SUPREME COURT OF ARIZONA

JEANNE KENTCH; TED BOYD; ABRAHAM HAMADEH; and REPUBLICAN NATIONAL COMMITTEE,

Petitioners/Plaintiffs/Contestant,

v.

HON. LEE F. JANTZEN, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave,

Respondent,

and

KRIS MAYES, an individual;

Real Party in Interest/Contestee,

and

ADRIAN FONTES, in his official capacity as the Secretary of State, *et al.,*

Nominal Defendants.

Arizona Supreme Court
No. CV-23-0205-SA

Arizona Court of Appeals,
Division One
No. 1-CA-CV 23-0472

Superior Court of Arizona,
Mohave County
No. S8015CV202201468

RESPONSE TO PETITION FOR SPECIAL ACTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules, and Regulations

Other Authorities

I. INTRODUCTION

This action has been pending since December 9, 2022. Now, 8 months later and after this action has been substantially litigated, Petitioners seek special action relief. Worse yet, Petitioners – like others propagandizing and monetizing the false and dangerous narrative that our democracy is broken and our elections are unreliable – deploy deception in their last ditch effort to resuscitate their lost cause.

This Court has asked the parties to brief whether special action jurisdiction is appropriate.[1] Adrian Fontes, in his official capacity as Arizona's Secretary of State (the "Secretary"), does not believe the petition meets the requirements for special action relief, and therefore this Court should decline jurisdiction. Moreover, sadly, this Court should sanction Petitioners for cavalierly misrepresenting the record. We will briefly explain why.

First, none of the reasons Petitioners proffer as a basis to accept jurisdiction satisfy Arizona Rule of Special Action Procedure ("Rule") 3. Petitioners complain of the lack of an appealable order but then claim the superior court has no jurisdiction to enter the very appealable order Petitioners complain is lacking. While this action is essentially done and litigated, other cost-related matters do

[1] This Court has not yet asked for briefing on the merits of Petitioners' arguments. If this Court accepts jurisdiction, then the Secretary of State looks forward to explaining why Petitioners' arguments lack merit.

remain pending before the superior court. But Petitioners have *not* sought entry of an appealable order. If Petitioners desire immediate entry of an appealable order while other matters remain pending, then Petitioners can do what every other litigant in every other case would do: ask. *See* Ariz. R. Civ. P. 54(b).

Second, the petition also fails because Petitioners have an equally plain, speedy, and adequate remedy by appeal to the court of appeals, again, provided they simply ask the superior court to enter an appealable order. *See* Rule 8(a). Then at that time, if Petitioners believe they have a valid basis for an appeal, they can do so.

Third, Rule 7(b) precludes review. Petitioners offer no reason why they deserve the extraordinary remedy of special action relief from this Court, especially given this action has been pending over 8 months and is nearly done. These issues, some fact intensive (like the denial of a motion for new trial), can and should be brought in the Court of Appeals first. Petitioners offer no legitimate basis to "jump the appeal line." Hon. Jennifer M. Perkins, *Tips for Successful Special Action Litigation*, Ariz. Att'y, April 2022, at 20 (2022).

Fourth, while maligning our elections and election officials, Petitioners have made material misrepresentations warranting stern rebuke. Petitioners claim they "filed a Motion for an Order Reflecting Additional Rulings of the Court on December 28, 2022, specifically urging the trial court to issue a final judgment,

and as to that portion of the motion, Contestee Mayes concurred." Petition ("Pet.") at 13.

That's false.

That motion specifically asks the superior court to "sign" an attached "order" which "is *not a final order* and does not inhibit the ability of any other party to make further motions to" the superior court. Pet. Appendix at APPV1-081(at 12:18, emphasis added). And likewise contrary to their misrepresentation to this Court, the filing referenced actually states that "Contestee Mayes affirmatively *declined* to stipulate" to the entry of the *non-appealable* order Petitioners sought. *Id*. (at 21:23, emphasis added). Our Attorney General actually filed an *objection* to Petitioners' request. *Id*. at APPV1-092-100. In fact, it was our Attorney General who asked the superior court to enter an appealable order. *Id*. at APPV1-094.

Then, Petitioners assert: "In *Lake v. Hobbs*, [the] Maricopa County Superior Court recently considered Plaintiff Lake's Motion for Relief from Order and granted part of that motion 'on Rule 60(b)(1) grounds[.]'" Pet. at 24, n. 15 (brackets in original). Notably, they purport to quote from that order.

