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Attorneys for Plaintiffs/Contestants

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

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

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

No. CV-2022-01468

**RESPONSE TO COURT'S ORDER
REQUIRING WRITTEN
SUBMISSIONS REGARDING ISSUES
ON WHICH NO AGREEMENT HAS
BEEN REACHED**

HEARING REQUESTED

(assigned to the Honorable Lee F.
Jantzen)

KATIE HOBBS, in her official capacity as the
Secretary of State; LARRY NOBLE, in his
official capacity as the Apache County
Recorder; APACHE COUNTY BOARD OF
SUPERVISORS, in their official capacity;
DAVID W. STEVENS, in his official capacity
as Cochise County Recorder; COCHISE
COUNTY BOARD OF SUPERVISORS, in
their official capacity; PATTY HANSEN, in
her official capacity as the Coconino County
Recorder; COCONINO COUNTY BOARD
OF SUPERVISORS, in their official capacity;
SADIE JO BINGHAM, in her official
capacity as Gila County Recorder; GILA
COUNTY BOARD OF SUPERVISORS, in
their official capacity; WENDY JOHN, in her
official capacity as Graham County Recorder;
GRAHAM COUNTY BOARD OF
SUPERVISORS, in their official capacity;
SHARIE MILHEIRO, in her official capacity
as Greenlee County Recorder; GREENLEE
COUNTY BOARD OF SUPERVISORS, in
their official capacity; RICHARD GARCIA,
in his capacity as the La Paz County Recorder;
LA PAZ COUNTY BOARD OF
SUPERVISORS, in their official capacity;
STEPHEN RICHER, in his official capacity as
the Maricopa County Recorder; MARICOPA
COUNTY BOARD OF SUPERVISORS, in
their official capacity; KRISTI BLAIR, in her
official capacity as the Mohave County
Recorder; MOHAVE COUNTY BOARD OF
SUPERVISORS, in their official capacity;
MICHAEL SAMPLE, in his official capacity
as Navajo County Recorder; NAVAJO
COUNTY BOARD OF SUPERVISORS, in
their official capacity; GABRIELLA
CAZARES-KELLY, in her official capacity
as the Pima County Recorder; PIMA
COUNTY BOARD OF SUPERVISORS, in
their official capacity; DANA LEWIS, in her
official capacity as the Pinal County Recorder;
PINAL COUNTY BOARD OF

1 SUPERVISORS, in their official capacity;
2 SUZANNE SAINZ, in her official capacity as
3 the Santa Cruz County Recorder; SANTA
4 CRUZ COUNTY BOARD OF
5 SUPERVISORS, in their official capacity;
6 MICHELLE M. BURCHILL, in her official
7 capacity as the Yavapai County Recorder;
8 YAVAPAI COUNTY BOARD OF
9 SUPERVISORS, in their official capacity;
10 RICHARD COLWELL, in his official
11 capacity as the Yuma County Recorder; and
12 YUMA COUNTY BOARD OF
13 SUPERVISORS, in their official capacity,

14 Defendants.

15 Pursuant to the Court's December 20, 2022, Order concerning the inspection of
16 ballots, Plaintiffs/Contestees ("Plaintiffs") write to raise five issues as to which the parties
17 have been unable to reach agreement regarding the process for inspecting ballots in advance
18 of the evidentiary hearing scheduled for Friday, December 23, 2022. In addition, Plaintiffs
19 request a hearing today to expeditiously resolve these matters. First, Plaintiffs ask the Court
20 to compel Maricopa County to provide an unredacted electronic copy of the Cast Vote
21 Record for the November 8, 2022 General Election for Plaintiffs' expert to search on his
22 own computer system. Access to the Cast Vote Record will enable Plaintiffs to efficiently
23 identify which ballots should be inspected, and should be granted on the grounds that the
24 CVR is a public record or, in the alternative, a part of the "ballots" for purposes of inspection
25 under A.R.S. § 16-677.

26 Second, Plaintiffs ask the Court to compel Maricopa County to provide the list of all
27 voters whose provisional ballot was rejected along with the reason why the ballot was
28 rejected.

