable when viewing the first page of the exhibit</i>	Stipulated in Evidence/Objection

PLEASE NOTE: Each party shall provide a binder of exhibits for the court's use. Each exhibit shall be separated by numbered divider tabs.

For additional assistance in preparation of exhibits contact the courtroom clerk at:
Camille.Ladden@maricopa.gov or (602) 506-8806.



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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

KELLI WARD,

Plaintiff/Contestant;

vs.

**CONSTANCE JACKSON; FELICIA
ROTELLINI; FRED YAMASHITA;
JAMES MCLAUGHLIN; JONATHAN
NEZ; LUIS ALBERTO HEREDIA; NED
NORRIS; REGINA ROMERO; SANDRA D.
KENNEDY; STEPHEN ROE LEWIS; and,
STEVE GALLARDO;**

Defendants/Contestees.

Case No. CV2020-015285

MOTION TO COMPEL,

OR

**MOTION FOR CONTINUED
INSPECTION**

(Elections Matter)

(Expedited Relief Requested)

Plaintiff/Contestant (“Plaintiff”) hereby files this Motion to Compel, or Motion for Continued Inspection.

On Tuesday, December 1, 2020, representatives of Plaintiffs, Defendants, and Intervenor Hobbs attended an inspection of ballots at the Maricopa County Tabulation and Election Center (“MCTEC”). The inspection of “duplicate” ballots began at around 4:30 PM (shortly after the

court hearing on Defendants' request to exclude credentialed observers). The inspection concluded at around 6:00 P.M., with one credentialed observer and undersigned counsel present and observing the review of duplicate ballots, on behalf of Plaintiff. (Counsel Gonski and Desai were present on behalf of Defendants and Intervenor Hobbs, respectively.)

Of the one hundred (100) duplicate ballots that were inspected and compared to their "originals," a ballot was identified where the original was clearly a vote for Trump, and the duplicate ballot switched the vote to Biden.

A second ballot was also identified on which the original ballot was clearly a vote only for Trump, but the duplicate ballot had a vote for both Trump and a "blank" write-in candidate, causing the "Trump" vote to be cancelled (due to an "over-vote").

There were no errors observed in the sample which granted a vote to Trump, or which cancelled out a Biden vote.

Given the extremely small sample size – and the fact that candidates Trump and Biden are apart by less than one half of one percent apart in the official statewide canvas (0.03%, or zero point zero three percent)¹ – a *prima facie* error rate of two percent against Trump alone is obviously of serious concern.²

Plaintiff therefore asks the Court to order that the inspection of duplicate ballots continue, on a larger scale (of more ballots, e.g. 2,500), and that a trial of the matter be continued pending its result.

¹ According to the Secretary of State's canvass, there were 3,333,829 total votes cast statewide for candidates Trump and Biden (1,661,686 for Trump, 1,672,143 for Biden).

² With respect to the separate analysis of one hundred signed ballot envelopes – two handwriting experts attended, along with lawyers. The result of that analysis appears to be that around eight to ten percent of the mail-in ballots had "inconclusive" matches – which is not to say that the signatures were invalid or fraudulent, simply that the experts cannot say to a professional standard one way or the other, apparently because there were too few signatures on file.

On average, it took around only one minute for each duplicate ballot to be reviewed, by a single observer. (As briefly discussed in the Tuesday “discovery” hearing, the county just made one table/computer available for the review.) With a team of five observers, a larger twenty-five hundred (2,500) sample could be reviewed in a single day (eight hours. Plaintiff actually brought a team of five observers to this inspection; but again, the county accommodated only one ballot being inspected at a time).

As of this writing, the county has not committed to what the total number of duplicate ballots is for Maricopa County. Further, the total number of duplicate ballots statewide is unknown. Plaintiff asks that the Court order the Secretary of State to produce that information, to the extent known or knowable. If the number of statewide duplicate ballots is significant, as Plaintiff believes, then Plaintiff asks to perform a reasonable inspection of duplicate ballots statewide.

