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SUPERIOR COURT OF ARIZONA

MOHAVE COUNTY

JEANNE KENTCH, et al.,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, et al.,

Defendants.

No. S8015CV202201468

RESPONSE TO PLAINTIFFS' MOTION FOR A NEW TRIAL

(Assigned to the Hon. Lee F. Jantzen)

This case is over and should have ended long ago. Nevertheless, Plaintiffs refuse to concede not only that Kris Mayes lawfully won the 2022 election for Arizona Attorney General, but also that Plaintiffs/Contestants lost this election contest—in which Plaintiffs presented a single witness, finished their case-in-chief in under 20 minutes, and conceded in closing that the evidence "won't actually be enough to sustain this particular contest." [12/23/2022 Bench Trial Tr. ("Tr.") 112:11]

Despite that concession, Plaintiffs now bring their latest gambit in this seemingly never-ending contest: a Motion for a New Trial. In "mov[ing] for a new trial"—despite admitting that Ms. "Mayes has now taken the oath of office for Attorney General"—Plaintiffs ask this Court to allow them "to meticulously inspect" "*all* ballots, not just a sample"; to empower Plaintiffs to adjudicate these ballots according to their own procedures, at their own leisure, and not subject to any "time restraints"; and to (eventually) conduct a new trial. [Mot. for New Trial ("Mot.") at 3, 7 & n.2, 9] But Plaintiffs' Motion fails for, at the very least, five independent reasons.

First, as a procedural matter, Plaintiffs' Motion is not permitted. The statutes governing this special statutory proceeding set expedited timelines, including that this Court issue its ruling within "five days" of the contest hearing and, then, enter judgment "immediately." A.R.S. § 16-676(B). These statutory timelines are not "artificial time restraints," as Plaintiffs contend (at 9). And they do not permit repeat election contests, or new trials—as other courts have held.

Second, as to the merits, Plaintiffs' Motion also fails. In advocating a new trial, Plaintiffs (at 3) claim "irregularit[ies] in the proceedings" and "errors of law." But Plaintiffs fail to identify any; and none occurred in this three-hour trial. Plaintiffs (at 3) also flag purportedly "newly discovered material evidence." For all this information, though, Plaintiffs failed to exercise diligence to obtain it, to show the information is material, or to show it would affect the outcome.

Third, as to the remedy, Plaintiffs' request is improper. Under the guise of a motion for a

new trial, Plaintiffs (at 7) ask this Court to sanction a statewide hand recount of "*all* ballots, not just a sample," according to Plaintiffs' preferred procedures. But the governing statutes do not allow this candidate-conducted recount; indeed, the Arizona Court of Appeals has held as much. And, in any event, Plaintiffs already inspected thousands of ballots and received the results of the separate statewide recount that was conducted—both of which confirm that Ms. Mayes won.

Fourth, in this Motion for a New Trial, Plaintiffs raise—for the first time—new claims challenging the 2019 Elections Procedure Manual and various procedures on election day. But Plaintiffs did not raise these claims in their Complaint, and, so, they cannot be raised now.

Fifth, even if Plaintiffs' Motion somehow survives every issue above, it must be denied pursuant to both laches and mootness. Plaintiffs sat on their supposedly "newly discovered" evidence and waited to spring it on this Court until *after* Ms. Mayes was sworn into office.

In the end (and, we hope, it is the end), Plaintiffs never should have filed this Motion. This Court therefore should deny it, grant the pending Motion for Attorneys' Fees, and enter judgment "immediately," as A.R.S. § 16-676(B) directs.

Analysis

I. Arizona's election-contest statutes bar Plaintiffs' request for a new trial.

As a threshold matter, Plaintiffs are not entitled to a new trial in this expedited election contest. In moving for a new trial, Plaintiffs (at 9) assert that, because Ms. "Mayes has now taken the oath of office for Attorney General," "there are no artificial time restraints on completing the contest process." Plaintiffs (at 10) thus urge this Court to take the "adequate time to conduct the proceedings that Contestants requested." But the time restraints in Arizona's election-contest statutes can hardly be characterized as "artificial," and they bar a new trial now.