That's also false.

The superior court actually, unequivocally, *denied* Ms. Lake's request for relief under Arizona Rule of Civil Procedure 60(b)(1). *See* Secretary's Appendix at 026-033 (May 15, 2023 Minute Entry in *Kari Lake v. Katie Hobbs, et al.*,

CV2022-095403). Did Petitioners (one of whom was a candidate for the office of Arizona's Chief Legal Officer), or their 7 different lawyers (one of whom used to head the former Attorney General's election integrity unit), not think anyone would notice this deception? Or are they too preoccupied with trying to bolster a hopeless position that they never bothered to confirm the facts they have misrepresented? Neither is excusable. Both are sanctionable under the circumstances.

Accordingly, for the following reasons, this Court should decline jurisdiction and award sanctions.

II. STATEMENT OF ISSUES

Pursuant to this Court's August 4, 2023, Order Directing Service, and Fixing Time for Response and Reply, this Response addresses three issues:

1. "[W]hether the petition meets the criteria of Rule 3, Ariz. R.P. Spec. Act[.]."

2. "[W]hether there is an equally plain, speedy and adequate remedy by appeal."

3. "[W]hether the petition meets the criteria of Rule 7(b), Ariz. R.P. Spec. Act."

III. THE FACTS

Our Attorney General has included a recitation of facts in her response.

Rather than repeat them here, for purposes of economy, we incorporate those facts herein by reference.

IV. ARGUMENT AND JURISDICTIONAL STATEMENT

A. THE COURT SHOULD DECLINE JURISDICTION AND SANCTION PETITIONERS

This Court's decision whether to accept special action jurisdiction is "highly discretionary." Rule 3, State Bar Committee Note. A petitioner carries the burden of persuading this Court whether "extraordinary" special action relief is warranted. *Id.* As we will explain, Petitioners have not met their burden, and they have made at least one material misrepresentation to this Court warranting rebuke.

1. THE COURT SHOULD DECLINE JURISDICTION BECAUSE THE PETITION DOES NOT RAISE A QUESTION UNDER RULE 3

A special action can only raise three questions:

> (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
>
> (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
>
> (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Rule 3. Importantly, "[t]he general rule is that there is no review simply because a lower body was in error as a matter of law." *Id.* (citing cases).

With regard to whether to accept special action jurisdiction, Justice Bolick's dissent in *Arizonans for Second Chances, Rehabilitation, & Public Safety v. Hobbs*, 249 Ariz. 396 (2020), is instructive:

> A special action requests extraordinary relief, acceptance of jurisdiction is highly discretionary, and the plaintiff bears the burden of persuasion to establish the discretionary factors. *Id*. state bar committee's note. If the plaintiff fails to establish one of the grounds for special action, review should be denied. *See, e.g., Kord's Ambulance Serv., Inc. v. City of Tucson*, 157 Ariz. 311, 313, 757 P.2d 115, 117 (App. 1988). Although special action relief may be appropriate where a prompt legal determination is necessary, it is not enough that proceedings in trial court may be time-consuming. *See, e.g., Caruso v. Superior Court*, 100 Ariz. 167, 171, 412 P.2d 463 (1966); *Neary v. Frantz*, 141 Ariz. 171, 177, 685 P.2d 1323, 1329 (App. 1984) ("A remedy does not become inadequate merely because more time would transpire by pursuing a conventional action."). Rather, as a threshold requirement, Petitioners must demonstrate that the action presents a question appropriate for special action review.

Arizonans for Second Chances, Rehab., & Pub. Safety, 249 Ariz. 396, 426-427, ¶ 122 (Bolick, J., dissenting).

None of the issues Petitioners raise satisfy Rule 3. First, Petitioners invoke Rule 3(a) and assert that the superior court "fail[ed] to perform a duty required by law when it failed to issue a final judgment as prescribed by Arizona Rule of Civil Procedure 54(c)". Pet. at 5. But Petitioners have not asked the superior court to enter an appealable order. Petitioners have asked for a *non-appealable* order reflecting additional rulings (on December 28, 2022), a new trial (on January 3, 2023), and even a Rule 16 scheduling conference (June 20, 2023). *See* Secretary's Appendix at 034-043 (Superior Court Docket (a copy current as of August 2, 2023), 044-050 (Request to Set Rule 16(d) Scheduling Conference). Notably absent from the docket is a clear request from Petitioners asking the superior court to perform the very duty Petitioners claim it refuses to perform, and their assertion to the contrary is *false*. *See* Section IV(A)(4), *infra*. If Petitioners want an

appealable order, let them ask the superior court for one. They should not be rewarded with extraordinary relief for accusing the superior court of shirking its duty when they have, themselves, failed to ask the superior court to perform the very duty they claim the superior court refuses to perform.[2]

