

1 RACHEL H. MITCHELL
2 MARICOPA COUNTY ATTORNEY

3 By: Thomas P. Liddy (Bar No. 019384)
4 Joseph E. La Rue (Bar No. 031348)
5 Joseph J. Branco (Bar No. 031474)
6 Karen J. Hartman-Tellez (Bar No. 021121)
7 Jack L. O'Connor III (Bar No. 030660)
8 Sean Moore (Bar No. 031621)
9 Rosa Aguilar (Bar No. 037774)
10 Deputy County Attorneys
11 liddy@mcao.maricopa.gov
12 laruej@mcao.maricopa.gov
13 brancoj@mcao.maricopa.gov
14 hartmank@mcao.maricopa.gov
15 occonnorj@mcao.maricopa.gov
16 moores@mcao.maricopa.gov
17 aguilarr@mcao.maricopa.gov
18 Deputy County Attorneys
19 MCAO Firm No. 0003200

20 CIVIL SERVICES DIVISION
21 225 West Madison Street
22 Phoenix, Arizona 85003
23 Telephone (602) 506-8541
24 Facsimile (602) 506-4316
25 ca-civilmailbox@mcao.maricopa.gov

26 Emily Craiger (Bar No. 021728)
27 emily@theburgesslawgroup.com
28 THE BURGESS LAW GROUP
3131 East Camelback Road, Suite 224
Phoenix, Arizona 85016
Telephone: (602) 806-2100

Attorneys for the Maricopa County Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, *et al.*,
Plaintiffs/Contestants,
v.

No. CV2022-01468

**NOTICE REGARDING
INSPECTION OF BALLOTS IN
MARICOPA COUNTY**

1 KRIS MAYES,

2 Defendant/Contestee

(Election Challenge)

3 and

(Hon. Lee F. Jantzen)

4 KATIE HOBBS, *et al.*,

5 Official Capacity Defendants.

6 Consistent with this Court’s December 21, 2022 Order (“Order”), the Maricopa
7 County Defendants address, in writing, the Parties’ failure to reach an agreement on the
8 issue of the Inspection of Ballots. (*See* Order, at 4.) The Maricopa County Defendants also
9 respond to Contestants’ “Response to Court’s Order Requiring Written Submissions
10 Regarding Issues On Which No Agreement Has Been Reached”; this Court should deny
11 Contestants’ requests because they lack any basis under the election contest statutes and
12 any harm is the result of Contestants’ dilatory conduct.

13 **Background**

14 At roughly 2:20 p.m. on December 21, 2022, this Court issued the Order. This Court
15 allowed “a limited inspection of ballots.” (Order, at 4.) This Court also ordered the parties
16 to “meet and confer and choose the parties to do the inspection” by noon today. (*Id.*)

17 **A. Maricopa County Defendants’ proposal**

18 After this Court’s entry of the Order, counsel for the Maricopa County Defendants
19 discussed the inspection of ballots on a call that occurred at roughly 3:30 p.m. on December
20 20. (*See* Exh. 1.) To expedite the process, Co-Director of Elections Scott Jarrett attended
21 the call. In substance, the Maricopa County Defendants proposed the following terms:

22 1. As an initial matter, the Maricopa County elections official needed to
23 orchestrate the inspection of ballots—Jarrett—is a defendant and under subpoena for trial
24 on December 21 and 22 in *Lake v. Hobbs*, CV2022-095403 (Maricopa Cnty. Super. Ct.).
25 *Cf.* A.R.S. § 16-677 (“The inspection of the ballots shall be made in the presence of the
26 legal custodian of the ballots . . .”). Preparing for the inspection takes a significant amount
27 of time. As a result, prior to trial in this matter on Friday, December 23, 2022, the Maricopa
28 County Elections Department would only be available to proceed with the inspection of

1 ballots on Wednesday, December 21.

2 **2.** The Maricopa County Defendants proposed to begin the inspection of ballots
3 at 9:00 a.m. on December 21. The inspection would proceed until 5:00 p.m., when Jarrett
4 would need to prepare for testimony the following day in *Lake*.

5 **3.** The inspection of ballots would include the following items:

6 • Digital images of ballots with undervotes for the Attorney General's
7 contest would occur from 9:00 a.m. to 11:00 a.m. The Elections Department
8 would work with the Parties to review as many digital images as possible
9 during the 2-hour timeframe and allow input into what ballot images to
10 review.

11 • Digital images of ballots that had the Attorney General's contest
12 adjudicated would occur from 11:00 a.m. to 12:00 p.m. The Elections
13 Department would work with the Parties to review as many digital images as
14 possible during the one-hour timeframe and allow input into what ballot
15 images to review.

16 • Lunch would occur from 12:00 pm to 12:45 p.m.