Finally, to the extent that the Court remains concerned about whether additional discovery will impinge on the so-called “safe harbor” date of December 8th in 3 U.S.C. § 5 (the date that was discussed during the Monday hearing, and also the subject of much discussion in *Bush v. Gore*) – a short legal brief and argument on the issue follows (which will also be repeated in Plaintiff’s Proposed Findings of Fact and Conclusions of Law):

The “Safe Harbor” Date

The so-called “safe harbor” date of December 8th, 2020 is “not serious” enough to defeat further inquiry into the validity of the ballots. *Bush v. Gore*, 531 U.S. 98, 130 (2000)(Souter, J., dissenting). If that date were to pass without a resolution of this case, then Arizona “would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes ‘ha[d] not been regularly given.’” *Id.*, 531 U.S. at 143 (emphasis original). Further, in contrast to the State of Florida in *Bush v. Gore*, neither Arizona’s legislature nor its courts have expressed a “wish” that Arizona must resolve judicial disputes regarding the selection of presidential electors

by the federal “safe harbor” date—to the contrary, Arizona’s statute regarding the selection of presidential-electors, A.R.S. § 16 212, merely states that electors shall cast their vote “[a]fter the secretary of state issues the statewide canvass containing the results of a presidential election.” A.R.S. § 16-212(B). Also, while December 14th is the date under federal law for presidential electors to “meet and give” their vote in each state, which is then transmitted to Congress (3 U.S.C. §§ 7, 9, 11) – and while the “fourth Wednesday in December,” i.e. December 23rd, is the date on which Congress must “request the state secretary of state to send a certified return immediately” if Congress has not already received those votes (3 U.S.C. § 12) – “none of these dates has ultimate significance in light of Congress’ detailed provisions for determining, on ‘the sixth day of January,’ the validity of electoral votes.” *Bush*, 531 U.S. at 143 (Ginsburg, J., dissenting); *see also* 3 U.S.C. § 15. In other words, the only deadline of any practical significance is January 6th, which is when Congress actually meets to count the electoral votes (and even after that, there is the “truly” final constitutional deadline of January 20th for inauguration of the President, per the 20th Amendment).

So the bottom line is: even if a final judicial decision comes after the “safe harbor” date of December 8th, then the court’s decision “must” still stand, unless there is (1) a formal objection to it in the U.S. Congress (by both a Senator and Representative), and (2) *both* Houses of Congress determine that the electors’ vote was not “regularly given.” *See* 3 U.S.C.A. § 15. For both Houses of Congress to agree to set aside the Court’s ruling would be an unlikely, unprecedented, and – for the reasons that follow – unconstitutional act.

Article II, Section 1, clause two of the United States Constitution expressly vests authority in the State legislature to appoint presidential electors “in such Manner as the Legislature thereof may direct.” The federal statutes at issue – 3 U.S.C. §§ 7, 9, 11 – unconstitutionally infringe on the power of the State legislature to direct the “manner” of appointing presidential electors, including when they are applied to create “deadlines” on the

appointment of electors and on the resolution of presidential-electoral disputes that interfere with deadlines that the legislature has already set for election contests under Arizona law. A.R.S. §§ 16-676, -677 provide that the Court shall set a time for the hearing of an election contest within ten days of the certification of the vote (which just happened Monday); that “either party may have the ballots inspected before preparing for trial”; that “[t]he court shall continue in session to hear and determine all issues arising in contested elections”; and that “[a]fter hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment...” Where the result of the federal statutes is to hold a trial within only three days of the contest being filed, with a very limited opportunity for an inspection of ballots, Congress has unconstitutionally infringed on the right of the state legislature to direct the “manner” in which presidential electors are chosen.

Finally, “[d]ue process requires that a party have an opportunity to be heard at a meaningful time and in a meaningful manner.” *McClung v. Bennett*, 225 Ariz. 154, 156, 235 P.3d 1037, 1039 (2010); U.S.C.A. Const. Amend. 14. Again, to hold a trial within only three days of a major elections contest being filed—and with the opportunity to inspect only hundreds out of millions of ballots—denies Plaintiff the opportunity to be meaningfully heard.

RESPECTFULLY SUBMITTED this 2nd day of December, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John “Jack” D. Wilenchik

Dennis I. Wilenchik, Esq.

Lee Miller, Esq.

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of December, 2020.

ELECTRONICALLY transmitted via
AZTurboCourt.com and emailed this 2nd
day of December, 2020 to the Honorable
Randall Warner

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HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
C. Ladden
Deputy

KELLI WARD

DENNIS I WILENCHIK

v.

