SUPREME COURT OF ARIZONA

JEANNE KENTCH; TED BOYD; ABRAHAM HAMADEH; and REPUBLICAN NATIONAL COMMITTEE,

Petitioners/Plaintiffs/Contestant,

v.

HON. LEE F. JANTZEN, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave,

Respondent,

and

KRIS MAYES, an individual;

Real Party in Interest/Contestee,

and

ADRIAN FONTES, in his official capacity as the Secretary of State, *et al.*,

Nominal Defendants.

Supreme Court No. CV-23-0205-SA

Court of Appeals Division One 1 CA-CV 23-0472

Mohave County Superior Court No. CV-2022-01468

REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

Timothy A. LaSota (020539)
tim@timlasota.com
TIMOTHY A. LA SOTA, PLC
2198 E. Camelback Rd, #305
Phoenix, Arizona 85016

Alexander Kolodin (030826)
Veronica Lucero (030292)
Arno Naeckel (026158)
James C. Sabalos (*pro hac vice*)
Davillier Law Group, LLC
4105 N. 20th St, Suite 110
Phoenix, Arizona 85016
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
anaeckel@davillierlawgroup.com
jsabalos@davillierlawgroup.com
phxadmin@davillierlawgroup.com

Jennifer J. Wright (027145)
Jennifer Wright Esq., PLC
4350 E. Indian School Rd
Suite #21-105
Phoenix, Arizona 85018
jen@jenwesq.com

Sigal Chattah Esq. (*pro hac vice*)
CHATTAH LAW GROUP
5875 S. Rainbow Blvd #204
Las Vegas, Nevada 89118
Chattahlaw@gmail.com

Attorneys for Petitioners-Plaintiffs/Contestant

Table of Contents

Table of Authorities

Cases

Rules

Constitutional Provisions

I. INTRODUCTION

"We accept special action jurisdiction to decide this matter because it involves a matter of statewide importance, great public interest, and requires final resolution in a prompt manner." *Ingram v. Shumway*, 164 Ariz. 514, 516 (1990).

It has been 33 days since Petitioners' Motion for a New Trial ("Motion") was denied and 236 days since Petitioners' relief was denied in the election contest, yet final judgments for both remain unsigned. Nevertheless, Contestee Kris Mayes ("Contestee") simultaneously argues that "an appeal provides Petitioners with an equally plain, speedy, and adequate remedy" [Mayes Resp. at 13] *and* that Petitioners have "no excuse for delaying nearly eight months to file a special action on pretrial decisions" [*id.* at 26]. Apparently, Petitioners are both too fast and too slow in attempting to obtain relief in this Court.

Contestee further argues that she has been prejudiced by Petitioners' "unreasonable delay," having already "hired attorneys and staff" [*id.* at 27], yet she nonetheless asks this Court to "permit this case to proceed through the [normal and slower] appellate process" rather than accepting special action jurisdiction [*id.* at 33], which would provide a speedy resolution to important issues of statewide magnitude. Ironically, Contestee's concession that she is executing the functions of Attorney General and her arguments regarding the extraordinary delays in this case—caused by

the trial court's dilatory conduct rather than by Petitioners' actions—establishes the dire need for *this* Court to accept jurisdiction.

Contestee also complains that Petitioners raised pre-trial errors in their Petition [*id.* at 26], but those errors either directly relate to the trial court's arbitrary and capricious findings or are capable of repetition if the Motion is granted. Contestee also urges the Court, based on laches, to bar directly relevant pre-trial determinations the trial court made, apparently on the theory that Petitioners failed to advance a special action petition of the court's December 22 decisions while Petitioners were simultaneously inspecting ballots and preparing for the December 23 trial. Such an expectation is unreasonable. [*Id.*]

Objections notwithstanding, Petitioners and Defendants agree on ***one*** point—that nine languishing months have passed since the election. And while Defendants would like to foreclose relief, wishing away not only Petitioners' due process rights but also the hundreds (conceivably *thousands*) of uncounted votes that will tip the balance in the closest election in Arizona history, Petitioners simply seek to expeditiously *count* all valid votes and determine the constitutionally elected Attorney General with finality.