17 • Inspection of a random sample of eight to twelve batches of ballots
18 (approximately 2,000 total ballots / approximately 70 ballots with the
19 Attorney General contest under voted) would occur from 12:45 p.m. to 5:00
20 p.m.

21 ○ This inspection could allow for a comparison of the ballots with
22 the results of how they were reported.

23 On the call, Counsel for the Contestants rejected this proposal and told counsel for
24 the Maricopa County Defendants that he would put forth a counterproposal.

25 At 6:00 p.m., counsel for Maricopa County reached out to counsel for Contestants
26 because they had not heard from Contestants about a counterproposal; counsel for Maricopa
27 County Defendants reiterated the urgency of the matter. Counsel for Contestants stated he
28 would email the counterproposal.

B. Contestant's counterproposal

At roughly 7:15 p.m., counsel for Contestants set out a counterproposal via email:

• Contestants requested an unredacted copy of the Recount Cast Vote Record to include both RecordId and ImageMask fields intact but not ballot

1 images. Contestants stated they would use this information to ascertain which
2 ballot images would be reviewed.

3 • Then, the Maricopa County Elections Department would load the
4 requested ballot images for review by the inspectors at Maricopa County
5 Tabulation and Election Center.

6 • From this review, Contestants would narrow the request for physical
7 ballots to inspect.

8 (Exh. 1.)

9 **C. Maricopa County Defendants’ response to Contestant’s counterproposal**

10 Two hours later, counsel for Maricopa County explained why it could not agree to
11 Contestants’ counterproposal. (*See Exh. 1.*) The request for an unredacted Recount Cast
12 Vote Record is beyond the scope of the statutory scheme and the Order. The Order granted
13 “a limited inspection of ballots . . . but the statute must be followed.” (Order, at 4.) Under
14 A.R.S. § 16-677(B), the contestant and contestee may appoint one member of a three-person
15 panel to inspect ballots; no other discovery is permitted. Additionally, as the Maricopa
16 County Defendants had previously explained, they will not release the unredacted Cast Vote
17 Record. Importantly, the **Recount** Cast Vote Record is currently under seal so even a
18 redacted version could not be released.

19 At 5:24 a.m. this morning, counsel for Contestants disagreed with Maricopa County
20 Defendants’ position and the position advanced by Contestee’s counsel. (Exh. 1.)

21 **Argument**

22 **I. Contestants improperly seek to transform this Court’s Order about ballot
23 inspection into a license to obtain the Cast Vote Record.**

24 Contestants’ first request—fulfillment of their demand for an unredacted Cast Vote
25 Record—lacks merit. Simply put, a Cast Vote Record is not a ballot. *See* § 16-677(a)
26 (permitting inspection of “ballots . . . before preparing for trial”); (*see also* Order, at 4
27 (“[T]he Court finds a limited inspection of ballots is appropriate . . . but *the statute must be
28 followed.*”) (emphasis added)).

Importantly, election contests are creatures of statute and do not provide a

1 mechanism for discovery. *Cf. Donaghey v. Att'y General*, 120 Ariz. 93, 95 (1978) (“It is
2 commonly stated that election contests are purely statutory and dependent upon statutory
3 provisions for their conduct.”). Earlier this cycle of election contests, a superior court
4 rejected a Contestant’s request for expedited discovery because it is not permitted by statute
5 and the court could not reconcile the request for discovery with the time-compressed
6 statutory scheme. (Exh. 2.)

7 Here, Contestants are not entitled to the Cast Vote Record in an election contest. This
8 Court cannot judicially expand § 16-677(a) to cover the Cast Vote Record without violating
9 legislative intent. *See Mathews ex rel. Mathews v. Life Care Centers of Am., Inc.*, 217 Ariz.
10 606, 608, ¶ 6 (App. 2008) (“Our primary goal of statutory interpretation is to find and give
11 effect to legislative intent. . . . We first look to the plain language of the statute as the best
12 indicator of that intent. . . . When statutory language is clear and unambiguous, we give
13 effect to it and do not use other methods of statutory interpretation.”).

14 Contestants’ arguments about the availability of the Cast Vote Record in response to
15 a public records request are meritless. This is not a public records request action. *See* § 39-
16 121.02(A). And a declaration from a former government official that a record “should be”
17 a public record adds nothing to the best interest of the state analysis under a properly brought
18 public records lawsuit. *E.g., Hodai v. City of Tucson*, 239 Ariz. 34, 38, ¶ 7 (App. 2016)
19 (“[A] public officer may refuse release or inspection of a public record if such disclosure
20 “might lead to substantial and irreparable private or public harm.”) (internal quotation
21 marks omitted).

22 Under the election contest statutes, Contestants are not entitled to the Cast Vote
23 Record. This Court should deny Contestants’ improper request.