Third, Plaintiffs ask this Court to reject Maricopa County's unilateral declaration
that it will cut the ballot inspection period allowed by the Court in half. The Court's order

1 calls for the inspection of ballots in advance of the evidentiary hearing on Friday, December
2 23, 2022. This effectively provides two days for Plaintiffs to inspect ballots. Defendant
3 Maricopa County has represented that they will *only* permit the inspect of ballots on
4 Wednesday, December 21, 2022. At best, this effectively cuts the ballot inspection period
5 in half. At worst, it effectively eliminates the ballot inspection in light of the need to
6 designate representatives and agree on how to proceed with inspection.

7 Fourth, Plaintiffs request that the Court clarify that A.R.S. § 16-677(B) requires that
8 there be three people inspecting any given ballot – not that there can only be three people
9 inspecting ballots at any given time in any given county or even the entire State.

10 Fifth, Plaintiffs request that the Court enter an order appointing inspectors in Pima
11 and Navajo Counties.

12 **I. Maricopa County Should be Compelled to Provide an Electronic Copy of**
13 **the Cast Vote Record**

14 A Cast Vote Record (“CVR”) is “essentially a spreadsheet in which each row
15 corresponds to a ballot that has been cast and each column indicates a voter’s choice on that
16 ballot for each race. The information in the CVR directly correlates, row by row with ballot
17 images, that is, pictures of ballots.” See Exhibit A (Declaration of Former Arizona
18 Secretary of State Kenneth R. Bennett) at ¶ 5. As described by former Arizona Secretary
19 of State Kenneth Bennett:

20 For any effort to rapidly review ballots, the CVR is essential. You must have
21 both a specific ballot image and its corresponding row in the CVR to be able
22 to prove that in a particular race that ballot reflects a vote for a certain
candidate (or no candidate). The CVR is thus the tally sheet for the election.

23 *Id.* at ¶ 6.

24 Access to the CVR is important because it allows Plaintiffs to quickly identify what
25 specific ballots are implicated by the concerns raised in the Complaint. There were over
26 1.5 million votes cast in Maricopa County in the 2022 General Election. Not all of them
27 are implicated by the issues raised in the Complaint, nor is it feasible for a 3-person panel
28 to inspect all of them before Friday’s hearing. With access to the CVR, Plaintiffs’ expert

1 can run a computer program that flags which ballots are potentially impacted by the issues
2 raised in the complaint, use the ballot image to further narrow that subset of materials, and
3 use the ballot number to expedite direct inspection of the ballots at issue.

4 These records should be considered public records and, as such, should have already
5 been provided to Plaintiffs. A valid public records request was submitted to Maricopa
6 County for the CVR used in the 2022 General Election. Instead, Maricopa County provided
7 a redacted version that prevented linking the CVR record to a specific ballot image for
8 review of adjudication of over votes and under votes. *Id.* Maricopa County has refused to
9 provide an unredacted version of the CVR, either in response to public records requests or
10 in conjunction with the ballot inspection process in this action. *See* Exhibit C (Email from
11 Emily Craiger).

12 Maricopa County's refusal to provide an unredacted copy of the CVR is
13 inappropriate. As former Secretary of State Bennett attests, "[a] cast vote record ('CVR')
14 should be a public record." Exhibit A at ¶ 5. This conclusion is consistent with the recent
15 ruling in at least one other jurisdiction, which found CVRs are public documents. *See Honey*
16 *v. Lycoming County Office of Voter Services*, CV-22-00115 (Pa. Ct. Comm. Pl. Dec. 16,
17 2022). It is also consistent with common sense. "The CVR does not contain any individual
18 voter identifying information." Exhibit A at ¶ 5. Thus, access to the CVR does not
19 implicate ballot secrecy.¹ Moreover, the CVR is not the original votes, thus there are not
20 the same concerns of a third-party altering vote counts, accidentally or otherwise.

21 Even if the unredacted CVR were not a public record (it is), it should still be provided
22 as part of the ballot inspection process. As described above, access to the unredacted CVR
23 will allow the parties to implement a more targeted ballot inspection process that focuses
24
25

26 ¹ If the CVR could be used to reverse engineer who a particular voter voted for, then there are
27 much bigger problems than just those associated with making it public: the state would have
28 access to a list of who voted for whom, in essence defeating the secret ballot. *See* Ariz. Const.
Art. 7, § 1 ("All elections by the people shall be by ballot, or by such other method as may be
prescribed by law; Provided, that secrecy in voting shall be preserved."). This cannot be correct.