A. The timelines in the contest statutes do not permit new trials.

"Election contests 'are purely statutory and dependent upon statutory provisions for their

conduct.'" *Pacion v. Thomas*, 225 Ariz. 168, 170 ¶ 12 (2010) (citations omitted). Indeed, the "time elements in election statutes [must] be strictly construed." *Bohart v. Hanna*, 213 Ariz. 480, 482 ¶ 6 (2006). Therefore, when these statutory time elements "conflict[] with a procedural rule, the statute prevails." *Albano v. Shea Homes Ltd.*, 227 Ariz. 121, 127 ¶ 26 (2011); *see, e.g.*, *Smith v. Bd. of Directors, Hosp. Dist. No. 1, Pinal Cnty.*, 148 Ariz. 598, 599 (App. 1985) (The time-extending provision of "Rule 6(a) does not apply to" "[t]ime elements in election statutes[.]").

Here, the contest statutes bar a new trial. Nowhere in these statutes has the Legislature authorized a new trial. *See* A.R.S. §§ 16-671–78. Any such motion, instead, would conflict with these statutes' expedited timelines. As the Legislature has directed, a contest must begin "within five days after completion of the canvass," and the hearing generally must be held "not later than ten days [thereafter]." A.R.S. §§ 16-673(A), -676(A). Critically, Arizona law also requires a prompt ruling and then "immediate[]" entry of judgment. A.R.S. § 16-676(B). Based on these expedited timelines and the requirement for an immediate judgment, no new trial is permitted.

Arizona courts have rejected similar attempts to apply civil rules inconsistent with contest statutes. *See Grounds v. Lawe*, 67 Ariz. 176, 186–87 (1948) ("This rule [relating to amending pleadings] has no application in jurisdictions such as ours where election contests are not governed by the general rules of chancery practice but rather are considered to be purely statutory[]" and where the "comprehensive code relating to this special statutory proceeding" lacked any section "relating to amendments."). Though Arizona has not resolved the issue, other states have held motions for a new trial are not permitted in statutory election contests. Such courts have held that a contest is "statutory in its nature, and intended to be expeditious, and not incumbered by the delays which would be occasioned by such proceeding as a motion for a new trial." *Packard v. Craig*, 45 P. 1033, 1033 (Cal. 1896); *see also Thomas v. Franklin*, 60 N.W. 568, 569 (Neb. 1894) (noting that motion for a new trial not permitted in election contests).

By setting expedited timelines, mandating judgment "immediately," and not reserving the option for a new trial, the Legislature has precluded Plaintiffs from receiving one.

B. *Hunt v. Campbell* does not dictate a contrary result.

In advocating "a [c]omplete [c]ontest" with "no artificial time restraints," Plaintiffs (at 9) rely on *Hunt v. Campbell*, 19 Ariz. 254 (1917), where the Arizona Supreme Court reversed the results of the gubernatorial election, over one year later. But *Hunt* does not support Plaintiffs' request for a roving, repeat trial and discovery fishing expedition.

Unlike now, the election-contest statutes that governed in *Hunt* did not set expedited timelines for these contests, as Plaintiffs fail to acknowledge. *See Hunt*, 19 Ariz. at 286 (applying Arizona's "Civil Code 1913").[1] Those prior statutes set *only two* deadlines: for initiating a "contest" and filing an "answer." 1913 Civ. Code §§ 3061, 3063–64. No other deadlines applied. *See id.* §§ 3060–70. And, notably, the Legislature gave the court discretion to "set a time for the hearing of the contest" and for "[s]uch hearing [to] be continued . . . until such time as the court may direct." *Id.* § 3068. None of the other time restraints in the current contest statutes existed.[2]

After *Hunt*, the Legislature (unsurprisingly) amended the election-contest statutes, avoiding drawn-out contests and uncertainty. Specifically, the Legislature shortened deadlines that had applied in the 1916 election: (1) from "twenty days," 1913 Civ. Code § 3061, to "five

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[1] The 1913 Revised Statutes of Arizona, Civil Code ("1913 Civ. Code"), is available on the State of Arizona website https://azmemory.azlibrary.gov/nodes/view/38228.

[2] That conclusion is clear from *Hunt*'s history. "The contest consumed almost five months for trial in the lower court." *Hunt*, 19 Ariz. at 299. And over the more than 13 months from the November 1916 election to the Supreme Court's December 1917 opinion, control of the governor's office ping ponged from incumbent George Hunt, to challenger Thomas Campbell, and, ultimately, back to Mr. Hunt—including a month where both claimed to hold the office. *See* Douglas Towne, *The 1916 Arizona Governor's Election Was Undecided for More Than a Year*, Phoenix (Nov. 3, 2022), https://www.phoenixmag.com/2022/11/03/governorship-a-deux/ (describing how both the incumbent and the challenger "'Sw[ore] in as Governor,'" "the incumbent barricaded [himself] in the governor's office guarded by loyalists while the challenger presided from his nearby house," and "[t]here was the prospect of a war between [the Industrial Workers of the World] on Hunt's side and a pack of cowboys loyal to Campbell").

