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** Pro hac vice application forthcoming*

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Arizona Secretary of State Adrian Fontes

ARIZONA SUPERIOR COURT
MCNAVE COUNTY

JEANNE KENTCH, an individual; TED
BOYD, and individual; ABRAHAM
HAMADEH, an individual; and
REPUBLICAN NATIONAL COMMITTEE, a
federal political party committee,

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

KATIE HOBBS, in her official capacity as the
Secretary of State; et al.,

Defendants.

No. S8015CV2022-01468

**ARIZONA SECRETARY OF STATE
ADRIAN FONTES' RESPONSE IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR NEW TRIAL**

(Assigned to Hon. Lee F. Jantzen)

Introduction

On December 23, 2022, this Court set aside an entire day of Court time – just before a long holiday weekend, no less – to give Plaintiffs the opportunity to present any and all evidence to support their four remaining legal claims. Plaintiffs inspected thousands of ballots, had their day in Court, and the sum total of the evidence adduced by the parties was this:

- Plaintiffs believed that 6 ballots they inspected from Maricopa County should have counted for candidate Abraham Hamadeh;
- Contestee Kris Mayes believed that 8 ballots she inspected in Maricopa County should have counted for her, and
- The Maricopa County Co-Director of Elections testified that had he been adjudicating the 14 ballots identified by the parties, the result would have been 3 more votes for now-Attorney General Mayes.

This Court inspected the ballots at issue itself, held that it would not adjust the vote totals in the race for Arizona Attorney General, and also held – as Plaintiffs had to concede – that Plaintiffs came nowhere close to meeting their heavy burden to overturn the results of the election.

As this Court knows, this election contest proceeded in parallel with a statutorily required recount initiated by the Secretary in Maricopa County Superior Court (and overseen by Judge Timothy Thomason) as required by Arizona law. [See **Exhibit A** (12/5/22 Order to Conduct Recount)] The recount statutes are clear: as the filing officer in this statewide race, the Secretary had a duty to present the “result of the recount . . . to the court,” and “the court . . . then announce[s] the result.” A.R.S. § 16-665(A). This bears repeating – the “court,” and no one else, “announces the result.” The recount order also specifically ordered the counties conducting the recount to “not release to the public the results of the recount, including daily vote totals, until the Court has certified the results.” [**Exhibit A** ¶ F] In other words, no one – not the Secretary, not Pinal County, and not anyone else – was allowed to release information about the recount

1 before Judge Thomason “announced the result” as he did at a hearing held on December 29. And
2 the result of the recount was that Attorney General Mayes defeated Mr. Hamadeh by 280 votes.
3 In other words, even had the Court altered the vote totals by the 6 ballots identified by Plaintiffs,
4 it would have not changed the election’s outcome.

5 Recounts are one of several safeguards set out in Arizona statutes to ensure that votes are
6 accurately counted. Nearly every recount conducted in jurisdictions throughout the country has
7 a “variance” in the vote total; it’s why the Legislature has required recounts in certain close
8 races. But the fact that a variance occurred and that the recount process here allowed one Arizona
9 county to correct certain errors in its original count of ballots is not a ground for a new trial under
10 Arizona law. Instead, it’s a sign that the recount process designed by the Legislature as a
11 safeguard worked. Nor can Plaintiffs use Rule 59, Ariz. R. Civ. P., as a backdoor means to either:
12 (1) amend their complaint and pursue new theories not set forth in their statement of election
13 contest (*Kitt v. Holbert*, 30 Ariz. 397, 406 (1926) (“a statement of contest in an election contest
14 may not be amended”)), or (2) secure an extra-statutory hand recount of all ballots cast in the
15 entire state (*Barrera v. Superior Ct.*, 117 Ariz. 528, 530 (App. 1977) (“no authority exists in
16 Arizona for ordering the recount requested by appellant”)).

17 For these and other reasons, the Secretary opposes Plaintiffs’ Motion for New Trial, and
18 joins in the responses filed by Contestee Kris Mayes and the Maricopa County Defendants.
19 Beyond the arguments provided in those responses, the Secretary adds just a few notes below to
20 not only provide the Court important context about the release of vote totals and information
21 related to recounts, but to also highlight why granting Plaintiffs’ requested relief would create
22 dangerous precedent going forward and endanger the orderly administration of elections and
23 transitions of power that must follow. The 2022 General Election for Arizona Attorney General
24 is over, and Attorney General Mayes won. The Court should not permit these proceedings to
25 drag out any further.