1 on the ballots that are actually implicated by the concerns raised in this contest, rather than
2 shooting in the dark through 1.5 million ballots.

3 In communications with Maricopa County, the County has suggested that this Court
4 lacks power to order the production of the CVR. *See, e.g.*, Exhibit C (“No other discovery
5 is permitted.”). This argument misses the mark.

6 First, access to the unredacted CVR is properly viewed as part of the ballot inspection
7 process, which has been authorized by this Court under A.R.S. § 16-667.

8 Second, even if it is viewed as a discovery request, the Court retains authority under
9 the Arizona Rules of Civil Procedure to authorize it. As the Superior Court for Maricopa
10 County recently ruled:

11 While an election contest is a “purely statutory” and “special proceeding,”
12 *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959), the legislature has mandated that
13 such actions be “brought in the superior court of the county in which the
14 person contesting resides or in the superior court of Maricopa County.”
15 A.R.S. § 16-672(B). In turn, Arizona Rules of Civil Procedure “govern the
16 procedure in all civil actions **and proceedings in the superior court of
Arizona.**” Ariz. R. Civ. P. 1 (emphasis added). An election contest is a
“proceeding in the superior court of Arizona.”

17 *Finchem, et al. v. Fontes, et al.*, CV2022053927 at 3 (Dec. 16, 2022) (Under Advisement
18 Ruling). Defendants and Contestees have effectively conceded as much by brining motions
19 to dismiss, which are not authorized by the contest statute but are instead creatures of the
20 Arizona Rules of Civil Procedure. *See id.* (finding argument that an election contest is not
21 subject to Rule 8 and Rule 12(b)(6) of the rules of civil procedure to be “frivolous”). Thus,
22 whether as part of the ballot inspection process or as a separate discovery request under the
23 Arizona Rules of Civil Procedure, this Court has the power to compel Maricopa County to
24 provide the CVR.

25 Finally, in their communications with Plaintiffs, Maricopa County has raised
26 concerns that there are two CVRs: one associated with the initial count and one associated
27 with the 2022 recount, and that the later cannot be provided because it is under seal. To
28 alleviate these concerns, Plaintiffs are willing to work with the CVR from the initial count,

1 rather than the recount CVR. Moreover, while Plaintiffs do not believe it is necessary, as
2 the CVR is properly considered a public record, Plaintiffs are also willing to support a
3 protective order in this case to permit access to the CVR for the limited purpose of
4 facilitating this election contest.

5 **II. Maricopa County Should be Compelled to Provide the Names of all Voters**
6 **who Provisional Ballot was Rejected**

7 Maricopa County Election Department Canvas shows that 7,803 voters showed up
8 to the polls to vote on election day and that they were given a provisional ballot. Maricopa
9 County accepted 2,954 of those provisional ballots and rejected 4,849. Based upon the
10 Maricopa County provisional ballot report, 2,556 voters did not have their provisional ballot
11 accepted because they were not registered to vote while another 1,942 had their provisional
12 ballot rejected because they were not registered to vote this election (counsel for Maricopa
13 County explained at the December 19th hearing that these “B12” voters registered to vote
14 after the time to register to vote expired).

15 Plaintiffs have requested that Maricopa County produce the list of all voters who
16 Provisional Ballot was rejected along with the reason for the rejection of the provisional
17 ballot. To date, Plaintiffs still have not received this record. This list of voters is important
18 for Plaintiffs to ensure that every eligible vote is properly counted.

19 **III. The Court Should Clarify that Maricopa County Cannot Unilaterally Cut**
20 **the Inspection Time in Half**

21 In its December 20, 2022, Order, the Court permitted the inspection of ballots in
22 advance of the evidentiary hearing on Friday, December 23, 2022. As a practical matter,
23 this provides Plaintiffs two days to inspect ballots. The Court also provided a deadline of
24 noon today, December 21, 2022, for the parties to meet and confer regarding the inspection
25 of ballots, and a deadline of 4:00 pm for the parties to submit any issues to the Court for
26 resolution.