days," A.R.S. § 16-673(A), for filing an election contest, and (2) from "ten days," 1913 Civ. Code §§ 3063–64, to "five days," A.R.S. § 16-675(A), for an answer. The Legislature also removed courts' unbridled discretion to "set" and "continue[]" the "time for the hearing," 1913 Civ. Code § 3068, and instead required courts to "set a time for the hearing of the contest, not later than ten days after the day on which the statement of contest was filed, which may be continued for not to exceed five days for good cause shown," A.R.S. § 16-676(A). And, critically, the Legislature added the requirement at issue now: that, "within five days after the [contest hearing], the court shall file its findings and *immediately* thereafter shall pronounce judgment." A.R.S. § 16-676(B) (emphasis added). Through these amendments, the Legislature ensure[d] a resolution of the contest as soon as possible so that the winner can take the office to which he was rightfully elected." *Babnew v. Linneman*, 154 Ariz. 90, 92 (App. 1987).[3]

II. Plaintiffs fail to demonstrate entitlement to a new trial under any ground in Rule 59.

Fortunately, the Court need not reach the legal issue above because Plaintiffs have not satisfied any basis under Rule 59 for this Court to grant a new trial. Plaintiffs (at 3) move for a new trial under three purported grounds in Rule 59(a)(1): (1) "any irregularity in the proceedings," *id.* at (a)(1)(A), (2) "newly discovered material evidence," *id.* at (a)(1)(D), and (3) any "other errors of law at the trial or during the action," *id.* at (a)(1)(F). Plaintiffs recite these grounds without any analysis, instead leaving it to Defendants and this Court to decipher how their Motion grafts onto them. In the end, this Motion falls far short of demonstrating entitlement to the extreme relief they request. *See State v. Spears*, 184 Ariz. 277, 287 (1996) ("Motions for new trial are disfavored and should be granted with great caution.") (citation omitted).

[3] In advocating a new election contest without time restraints, Plaintiffs (at 9) also cite *Reyes v. Cuming*, 191 Ariz. 91 (App. 1997). But the contestant in *Reyes* appears to have satisfied all statutory deadlines. *See id.* at 92 ("Reyes filed a timely contest . . . . Reyes timely brought this appeal."). He did not request a new trial. And *Reyes* did not consider whether the appeal of his election contest was barred by either laches or mootness, both of which bar a new trial here.

A. Plaintiffs identify no "irregularity in the proceedings."

An irregularity in the proceedings refers to "an error [that] has occurred in the original trial that probably affected the verdict." *Anderson v. Nissei ASB Mach. Co*., 197 Ariz. 168, 178 ¶ 38 (App. 1999) (citation omitted). Here, Plaintiffs identify no irregularity that occurred during the December 23 trial, let alone one that "probably affected the verdict." *Id.*

In fact, Plaintiffs hardly discuss the trial at all. They focus instead, almost exclusively, on what occurred in Pinal County (or Maricopa County) on election day and after, during the statutorily mandated statewide recount. This of course did not "occur[] in the original trial." *Id.*

No irregularity occurred during the December 23 trial. It lasted just over three hours. Plaintiffs examined a single witness, during which time Defendants made no objections. [*See* Tr. 26:14–31:18] Defendants also put on a single witness. [Tr. 38:24–89:11] The Court made no evidentiary rulings against Plaintiffs. And Plaintiffs' counsel conceded during closing that their evidence was not "enough to sustain this particular contest." [Tr. 112:6–13] Consistent with that concession, this Court ruled that Plaintiffs' contest failed and confirmed the election results. In short, it is difficult to conceive of a more subdued or straightforward trial than the one here. There were no irregularities, and Plaintiffs are not entitled to a new trial under Rule 59(a)(1)(A).

B. Plaintiffs identify no "errors of law."

Plaintiffs do not identify any "errors of law at the trial or during the action" under Rule 59(a)(1)(F). While entirely unclear, to the extent Plaintiffs challenge this Court's denial of additional discovery (*see* Mot. at 13), the Court's ruling on that issue is consistent with the contest statute, as explained below in Part III. The only "discovery" permitted in a contest is an "inspection of ballots" to "prepare for trial." A.R.S. § 16-677. The Court's adherence to that statutory text is the opposite of an error of law. And to the extent Plaintiffs are using this Motion to renew their discovery requests, Rule 59 "may not be used to relitigate old matters." *Exxon*

Shipping Co. v. Baker, 554 U.S. 471, 486 n.5 (2008) (citation omitted).

