

ARIZONA SUPREME COURT

KELLI WARD,

Plaintiff/Appellant,

v.

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

Defendants/Appellees.

Arizona Supreme Court
No. CV-20-0343-AP/EL

Maricopa County Superior Court
No. CV2020-015285

DEFENDANTS' BRIEF

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**Pro Hac Vice Application Pending*

INTRODUCTION

“Voters, not lawyers, choose the President. Ballots, not briefs, decide elections.” *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). On November 3, nearly 3.4 million Arizonans cast their ballots. After thorough and careful tabulation, election officials determined that Joe Biden and Kamala Harris prevailed, chosen by the voters by a margin of over ten thousand votes. Unwilling to accept the people’s decision, Plaintiff Kelli Ward—Chair of the Arizona Republican Party and an elector for President Trump—filed multiple lawsuits in state and federal court seeking to cast doubt over the integrity of the election. In this one, Ward sought to have Trump electors installed in place of Defendants, the Biden Electors (“Electors”). Although Ward’s woefully deficient statement of contest contained only vague allegations of irregularities, the trial court gave her discovery far beyond what is contemplated by Arizona’s election contest statutes, and an opportunity to present her evidence in a two-day trial. The court also considered all of Ward’s evidence on its merits, even though much could have been excluded on hearsay or relevance grounds, for failure to adequately disclose witnesses, or a variety of other grounds.

After Ward had this fulsome opportunity to make her case, the result was total defeat. The trial court—having thoroughly reviewed the record and made credibility determinations of the witnesses—held Ward failed to prove each and every ground

for contest asserted; failed to show that there was any fraud, misconduct, or illegal voting in the election; failed to show that the number of purportedly tainted ballots would have changed the results; failed to show that her challenges to policies about observation were timely brought; and ultimately that she had failed to show that the winner of Arizona's presidential election was anyone other than Joe Biden. The trial court's determinations were in no way erroneous. This Court should affirm.

STATEMENT OF THE CASE

Ward initiated this action by filing a Rule 27 Petition for Discovery, seeking to examine thousands of ballots cast in Maricopa County (the "County"). As grounds for the Petition, Ward stated that she intended to bring a contest challenging the results of the presidential election and seeking a court order requiring Arizona to shift its eleven electoral votes from Vice President Biden to President Trump. Secretary of State Katie Hobbs intervened. At a hearing on November 30—the same day Arizona certified its election results and thus the first day that a contest could be filed under A.R.S. § 16-672—the court granted Ward's Rule 27 request, over objections. The court also ordered all parties to begin reviewing ballot and ballot affidavits the following day.

Later that same day, Ward filed her statement of contest. Her claims center on two sets of ballot-processing procedures and observation policies. First, she challenged the process by which county election officials verify signatures on ballot

envelopes. Compl. ¶¶ 13-15; *see also* A.R.S. § 16-550(A) (requiring county recorders to compare signatures on ballot affidavits with those on voter's registration record and providing voter opportunity to cure if recorder deems signatures inconsistent). Second, she alleged that the software used to process and print manually duplicated ballots (i.e., ballots that had to be re-created by hand because the tabulator machine could not read them) may have been inaccurate and was not subject to sufficient public observation. *Id.* ¶¶ 26-27; *see also* A.R.S. § 16-621(A). Third, Ward alleged that both of these processes had been compromised due to inadequate observation opportunities by the public or by party observers. Compl. ¶¶ 34-35.

Counsel for all parties gathered at the County's ballot-tabulation facility on December 1 and together reviewed 100 duplicated ballots and 100 signed ballot envelopes. The following day, Ward sought expanded discovery and asked to review an additional sample of 2,500 duplicated ballots, asking also that the court continue the trial to the following week. Before the trial court ruled on that motion, the County intervened and agreed to voluntarily make as many ballots available for review as it could before trial (which was scheduled for December 3-4). By the time Ward completed the review on the evening of December 2, she had reviewed 1,526 additional duplicated ballots. In total, the parties and their designated experts reviewed 100 ballot envelope affidavits and 1,626 duplicated ballots.

Trial began the morning of December 3. After dismissing Ward's observation-related claims on laches grounds, the trial court took evidence on the two remaining claims relating to signature matching and ballot duplication.

After trial, the court issued a nine-page order denying Ward's remaining claims. First, the court found that because the observation procedures were materially the same as for the August primary election, Ward's claim of insufficient opportunity to observe the actions of election officials was barred by laches. Opinion ("Op.") at 6. The court further found that Ward had failed to carry her "high burden of proof" on both claims presented at trial. Op. at 5-6. As to signature matching, the court found the evidence did not support a finding that elections officials had not been sufficiently judicious in their comparison of signatures. Op. at 6. And while the court found there were isolated mistakes in the ballot-duplication process, it also found that the process overall was 99.45% accurate, and that any mistakes were of no consequence to the outcome of the election. Op. at 8. In sum, the trial court held that "the evidence did not prove illegal votes, much less enough to affect the outcome of the election." *Id.*

Ward filed a notice of appeal. Because this case involves the election and statutory issues of statewide importance, this Court has jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and ARCAP 10(d)(1).