CONSTANCE JACKSON, et al.

SARAH R GONSKI

ROOPALI HARDIN DESAI
JOSEPH EUGENE LA RUE
DAVID SPILSBURY
DANIEL A ARELLANO
ROY HERRERA
COURT ADMIN-CIVIL-ARB DESK
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700 THIRTEENTH STREET, NW
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WASHINGTON DC 20005

MINUTE ENTRY

Prior to commencement of this Evidentiary Hearing, Plaintiff's exhibits 1 through 15; Biden Elector Defendants' exhibit 16; Intervenor Maricopa County Board of Supervisors and proposed Intervenor Adrian Fontes' exhibits 17 through 30 and 35; and Intervenor Secretary of State's exhibits 31 through 34 are marked for identification.

East Court Building – Courtroom 414

10:30 a.m. This is the time set for an Evidentiary Hearing on Plaintiff's anticipated election contest petition via GoToMeeting.

The following parties/counsel are present virtually through GoToMeeting and/or telephonically:

- Plaintiff Kelli Ward is represented by counsel, John D. Wilenchik.
- Defendants Constance Jackson, Felicia Rotellini, Fred Yamashita, James McLaughlin, Jonathan Nez, Luis Alberto Heredia, Ned Norris, Regina Romero, Sandra D. Kennedy, Stephen Roe Lewis, and Steve Gallardo (collectively, the "Biden Elector Defendants") are represented by counsel, Sarah Gonski, Bruce Spiva (*pro hac vice*), Daniel Arellano, and Roy Herrera.
- Proposed Intervenor Adrian Fontes (in his official capacity as Maricopa County Recorder) and Intervenor Maricopa County Board of Supervisors (collectively, "Maricopa County") are represented by counsel, Thomas Liddy, Emily Craiger, and Joseph La Rue.
- Intervenor Katie Hobbs (in her official capacity as the Arizona Secretary of State) is represented by counsel, Rooplai Desai and Kristen Yost. Election Director Sambo "Bo" Dul is also present.
- Proposed Intervenor-Plaintiffs James Stevenson, Baron Benham, Lynie Stone, and Jessica Chambers are represented by counsel, David Spilsbury.

A record of the proceedings is made digitally in lieu of a court reporter.

The court has received and considered Maricopa County's December 2, 2020 Motion to Intervene.

In the absence of any objection,

IT IS ORDERED granting the Motion to Intervene and allowing Adrian Fontes (in his official capacity as Maricopa County Recorder) to intervene in this action.

LET THE RECORD REFLECT Maricopa County hereafter is referred to as "County Intervenor" for the purpose of this Evidentiary Hearing.

The court has received and considered proposed Intervenor-Plaintiffs' December 2, 2020 Motion to Intervene Under Rule 24.

Due to being untimely filed,

IT IS FURTHER ORDERED denying the Motion to Intervene Under Rule 24.

The court addresses The Lincoln Project's December 3, 2020 Motion for Leave to File Amicus Curie Brief.

Due to being untimely filed,

IT IS FURTHER ORDERED denying The Lincoln Project's December 3, 2020 Motion for Leave to File Amicus Curie Brief.

10:34 a.m. Counsel for proposed Intervenor-Plaintiffs, Mr. Spilsbury, disconnects from the GoToMeeting platform.

Argument is presented regarding:

1. Defendants' December 2, 2020 Motion to Dismiss (filed in conjunction with the Pre-Trial Brief) by the Biden Elector Defendants.
2. Intervenor Arizona Secretary of State's December 2, 2020 Motion to Dismiss (filed in conjunction the Pre-Hearing Memorandum).

To the extent that the Motions to Dismiss argue that the election contest statute does not permit this case to be brought,

IT IS FURTHER ORDERED denying the Motions to Dismiss. The court finds that an election contest concerning the vote for president and electors falls within the phrase "other questions or proposal submitted for vote of the people" in A.R.S. § 16-672(A).

IT IS FURTHER ORDERED granting the Motions to Dismiss based on laches as to any claim of misconduct based on insufficient opportunity to observe either the counting of votes, comparison of signatures on mail-in ballots, or the duplication of ballots.

IT IS FURTHER ORDERED that in all other respects, the Motions to Dismiss are denied without prejudice to arguments being presented at the conclusion of this hearing after the evidence has been presented.

