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23 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
24 **IN AND FOR THE COUNTY OF MOHAVE**

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

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

ADRIAN FONTES, *et al.*,
Defendants.

No. S8015CV202201468

**PLAINTIFFS'
CONSOLIDATED REPLY TO
NOTICE OF SUPPLEMENTAL
AUTHORITY IN SUPPORT OF
PLAINTIFFS' MOTION FOR A
NEW TRIAL**

(assigned to Hon. Lee F. Jantzen)

(ORAL ARGUMENT
REQUESTED)

1 Plaintiffs submit this consolidated reply to their Notice of Supplemental Authority
2 in Support of Plaintiffs’ Motion for a New Trial.

3 Although the Arizona Supreme Court’s March 22nd Order in *Lake v. Hobbs*
4 (“Order”) may not be *binding* precedent, any decision from the Supreme Court certainly
5 provides *significant* guidance concerning the election contest still pending in this Court and
6 how the State’s highest court may consider issues on appeal.

7 **1. The Order Evidences A New Trial Is Not Barred By The Time Provisions of**
8 **A.R.S. § 16-676**

9 Defendants assert that this Court has been divested of its jurisdiction and that election
10 contest proceedings can only continue following a “timely-taken appeal[.]” Maricopa Resp.
11 to Notice (Mar. 27, 2023) at 2; *see also* Mayes Resp. to Mot. New Trial (Jan. 17, 2023) at
12 5. This convoluted claim lacks statutory and precedential support.¹ In fact, Arizona courts
13 have long held that the Arizona Rules of Civil Procedure apply in election contests where
14 they don’t conflict with express statutory provisions. *See* Pl.’s Reply ISO New Trial at 12-
15 14. Critically, the Order remanded to the trial court a previously dismissed election contest
16 claim for further proceedings – which no one disputes could result in an evidentiary hearing.
17 Defendants’ continued assertion that A.R.S. § 16-676’s time provisions bar Plaintiffs’
18 motion now that the Supreme Court has reinstated an election contest claim for a possible
19 new trial is plainly wrong.

20 **2. A New Trial Is Appropriate Because Evidence Was Withheld, Not “Properly**
21 **Denied”**

22 Secretary Fontes argues that his predecessor, Secretary Hobbs, was simply
23 complying with a court order when she withheld material evidence to this case. Secretary
24 Hobbs was aware at trial that the recount confirmed tabulators had misread validly cast

25
26 ¹ Regardless, lacking a final order and entry of judgment as required under Rule 54(b), an appeal
27 is not yet ripe. *See* Ariz. R. Civ. App. P. (“ARCAP”) 9(a). Furthermore, even if Plaintiffs could
28 have filed an appeal before the entry of judgment under ARCAP 9(c), Plaintiffs can still file a
“timely-taken appeal” under ARCAP 9(e)(1)(D). But more to the point, nothing in the election
contest statutes grants the right to appeal nor prohibits a new trial; suggesting that an appeal is
authorized while a new trial is barred is nothing more than self-serving argumentation.

1 votes as undervotes – votes that were mistakenly excluded from the official canvass.
2 Critically, Plaintiffs litigated that precise issue at trial while Secretary Hobbs kept this
3 critical finding under lock-and-key.

4 To be clear, the recount order prevented the *counties* from “releas[ing] to the public
5 the results of the recount, including daily vote totals” and required all parties (including the
6 Secretary) to “keep confidential any information they may acquire that would *disclose the*
7 *vote of any elector*” (emphasis added). See *In the Matter of the November 8, 2022, General*
8 *Election for Attorney General; Superintendent of Public Instruction; and State*
9 *Representative for District 13*, Maricopa County Superior Court, CV2022-015915, Order
10 to Conduct Recount (Dec. 5, 2022), available at
11 [https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4103/6380585650](https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4103/638058565099630000)
12 99630000 (last accessed Apr. 3, 2023) at 2 (attached as Exhibit A). Disclosing to this Court
13 and to the parties that the recount confirmed tabulator errors specifically at issue at trial
14 would not have contravened the Maricopa County order. Plainly, confirming tabulators
15 improperly recorded valid votes as undervotes is neither a “daily vote total” nor information
16 that would “disclose the vote of an elector[.]” *Id.* Defendants’ suggestion the Secretary
17 was judicially prohibited from disclosing this critical revelation until *after* the trial is, at
18 best, disingenuous.

19 Further, Secretary Fontes appears to argue that Maricopa County’s decision to
20 withhold provisional ballot information until 8 days after trial (a public record that is
21 electronically stored, readily accessible, and available to Maricopa County as soon as the
22 election was canvassed) amounted to “discovery previously requested that was properly
23 denied.” Fontes Resp. at 2. Secretary Fontes says that consideration of that evidence
24 constitutes “another bite of the apple.” *Id.* That is both incorrect as a legal principle and
25 would directly undermine congressional intent behind fundamental election safeguards.