24 **II. Similarly, the statutory scheme does not entitle Contestants to the names of all**
25 **voters whose provisional ballots were rejected.**

26 Contestants’ argument that this list of names is “important” is inapposite. No doubt,
27 a contestant or contestee could determine that many documents collected or compiled by an
28 elections department might be “important” in a particular election contest. But the

1 legislature has clearly spoken: only one type of document—“ballots”—is important enough
2 to include in the statutory scheme. Contestants’ argument is better left for the legislature,
3 not the judiciary. *See Fremont Indem. Co. v. Indus. Comm’n of Ariz.*, 182 Ariz. 405, 409
4 (App. 1995) (“Arguments about the wisdom of the statute must be addressed to the
5 legislature, not to the courts.”).

6 **III. Contestants’ dilatory conduct—not the Maricopa County Defendants’ other**
7 **obligations—have shortened the timeframe for ballot review.**

8 As this Court is well-aware, election contests are necessarily time restricted. *See*
9 A.R.S. § 16-673(A) (“The elector contesting a state election shall, within five days after
10 completion of the canvass of the election and declaration of the result thereof by the
11 secretary of state or by the governor, file in the court in which the contest is commenced a
12 statement in writing . . .”). Even lawsuits filed or appealed within the statutory timeframe
13 may suffer adverse consequences given the nature of these proceedings. *Cf. Lubin v.*
14 *Thomas*, 213 Ariz. 496, 498, ¶ 11 (2006) (“We caution, however, that a party’s failure to
15 diligently prosecute an election appeal may in future cases result in a dismissal for laches.”);
16 *see also id.* at 497, ¶ 10 (“Unreasonable delay can therefore prejudice the administration of
17 justice by compelling the court to steamroll through . . . delicate legal issues . . .”);
18 *Donaghey*, 120 Ariz. at 95 (“The rationale for requiring strict compliance with the time
19 provisions for initiating a contest is the strong public policy favoring stability and finality
20 of election results.”).

21 Here, Contestants waited several days after the certification to bring their election
22 contest. This after Contestants filed suit too early. (*See Exh. 3.*) Accordingly, the time
23 crunch with respect to ballot inspection is of Contestants’—not the Maricopa County
24 Defendants’—making. To be clear: the Maricopa County Defendants did not set the ballot
25 inspection schedule based on “staffing preferences and priorities.” (Contestants’ Resp., at
26 8.) Co-Director of Elections Scott Jarrett—the person responsible for orchestrating the
27 ballot inspection—is a defendant and under subpoena for trial on December 21 and 22 in
28 *Lake v. Hobbs*, CV2022-095403 (Maricopa Cnty. Super. Ct.). That is the reason ballot

1 inspection cannot occur on December 22.

2 Further, the Maricopa County Defendants moved with alacrity to set up the
3 inspection for December 21, 2022. (*See* Exh. 1.) In contrast, Contestants dragged their feet
4 and refused to work with counsel for the Maricopa County Defendants to reach an
5 agreement by insisting on non-ballot documents that are outside the scope of the statutory
6 scheme. Contestants made those documents a non-negotiable then refused to negotiate. This
7 Court should reject Contestants’ efforts to pin the blame on the Maricopa County
8 Defendants.

9 **IV. Contestants are entitled to one inspector—not eight—in Maricopa County.**

10 Contestants are not entitled to nominate as many inspectors as they please. The
11 nomination of many inspectors is not contemplated in the controlling statutes. As noted
12 above, the election contest is purely a creature of statute. *See Grounds v. Lawe*, 67 Ariz.
13 176, 186 (1948). The legal processes and discovery allowed can go no further than the
14 boundaries of what is permitted by statute.

15 The language of § 16-677 makes clear that only one inspection panel is
16 contemplated. Under that statute, after the party applying for the inspection of the ballots
17 pays the required sureties then “the court shall appoint **three persons**, one selected by each
18 of the parties and one by the court, by whom **the inspection** shall be made. If either party
19 fails to name **a person** to act in making the inspection, the court shall make the
20 appointment.” A.R.S. § 16-677(B) (emphasis added).

21 Thus, the plain language only contemplates a single inspection panel to conduct the
22 inspection; if the statute allowed for multiple inspection panels it would read something
23 akin to “the court shall appoint three persons per inspection panel.” But the law does not
24 read this way. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 (2019) (“A cardinal principle
25 of statutory interpretation is to give meaning, if possible, to every word and provision so
26 that no word or provision is rendered superfluous.”). Further, the law contemplates this
27 Court appointing “a person” in the event a party fails to name an inspector—not multiple
28 persons if one side seeks to appoint multiple people.