The unusual posture of this case created by the trial court's dilatory conduct necessitates this special action. Critically, if the Court grants a new trial, any appeal resulting from trial can *hopefully* be exhausted before the new year. In fact, Petitioners assert that every day Contestee remains in office is another day that the will of Arizona voters is subverted, and democracy is denied. Thus, time is *plainly* of the essence. All

available evidence suggests that once all votes are counted, Abraham Hamadeh—not Kris Mayes—will prevail, rendering him Arizona's constitutionally elected Attorney General.

Although this case is unique, it is properly before this Court as a "matter of statewide importance, great public interest, and require[ing] final resolution in a prompt manner[.]" *Ingram*, 164 Ariz. at 516. Not only should this Court accept special action jurisdiction, but it should also remand for a new trial.

II. ARGUMENT

To distract this Court, Contestee and Nominal Defendant Secretary of State ("Secretary") (together, "Defendants") have radically distorted Petitioners' arguments. From misrepresenting that Petitioners failed to attach the July 17 Order ("Order") [Mayes Resp. at 21][1] to asserting that "Petitioners do not even try to allege an abuse of discretion or cite any duty that the trial court ignored" [Mayes Resp. at 2], the Defendants' responses deflect and distract more than they assert.

In fact, the Petition clearly alleges the trial court:

(1) failed to perform its non-discretionary duty to issue final judgments, Rule 3(a), Ariz. R. P. Spec. Act. ("Rule 3") [Petition at 19];

(2) abused its discretion, or alternatively is threatening to proceed without legal authority, by denying Petitioners' Motion, Rule 3(b) [*id.*];

[1] Petitioners included relevant written orders in the Petition's Volume 2 Appendix and attached the Order to the electronic filing.

(3) abused its discretion by strictly construing the time constraints in its Order, Rule 3(c) [*id.* at 21];

(4) abused its discretion by severely limiting discovery, Rule 3(c)[2] [*id.* at 24];

(5) abused its discretion and/or was arbitrary and capricious in its application of court rules and procedures, Rule 3(c)[3] [*id.* at 27];

(6) made arbitrary and capricious findings concerning the newly discovered provisional ballot evidence in its Order, Rule 3(c) [*id.* at 30];

(7) made arbitrary and capricious findings concerning the newly discovered (and wrongfully withheld) evidence related to machine tabulators misreading valid votes as undervotes in its Order, Rule 3(c) [*id.* at 33]; and

(8) made arbitrary and capricious determinations due to the lack of consistent and uniform procedures for election contests, Rule 3(c) [*id.* at 33-34].

Notably, Contestee spills much ink to direct attention to Section C of the Petition [Mayes Resp. at 17, 21-22], which simply recounts arbitrary and capricious statutory interpretations and/or abuses of discretion the trial court made throughout these

[2] Discovery relates to the arbitrary and capricious finding that provisional ballot information "was discoverable in November and December with sufficient diligence," yet it was the trial court that repeatedly denied Petitioners' requests to compel discovery. [Petition at 28.] Further, Maricopa County refused to provide the report to avoid "open[ing] the door to discovery." [*Id.*]

[3] The muddled set of rules litter the Order, whereby the trial court not only used the lack of clarity to discount newly discovered evidence but also to preclude relief. [Petition at 27; APPV2-065 to 069.]

proceedings. Those issues could—but need not be—resolved here because they are distinct from the primary relief requested, which is summarized as follows:

> The trial court has a duty to issue final judgments and should be compelled to issue final judgments as to both the original election contest and the Motion for a New Trial. *See* Ariz. R. P. Spec. Act. 3(a). [Petition at 19.]
>
> [T]he trial court abused its discretion by denying Petitioners' Motion. *See* Ariz. R. P. Spec. Act. 3(c). Alternatively, if an appeal is not ripe, based on the trial court's unsigned order, it is threatening to proceed without legal authority. Ariz. R. P. Spec. Act. 3(b). [*Id.*]

