NO. 20-

IN THE
SUPREME COURT OF THE UNITED STATES

KELLI WARD,
Petitioner,
v.

CONSTANCE JACKSON, FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; AND STEVE GALLARDO,
Respondents;

KATIE HOBBS, IN HER OFFICIAL CAPACITY AS THE ARIZONA SECRETARY OF STATE; ADRIAN FONTES, IN HIS OFFICIAL CAPACITY AS THE MARICOPA COUNTY RECORDER; AND CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES, AND STEVE GALLARDO, IN THEIR OFFICIAL CAPACITIES AS THE MARICOPA COUNTY BOARD OF SUPERVISORS,
Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

APPENDIX

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December 11, 2020

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SUPREME COURT OF ARIZONA

KELLI WARD, Plaintiff/Appellant, v. CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO, Defendants/Appellees, and KATIE HOBBS, in her official capacity as the Arizona Secretary of State; ADRIAN FONTES, in his official capacity as the Maricopa County Recorder; and the MARICOPA COUNTY BOARD OF SUPERVISORS, Intervenors.	Arizona Supreme Court No. CV-20-0343-AP/EL Maricopa County Superior Court No. CV2020-015285 **FILED 12/08/2020**

DECISION ORDER

The Court accepted jurisdiction of this expedited election appeal and en banc has considered the record, the trial court's December 4, 2020 minute entry, and the briefing of Appellant Kelli Ward, Defendant Biden Electors, Intervenors Maricopa County and the Secretary of State, and amicus curiae The Lincoln Project.

The Secretary duly certified the statewide canvass and on

November 30, 2020, she and the Governor signed the certificate of ascertainment for presidential electors, certifying that in Arizona the Biden Electors received 1,672,143 votes and the Trump Electors received 1,661,686 votes (a difference of 10,457 votes out of a total of 3,333,829 cast for these two candidates). Although slim, the margin was outside the one-tenth of one percent of the total number of votes cast for both of the presidential electors which is the statutory trigger for an automatic recount. A.R.S. § 16-661(A)(1).

The Secretary's certification followed Maricopa County's audit. Under Arizona law, the county officer in charge of the election conducts a hand count prior to the canvass. A.R.S. § 16-602(B). The statute provides detailed instructions on the hand count process, and in this case the November 9, 2020 Maricopa County hand count included 5000 early ballots and a hand count of Election Day Ballots from two-percent of the vote centers. The audit revealed no discrepancies in the tabulation of the votes between hand count totals and machine totals. The County completed its canvass on November 23, 2020.[1] Maricopa County is the only county implicated in this proceeding.

Appellant filed her contest under A.R.S. § 16-673 raising three statutory bases for a challenge under A.R.S. § 16-672 which include "misconduct" by an election board or officer; "[o]n account of illegal votes"; or "[t]hat by reason of erroneous count of votes the

[1] https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf

person declared elected ... did not in fact receive the highest number of votes." A.R.S. § 16-672(A)(1), (4) and (5). In her First Amended Complaint, Appellant sought the inspection of an unspecified number of ballots under A.R.S. § 16-677, which authorizes the inspection of ballots before preparing for trial after the statement of contest has been filed.

Under Arizona law, "If any ballot, including any ballot received from early voting, is damaged, or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. All duplicate ballots shall be clearly labeled 'duplicate' and shall bear a serial number that shall be recorded on the damaged or defective ballot." A.R.S. § 16-621(A).

In this election, Maricopa County had 27,869 duplicate ballots pertaining to the Presidential Electors. Witness testimony explained that "duplicate ballots" include those reflecting "overvotes" or votes for more than one candidate; overseas ballots; and ballots that are damaged or otherwise cannot be machine tabulated. The trial court also heard testimony from a number of witnesses who presented credible testimony that they saw errors in which the duplicate ballot did not accurately reflect the voter's apparent intent as reflected in the original ballot.

Before the trial, the parties conducted a review of randomly

chosen sample ballots. The first review was of 100 ballots and the second was of 1526 ballots, and of the 1626 total, there were nine errors, (1617 correct duplicate ballots) that if correct would have given the Trump Electors an additional seven votes and the Biden Electors an additional two votes. The Secretary maintains that this constitutes an error of no more than 0.37% within the sample. Appellant argues that the error rate was 0.55%, and the trial court concluded the results were "99.45% accurate." When this is extrapolated to the total number of duplicate ballots it is not sufficient to come close to warranting a recount under A.R.S. § 16-661.