Second, Petitioners invoke Rule 3(b) and assert that the superior court is "threatening to proceed in excess of its legal authority if it issues a final judgment denying Petitioners' Motion for a New Trial". Pet. at 5. This argument is nonsensical and ironic.

This argument is nonsensical because entering an appealable judgment and denying a new trial is quite literally the superior court's job. *See* Ariz. R. Civ. P. 7.1(c), 52(c), 54, 59; Ariz. Const. art. VI, § 14 (outlining superior court jurisdiction); A.R.S. §§ 12-122 (general power), 12-123(B) (jurisdiction); *Filer v. Maricopa Cnty.*, 68 Ariz. 11, 16 (1948) ("It is of course the law that the granting of a new trial is largely in the discretion of the trial court, and that the reviewing court will not disturb the ruling except for an abuse of that discretion." (cleaned up)); *Estabrook v. J. C. Penney Co.*, 105 Ariz. 302, 305, 464 P.2d 325, 328 (1970) ("A trial judge has considerable latitude in awarding a new trial, and except in cases

[2] Compare our facts with the facts in the case Petitioners cite, *Southern California Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 53 ¶ 20 (1999), wherein there actually was a "refusal to enter an appealable order." *See* Pet. at 19. This case and ours are dissimilar.

where his broad discretion is clearly abused an appellant court will not overturn his action."). Thus, doing so here is well within the superior court's legal authority. Petitioners' position leaps across the line from debatable into the realm of lacking any (let alone substantial) justification. *See* A.R.S. § 12-349.

This argument is ironic because it contradicts Petitioners' argument that the trial court violated Rule 3(a) by failing to enter an appealable order. Which is it? Is there a basis for jurisdiction for not entering an appealable order, or is there a basis for jurisdiction only should the superior court enter an appealable order? Petitioners cannot have it both ways. The logical outcome of Petitioners' contradictory positions is a circular violation of Rule 3 that can never be remedied, because according to Petitioners, the superior court must – but at the same time cannot – enter an appealable judgment. How, then, can this action ever be resolved? This argument "create[s] a new definition of chutzpah." *Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004), as amended (May 17, 2004), amended, 02-15030, 2004 WL 1088297 (9th Cir. May 17, 2004) ("Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah.").

Third, none of Petitioners' legal arguments asserted as a basis for invoking Rule 3(c) warrant special action relief. This action has been pending for over 8 months. Since then, power has transitioned. Until now, Petitioners have done

nothing to advance this action to an appealable conclusion. To the contrary, they have done much to keep their failed contest alive and pending in the superior court.[3] A denial of a motion for new trial can be appealed in the normal course of an appeal and need not be separately addressed via special action. The same is true with regard to Petitioners' disagreements – *expressed over 8 months after the case was commenced, and after it has been substantially litigated* – with the superior court's procedural decisions, interpretation of our election contest statutes, or findings of fact. Again, it matters that this case has been substantially litigated. It should and will soon be finished. There is no basis upon which to bypass the normal appellate process in favor of an accelerated special action under these facts.

Fourth, a special action cannot be used to remedy a party's failure to preserve an issue for appeal. Yet that seems to be the case here, because Petitioners did not properly preserve their novel nominal party/due process argument before the superior court.

Petitioners argue that they were deprived of due process because Arizona's Chief Election Officer, whom they named as a *defendant* in this election contest, had the temerity to defend the integrity of Arizona's elections instead of sitting

[3] They have asked for entry of a non-appealable order so more motions can be filed, they have moved for a new trial, and they have asked for a Rule 16 scheduling conference. But they have not tried to bring this action to a conclusion. *See* Secretary's Appendix at 034-043 (Superior Court Docket).

silent. In other words, the Secretary cannot avail himself of due process without depriving Petitioners of theirs. Thus, according to Petitioners: *Due process for we, but not for thee*. To summarize Petitioners' argument is enough to defeat it.