Counsel for Plaintiff requests that the court allow further inspection of all duplicate ballots and all electronically adjudicated ballots statewide and to continue this proceeding until such an inspection has been performed.

IT IS FURTHER ORDERED denying Plaintiff's request.

Discussion is held regarding County Intervenors' December 2, 2020 Motion to Seal Exhibit 89. Counsel for County Intervenors makes an oral motion to seal Plaintiff's exhibit 14 and County Intervenors' exhibits 30 and 35. Counsel for Plaintiff objects to the sealing of Plaintiff's exhibit 14 and County Intervenors' exhibits 35.

IT IS FURTHER ORDERED granting the above-mentioned Motions and sealing Plaintiff's exhibit 14 and County Intervenors' exhibits 30 (referenced as exhibit 89 in County Intervenors' Motion) and 35, not to be opened until further order of the court, upon being received in evidence. The court finds that the voter's interest in confidentiality outweighs the public's interest to seeing the specifics of these documents.

The court advises counsel that the rule on sealing documents requires a set of specific findings; therefore they should lodge a form of order with findings.

Counsel for Intervenor Secretary of State seeks clarification of the court's order regarding the Motions to Dismiss with respect to partial granting of the Motions on the observation for the counting of votes, comparison of signatures on mail-in ballots, or the duplication of ballots. The court clarifies its ruling.

Plaintiff's Case:

Scott Jarrett is sworn and testifies.

Plaintiff's exhibit 1 is received in evidence.

LET THE RECORD FURTHER REFLECT that it is 11:40 a.m. and Joshua Offenhartz is now present on behalf of Plaintiff, appearing with John D. Wilenchik.

County Intervenors' exhibits 19 and 20 are received in evidence.

12:05 p.m. The court stands at recess.

1:00 p.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Scott Jarrett continues to testify.

County Intervenors' exhibit 35 is received in evidence.

Discussion is held regarding County Intervenors' exhibit 35. The court notes that there is a discrepancy of the number of pages of County Intervenors' exhibit 35. The court directs counsel for County Intervenors to provide the clerk a copy of that exhibit with the missing pages to substitute in place of the original exhibit 35 marked for identification.

County Intervenors' exhibits 17, 31, 18, 22, 23, 24, 25, 26, 27, and 28, are received in evidence.

Plaintiff's exhibit 14 is received in evidence.

Scott Jarrett is excused, subject to recall.

Counsel for Biden Elector Defendants objects to Plaintiff calling several witnesses due to lack of disclosure. The objection is overruled.

2:10 p.m. The court stands at recess.

2:20 p.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Logistical matters are discussed regarding appearances of witnesses. Counsel for Biden Elector Defendants objects to having other fact witnesses observing other fact witnesses' testimony prior to their testimony.

IT IS FURTHER ORDERED overruling the objection. The court will allow one witness at a time on a rolling basis.

Thomas Lane is sworn and testifies.

Thomas Lane is excused.

Cheri Beltramo is sworn and testifies.

Cheri Beltramo is excused.

Kenneth Sampson is sworn and testifies.

Kenneth Sampson is excused.

Lori Grey is sworn and testifies.

Lori Grey is excused.

Janese Bryant is sworn and testifies.

Janese Bryant is excused.

3:24 p.m. The court stands at recess.

3:39 p.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Linda Brickman is sworn and testifies.

Linda Brickman is excused.

Discussion is held regarding the process for the rest of the case.

Counsel for Intervenor Secretary of State and Biden Elector Defendants make Rule 50 Motions for Judgment as a Matter of Law.

The court will table the Rule 50 Motions at this time.

Laurie Hoeltzel is sworn and testifies.

Counsel for Biden Elector Defendants mention exhibit 15, but does not offer it and it has not been received in evidence.

Laurie Hoeltzel is excused.

Plaintiff rests.

Further discussion is held regarding the Rule 50 Motions.

The court rules that it will not entertain Rule 50 Motions, due to this not being a jury trial.

Discussion is held regarding procedural issues.

4:30 p.m. The court stands at recess until **Friday, December 4, 2020 at 9:15 a.m.** in this division.

LATER:

LET THE RECORD FURTHER REFLECT that County Intervenors' exhibit 35 has now been substituted with the correct amount of pages.