C. Most of Plaintiffs' "newly discovered evidence" is not new, and none of it either is "material" or would change the result at a new trial.

To obtain relief based on newly discovered evidence, "the moving party must demonstrate that the evidence (1) is material, (2) existed at the time of trial, (3) could not have been discovered before trial by the exercise of due diligence, and (4) would probably change the result at a new trial." *Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, 490 ¶ 24 (App. 2013). Although Plaintiffs fail to engage with these factors, they identify several items that they seem to claim constitute "newly discovered evidence": (1) a list of provisional voters; (2) Kari Lake trial testimony; and (3) issues related to the recount and Pinal County. None warrants a new trial.

1. List of provisional ballot voters

Plaintiffs assert that, sometime after the trial and pursuant to a public-records request, they received the list of persons who voted provisionally in Maricopa County but whose votes were not counted. [Mot. at 12–13] Plaintiffs claim that obtaining this list entitles them to a new trial. It does not. This list (1) could have been discovered with "due diligence," (2) is not "material," and (3) "would [not] probably change the result." *Waltner*, 231 Ariz. at 490 ¶ 24.

First, Plaintiffs failed to exercise "due diligence" in seeking to acquire this list of provisional voters. *Id.* At best, this list of voters could relate to Count 1 only, which is predicated on the check-in/check-out issues that Plaintiffs alleged occurred on Election Day, November 8, 2022. Plaintiffs thus could have made a records request starting that day. At a bare minimum, Plaintiffs must have known they wanted this list by November 22, when they filed their first election contest (in Maricopa County), or certainly when they filed their second contest in this Court on December 9. Yet Plaintiffs waited until "eleven-days prior to the trial," or until approximately December 12, to "first request[]" the list. [Mot. at 12–13]. Plaintiffs then received

the information within a couple weeks. [*See id.*] Plaintiffs thus failed to exercise "due diligence" to obtain these records, *Waltner*, 231 Ariz. at 490 ¶ 24, particularly when, "[i]n election matters, time is of the essence," *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 15 (1998).

Next, this evidence is not material to Plaintiffs' claims and would not "probably change the result" of the trial. *Waltner*, 231 Ariz. at 490 ¶ 24. Plaintiffs fail to explain how this evidence is material to their actual claims. At most, Plaintiffs argue (at 13) that it will be "relevant to ensuring the accuracy of the election results" (not their claims here). More fatally, Plaintiffs do not and cannot explain how this evidence would "probably change the result" of the trial. *Waltner*, 231 Ariz. at 490 ¶ 24. Again, at most, Plaintiffs (at 13) claim that the list has the "potential" to identify not-yet-identified vote discrepancies. This is insufficient for a new trial.

2. Kari Lake trial testimony

Plaintiffs (at 13) also assert—again without any explanation as to why it entitles them to relief under Rule 59(a)(1)(D)—that testimony in the December 21 and 22, 2022 Kari Lake trial (two days before the trial in this case) "revealed that some ballots in Maricopa County were printed in such a way that their timing marks could not be correctly read, which prevented Maricopa County's tabulators from properly reading and tabulating a large number of ballots." From this, Plaintiffs (at 14) hypothesize that "any votes for Mr. Hamadeh which were erroneously read as undervotes would likely not have been properly recorded, as they eventually were in Pinal County." How? In any event, this "evidence" fails to satisfy Rule 59(a)(1)(D).

Most plainly, this evidence was discoverable with reasonable diligence. Plaintiffs themselves admit the testimony from the Lake trial took place two days before the trial here. It was also publicly available and highly publicized.[4] Further, the "evidence" is not "material" to

[4] Abe Hamadeh retweeted out multiple clips of the Kari Lake trial testimony. *See, e.g.*, Abe Hamadeh (@AbrahamHamadeh), Twitter (Dec. 21–22, 2022), https://twitter.com/AbrahamHamadeh.

any of the claims in this contest, and Plaintiffs do not explain the connection. *Waltner*, 231 Ariz. at 490 ¶ 24. And certainly this evidence "would [not] probably change the result" in this case (or the election). *Id.* As the Judge ruled in the Lake trial, Lake's own witness "admitted that the voters who suffered from tabulator rejection *would nevertheless have their votes counted*." [12/24/22 Under Advisement Ruling at 6, *Lake v. Hobbs*, CV 2022-095403 (Ariz. Super. Ct.) (attached as Ex. A)]