27 As part of the meet and confer with Maricopa County, the County has represented
28 that “the only day the County is able to facilitate this ballot inspection is tomorrow

1 [Wednesday, December 21, 2022].” See Exhibit B. This unreasonably and unilaterally cuts
2 the ballot inspection period in half and, given the Court’s schedule for briefing any issues
3 concerning ballot inspection by 4:00 today, potentially eliminates it completely. This
4 substantially prejudices Plaintiffs’ ability to gather evidence to support our case, which is
5 already predicated on a quick turnaround.

6 Maricopa County should not be allowed to run out the clock on ballot inspection by
7 placing arbitrary time limits that do not align with the Court’s Order. Nor should the second
8 largest election district in the United States be permitted to decide that its staffing
9 preferences and priorities should take precedence over compliance with this Court’s orders.
10 Thus, Plaintiffs respectfully request that the Court direct Maricopa County to facilitate
11 ballot inspections so that Plaintiffs have the opportunity to inspect the necessary ballots so
12 that they can prepare for trial.

13 **IV. The Three Person Inspection Requirement Means Three People Looking at**
14 **Any Given Ballot, Not *Only* Three People in the Entire State**

15 Arizona revised statute 16-677(B) provides in part “the court shall appoint three
16 persons, one selected by each of the parties and one by the court, by whom the inspection
17 shall be made.” Defendants have suggested that this means *only* three people may be
18 involved in inspecting ballots. See, e.g., Exhibit B. Section 16-677(B) is better read as a
19 requirement that three people be present whenever a *specific ballot* is being examined.

20 Section 16-677(B) is effectively a procedural check against chicanery. It ensures
21 that anytime one party is examining a ballot, a representative from the other party is there,
22 along with a neutral representative selected by the Court. In doing so, it ensures that each
23 party can look over the other’s shoulder and be confident that nothing untoward is
24 happening.

25 Defendants’ interpretation of section 16-677(B) does not further this purpose and
26 introduces a host of logistical problems. For example, Plaintiffs are seeking to examine
27 ballots in multiple counties, including Maricopa, Pima, and Navajo. As a rough estimate,
28 Navajo County is roughly four hours away from Maricopa and six hours away from Pima

1 County. The travel distances alone make it nearly logistically impossible for the same three
2 people to conduct meaningful ballot inspections in multiple counties within the timeframe
3 set by the Court. Even within a given county, the number of ballots makes it difficult for
4 the same three people to inspect every ballot subject to review, or even a meaningful sample
5 thereof, within the allotted time.

6 A better interpretation of section 16-677(B), which also serves its underlying
7 purpose, is to read the statute to allow multiple three-person teams to inspect ballots, as long
8 as three people are looking at the same ballot.

9 **V. The Court Should Enter an Order Concerning the Appointment of Ballot**
10 **Inspectors in Pima and Navajo Counties**

11 Arizona Revised Statutes section 16-677(B) provides that “the court shall appoint three
12 persons, one selected by each of the parties and one by the court, by whom the inspection
13 shall be made. If either party fails to name a person to act in making the inspection, the
14 court shall make the appointment.” Both Pima and Navajo county has requested an order
15 appointing the inspectors. Plaintiffs request an order from this Court appointing Plaintiffs’
16 designee as one inspector, the contestee’s designee as another inspector, and the respective
17 County official with custody of the ballots that will make the ballots available for review as
18 the third inspector.