A. THE COURT SHOULD ACCEPT SPECIAL ACTION JURISDICTION IN THIS EXCEPTIONAL CASE.

Hanging in the balance is the question: Who is the constitutionally elected Attorney General? Contestee, understandably, wants to impound new evidence that became public after trial and its implications—that Abraham Hamadeh is Arizona's Attorney General. The record reflects that Petitioners diligently prosecuted their Motion but faced a decidedly slow trial court that consistently stalled *post-trial* proceedings (ironically, after speeding through reasonable discovery). [APP023-032.]

The closest election in Arizona history demands full and fair litigation of lingering issues, and this Court should give the Due Process and Election Clauses, *see* Ariz. Const. art. 2, §§ 4, 21, their full effect—especially where the trial court acknowledged this case presents "a close call in a closely contested election." [APPV2-061.] The Court's exercise of special jurisdiction is appropriate in these unusual circumstances. *See* Ariz. Const. art. 6, § 5(1), (4), (5). Further, the manifest injustices preventing a fair adjudication of evidence must ultimately be resolved by *this* Court, as

neither party will accept anything less. *See generally Mann v. Maricopa Cnty.*, 104 Ariz. 561, 563 (1969) (accepting original jurisdiction where "an important facet of the administration of justice is concerned").

1. Petitioners lack an equally plain, speedy, and adequate remedy by appeal.

Time is of the essence.

Petitioners lack a plain, speedy, and adequate remedy by appeal because final judgment has not issued, rendering an appeal premature. Ariz. R. Spec. Act. 1(a). Instead, Petitioners ask this Court to exercise extraordinary special action jurisdiction, because it has been

- 281 days since the General Election,
- 225 days since filing the Motion,
- 191 days since the Motion was ripe,
- 33 days since the trial court denied the Motion,

and the trial court *still* has not entered final judgment. Arizonans should not have to wait for an unresponsive trial court to perform the ministerial task of signing an order containing its ruling and reasoning—especially when who is entitled to discharge the duties of Attorney General is at stake.

This issue of "statewide importance" is of "great public interest," *Ingram*, 164 Ariz. at 516—namely, Arizonans need to know not only who is the *de facto* but also the *de jure* Attorney General. Time is of the essence, yet the trial court has shown zero urgency. Given Contestee's potential *de facto* status as Attorney General, it "would seem

to invite on the part of plaintiff and defendant every reasonable effort to expedite the ultimate determination as to who is the real [Attorney General]." *Cambell v. Hunt*, 18 Ariz. 442, 457 (1917).

Without relief, there is no telling when the trial court will issue signed, appealable orders. Until then, Petitioners' right to appeal is hamstringed. In fact, Contestee and the Secretary filed a *joint* Motion to Dismiss the pending appeal in the Court of Appeals on August 4, 2023, asserting it was premature.[4] [Appx247.] Simultaneously, Defendants filed a *joint* Notice of Pending Motions and Request for Rulings in the trial court. Yet twelve days later, the trial court has still failed to act.[5] [Appx249-251.] Setting aside the impropriety of the Contestee (as a *candidate*) and the Secretary (as a state officer) filing *joint* substantiative motions, it is plain that Defendants intend to stall *any* resolution, and the trial court is unlikely to be moved to quick action.