Argument

I. The Secretary Followed the Law and a Court Order.

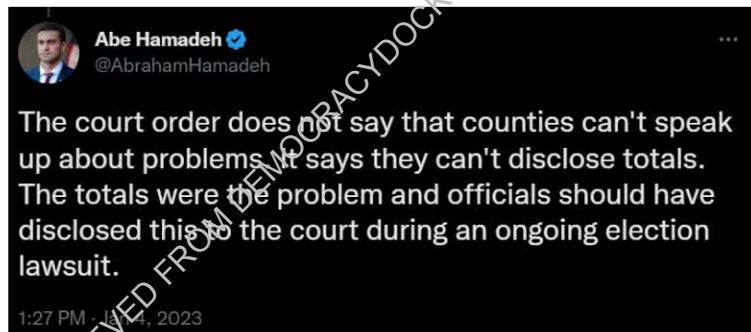
First, and to dispel in no uncertain terms the various insinuations made in Plaintiffs' Motion and on Plaintiff Hamadeh's social media accounts, the Secretary did nothing wrong by not disclosing what Plaintiffs call [at 5] "material discrepancies" in the number of ballots that were the subject of the recount. Instead, the Secretary adhered carefully to not only the recount statute, but also to the Recount Order issued by the court. The Secretary followed the law, and there is nothing to justify Plaintiffs' extraordinary request for a do-over of their ill-founded election contest.

The Arizona Legislature has prescribed a strict scheme for how a recount is conducted. Under A.R.S. § 16-661(A), a recount of votes is required when the canvass of the primary or general election returns shows that the margin between the two candidates receiving the greatest number of votes for a particular office is less than or equal to one-half of one percent of the number of votes cast for both such candidates. When that occurs, the filing officer (here, in a statewide race, the Secretary) must petition the superior court for an order requiring a recount of the votes cast for the office subject to recount. A.R.S. §§ 16-662, 16-663. The actual conduct of the recount is dictated by A.R.S. § 16-664, and is conducted by Arizona's fifteen counties as the Secretary's designees.

On December 5, 2022, Judge Thomason entered the Recount Order, which spelled out the details of how the recount would proceed and how results would be reported. [Exhibit A] Under the Recount Order, the counties were to report their results to the Secretary, who would ultimately provide "result of the recount . . . to the court," and "the court . . . then announce[s] the result." A.R.S. § 16-665(A) (emphasis added). Nothing in the statute authorizes the Secretary or the counties to release numbers or information related to the recount; that is the court's job alone. And to that end, the Recount Order specifically ordered the counties to "not release to the public the results of the recount, including daily vote totals, until the court has certified the

1 results.” [Exhibit A ¶ F] Despite some suggestion to the contrary by Plaintiffs, there is nothing
2 unusual about this provision in a recount order; in 2016, for example, former Secretary of State
3 Michele Reagan (a Republican) obtained a recount order with a similar confidentiality provision
4 in a close race for the Republican nomination for Congressional District 5. [See Exhibit B]

5 Given the plain language of A.R.S. § 16-665(A) and the Recount Order, any suggestion
6 that either the Secretary or county officials did something improper by not affirmatively
7 disclosing the “discrepancies” uncovered by Pinal County has no basis whatsoever. Plaintiffs’
8 Motion makes a half-hearted attempt to distinguish between “results” and issues discovered in
9 calculating those results, but Plaintiff Hamadeh then clarified that the two were one and the
10 same:



11 @AbrahamHamadeh, Jan. 4, 2023, 1:27 PM,
12 [https://twitter.com/AbrahamHamadeh/status/1610734627689492480?s=20&t=XctvrJMOVhZi](https://twitter.com/AbrahamHamadeh/status/1610734627689492480?s=20&t=XctvrJMOVhZiBx9Evo6UHg)
13 [Bx9Evo6UHg](https://twitter.com/AbrahamHamadeh/status/1610734627689492480?s=20&t=XctvrJMOVhZiBx9Evo6UHg). In other words, according to Mr. Hamadeh, the Secretary and Pinal County
14 should have directly violated A.R.S. § 16-665(A) and the Recount Order by affirmatively
15 disclosing to him information that would have made no difference in this litigation (and that they
16 had no cognizable duty to disclose). That Plaintiffs cannot identify any legal duty compelling
17 such a remarkable thing speaks volumes.

18 Plaintiffs may say whatever they want in the public and political spheres, but they should
19 not be permitted to accuse the Secretary and county officials of wrongdoing here in a meritless
20 attempt to redo their failed litigation. At bottom, the Secretary’s adherence to the recount statutes
21 and Recount Order simply cannot justify a new trial.
22

1 **II. Further Proceedings Are Unwarranted Because Plaintiffs’ Contest Has Been**
2 **Adjudicated and the Recount Has Concluded.**

3 There are many safeguards in place in Arizona statutes and rules to ensure both that
4 Arizonans’ votes are counted accurately and that election contests are resolved promptly so that
5 there is finality and continuity in governance. One safeguard to ensure accuracy in vote counts
6 in especially close races is the recount procedure. Another allows election results to be contested
7 by losing candidates, and even nullified—if there is sufficient evidence to support the grant of
8 such relief. Both procedures, a recount and an election contest, were used with regard to the 2022
9 Attorney General race. And the result is that Attorney General Mayes won.