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3 ORIGINAL of the foregoing E-FILED
4 this ____ day of December 2022 with
5 AZTURBOCOURT, and copies e-served / emailed to:

6 HONORABLE LEE F JANTZEN
7 MOHAVE COUNTY SUPERIOR COURT
8 Danielle Lecher, Judicial Assistant
9 DLecher@courts.az.gov
10 division4@mohavecourts.com

11 David A. Warrington,
12 Gary Lawkowski
13 DHILLON LAW GROUP, INC.
14 DWarrington@dhillonlaw.com
15 GLawkowski@dhillonlaw.com
16 *Pro hac vice forthcoming

17 Timothy A La Sota,
18 TIMOTHY A. LA SOTA, PLC
19 tim@timlasota.com
20 *Attorneys for Plaintiffs/Contestants*

21 D. Andrew Gaona
22 COPPERSMITH BROCKELMAN PLC
23 agoana@cblawyers.com
24 *Attorney for Defendant Katie Hobbs*

25 Sambo Dul
26 STATES UNITED DEMOCRACY CENTER
27 bo@statesuniteddemocracycenter.org
28 *Attorney for Defendant Katie Hobbs*

29 Daniel C. Barr
30 Paul F. Eckstein
31 Alexis E. Danneman
32 Austin Yost
33 Samantha J. Burke
34 PERKINS COIE LLP
35 dbarr@perkinscoie.com
36 peckstein@perkinscoie.com
37 adanneman@perkinscoie.com
38 ayost@perkinscoie.com

1 sburke@perkinscoie.com

2 *Attorney for Kris Mayes*

3 Celeste Robertson

4 Joseph Young

4 APACHE COUNTY ATTORNEY'S OFFICE

5 crobertson@apachelaw.net

5 jyoung@apachelaw.net

6 *Attorneys for Defendants Larry Noble, Apache County Recorder*

7 Christine J. Roberts

8 Paul Correa

8 COCHISE COUNTY ATTORNEY'S OFFICE

9 croberts@cochise.az.gov

10 pcorrea@cochise.az.gov

10 *Attorneys for Defendants David Stevens, Cochise County Recorder*

11 Bill Ring

12 COCONINO COUNTY ATTORNEY'S OFFICE

13 wring@coconino.az.gov

13 *Attorney for Defendants Patty Hansen, Coconino County*

14 Jeff Dalton

15 GILA COUNTY ATTORNEY'S OFFICE

16 jdalton@gilacountyaz.gov

16 *Attorney for Defendants Sadie Jo Bingham, Gila County Recorder*

17 Jean Roof

18 GRAHAM COUNTY ATTORNEY'S OFFICE

19 jroof@graham.az.gov

20 *Attorney for Defendants Wendy John, Graham County Recorder*

21 Scott Adams

22 GREENLEE COUNTY ATTORNEY'S OFFICE

23 sadams@greenlee.az.gov

23 *Attorney for Defendants Sharie Milheiro, Greenlee County Recorder*

24 Ryan N. Dooley

25 LA PAZ COUNTY ATTORNEY'S OFFICE

26 rdooley@lazpazcountyaz.org

26 *Attorney for Defendants Richard Garcia, La Paz County Recorder*

27 Ryan Esplin

28 MOHAVE COUNTY ATTORNEY'S OFFICE – CIVIL DIVISION

1 esplinr@mohave.gov
2 *Attorney for Defendants Kristi Blair, Mohave County Recorder*

3 Daniel Jurkowitz
4 Ellen Brown
5 Javier Gherna
6 PIMA COUNTY ATTORNEY'S OFFICE

7 Daniel.Jurkowitz@pcao.pima.gov
8 Ellen.Brown@pcao.pima.gov
9 Javier.Gherna@pcao.pima.gov
10 *Attorneys for Defendants Gabriella Cazares-Kelly, Pima County Recorder*

11 Craig Cameron
12 Scott Johnson
13 Allen Quist
14 Jim Mitchell
15 PINAL COUNTY ATTORNEY'S OFFICE

16 craig.cameron@pinal.gov
17 scott.m.johnson@pinal.gov
18 allen.quist@pinal.gov
19 james.mitchell@pinal.gov
20 *Attorneys for Defendants Dana Lewis, Pinal County Recorder*

21 Kimberly Hunley
22 William Moran
23 SANTA CRUZ COUNTY ATTORNEY'S OFFICE
24 khunley@santacruzcountyaz.gov
25 wmoran@santacruzcountyaz.gov
26 *Attorneys for Suzanne Sainz, Santa Cruz County Recorder*

27 Collen Connor
28 Thomas Stoxen
29 YAVAPAI COUNTY ATTORNEY'S OFFICE
30 Colleen.Connor@yavapaiaz.gov
31 Thomas.Stoxen@yavapaiaz.gov
32 *Attorney for Defendants Michelle M. Burchill, Yavapai County Recorder*

33 Bill Kerekes
34 YUMA COUNTY ATTORNEY'S OFFICE
35 bill.kerekes@yumacountyaz.gov
36 *Attorney for Defendants Richard Colwell, Yuma County Recorder*

37 /s/J. Christiansen

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