3. Pinal County and recount results

The lion's share of Plaintiffs' Motion centers on the fact that the mandatory recount showed a total "net variance" of 507 ballots in Pinal County, resulting in a net gain of 277 votes in favor of Mr. Hamadeh. This, together with the recount results from all counties, "reduced Mr. Hamadeh's previous 511 vote deficit" to 280 votes. [Mot. at 4] While unclear, Plaintiffs seem to argue that three issues constitute new evidence: (1) that the margin in the race narrowed, (2) specific errors that were identified and corrected in Pinal County, and (3) and hand counts.

Smaller margin. That the recount revealed a smaller margin of victory for Ms. Mayes does not warrant a new trial for at least one glaring reason: the evidence would decidedly *not* "change the result at a new trial." *Waltner*, 231 Ariz. at 490 ¶ 24. Even if another trial was held to permit Plaintiffs to introduce the results of the recount, including from Pinal County, Plaintiffs still would not succeed. Ms. Mayes still received hundreds more votes than Mr. Hamadeh.

Issues in Pinal County. Faced with the dispositive fact that the trial outcome would have been the same with or without the recount results, Plaintiffs revert to their Day 1 strategy of trying to cast a vague sense of doubt on the election as a whole, pointing to issues that occurred in Pinal County. But the issues now identified by Plaintiffs neither were "material" to any of Plaintiffs' claims nor "would [they] probably change the result at a new trial," or both. *Waltner*, 231 Ariz. at 490 ¶ 24. Plaintiffs do not attempt to establish otherwise.

Plaintiffs point out two issues. First, they note (at 12) that after the election and during the recount, Pinal County elections officials determined that certain ballots were inadvertently not counted at all. This fact is not related to any claim in the Complaint. Even if it were, Plaintiffs do not argue that Pinal County finding and identifying additional votes would change the result at trial. Indeed, they even admit (at 12) that it would not. At most, Plaintiffs (at 12) argue that if they can look in more places, and "if the Pinal County issue repeats itself anywhere else in the State—[it] could be outcome determinative in this election." This is not enough for a new trial.[5]

Plaintiffs also note that Pinal County identified 63 ballots with "unclear marks" that "were not subject to adjudication on Election Day" and which were subsequently adjudicated during the recount (and counted). [Mot. Ex. B, Supplement] The report concludes that this was a result of "human error" in Pinal County and was accounted for, and corrected, in the recount. [*See id.*] Plaintiffs cannot show that a mistake in Pinal County—which has now been corrected—would have changed the result of this case, or the election. Beyond speculation, they provide no support that similar errors occurred in other counties (and were not identified during the recount).

Plaintiffs also attempt to concoct an issue from the fact that the Secretary of State purportedly knew the results of the recount prior to the December 23 trial in this case and did not disclose them. [*See* Mot. at 5, 10] But the court in the recount case ordered, consistent with the recount statute, that the results not be released by anyone until that court certified them at the formal hearing on the results. [Mot. Ex. E, ¶¶ G–H] *See also* A.R.S. § 16-665(A). More importantly, the Secretary's knowledge is of no consequence because, as just explained, the recount and any issues related to it would not have changed the outcome of the trial.

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[5] In any event, there is zero basis to believe that any other county had this or a similar issue. If anything, the recount further confirms that Ms. Mayes received the most votes. Every county combed through its election results to identify issues and reconcile votes, and no other county found an issue like that identified in Pinal County.

Hand Count. Finally, in their Motion (at 7), and Amended Motion (at 3–4), Plaintiffs point out that during the recount, hand audits of certain counties yielded a handful of votes in favor of Mr. Hamadeh. Plaintiffs do not and cannot argue that this small number of additional votes would likely change the result at trial. Once again, at most, Plaintiffs argue that *if* they can look at every ballot in the state, the result hypothetically might be different. But the evidence that Plaintiffs have identified does not allow for a new trial. *See Waltner*, 231 Ariz. at 490 ¶ 24 (requiring showing that new evidence "would probably change the result at a new trial").

In short, the results of the recount do not warrant a new trial. They do the opposite—they confirm (again) that Ms. Mayes received the most votes in the election for Attorney General.