19 **CONCLUSION**

20 For the foregoing reasons, Plaintiffs respectfully request that this Court direct
21 Maricopa County to provide Plaintiffs with an unredacted copy of the initial 2022 General
22 Election CVR, provide a list of voters names who provisional ballot was rejected, clarify
23 that the inspection of ballots shall continue until Plaintiffs have the opportunity to properly
24 review all ballots necessary to prepare for trial pursuant to A.R.S. § 16-677, clarify that
25 A.R.S. § 16-677(B) allows for multiple three-person teams to inspect ballots as long as three
26 people are looking at any given ballot, and appoint representatives for Navajo and Pima
27 Counties.
28

1 RESPECTFULLY SUBMITTED this 21st day of December, 2022.
2
3

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Exhibit A

Bennett Declaration

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DECLARATION OF KENNETH R. BENNETT

I, Kenneth Bennett, hereby declare as follows under penalty of perjury:

1. I am over the age of 18 and competent to make this declaration.
2. I am a citizen of the United States and of the State of Arizona.
3. I reside in Prescott, AZ.
4. For six years, from 2009 to 2015, I served as the Arizona Secretary of State.

During my tenure, I oversaw 12 statewide or multi-jurisdiction elections, the most of any living Secretary of State. I was also formerly a state senator from 1999 to 2007 and served as the President of the Arizona Senate. In the past, I have also been a candidate for Congress and Arizona Governor. I am currently the senator-elect for Arizona Senate District 1.

5. A cast vote record ("CVR") should be a public record. It is essentially a spreadsheet in which each row corresponds to a ballot that has been cast and each column indicates a voter's choice on that ballot for each race. The information in the CVR directly correlates, row by row with ballot images, that is, pictures of ballots. The CVR does not contain any individual voter identifying information.

6. For any effort to rapidly review ballots, the CVR is essential. You must have a both a specific ballot image and its corresponding row in the CVR to be able to prove that in a particular race that ballot reflects a vote for a certain candidate (or no candidate). The CVR is thus the tally sheet for the election. It is the only way to verify that the votes on particular ballots were correctly recorded and tabulated.

7. I recently served as an expert witness in a Pennsylvania state court case, *Honey v. Lycoming County Office of Voter Services*, CV-22-00115 (Pa. Ct. Comm. Pl. Dec. 16, 2022), in which the court ruled last week that CVRs are public documents.

8. Candidates cannot effectively exercise their right to contest elections unless they are given an opportunity to review the election's CVR.

I declare under penalty of perjury that the above is true and correct.

Signed: Kenneth R. Bennett
Kenneth R. Bennett
12/21/2022
Date: _____

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Exhibit B

Craiger/La Sota email exchange

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tim timlasota.com

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To:

- Barr, Daniel (PHX) <DBarr@perkinscoie.com>

Cc:

- Emily Craiger <emily@theburgesslawgroup.com>

+5 others

Wed 12/21/2022 5:24 AM

I disagree. This is clearly part of the right to inspect ballots. For one thing it is implicit in that right because without it inspection is difficult and potentially futile....

I do not understand why you will not provide this data. Other than your hyper technical explanation about it being beyond the scope of what is permitted.

Thanks, Tim

Emily Craiger <emily@theburgesslawgroup.com>

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To:

- tim timlasota.com

Cc:

- Joseph LaRue <laruej@mcao.maricopa.gov>

+5 others

Tue 12/20/2022 9:28 PM

Tim,

Your request for the unredacted Recount CVR is beyond the scope of the statute and the Court's order. Under A.R.S. § 16-677(B), your client may appoint one member of a three person panel to inspect ballots. No other discovery is permitted. Also, as the County has previously explained, it will not release the unredacted CVR. Further, the Recount CVR is currently under seal so even a redacted version cannot be released. As such, the County cannot agree to your request.

As we discussed on the phone this afternoon, the only day the County is able to facilitate this ballot inspection is tomorrow because of the hearing schedule in the *Lake v. Hobbs, et. al.* matter. We also informed you that preparing for the inspection takes a significant amount of time. Please let us know how your client intends to proceed.

Thanks, Emily

Emily Craiger

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Exhibit C

Plaintiffs' List of Designees Pursuant to A.R.S. § 16-677

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Plaintiffs' List of Designees Pursuant to A.R.S. § 16-677

Maricopa County

- Heidi Grande
- Ben Thurston
- Dianne Serra
- Andrea Wolverton
- Marcela Orr
- Gina Godbehere
- Liesl Emerson
- Leslie White

Pima County

- Shelley Kais
- Bill Beard
- Cindy Coleman

Navajo County

- Lisa Green
- Lou Carlassara
- Ken Fisk
- Sandee McKinlay

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