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HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
C. Ladden
Deputy

KELLI WARD

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MINUTE ENTRY

East Court Building – Courtroom 414

9:15 a.m. This is the time set for a continued Evidentiary Hearing on Plaintiff's anticipated election contest petition via GoToMeeting.

The following parties/counsel are present virtually through GoToMeeting and/or telephonically:

- Plaintiff Kelli Ward is represented by counsel, John D. Wilenchik.
- Defendants Constance Jackson, Felicia Rotellini, Fred Yamashita, James McLaughlin, Jonathan Nez, Luis Alberto Heredia, Ned Norris, Regina Romero, Sandra D. Kennedy, Stephen Roe Lewis, and Steve Gallardo (collectively, the “Biden Elector Defendants”) are represented by counsel, Sarah Gonski, Bruce Spiva (*pro hac vice*), Daniel Arellano, and Roy Herrera.
- Intervenors Adrian Fontes (in his official capacity as Maricopa County Recorder) and Maricopa County Board of Supervisors (collectively, “County Intervenors”) and are represented by counsel, Thomas Liddy, Emily Craiger, and Joseph La Rue.
- Intervenor Katie Hobbs (in her official capacity as the Arizona Secretary of State) is represented by counsel, Rooplai Desai and Kristen Yost. State Election Director Sambo “Bo” Dul is also present.

Counsel for Biden Elector Defendants addresses the court as to the court’s ruling denying any Rule 50 motion practice after the conclusion of Plaintiff’s case. Discussion is held thereon and counsel for Biden Elector Defendants states his position on the record. The court affirms its prior ruling denying the request for any Rule 50 motion practice.

A record of the proceedings is made digitally in lieu of a court reporter.

Biden Elector Defendants’ Case:

Linton Mohammed is sworn and testifies.

Biden Elector Defendants’ exhibit 16 is received in evidence.

Linton Mohammed is excused.

Biden Elector Defendants rest.

Intervenor Secretary of State’s Case:

Sambo “Bo” Dul is sworn and testifies.

Intervenor Secretary of State's exhibit 32 is received in evidence.

Sambo "Bo" Dul is excused.

Intervenor Secretary of State rests.

LET THE RECORD REFLECT that the court notes its prior acquaintance with County Intervenor's witness, Reynaldo Valenzuela, due to election matters while serving previously as the civil presiding judge.

County Intervenor's Case:

Reynaldo Valenzuela is sworn and testifies.

County Intervenor's exhibit 29 is received in evidence.

10:31 a.m. The court stands at recess.

10:41 a.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Reynaldo Valenzuela continues to testify.

County Intervenor's exhibit 30 is received on evidence.

Reynaldo Venezuela is excused.

Scott Jarrett is recalled and testifies further.

Scott Jarrett is excused.

County Intervenor rests.

Plaintiff's Rebuttal:

Liesl Emerson is sworn and testifies.

Liesl Emerson is excused.

Plaintiff rests.

11:30 a.m. The court stands at recess.

11:36 a.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Closing arguments are presented.

Based on the testimony and evidence presented,

IT IS ORDERED taking this matter under advisement with a written ruling to be issued as a "**LATER:**" to this minute entry.

Pursuant to the orders entered, and there being no further need to retain the exhibits not offered in evidence in the custody of the Clerk of Court,

LET THE RECORD FURTHER REFLECT counsel indicate on the record that the courtroom clerk may dispose of Plaintiff's exhibits 2 through 13 and 15; County Intervenors' exhibit 21; and Intervenor Secretary of State's exhibits 33 and 34 not offered or received in evidence.

12:22 p.m. Matter concludes.

LATER:

Based on the evidence presented, the Court makes the following findings, conclusions, and orders. For reasons that follow, the relief requested in the Petition is denied.

1. Background.

On November 30, 2020, Governor Ducey certified the results of Arizona's 2020 general election, and the Biden/Harris ticket was declared the winner of Arizona's 11 electoral votes. The same day, Plaintiff filed this election challenge under A.R.S. § 16-672. In order to permit this matter to be heard and appealed (if necessary) to the Arizona Supreme Court before the Electoral College meets on December 14, 2020, the Court held an accelerated evidentiary hearing on December 3 and 4, 2020.