III. Plaintiffs are not entitled to the further extraordinary relief they request.

Beyond asking for a new trial, Plaintiffs (at 11) ask this Court to "order [a] full ballot inspection[] . . . to ensure the accuracy of the election outcome" and resolve their "lingering questions" about the statewide recount that another judge of this Court certified. But that is not all. Plaintiffs (at 7 & n.2, 12) request the opportunity to "meticulously inspect" "*all* ballots, not just a sample," through Plaintiffs' own procedures, rather than "Maricopa County's recount process." But Plaintiffs cite no authority for this extraordinary request. None exists.

Instead, granting this relief is plainly prohibited by law. As noted above, "[e]lection contests 'are purely statutory and dependent upon statutory provisions for their conduct.'" *Pacion*, 225 Ariz. at 170 ¶ 12 (citations omitted). As the party "seeking a judicially-ordered recount," the "burden is on [Plaintiffs] . . . to point out a law vesting that authority in the court." *Barrera v. Superior Ct.*, 117 Ariz. 528, 529 (App. 1977). But the law does not allow a contestant to conduct a statewide hand recount of all ballots cast in an election. *See* A.R.S. §§ 16-671–78. The Court of Appeals, in fact, has held that "no authority exists in Arizona for ordering" a

"manual recount" of an election, when requested by a contestant. *Barrera*, 117 Ariz. at 529–30.[6]

Nor do the contest statutes support Plaintiffs' argument (at 7) that they "are statutorily entitled to inspect *all* ballots, not just a sample." The Supreme Court has rejected this argument. *See Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (holding that trial court properly denied contestants' request for "additional time and the opportunity to review additional ballots" after their inspection revealed insufficient evidence). In fact, the contest statutes permit only one form of discovery—an "inspection of ballots"—and only to the extent necessary to "properly prepare for trial." A.R.S. § 16-677(B).

While Plaintiffs' Motion is fatally unclear, at points they seem (at 3–4) to be asking for relief from this Court's order "limiting discovery." To the extent Plaintiffs are asking for this Court to reconsider its order requiring both the ballot inspection and the contest hearing to have been conducted by the statutory deadlines, Plaintiffs cite no reason to do so.[7]

Also unclear is Plaintiffs' argument in support of this relief. In a single sentence (at 3–4), Plaintiffs contend that, "[i]f necessary, th[eir] motion should also be treated as a motion pursuant to Rule 60(b) for relief from this Court's order limiting discovery." Plaintiffs do not identify the "final order" at issue, or mention which of the grounds under Rule 60(b) supports their argument, do not cite any caselaw, and do not engage in any analysis. No relief is available under 60(b). *See Hawke v. Bell*, 136 Ariz. 18, 21 (App. 1983) (holding that a court abused its discretion in

[6] To be clear, Arizona law distinguishes between a recount of votes (*see* A.R.S. §§ 16-661–667) and an election contest (*see* A.R.S. §§ 16-671–16-678). This case, of course, is a contest, not a recount. But because of the margin between Ms. Mayes and Mr. Hamadeh, a recount was also completed, as overseen and certified by the Superior Court in Maricopa County. *See* A.R.S. § 16-662. Both proceedings proved the same thing: that "[Ms. Mayes] was still the winner." *Babnew*, 154 Ariz. at 95. Accordingly, the statutes do not require this Court to "amend its judgment in order to reflect the results of the recount," as Plaintiffs seem to request. *Id.* Instead, "[a]ll that is required under A.R.S. § 16-676(B) is that the [C]ourt either confirm or annul and set aside the election," which the Court has already done, correctly. *Id.*

[7] Though again unclear, to the extent Plaintiffs seek this discovery through a motion for a new trial, they of course cannot rely on Rule 59(a)(1), which authorizes only "a new trial."

setting aside a judgment where the "motion contained no argument"). Indeed, Rule 60(b) does not apply to "interlocutory order[s]," *Sw. Barricades, L.L.C. v. Traffic Mgmt., Inc.*, 240 Ariz. 139, 141 ¶ 11 (App. 2016), and it "does not allow the trial court to re-weigh evidence or review legal errors," *Aloia v. Gore*, 252 Ariz. 548, 553 ¶ 20 (App. 2022). This rule has no application.