10 But Plaintiffs argue that they are owed more than this—that they are in fact entitled to a
11 new trial and “entitled to inspect *all* ballots,” [Mot. at 7] (which this Court has already denied)¹—
12 because the recount ended in a shift in votes (or variance) and because the vote margin between
13 Hamadeh and Mayes is relatively small. But this is not such an extraordinary situation entitling
14 Plaintiffs to such extraordinary relief. Between 2000 and 2019 there have been 31 state-wide
15 recounts (and many more non-state-wide recounts) across the country. FairVote, *A Survey and*
16 *Analysis of Statewide Election Recounts, 2000-2019*, at 2 (2020).² Many of these recounts led to
17 variances of hundreds of votes or more. *Id.* at 12 (citing average shift of 430 votes across 31
18

19 ¹ Plaintiffs cite *Hunt v. Campbell*, 19 Ariz. 254 (1917), as apparent support for their request to
20 inspect contested ballots. But in that case, from over a century ago, the court appears to have
21 examined specific allegations of irregularities and fraud from a few precincts or polling places
22 across the State, as well as several other categories of identifiable ballots. This is a far cry from
23 Plaintiffs’ unsupported allegations and broad demands to inspect all ballots here. Not only is
24 Plaintiffs’ request to inspect and recount all ballots statewide foreclosed by statute (*Barrera*, 117
25 Ariz. at 530 (“no authority exists in Arizona for ordering the recount requested by appellant”)),
but it’s also an improper attempt to support new legal theories not pleaded in Plaintiffs’ statement
of election contest (*Kitt*, 30 Ariz. at 406 (“a statement of contest in an election contest may not
be amended”)).

26 ² <https://fairvote.app.box.com/s/uxqtvjw1c9op550kvpfi8pqsfy19vhst>

1 state-wide recounts, and shift of up to 2,567 votes). Moreover, many recent recounts in Arizona
2 alone have been conducted in races with narrower vote margins than the 2022 Attorney General
3 race. *See id.* at 10 (listing 2010 automatic recount of Arizona Proposition 112, with original
4 margin of 194 votes); Caitlin Sievers, *Kris Mayes comes out ahead of Abe Hamadeh, recount*
5 *triggered*, ARIZ MIRROR (Nov. 21, 2022) (citing 2014 Arizona congressional race with original
6 vote margin of 161 votes and 2016 congressional primary race with original vote margin of 16
7 votes).³

8 But neither a narrow margin nor a variance after a recount – with the result here of
9 Attorney General Mayes having 280 more votes than Mr. Hamadeh – can be used as an excuse
10 to endlessly litigate election results and secure what amounts to an extra-statutory recount.
11 Indeed, courts in Arizona and across the country have recognized the need for finality and prompt
12 resolution of election contests. *Donaghey v. Attorney Gen.*, 120 Ariz. 93, 95 (1978) (describing
13 the “the strong public policy favoring stability and finality of election results”); *id.* (“a successful
14 challenge months or years after an election would seriously erode the stability of state and local
15 governments”); *State ex rel. Shroble v. Prusener*, 185 Wis.2d 102, 115 (1994) (“The need for
16 finality in the election process requires that the time and method of challenging election results
17 be limited and at some point come to an end.”); *In re Recount of Ballots Cast in General Election*
18 *on November 6, 1973*, 457 Pa. 279, 286 (1974) (upholding denial of discretionary second recount
19 permitted under Pennsylvania law, “[i]n view of the nature of an election where finality is of
20 utmost importance”); *see also Hutchinson v. Miller*, 797 F.2d 1279, 1286 (4th Cir. 1986)
21 (expressing need for finality in elections); *Greenly v. Independent School Dist. No 316*, 395

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23
24 ³ <https://www.azmirror.com/2022/11/21/kris-mayes-comes-out-ahead-of-abe-hamadeh-recount-triggered/#:~:text=In%20Arizona%E2%80%99s%20recent%20past%2C%20recounts%20in%20Arizona%20have,votes%2C%20giving%20him%20a%20victory%20of%2027%20votes>

1 N.W.2d 86, 91 (Minn. Ct. App. 1986) (same); *Marra v. Zink*, 163 W.Va. 400, 402 (1979) (same);
2 *Nies v. Buffalo Bd. of Ed.*, 292 N.Y.S.2d 231, 234 (N.Y. Sup. Ct. Erie Cty. 1976) (same).

3 Arizonans deserve finality, and it should not be that an election contestant can get as many
4 bites at the apple as they choose because they claim to have discovered some new “irregularity”
5 or “evidence,” yet still cannot credibly allege that either is outcome-determinative. As before,
6 Plaintiffs fail to provide sufficient non-speculative evidence to show that the results of the
7 election would be different, thereby dooming their case.

8 **Conclusion**

9 Once upon a time, candidates made their case to their constituents as best they could,
10 campaigned in the way they saw fit, and accepted the will of the people as expressed at the ballot
11 box. It’s long-past-time for Arizona to get back to that tradition, and to say “enough is enough”
12 to this new trend of refusing to accept election results and trying to litigate those results until the
13 bitter end. This Court should take no part in it.

14 The 2022 General Election was more than two months ago, Attorney General Mayes has
15 been in office now for weeks attending to the business of the people, and this Court should deny
16 Plaintiffs’ request to drag these proceedings out any further. Arizonans deserve no less.

17 RESPECTFULLY SUBMITTED this 23rd day of January, 2023.

18 **COPPERSMITH BROCKELMAN PLC**

19 By /s/ D. Andrew Gaona

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