Further, the abuses of discretion and arbitrary and capricious findings articulated in the Order are unlikely to change, and any subsequent final order is likely to be

[4] Although premature appeals are discouraged, dismissal of a premature appeal may not be warranted in furtherance of justice. *See Snell v. McCarty*, 130 Ariz. 315, 317 (1981). As explained in Petitioners' Notice of Appeal, the trial court might "subsequently and formally enter final judgment," and Petitioners might seek special action directly in this Court. [Appx239.] Critically, while the trial court is ordinarily divested of jurisdiction, the well-established exception is actions in furtherance of the appeal. *Castillo v. Industrial Comm'n*, 21 Ariz. App. 465, 467 (1974). At this point, finalizing the July 14 and July 17 decisions is more akin to a ministerial task, as the court's decision is unlikely to change. *See, e.g.*, *Baker v. Bradley*, 231 Ariz. 475, 479 ¶ 11 (App. 2013).

[5] Petitioners alerted the trial court to the lack of final orders, for instance, in the Notice of Appeal [Appx239] but did not file separate motions or pleadings that might generate additional briefings, further delaying the trial court.

ministerial.[6] *See, e.g.*, *Baker*, 231 Ariz. at 479 ¶ 11. Yet that will not prevent Defendants from vigorously opposing *any* appeal. And even once an appeal *is* mature, as Arizona Rule of Civil Appellate Procedure ("ARCAP") 10 is not applicable, there is no guarantee the Court of Appeals will expedite it.[7] Even so, ARCAP 29, offered as an alternative, provides for expedited *decisions*, not an expedited briefing schedule. *See* Ariz. R. Civ. App. P. 29(a), (d). And while Mayes argued Petitioners could have appealed the Motion's denial [Mayes Resp. at 14], that still necessitates a *signed* order. *See State v. Birmingham*, 96 Ariz. 109, 112 (1964). None exist.

Petitioners have diligently advanced litigation.

Despite Contestee's blustering that Petitioners failed to proceed with expediency, the record reflects that Petitioners filed their Motion within *two* business days of learning the Secretary *knew* at the December 23 hearing that Pinal County's machine tabulators misread valid votes as undervotes—the very issue being litigated. Petitioners then diligently advanced the Motion by filing a reply, filing several notices of supplemental authority, making oral arguments, and even nudging the court by requesting a Rule 16(d) scheduling conference. [APP027-030.]

[6] Concerning pending motions, especially for the limited purpose of accepting special action jurisdiction, the motions can be "deemed denied by operation of law." *State v. Hill*, 174 Ariz. 313, 323 (1993) (citations omitted).

[7] Petitioners have not sought an expedited appeal (e.g., under ARCAP 3) so as to pursue this special action and allow space for the trial court to issue a final judgment. Defendants' Motion to Dismiss was imminent, and the lack of final judgment demonstrates that taking an expedited appeal would potentially result in an order of dismissal, causing further delays.

Petitioners had no clear procedure to compel a more expeditious decision on the Motion. And although Contestee suggests Petitioners could have filed a motion to expedite, she cites no relevant rule—because there is none. In fact, in previous filings, she has argued that "contest statutes bar a new trial" and that "[n]owhere in these statutes has the Legislature authorized a new trial. *See* A.R.S. §§ 16-671–78." [Appx202.] Now she argues that Petitioners should have used the election contest statutes to expedite the Motion. She can't have it both ways.

Conversely, Petitioners have consistently argued that the ordinary rules of civil procedure apply where they do not conflict with a statute's plain language [APPV2-014 to -016]; in this case, a Rule 59(a) Motion has no statutory accelerant. Furthermore, ARCAP 10 is inapplicable, as there is no expedited appellate review for election contests. *See* Ariz. R. Civ. App. P. 10 ("This Rule governs appeals in election matters designated by statute for expedited appellate review.").[8]

Currently, 280 votes separate Mayes and Hamadeh; withheld evidence implies the outcome will be reversed once *all* valid votes are counted. Meanwhile, Contestee has been executing the functions of Attorney General, making decisions impacting millions of Arizonans.

Notably, unlike *Lake v. Hobbs*, whereby this Court declined Lake's second Petition for Transfer because this Court "ha[d] no reason to doubt that the Court of

[8] ARCAP 10 applies to narrowly prescribed election issues *See, e.g.*, A.R.S. §§ 16-351(A) (candidate nomination petitions), 19-122 (initiative and referendum petitions).