In any event, this Court's order related to ballot inspection is beyond dispute (if that is what Plaintiffs are challenging). The contest statutes both (1) permitted Plaintiffs to inspect ballots to "prepare for trial" and (2) required the contest hearing to be held, at the latest, 15 days after Plaintiffs initiated their contest. A.R.S. §§ 16-676(A), -677(B). Here, the Court's order complied with both those provisions. It allowed Plaintiffs to inspect ballots "in all three counties" that they requested. [12/22/2022 Order regarding Emergency Hearing] Plaintiffs then did so and inspected over 2,300 ballots. [*See* Tr. 60:20–61:2, 85:17–21] Based on that inspection and the evidence at trial, "there would have been a net gain of three votes for [Ms.] Mayes." [Tr. 85:20–21]. Plaintiffs thus are not entitled to relief under Rule 60(b).

Though Plaintiffs might not have liked the outcome of their ballot inspection, they have already received everything the statutes permitted. What they are requesting now—that the Court order (post-trial) a "meticulous review of" all votes and a "full" inspection of every single ballot "without the rush conditions"—is not authorized anywhere in the contest statutes and conflicts with Arizona election law. This extraordinary request was never available, and it certainly cannot be sought through a "motion for a new trial" or any other procedural motion.

IV. Plaintiffs' various challenges to established election procedures are too late.

Also sprinkled throughout Plaintiffs' Motion are references to Plaintiffs' disagreement with certain established election procedures. Among other things, Plaintiffs seem to now claim that (1) the 2019 Elections Procedures Manual as related to certain hand count provisions is "invalid" or "unjustifiable by the Constitution" [Mot. at 12 n.4], (2) all counties should have

followed the same election procedures as Pinal County [at 12–13], (3) that Maricopa County's process for adjudicating overvotes is incorrect (at 11), and (4) that counties must conduct a hand count of all votes [Amended Motion]. Plaintiffs never raised these claims in their Complaint, even though they are based on pre-election procedures. While it is mostly unclear how these issues fit into the legal framework for a new trial, it is too late for Plaintiffs to rely on them now.

For one thing, Plaintiffs needed to make these challenges *before* the election, not after it. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) ("Challenges concerning alleged procedural violations of the election process must be brought prior to the actual election.").[8]

In any event, a motion for new trial is not the proper vehicle for raising new issues that could have been, but were not, asserted in the complaint and that were "first rais[ed] . . . in [a] motion for new trial." *Conant v. Whitney*, 190 Ariz. 290, 293 (App. 1997). Again, "a statement of contest in an election contest may not be amended, after the time prescribed by law for filing such contest has expired." *Burk v. Ducey*, No. CV-20-0349-AP/EL, 2021 WL 1380620, at *2 (Ariz. Jan. 6, 2021) (citation omitted). These new claims therefore are outside the scope of this election contest and are waived. *See Burk*, 2021 WL 1380620, at *2; *Conant*, 190 Ariz. at 293.

V. The doctrines of laches and mootness bar Plaintiffs' request for a new trial.

A. Laches bars a new trial on Plaintiffs' claims.

Plaintiffs' Motion is also barred by laches. Plaintiffs failed to diligently prosecute this election contest. As a result, this Court should apply laches, bar their latest gambit, and put to bed these unfounded, unending challenges to Arizona's lawful, legitimate elections.

"In election matters, time is of the essence," as this Court knows. *Harris*, 193 Ariz. at 412

[8] This Court has already held as much both in dismissing Count Five and during the trial. [*See* Tr. 113:1–19 (describing Plaintiffs' request for "recounting these [undervote] ballots" as "an attack on some of the processes in the election manual that's been in place several years now—at least since 2019")]

¶ 15. "The doctrine of laches prevents a party from asking [a] court to decide a difficult question of Arizona constitutional law[,]" at the eleventh hour, "when such a question could have been presented much earlier." *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993). Two elements must exist: "unreasonable delay and prejudice." *Ariz. Libertarian Party v. Reagan*, 189 F.Supp.3d 920, 922 (D. Ariz. 2016) (citing *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 8 (2000)).

First, even if Plaintiffs were permitted to ask for a new trial, they have unreasonably delayed in requesting it. "To determine whether delay was unreasonable, a court considers the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence in preparing and advancing his case." *Ariz. Libertarian Party*, 189 F.Supp.3d at 923 (citing *Harris*, 193 Ariz. at 412–13 ¶¶ 16–18).