2. The Burden Of Proof In An Election Contest.

A.R.S. § 16-672 specifies five grounds on which an election may be contested, three of which are alleged here:

A. Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the 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.

...

4. On account of illegal votes.

5. That by reason of erroneous count of 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)(1). Arizona law provides two remedies for a successful election contest. One is setting aside the election. A.R.S. § 16-676(B). The other is to declare the other candidate the winner if “it appears that a person other than the contestee has the highest number of legal votes.” A.R.S. § 16-676(C).

The Plaintiff in an election contest has a high burden of proof and the actions of election officials are presumed to be free from fraud and misconduct. *See Hunt v. Campbell*, 19 Ariz. 254, 268, 169 P. 596, 602 (1917) (“the returns of the election officers are prima facie correct and free from the imputation of fraud”); *Moore v. City of Page*, 148 Ariz. 151, 156, 713 P.2d 813, 818 (App. 1986) (“One who contests an election has the burden of proving that if illegal votes were cast the illegal votes were sufficient to change the outcome of the election.”). A plaintiff alleging misconduct must prove that the misconduct rose to the level of fraud, or that the result would have been different had proper procedures been used. *Moore*, 148 Ariz. at 159, 713 P.2d

at 821. “[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.” *Findley v. Sorenson*, 35 Ariz. 265, 269, 276 P. 843, 844 (1929).

These standards derive, in large part, from Arizona’s constitutional commitment to separation of powers. Ariz. Const. Art. 3. The State Legislature enacts the statutes that set the rules for conducting elections. The Executive Branch, including the Secretary of State and county election officials, determine how to implement those legislative directives. These decisions are made by balancing policy considerations, including the need to protect against fraud and illegal voting, the need to preserve citizens’ legitimate right to vote, public resource considerations, and—in 2020—the need to protect election workers’ health. It is not the Court’s role to second-guess these decisions. And for the Court to nullify an election that State election officials have declared valid is an extraordinary act to be undertaken only in extraordinary circumstances.

3. The Evidence Does Not Show Fraud Or Misconduct.

A.R.S. § 16-672(A)(1) permits an election contest “[f]or 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.” Plaintiff alleges misconduct in three respects. First is that insufficient opportunity was given to observe the actions of election officials. The Court previously dismissed that claim as untimely. *See Lubin v. Thomas*, 213 Ariz. 496, 497, 144 P.3d 510, 511 (2006) (“In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing party or the administration of justice.”). The observation procedures for the November general election were materially the same as for the August primary election, and any objection to them should have been brought at a time when any legal deficiencies could have been cured.

Second, Plaintiff alleges that election officials overcounted mail-in ballots by not being sufficiently skeptical in their comparison of signatures on the mail-in envelope/affidavits with signatures on file. Under Arizona law, voters who vote by mail submit their ballot inside an envelope that is also an affidavit signed by the voter. Election officials review all mail-in envelope/affidavits to compare the signature on them with the signature in voter registration records. If the official is “satisfied that the signatures correspond,” the unopened envelope is held until the time for counting votes. If not, officials attempt to contact the voter to validate the ballot. A.R.S. § 16-550(A).

This legislatively-prescribed process is elaborated on in the Secretary of State’s Election Procedures Manual. The signature comparison is just one part of the verification process. Other

safeguards include the fact that mail-in ballots are mailed to the voter's address as listed in voter registration records, and that voters can put their phone number on the envelope/affidavit, which allows election officials to compare that number to the phone number on file from voter registration records or prior ballots.

Maricopa County election officials followed this process faithfully in 2020. Approximately 1.9 million mail-in ballots were cast and, of these, approximately 20,000 were identified that required contacting the voter. Of those, only 587 ultimately could not be validated.

The Court ordered that counsel and their forensic document examiners could review 100 randomly selected envelope/affidavits to do a signature comparison. These were envelope/affidavits as to which election officials had found a signature match, so the ballots were long ago removed and tabulated. Because voter names are on the envelope/affidavits, the Court ordered them sealed. But because the ballots were separated from the envelope/affidavits, there is no way to know how any particular voter voted. The secrecy of their votes was preserved.

Two forensic document examiners testified, one for Plaintiff and one for Defendants. The process forensic document examiners use to testify in court for purposes of criminal guilt or civil liability is much different from the review Arizona election law requires. A document examiner might take hours on a single signature to be able to provide a professional opinion to the required degree of certainty.