Petitioners' position makes little sense standing alone, but its infirmity becomes manifest when considered in light of their principal argument why the superior court acted arbitrarily by denying them a new trial. On one hand, Petitioners argue that the superior court acted arbitrarily by denying Petitioners a new trial because the Secretary's predecessor failed, as a then-party to this action, to make a disclosure to Petitioners. *See* Pet. at 30-33. Then on the other hand, Petitioners argue that (1) the Secretary and other governmental defendants are "nominal" parties who should not participate at all in this action, sit idle, live with whatever result, and (2) by participating in this action they have deprived Petitioners of due process. *See* Pet. at 34. Petitioners maintain that the governmental defendants must switch between participating in the litigation and refraining from doing so whenever it benefits Petitioners. This position is untenable.

Even so, the issue has been waived because it was not properly preserved below, and thus cannot serve as a basis for special action relief. *See Cook v. Ryan*, 249 Ariz. 272, 276, ¶ 12 (App. 2020) (holding in special action that failure to raise a specific due process argument in the superior court is waived on appeal). But

even if this argument had debatable merit and were preserved, under our facts, such an argument is no basis for taking the extraordinary step of accepting special action jurisdiction because trial has occurred and this action is substantially done. This issue (if they truly believe it to be preserved) can be addressed in the normal course of an appeal, which is merely the next phase of this action.

Fifth, Petitioners "invite this Court" to make several legal holdings to ensure "uniform procedures" in election contests. Pet. at 34-35. This request, however, does not invoke any of the questions stated in Rule 3, and Petitioners fail to explain otherwise. Thus, the extraordinary relief of special action review is not warranted as to these issues.

2. THE COURT SHOULD DECLINE JURISDICTION BECAUSE PETITIONERS HAVE AN EQUALLY PLAIN, SPEEDY, AND ADEQUATE REMEDY BY APPEAL

"A special action is a separate, original proceeding in which an appellate court examines the action or inaction of public officials and may issue orders (similar to a common law writ) *affecting future proceedings* in a case." Hon. Jennifer M. Perkins, *Tips for Successful Special Action Litigation*, Ariz. Att'y, April 2022, at 20 (2022) (emphasis added). As Judge Perkins noted:

> Of greatest significance, is the issue you want to raise one that you can raise in a traditional appeal? The court generally does not exercise special action jurisdiction to merely allow a party to "jump the appeal line."

Id. It is for these reasons that, generally, "[a] decision of a Superior Court in a

special action shall be reviewed *by appeal* where there is an equally plain, speedy, and adequate remedy by that means. Procedure for appeal shall be as prescribed by the applicable rules …." Rule 8(a) (emphasis added).

This action should "be reviewed by appeal" because "there is an equally plain, speedy, and adequate remedy by that means." *Id.* This action is essentially done, save for rulings on already briefed fee and cost-related matters and entry of an appealable order. There is no reason to allow Petitioners to jump the appeal line when the issues are indeed just that: appellate issues. And the mere fact that review from this Court may be sought by Petitioners when they lose that appeal is not itself the sort of delay sufficient to allow them to cut line, forego a proper appeal, and petition directly to this Court.

3. THE COURT SHOULD DECLINE JURISDICTION BECAUSE THE PETITION DOES NOT COMPLY WITH RULE 7(B)

Again, special action jurisdiction is reserved for extraordinary circumstances when there is no "equally plain, speedy, and adequate remedy by appeal." Rule 1(a). Therefore:

> If a special action is brought in any appellate court, and if such an action might lawfully have been initiated in a lower court in the first instance, the petition shall also set forth the circumstances which in the opinion of the petitioner render it proper that the petition should be brought in the particular appellate court to which it is presented. If the appellate court finds such circumstances insufficient, the court will on that ground dismiss the petition.

Rule 7(b). "Where, as here, the court of appeals has original appellate jurisdiction, it is ordinarily the court to which the special action must be presented in the first

instance." *Kelley v. Ariz. Dept. of Corr.*, 154 Ariz. 476, 476 (1987). But, "if extremely unusual circumstances make it appropriate for [this Court] to do so, [it] may, in [its] discretion, entertain the special action directly." *Kelley*, 154 Ariz. at 476. Again, Justice Bolick's observations in *Arizonans for Second Chances* are helpful:

> In their special action petition, Petitioners asserted jurisdiction under Rule 7(b), which allows Petitioners to file a special action in an appellate rather than trial court in the first instance if they can persuade the court that their reasons for doing so are sufficient. Ariz. R.P. Spec. Act. 7(b). However, Rule 7 does not expand the questions that may be presented under Rule 3. Indeed, Rule 7(e) provides that a petition must contain a jurisdictional statement, and Rule 7(b) requires that Petitioners must "also" explain why they are seeking initial relief in an appellate court. That language demonstrates that Rule 7(b) is not an independent source of jurisdiction, and that the Rules' other jurisdictional prerequisites must be met.