Plaintiffs fail all these factors. They failed to "exercise[] diligence." *Id*. After hearing the evidence and ruling against Plaintiffs, this Court asked Plaintiffs whether they needed a written order within the next few days. Plaintiffs declined, asserting that they needed it only "eventually." [Tr. 117:24–25] Five more days passed, without any haste from Plaintiffs, until this Court entered its written findings and conclusions on December 28. Another five days passed, without any action by Plaintiffs, when, on January 2, Ms. Mayes was sworn in as Attorney General. Then, two more days passed before Plaintiffs moved for a new trial on January 4. In other words, Plaintiffs waited 12 days—and after Ms. Mayes was sworn in—before moving for a new trial. Even if this were allowed, it is too late. *See Bowyer v. Ducey*, 506 F.Supp.3d 699, 718 (D. Ariz. 2020) ("When contesting an election, any delay is prejudicial, but waiting until a month after Election Day and two days after certification of the election is inexcusable.").

Plaintiffs also lack "justification for [their] delay"; they had considerable "advance knowledge of the basis for the challenge." *Ariz. Libertarian Party*, 189 F.Supp.3d at 923. In moving for a new trial, Plaintiffs focus on evidence from Kari Lake's election-contest hearing

and the statewide recount. But any evidence from Ms. Lake's December 21 and 22 trial would have been known before Plaintiffs' trial on December 23. And, despite that the December 29 recount results are not material to Plaintiffs' claims, they had no reason for waiting nearly one week—and until after Ms. Mayes took office—to move for a new trial. No justification exists for such "dilatory conduct." *Sotomayor*, 199 Ariz. at 83 ¶ 6.

Second, Plaintiffs' delay also has "result[ed] in prejudice." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (2009) (citation omitted). Prejudice may be shown "either to the opposing party or to the administration of justice, which may be demonstrated by showing injury or a change in position as a result of the delay." *Id.* at 558 ¶ 6 (internal citation omitted). Both forms of prejudice exist here. Most directly, prejudice exists as to Ms. Mayes. She has now been sworn in as Attorney General and has begun exercising the duties of that office, including hiring staff and making decisions on active cases. *See Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) ("To permit election challenges two years or even two months after the completion of the election canvass could have the intimidating effect of preventing an office holder from fully exercising his independent judgment in the matters of his office."). Plaintiffs' unreasonable delay also has prejudiced "the administration of justice." *Martin*, 219 Ariz. at 558 ¶ 6. Plaintiffs' request (at 9) for a "complete contest" without "an artificial timetable" would prejudice the election officials (and court employees) whom Plaintiffs would force to work through this proceeding, all over again—when Plaintiffs already had their chance to present this evidence. And, finally, "the prejudice to the Defendants and the [2.5] million Arizonans who voted in the [2022] General Election [for Arizona Attorney General] would be extreme, and entirely unprecedented, if Plaintiff[s] were allowed to have their claims heard at this late date." *Bowyer*, 506 F.Supp.3d at 719. "Plaintiffs' claims for relief are not merely last-minute—they are after the fact." *Id.* (citation omitted). Ms. Mayes is the Arizona Attorney General. "The rationale

for interposing the doctrine of laches is now at its peak." *Id.* (citation omitted).

B. This election contest is now moot.

Any request for further relief in this case also is moot. "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012) (citation omitted). Here, no effective relief remains.

Were this case to proceed, the only relief Plaintiffs *could* obtain is set forth by statute: an order "annulling and setting aside the election" and declaring that the person is "elected and that the certificate of election of the person whose office is contested is of no further legal force or effect." A.R.S. § 16-676(B)–(C). But such relief would not make Mr. Hamadeh the Attorney General, as he requests (at 9–10). Kris Mayes has taken the oath of office and, so, "possesses all the rights and powers and is subject to all the liabilities, duties and obligations" of the Attorney General's Office. A.R.S. § 38-361. No provision of the statutes authorizes this Court to remove her.[9] *Cf. Laos v. Arnold*, 141 Ariz. 46, 49 (1984) (noting that "judgment of ouster" was proper in quo warranto action).

Conclusion

The Court should deny Plaintiffs' Motion, deny Plaintiffs' request (at 14) to stay entry of judgment, resolve the fee requests and sanctions requests, and enter judgment "immediately," as A.R.S. § 16-676(B) requires. In awarding fees, this Court should also award fees to Ms. Mayes for responding to this Motion, which Plaintiffs filed "without substantial justification" and to "[u]nreasonably expand or delay the proceeding." A.R.S. § 12-349(A)(1), (3).

[9] Notably, the Supreme Court did not decide—let alone consider—laches or mootness in *Hunt v. Campbell*, on which Plaintiffs rely. *See Hunt*, 19 Ariz. 254.

Dated: January 17, 2023.

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