Appeals appreciates Petitioner's desire for an expedited resolution[,]" there is no reason to believe here that this matter will be expeditiously resolved absent this Court's intervention. [APP004.]

Finally, even if Petitioners could file this special action in a lower court under Arizona Rule of Procedure for Special Actions 8(a), final resolution will be forestalled for months, though time is clearly of the essence regarding this critically important issue of statewide magnitude that has no other plain, speedy, and adequate remedy by appeal.

2. The Petition satisfies Arizona Rule of Procedure for Special Actions 3.

Every question presented in the Petition adheres to Rule 3 of the Arizona Rules of Procedure for Special Actions.

First, the trial court has a duty to issue final judgments and has failed to do so here. [Petition at 19.] *See So. Cal. Edison Co. v. Peabody Western Coal Co.*, 194 Ariz. 47, 53 ¶ 20 (1999) ("refusal to enter an appealable order may be reviewed for abuse of discretion by special action proceedings"). Whether pursued under Rule 3(a) as a failure to perform a duty *or* under Rule 3(c) as an abuse of discretion, the constitutional duty to make speedy decisions and the procedural responsibility to timely issue appealable orders is squarely the responsibility of the trial court—not Petitioners.

Second, the trial court abused its discretion when it denied Petitioners' Motion. Ariz. R. P. Spec. Act. 3(c). [Petition at 19.] Petitioners point to specific abuses of discretion by the court and its outright arbitrary and capricious findings. Granted, the

Order's unclear wording and the trial court's repeated failure to make specific findings made the Order difficult to unpack. Critically, "failure to make the required findings may be reversible error." *Miller v. Bd. of Supervisors*, 175 Ariz. 296, 300 (1993).

Further, "[m]isapplication of law or legal principles constitutes an abuse of discretion." *Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 14 (2013). And a determination can be considered arbitrary and capricious when the record shows "there has been 'unreasoning action, without consideration and in disregard for facts and circumstances[.]'" *Maricopa Cnty. Sheriff's Office v. Maricopa Cnty. Emp. Merit Sys. Com'n,* 211 Ariz. 219, 223 ¶ 17 (2005). The Petition details the misapplications of law and several determinations in the Order where the record neither supports the finding nor the reasoning.

Accordingly, the Petition satisfies Rule 3.

3. The Petition complies with Arizona Rule of Procedure for Special Actions 7(b).

Rule 7(b) requires the Petition to "set forth the circumstances which in the opinion of the petitioner render it proper that the petition should be brought in" this Court, Ariz. R. P. Spec. Act. 7(b), and the Petition does just that. After several introductory pages detailing the months this case has languished in the trial court, Petitioners state:

> These unexplainable and unnecessary delays on an issue of extreme statewide importance justify Petitioners' request to seek extraordinary relief from this Court directly via special action.[2] *See* Ariz. R. P. Spec. Act. 7(b). Not only does this petition raise "purely legal issues of statewide

> importance[,]" but there is also no "equally plain, speedy, and adequate remedy by appeal[.]" *Tobin v. Rea*, 231 Ariz. 189, 193 ¶ 8 (2013) (citing Ariz. R. P. Spec. Act. 1(a)) (other citations omitted).

[Petition at 3.] Although Contestee tries to distinguish *Tobin* due to looming deadlines in that case, the central premise remains—this a purely legal issue of statewide importance, and her laches argument betrays her claims otherwise.[9] There is no doubt that if Contestee is *not* the constitutionally elected Attorney General, every day she exercises her duties, Arizona suffers irreparable damage. Contestee catches herself coming and going on this issue because she fears that once the votes are counted, she will lose her office.