Of the 100 envelope/affidavits reviewed, Plaintiff's forensic document examiner found 6 signatures to be "inconclusive," meaning she could not testify that the signature on the envelope/affidavit matched the signature on file. She found no sign of forgery or simulation as to any of these ballots.

Defendants' expert testified that 11 of the 100 envelopes were inconclusive, mostly because there were insufficient specimens to which to compare them. He too found no sign of forgery or simulation, and found no basis for rejecting any of the signatures.

These ballots were admitted at trial and the Court heard testimony about them and reviewed them. None of them shows an abuse of discretion on the part of the reviewer. Every one of them listed a phone number that matched a phone number already on file, either through voter registration records or from a prior ballot. The evidence does not show that these affidavits are fraudulent, or that someone other than the voter signed them. There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots.

Third, Plaintiff alleges errors in the duplication of ballots. Arizona law requires election officials to duplicate a ballot under a number of circumstances. One is where the voter is overseas and submits a ballot under UOCAVA, the Uniformed And Overseas Citizens Absentee Voting Act. Another is where the ballot is damaged or otherwise cannot be machine-tabulated. When a duplicate is necessary, a bipartisan board creates a duplicate ballot based on the original. A.R.S. § 16-621(A). In 2020, Maricopa County had 27,869 duplicate ballots out of more than 2 million total ballots. The vast majority of these were either mail-in ballots or UOCAVA ballots. 999 of them came from polling places.

The Court ordered that counsel could review 100 duplicate ballots. Maricopa County voluntarily made another 1,526 duplicate ballots available for review. These ballots do not identify the voter so, again, there is no way to know how any individual voter voted. Of the 1,626 ballots reviewed, 9 had an error in the duplication of the vote for president.

Plaintiff called a number of witnesses who observed the duplication process as credentialed election observers. There was credible testimony that they saw errors in which the duplicated ballot did not accurately reflect the voter's apparent intent as reflected on the original ballot. This testimony is corroborated by the review of the 1,626 duplicate ballots in this case, and it confirms both that there were mistakes in the duplication process, and that the mistakes were few. When mistakes were brought to the attention of election workers, they were fixed.

The duplication process prescribed by the Legislature necessarily requires manual action and human judgment, which entail a risk of human error. Despite that, the duplication process for the presidential election was 99.45% accurate. And there is no evidence that the inaccuracies were intentional or part of a fraudulent scheme. They were mistakes. And given both the small number of duplicate ballots and the low error rate, the evidence does not show any impact on the outcome.

The Court finds no misconduct, no fraud, and no effect on the outcome of the election.

4. The Evidence Does Not Show Illegal Votes.

A.R.S. § 16-672(A)(2) permits an election contest “[o]n account of illegal votes.” Based on the facts found above, the evidence did not prove illegal votes, much less enough to affect the outcome of the election. As a matter of law, mistakes in the duplication of ballots that do not affect the outcome of the election do not satisfy the burden of proof under Section 16-672(A)(2).

5. The Evidence Does Not Show An Erroneous Vote Count.

A.R.S. § 16-672(A)(5) permits an election contest on the ground that, “by reason of erroneous count of votes” the candidate certified as the winner “did not in fact receive the highest number of votes.” Plaintiff has not proven that the Biden/Harris ticket did not receive the highest number of votes.

6. Orders.

Based on the foregoing,

IT IS ORDERED denying the relief requested in the Petition.

IT IS FURTHER ORDERED denying the request to continue the hearing and permit additional inspection of ballots.

IT IS FURTHER ORDERED, as required by A.R.S. § 16-676(B), confirming the election.

IT IS FURTHER ORDERED that any request for costs and/or attorneys’ fees be filed, and a form of final judgment be lodged, no later than January 5, 2020. If none of these is filed or lodged, the Court will issue a minute entry with Rule 54(c) language dismissing all remaining claims.

The Court finds no just reason for delay and enters this partial final judgment under Ariz. R. Civ. P. 54(b). The Court makes this finding for purposes of permitting an immediate appeal to the Arizona Supreme Court.

/ s / RANDALL H. WARNER

JUDGE OF THE SUPERIOR COURT