Arizonans for Second Chances, Rehab., & Pub. Safety, 249 Ariz. at 426-427, ¶ 123 (Bolick, J., dissenting).

This substantially litigated action presents no extremely unusual circumstances warranting this Court's extraordinary early intervention 8 months after this action was filed. This special action could have been brought months ago, and even now in the Court of Appeals (where Petitioners have already filed an appeal, albeit prematurely). Afterall, it is there where any appeal in this action lies, and an appeal is indeed the next step in this action. But Petitioners seek to bypass the normal order of appeals, and even the entry of appealable judgment (the only impediment here to an appeal in the normal course), and jump straight to this Court

under the guise that special action relief is the only way to remedy Petitioners' perceived wrongs. Not so. Petitioners have an adequate remedy by appeal, provided they actually seek entry of an appealable order.

Further, although the Court has not yet asked for briefing on the merits of Petitioners' substantive arguments, it is important to note that none of them are especially difficult to analyze, and the circumstances here are not extremely unusual. Election challenges are nothing new (although continuing to contest them 8 months later is unusual). And while one could argue that the nominal party/due process arguments raised for the first time here are arguments of first impression, it is only so because the arguments are objectively meritless and, as such, have never been raised before.

Moreover, "Laches will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6 (2000). If time were of the essence to Petitioners, then they could have sought special action review months ago. They chose to wait until now, only *after* their motion for a *new trial* failed. Laches instructs us that they should not be granted the extraordinary relief a special action provides because of their self-inflicted delay. *See Schoenberger v. Bd. of Adjustment of City of Phoenix*, 124 Ariz. 528, 530 (1980) ("Although the rules do not limit the time within which a special action may be filed, the doctrine of laches has been applied

to deny special action relief.").

Here, Petitioners unreasonable delay is manifest from the many months during which they could have first sought special action relief for at least some of the issues raised. And their unreasonable delay also has "result[ed] in prejudice" to the Secretary, our Attorney General, *and* Arizona's election officials, courts, and voters. *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 delay." *Martin*, 219 Ariz. at 558 ¶ 6. "To determine whether delay has prejudiced the administration of justice, a court considers prejudice to the courts, candidates, citizens who signed petitions, election officials, and voters." *Ariz. Libertarian Party v. Regan*, 189 F.Supp.3d 920, 923 (D. Ariz. 2016) (citing *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000), and *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993)). Both exist here.

First, prejudice exists as to Attorney General Mayes. She has now been sworn in as Attorney General. She has staffed the office and shaped its decision-making. Petitioners at minimum could have sought review of the superior court's discovery decisions and interpretation of the law many months ago. Instead they sought a new trial and even a scheduling conference, and then waited 17 days after

being denied that relief to file this special action.

Second, Petitioners' unreasonable delay also has prejudiced "the administration of justice." *Martin*, 219 Ariz. at 558 ¶ 6. Petitioners have themselves contributed to the lack of finality they now claim to have been seeking – finality that the Secretary and our Attorney General (and Arizonans) are just as much entitled to as Petitioners. Yet they chose a different path, knowing full well that our Attorney General had to assume office and honor her oath to Arizona. So much has happened while Petitioners meandered in the superior court, and the extraordinary relief of special action should not be employed to try and unwind all that our Attorney General has done, to Arizona's detriment, by fast-tracking the resolution of issues that deserve to be fully and carefully briefed in the normal course of an appeal.

Petitioners' delay has also prejudiced (and will prejudice) "the election officials" and court employees whom Petitioners have forced to work on expedited timelines – first through the 2022 holidays, and now before this Court. *Sotomayor*, 199 Ariz. at 83 ¶ 9. All of that work placed Petitioners' case ahead of others that are no doubt equally deserving of careful judicial review. Under our facts, this Court should be wary of rewarding 8 months of delay with expedited consideration.