26 Secretary Fontes is Arizona’s Chief Elections Officer for purposes of the National
27 Voter Registration Act and the Help America Vote Act (*see* A.R.S. § 16-142) – federal Acts
28 passed, in part, to *prevent* erroneous disenfranchisement. See, e.g., 52 U.S.C. § 20501(b)

1 (express purpose of the NVRA is to “increase” voter registration and make it possible for
2 State officials to “enhance[] the participation of eligible citizens as voters”); 52 U.S.C.
3 § 20902 (providing funds to upgrade voting systems that ensure all lawful votes can be
4 accurately counted). Yet Secretary Fontes suggests that this Court should not consider the
5 withheld evidence, even if it not only *proves* voters were erroneously disenfranchised, but
6 that Hamadeh in fact received the most votes. The Secretary’s position undermines his state
7 and federal responsibilities to “enhance[] the participation of eligible citizens” by asking
8 this Court to not only ignore defective government systems and procedures that
9 disenfranchised voters, but rewards Maricopa County for withholding critical, outcome
10 determinative evidence, seemingly, in order to avoid scrutiny. Affirming this conduct
11 sanctions State actions that put the thumb on the scales of justice; conduct that left
12 undeterred could be discriminatorily administered to the benefit or detriment of specific
13 candidates in election contests.

14 Secretary Fontes further indicates Plaintiffs are “effectively amend[ing] their
15 statement of election contest.” *Id.* Not true. Paragraphs 58 and 59 of Plaintiffs election
16 contest specifically identify registration errors that caused voters who have voted in past
17 Arizona elections to have provisional ballots rejected. Stmt. of Election Contest at 17. And
18 paragraph 51 deals specifically with undervotes. *Id.* at 15. Plaintiffs raised these issues in
19 their complaint and preserved them throughout this litigation.

20 **3. Plaintiffs’ Count V Claim Is Virtually Identical To Lake’s Count III Claim**

21 Although Plaintiffs maintain that Count V is virtually identically to Lake’s Count
22 III, because Plaintiffs do not believe that Count V is necessary to prove Abraham Hamadeh
23 received the most votes for Attorney General and for the sake of conserving judicial
24 resources, Plaintiffs withdraw their request to have this Court reconsider its non-final order
25 dismissing that claim on laches grounds. *Compare* Stmt. of Election Contest at 23-24 *with*
26 *Lake v. Hobbs*, Maricopa County Superior Court, CV2022-095403, Complaint in Special
27 Action and Verified Statement of Election Contest Pursuant to A.R.S. §16-672 (Dec. 9,
28

1 2022) at 59 (available at
2 <https://www.clerkofcourt.maricopa.gov/home/showpublisheddocument/4151/6380645166>
3 68500000 (last accessed Apr. 3, 2023)).

4 RESPECTFULLY SUBMITTED this 4th day of April, 2023.

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1 ORIGINAL efiled and served via electronic means
2 this 4th day of April, 2023, upon:

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25 /s/ Jennifer J. Wright

EXHIBIT

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

IN THE MATTER OF the November 8, 2022,) No. CV2022-015915
General Election for Attorney General;)
Superintendent of Public Instruction; and State) **ORDER TO CONDUCT RECOUNT**
Representative for District 13)
) **Priority Case – A.R.S. § 16-663(A)**
)
)

The facts requiring a recount of the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Instruction, and State Representative for District 13 having been certified to this Court,

IT IS ORDERED pursuant to A.R.S. §§ 16-624(D) and 16-663 that:

A. A recount of the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Inspection, and State Representative for District 13 shall be conducted;

B. The Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties' Boards of Supervisors, as the designees of the Secretary of State, shall conduct the recount on an automatic tabulating system to be furnished and programmed under the authority of the respective Boards of Supervisors to electronically tabulate the ballots. The Boards of Supervisors shall satisfy A.R.S. § 16-664(C) by reprogramming the automatic tabulating system to recount only the votes cast in the November 8, 2022 General Election for the offices of Attorney General, Superintendent of Public Inspection, and State Representative for District 13 (in Maricopa County);

C. The Secretary and the Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma

1 Counties' Boards of Supervisors shall conduct logic and accuracy testing on the automatic
2 tabulating system in accordance with A.R.S. § 16-449;

3 D. If the ballots are not currently in the possession of the Apache, Cochise,
4 Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa
5 Cruz, Yavapai, and Yuma Counties' Boards Supervisors or their designees, the respective
6 Counties' Treasurers shall deliver to the respective Counties' Boards of Supervisors the
7 packages or envelopes containing the ballots cast in the November 8, 2022 General Election,
8 pursuant to A.R.S. § 16-624(D);

9 E. The Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz,
10 Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties' Boards of
11 Supervisors shall certify, through their designees, their recount results to the Secretary of State
12 by 5:00 p.m. on December 21, 2022, by e-mail to Elections Director Kori Lorick at
13 klorick@azsos.gov;

14 F. Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa,
15 Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma Counties shall not release to the
16 public the results of the recount, including daily vote totals, until the Court has certified the
17 results;

18 G. All participants to the recount keep confidential any information they may
19 acquire that would disclose the vote of any elector and destroy any notes that would disclose
20 the same; and

21 H. Setting a hearing for December 22, 2022 at 9:00 a.m. for the presentation
22 of the results under A.R.S. § 16-665(A) before Judge Timothy J. Thomason, 101 W. Jefferson,
23 Phoenix, AZ 85003, 7th Floor, Courtroom 713.

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DONE IN OPEN COURT this 5th day of December, 2022.

Timothy J. Thomason

Hon. Timothy J. Thomason

Judge of the Superior Court for Maricopa County

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