In addition to these issues of critical statewide importance, the Petition raises questions of expediency and judicial economy, recognizing that "given this case's significance, the losing party will undoubtedly seek review by this Court [even if litigated at the appellate level], further delaying a complete and final adjudication of the 2022 Attorney General's race." [Petition at 5 n.4.] Contestee's approach would only further delay the outcome.

B. THE REQUESTED SANCTIONS ARE NOT WARRANTED.

Petitioners' characterization of the Proposed Order Reflecting Additional Rulings of the Court [APPV1-089] and reference to a stipulation by Respondent Mayes

[9] Contestee suggests reversing the trial court's denial of the Motion requires a fact-intensive review. [Mayes Resp. at 21.] Petitioners disagree. The Order contains errors of law, is internally inconsistent, and makes findings unsupported by the record. [APPV2-065 to -072.]

[APPV1-094] was an unintentional error. Had Respondents contacted Petitioners, Petitioners would have corrected the record, saving Respondents the time of addressing this issue in briefing.[10]

As this Court is aware, Petitioners—far from intending to mislead the Court—included the relevant documents in the Appendix and provided a hyperlink to the relevant order so that the Court could reference the record itself.[11] Fortunately, "civil litigation…is not a game of 'gotcha.'" *Chabrowski v. Litwin*, No. CV-16-03766-PHX-DLR, 2017 U.S. Dist. LEXIS 181318, at *1 (D. Ariz. June 19, 2017) (cleaned up).[12]

Thus, while Petitioners regret the error, this Court should not entertain caustic distractions to the issues this case calls upon it to decide—whether material evidence, withheld due to Defendants' severe lack of compliance with duties of disclosure and candor, entitle Mr. Hamadeh to a new trial. Red herrings aside, Petitioners and Arizonans are entitled to a plain, speedy, and adequate answer as to whether this warrants a new trial.

[10] Statements conveyed the point that the trial court has been alerted to the deficiency. *See supra* at n. 4, 5. As to the Rule 60 Motion, Petitioners conveyed that the trial court in *Lake v. Hobbs* decided the motion *on the merits*. *Lake v. Hobbs*, Maricopa County Superior Court CV 2022-095403, Minute Entry (May 15, 2023) (reasoning that "had the legislature wanted to abrogate or accelerate the rules for an election challenge so as to preclude Rule 60 relief they would have done so"). [APP017.]

[11] The hyperlink to the *Lake v. Hobbs* minute entry in the Petition now appears broken. *See* attached. [APP021-022.]

[12] Sanctions should "never [be] wielded against candidates or their attorneys for asserting their legal rights in good faith." [APP007.] Petitioners erred but acted in good faith.

III. CONCLUSION

Rather than acknowledging the import of evidence that came to light after trial, Defendants seek to sweep it all under the rug. In fact, Defendants would rather attack the legal process and Petitioners' counsel than consider the evidence that Hamadeh, not Mayes, received the most lawful votes for Attorney General.

WHEREFORE, Petitioners respectfully request that the Court accept special action jurisdiction and grant the relief requested by: (1) ordering the trial court to issue final judgments consistent with Rule 54(c); (2) reversing the trial court's denial of Petitioners' Motion and remanding for further proceedings; and (3) ordering any other appropriate relief, including, but not limited to the conclusions of law referenced in Section C of the Petition.

RESPECTFULLY SUBMITTED this 16th day of August 2023.

JENNIFER WRIGHT ESQ., PLC

By /s/ Jennifer J. Wright
Jennifer J. Wright (027145)

Davillier Law Group, LLC

By /s/ Veronica Lucero (with permission)
Alexander Kolodin (030826)
Veronica Lucero (030292)
Arno Naeckel (026158)
James C. Sabalos (*pro hac vice*)

CHATTAH LAW GROUP

By /s/ Sigal Chattah (with permission)
Sigal Chattah Esq. (*pro hac vice*)

TIMOTHY A. LA SOTA, PLC

By /s/ Timothy La Sota (with permission)
Timothy A La Sota, SBN # 020539

Attorney for Petitioners/Contestant