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 [Petitioners] were allowed to have their claims heard at this late date.

Bowyer v. Ducey, 506 F.Supp.3d 699, 719 (D. Ariz. 2020) (citing *SW Voter Registration Educ. Project v. Shelly*, 344 F.3d 914, 919 (9th Cir. 2003)). If Petitioners desire to appeal, then they can do so in the normal course. There is no reason, under our facts, to favor them with extraordinary special action relief.

4. THE COURT SHOULD SANCTION PETITIONERS BECAUSE THEY MISREPRESENTED THE RECORD TO THE COURT

Unfortunately for all involved, and especially Arizona, we again tread the treacherous waters of sanctionable misconduct and ask this Court to, again, guide our profession back to safe harbor.

The Secretary has said this before, but it bears repeating: Those who invoke our Courts must do so in good faith. We cannot allow a disgruntled vocal minority to weaponize our Courts, sow unfounded distrust in our election processes, malign our public servants, and undermine our democracy – all for the purpose of trying to overturn the People's will and topple an election. Our democracy thrives because, among other things, it demands accountability. And we must hold accountable those who materially misrepresent the facts in order to gain some kind of advantage – here, the ultimate goal being to usurp an elected office. *See* A.R.S. § 12-349; *see also* ARCAP 25 (made applicable here by Rule 7(i)).

Petitioners have made clear misrepresentations (not mere mistakes) in an

effort to skip the appeal line and convince this Court to quickly remedy a perceived injustice that, frankly, does not exist. Candor to our courts is the standard by which all who invoke judicial relief must abide. *See* ER 3.3, Comment 2.[4] It is a foundational precept upon which our justice system stands. If that foundation falters, so goes our justice system. Therefore, if we do not at least require those appearing before our courts to adhere to the core principle of candor, and if our courts do not admonish those who do not do so, the credibility of our justice system will erode.

a) ARIZONA RULE OF CIVIL APPELLATE PROCEDURE 25

"An appellate court may impose sanctions … if it determines that an appeal … is frivolous, or was filed solely for the purpose of delay" or "for a violation of" the rules of civil appellate procedure. ARCAP 25. The sanctions imposed should be "appropriate in the circumstances of the case, and to discourage similar conduct in the future." *Id.* "Sanctions may include contempt … or withholding or

[4]"This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, . . . the lawyer must not mislead the tribunal by false statements of law or fact or evidence that the lawyer knows to be false."

imposing costs or attorneys' fees." *Id.* ARCAP 25 applies in a special action. *See* Rule 4(g).

This Court uses an objective test for determining whether there is a violation of ARCAP 25. *See Matter of Levine*, 174 Ariz. 146, 153 (1993), reinstatement granted, 176 Ariz. 535 (1993). Relevant here, the procedural rules governing both special actions and appeals necessarily presume that factual assertions, especially if material to the arguments presented, are not blatantly misstated. And even were this not the case, the ethical rules governing lawyers certainly do, and this is a sound standard for those appearing before the Court. *See* E.R. 3.3.

b) A.R.S. § 12-349

In Arizona, "in any civil action commenced … in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party … if the attorney or party," among other things, "[b]rings or defends a claim without substantial justification," "[b]rings or defends a claim solely or primarily for delay or harassment," or "[u]nreasonably expands or delays the proceeding." A.R.S. § 12-349(A)(1)-(3) (emphasis added). The phrase "'without substantial justification' means that the claim … is groundless and is not made in good faith." A.R.S. § 12-349(F). In this regard, "[w]hile groundlessness is determined objectively, bad faith is a subjective determination." *Takieh v.*

O'Meara, 252 Ariz. 51, 61, ¶ 37 (App. 2021), review denied (Apr. 7, 2022).

Sanctions under A.R.S. § 12-349 is mandatory where factually supported, and a violation need only be proven by a preponderance of the evidence. *See Democratic Party v. Ford*, 228 Ariz. 545, 548 ¶10 (App. 2012); *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555 ¶27 (App. 2001). And when making an award under § 12-349, the Court must set forth the specific reasons for the award. *See* A.R.S. § 12-350. In doing so, the Court can consider any variety of factors, including those listed in A.R.S. § 12-350. *See id.*

c) SANCTIONS HERE ARE WARRANTED

Petitioners advance an argument on appeal hinging on a material mischaracterization of the record. Either this was done intentionally or out of willful ignorance. Neither is excusable, and reasonable people with full knowledge of the relevant facts would not have done so.