STANDARD OF REVIEW

A trial court's factual determinations will be upheld on appeal "so long as they are supported by reasonable evidence," unless the court abused its discretion or exceeded its jurisdiction or legal authority. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254 (2003). The trial court's legal determinations are reviewed de novo. *State ex rel. Dep't of Econ. Sec. v. Hayden*, 210 Ariz. 522, 523 (2005).

ARGUMENT

I. The Court should issue a ruling by December 8.

Immediate resolution of the appeal on the record is needed to bring certainty and stability to the people of Arizona, and of this Country, in advance of pending deadlines related to the casting and counting of votes by electors. *See* 3 U.S.C. § 7 (setting December 14 as the date for the meeting of electors); A.R.S. § 16-212 (requiring presidential electors to cast their electoral college votes "for the candidate for president and the candidate for vice president who jointly received the highest number of votes"); *see also* 3 U.S.C. § 5 (giving conclusive effect in Congress's counting of electoral votes to votes from states in which the "final determination of any controversy or contest concerning the appointment" of electors has been completed by December 8). The Electors respectfully request that this Court issue a decision no later than December 8, 2020.

II. The trial court correctly rejected Ward's claims.

The trial court correctly found that there was no fraud, misconduct, or illegal votes. In fact, Ward did not even pursue this argument at trial (or produce any evidence to support it). Instead, she advanced two contentions: (1) that officials “overcounted mail-in ballots” due to insufficiently careful signature review, Op. at 6, and (2) that officials made mistakes when hand duplicating ballots considered unreadable by the tabulation machine. Op. at 8. Because Ward failed to establish either, the court correctly rejected both.

A. No evidence of irregularities with signature-reviewed ballots.

Arizona has a strong policy in favor of stability and finality of election results. *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 94 (1978); *see also Jennings v. Woods*, 194 Ariz. 314, 331 (1999) (upsetting the “results of a popular election” is “a course of action upon which [courts] embark reluctantly”); *McComb v. Superior Court In & For Cty. of Maricopa*, 189 Ariz. 518, 529 (Ct. App. 1997), *as amended* (July 25, 1997) (noting nullifying an election after the fact frustrates the will of the people). Accordingly, the actions of election officials “are presumed to be free from fraud and misconduct.” Op. at 5 (citing *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917)); *see also Moore v. City of Page*, 148 Ariz. 151, 156 (Ct. 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.”). Evidence of fraud,

moreover, “may not be predicated on speculation and conjecture.” *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960). “[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 (1929).

At trial, Ward made none of the necessary showings. As to signature review, her own forensic document examiner testified that she had reviewed a sampling of 100 ballots and found no sign of forgery. Op. at 7. The Electors also presented testimony from a forensic examiner, who agreed that no ballots appeared to have been forged, and that it was reasonable for election officials to conclude that all 100 ballots passed signatures verification. Both examiners testified that a number of the signatures—one said six, the other said eleven—were “inconclusive” matches according to professional forensic standards because there was only one other comparison signature on file. But Ward submitted the “inconclusive” signatures for review under seal (as Exhibit 30), and after conducting its own review the trial court concluded that “none of them shows an abuse of discretion on the part of the reviewer.” *Id.* There is no sound basis to disturb that factual finding.

Further, the trial court heard and credited evidence that signature-verification procedures are careful and thorough, and that they are just one of many layers of ballot security the County employs. Reynaldo Valenzuela, Director of Election

Services in Maricopa County, testified that the signature-verification process includes multiple tiers of review and procedural safeguards.¹ Both he and State Election Director Bo Dul also testified that signature verification is not an end in itself; its function is to aid the County in confirming the voter's identification. Other information contained on the ballot and voter file, such as the voter's printed name, phone number, and address, further aid the County's confirmation of the voter's identity. Finally, the Electors' expert opined that of the approximately one dozen signature-matching regimes for elections that he has reviewed in depth, the County's was the best.

Based on this record, the trial court concluded that "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." Op. at 7. That conclusion was amply supported and warranted the court's rejection of Ward's claim that the signature-verification process was grounds to overturn the election.

¹ Because of the expedited nature of these proceedings, a transcript of the proceedings is not yet available.

B. No evidence that hand ballot duplication was tainted by fraud, misconduct, or illegal voting.

The trial court likewise correctly found that Ward failed to show that the County's ballot duplication process was marred by fraud, misconduct, or illegal voting.