Again, Petitioners claim they:

> … filed a Motion for an Order Reflecting Additional Rulings of the Court on December 28, 2022, specifically urging the trial court to issue a final judgment, and as to that portion of the motion, Contestee Mayes concurred.

Pet. at 13. But that motion specifically asks the superior court to "sign" an attached "order" which "is *not a final order* and does not inhibit the ability of any other party to make further motions to" the superior court. Pet. Appendix at APPV1-081(at 12:18, emphasis added). And the filing referenced actually states

that "Contestee Mayes affirmatively *declined* to stipulate" to the entry of the non-appealable order sought. *Id*. (at 21:23, emphasis added). Indeed, our Attorney General filed an *objection* to petitioner's request. *Id*. at APPV1-092-100.

The significance of this deception is amplified when one reviews Petitioners' Motion for a New Trial, *filed after the motion they claim wherein they sought an appealable order*, in which they make it clear they do not desire entry of an appealable order: "Contestants further ask that *entry of any judgement be stayed* pursuant to Rule 62(a) until a new trial is held and the case decided." *Id*. at APPV1-114 (emphasis added).

Then, Petitioners assert:

> In *Lake v. Hobbs*, [the] Maricopa County Superior Court recently considered Plaintiff Lake's Motion for Relief from Order and granted part of that motion "on Rule 60(b)(1) grounds[.]"

Pet. at 24, n. 15 (brackets in original). In fact, Petitioners purport to *quote* from that order. *See id*. But that also never happened, and the quote, presumably given to emphasize the truth of a falsity, is at minimum taken out of context. *See* Secretary's Appendix at 026-033.

In both instances, Petitioners had *all* the information necessary to ascertain the validity of these assertions. Seven different lawyers (one of whom used to head the former Attorney General's election integrity unit), and four petitioners (one a former candidate for the office of Arizona's Chief Legal Officer), either: (1)

ignored these facts, cavalierly made false statements, and hoped nobody would catch on; *or* (2) never bothered to look in the first place. Either way, Petitioners have made material misrepresentations that are unjustified, unreasonably expand this action, and delay its timely adjudication.

This Court has been misled. And after comparing the false statements with the record, it appears impossible that this was a mistake. If it were, or if this were even a close call where we could give the benefit of some doubt to Petitioners, we would not ask for sanctions. After all, doing so does not advance the merits and takes time and resources. But one can only deduce that either this was done with knowledge of the deception, or it was done without confirming the sources cited, which is itself tantamount to deception insofar as doing so necessarily assumes one is willing to accept her unchecked assertions may be wrong. Neither scenario is acceptable.

The blatant nature of this deceit cannot be ignored, especially given – in the context of this election challenge – the damage such misinformation can do and has done to our Democracy. It needs to be admonished now, so that it does not leach into whatever appeal Petitioners file, or worse, out into the world for others to absorb. Sanctions are necessary here to protect the integrity of our judicial process and destroy the spread of misinformation in pursuit of justice before it irreversibly takes root.

5. PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES

Petitioners are not entitled to attorneys' fees for the reasons our Attorney General states in her brief (which are incorporated herein), and because even if the Court accepts jurisdiction, any award would be premature because there would still need to be briefing and a substantive decision on the merits of Petitioners' arguments.

V. CONCLUSION

Petitioners continue to recklessly perpetuate the tired but dangerous narrative that our elections are unreliable and our democracy is withering on the vine. Worse, Petitioners have resorted to peddling misinformation in order to sway this Court.

Deliberately peddling misinformation to this Court demonstrates a profound disrespect for our democratic institutions. If people are truly suspicious of our election processes, doubt our election officials, or question the efficacy of our democracy, it is because misinformation continues to circulate unchecked. This Court must safeguard the truth, and admonish those who dare deceive the public while invoking our judiciary, so that our judiciary remains revered worldwide as the standard for judicial efficacy and our democratic institutions continue to thrive.

An appeal may be inevitable, but 8 months after this election challenge was denied, the extraordinary relief of special action review is unwarranted under our

facts.

After the 2022 general election, Arizona is exhausted. We all are.

This Court should decline jurisdiction and award sanctions.

RESPECTFULLY SUBMITTED: August 11, 2023.

SHERMAN & HOWARD L.L.C.

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