The trial court heard testimony from a number of poll observers, who testified that they saw election workers make some mistakes in ballot duplication. Several witnesses seemed confused, however, about the difference between actual duplication mistakes and mistaken *suggestions* by the County's pre-fill software, which surveyed a digital image of the ballot and suggested which oval to fill in on the duplicated ballot. For example, Thomas Lane admitted on cross examination that: (1) he only observed mistakes in the software's pre-fill function, (2) the final completion of duplicated ballots was done by a bipartisan team, and (3) he had no reason to believe any mistaken suggestions weren't ultimately disregarded by the reviewers. Similarly, while two of Ward's other witnesses, Ken Sampson and Linda Brickman, testified that the pre-fill software did not appear terribly accurate in predicting votes, County witness (and Election Director) Scott Jarrett testified that the pre-fill suggestions were just that—suggestions—and could be toggled off altogether at the election worker's choosing. Indeed, Ward's own witnesses confirmed that some of the bipartisan teams would completely refill the duplicated ballots, without relying on the pre-filled suggestions. *See, e.g., Lane Testimony.*

In any event, the poll observers uniformly testified that any specific errors they saw in ballot duplication were addressed by either the ballot-duplication board or by nearby supervisors. Testimony of Lane (testifying he flagged apparent mistakes in duplication process and had no reason to believe they went uncorrected); Beltramo (testifying duplication errors she noticed and flagged for election officials were corrected); Gray (testifying election officials corrected errors she was able to flag timely); Bryant (testifying she did not see any mistakes in duplication process). In short, as the trial court recognized, “when mistakes were brought to the attention of election workers, they were fixed.” Op. at 8.

Additional evidence likewise established that the duplication process is careful, although inevitably not 100% perfect. Director Jarrett testified, for example, that the duplication is done by a bipartisan review panel consisting of three workers who carefully review ballots according to specific and lengthy procedures (including those mandated by A.R.S. § 16-621(A)). And the review of ballots bore that out: out of 1,626 ballots reviewed, the error rate was well under one percent and the County’s duplication process was 99.45% accurate.

In sum, Ward’s evidence showed only that “there were mistakes in the duplication process,” but those “mistakes were few.” Op. at 8. As recognized just last week in another election challenge, “the law cannot provide, nor does it guarantee, perfection.” *Aguilera v. Fontes*, CV2020-014562, Order at 2 (Maricopa

Cty. Sup. Ct. Nov. 29, 2020). “A flawless election process is not a legal entitlement;” “[r]ather, a perfect process is an illusion.” *Id.* at 5. So too, here. The trial court correctly recognized that honest mistakes on a small number of hand-duplicated ballots do not, and cannot, justify overturning the results of Arizona’s presidential election. There is no reason to overturn that finding here.

C. The trial court correctly found that the Biden/Harris ticket received the highest number of votes.

In any event, the trial court correctly found that Ward’s claims merited rejection because she did not demonstrate that “the result would have been different had proper procedures been used.” *Moore*, 148 Ariz. at 159. As noted, Arizona courts have been clear that “honest 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*, 35 Ariz. at 269.

Here, although the initial inspection identified a miniscule number of mis-duplicated ballots, Ward presented no evidence indicating that they were the result of fraud. Even Ward’s own witnesses appeared to agree that the errors seemed like honest mistakes, and were promptly addressed when recognized. *Supra* at 10. Because she did not establish fraud—and the trial court expressly found there was no fraud—Ward had to show that the results of the presidential election are at least uncertain.

The trial court correctly held that Ward failed to make the showing that the winner of the presidential election was anyone other than Joe Biden. Of the 1,626 duplicate ballots reviewed (out of 27,869 ballots duplicated in Maricopa County), nine had errors—but they disadvantaged both candidates. One vote for Trump was erroneously given to Biden; six votes for Trump were given to no candidate; and two votes for Biden were given to no candidate. Even on the generous assumption that the 0.369% error rate held steady across all duplicated ballots in Maricopa County, Biden’s margin of victory would decrease by only 103 additional votes. Accordingly, the trial court correctly determined that Ward did not meet her burden to show that the entire election should be overturned. *Findley*, 35 Ariz. at 269.

D. The trial court correctly found Ward’s claims about observation barred by laches.

Finally, the trial court correctly dismissed Ward’s observation-based claims. Claims about COVID-related changes to observation policies could have been addressed before the election—indeed, they had to be, because “[c]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election.” *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *3 ¶ 11 (Ariz. App. July 22, 2019) (citing *Sherman v. City of Tempe*, 202 Ariz. 339 ¶ 9 (2002)). Ward’s Complaint challenged what were, in her view, a lack of meaningful opportunities to observe the tabulation, duplication, and signature verification process. But those policies were not new, and “procedures leading up to

an election cannot be questioned after the people have voted.” *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987); *see also Zajac v. City of Casa Grande*, 209 Ariz. 357, 360 ¶ 14 (2004) (collecting cases).

Because Ward’s claim “should have been—and could have been—addressed before the vote,” the trial court correctly dismissed it. *Williams*, 2019 WL 3297254, at *3. If allowed, her attempt to press those claims at this late date would have prejudiced Defendants, Arizona election officials, and voters, who lose the benefit of a “strong public policy favoring stability and finality of election results.” *Donaghey*, 120 Ariz. at 95.

CONCLUSION

The Court should promptly affirm the trial court’s decision denying all relief and confirming the election pursuant to A.R.S. 16-676(B).

RESPECTFULLY SUBMITTED this 7th day of December, 2020.

SIGNED: /s/ Sarah R. Gonski

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