Although Appellant requested additional time and the opportunity to review additional ballots, Appellant offered no evidence to establish that the 1626-ballot sample was inadequate to demonstrate any fraud, if present. As the trial court noted, this review confirmed the witness testimony that there were mistakes in the duplication process, the mistakes were few, and when brought to the attention of election workers, they were fixed. Extrapolating this error rate to all 27,869 duplicate ballots in the county would result in a net increase of only 103 votes based on the 0.37% error rate or 153 votes using the 0.55% error rate, neither of which is sufficient to call the election results into question.

The parties also presented evidence after reviewing a sample of the envelope signatures on mail-in ballots. Their experts determined

that out of 100 signatures, six to eleven of the signatures were "inconclusive" but neither expert could identify any sign of forgery or simulation and neither could provide any basis to reject the signatures.

Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz. App. 602 (1966). Elections will not be held invalid for mere irregularities unless it can be shown that the result has been affected by such irregularity. *Territory v. Board of Sup'rs of Mohave County*, 2 Ariz. 248 (1887). The validity of an election is not voided by honest mistakes or omissions unless they affect the result, or at least render it uncertain. *Findley v. Sorenson,* 35 Ariz. 265, 269 (1929). Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, *Morgan v. Board of Sup'rs*, 67 Ariz. 133 (1948).

The legislature has expressly delegated to the Secretary the authority to promulgate rules and instructions for early voting. A.R.S. § 16-452(A). After consulting with county boards and election officials, the Secretary is directed to compile the rules "in an official instructions and procedures manual." The Election Procedures Manual or "EPM," has the force of law. The Court recently considered a challenge to an election process and granted relief where the county recorder adopted a practice contrary to the EPM.

Arizona Pub. Integrity All. v. Fontes, ___ Ariz. ___, 475 P.3d 303, 305 (Ariz. November 5, 2020). Here, however, there are no allegations of any violation of the EPM or any Arizona law.

Intervenor Maricopa County argues that the trial court could not entertain this challenge under A.R.S. § 16-672(A) which authorizes a contest of the "election of any person declared elected to state office." Intervenors/Defendants/Amicus contend that the Court must decide this matter within the "safe harbor" deadline of 3 U.S.C. § 5.

The Court concludes, unanimously, that the trial judge did not abuse his discretion in denying the request to continue the hearing and permit additional inspection of the ballots. The November 9, 2020 hand count audit revealed no discrepancies in the tabulation of votes and the statistically negligible error presented in this case falls far short of warranting relief under A.R.S. § 16-672. Because the challenge fails to present any evidence of "misconduct," "illegal votes" or that the Biden Electors "did not in fact receive the highest number of votes for office," let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results, the Court need not decide if the challenge was in fact authorized under A.R.S. § 16-672 or if the federal "safe harbor" deadline applies to this contest. Therefore,

IT IS ORDERED affirming the trial court decision and confirming the election of the Biden Electors under A.R.S. § 16-676(B).

IT IS FURTHER ORDERED directing Defendants/Intervenors to file a

response, which may be a collective response, to Appellant's Motion to Unseal Exhibits no later than Friday, December 11, 2020.

IT IS FURTHER ORDERED denying the Secretary's request for attorneys' fees under A.R.S. § 12-349.

DATED this 8th day of December, 2020.

_____/S/_____
ROBERT BRUTINEL
Chief Justice

TO:

Dennis I Wilenchik
N L Miller Jr
John D Wilenchik
Sarah R Gonski
Daniel A Arellano
Roy Herrera
Joseph I Vigil
Joseph Branco
Thomas P Liddy
Emily M Craiger
Joseph Eugene La Rue
Roopali H Desai
Kristen M Yost
Susan M Freeman
Bruce E Samuels
Hon. Randall H Warner
Hon. Jeff Fine

Clerk of the Superior Court
*** Filed ***
12/4/2020 4:05 p.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-015285 12/04/2020

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
C. Ladden
Deputy

KELLI WARD

DENNIS I WILENCHIK

v.

CONSTANCE JACKSON, et al.

SARAH R GONSKI

ROOPALI HARDIN DESAI
JOSEPH EUGENE LA RUE
DAVID SPILSBURY
ROY HERRERA
DANIEL A ARELLANO
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE WARNER
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MINUTE ENTRY

East Court Building – Courtroom 414

9:15 a.m. This is the time set for a continued Evidentiary Hearing on Plaintiff's anticipated election contest petition via GoToMeeting.

The following parties/counsel are present virtually through GoToMeeting and/or telephonically:

- Plaintiff Kelli Ward is represented by counsel, John D. Wilenchik.

- Defendants Constance Jackson, Felicia Rotellini, Fred Yamashita, James McLaughlin, Jonathan Nez, Luis Alberto Heredia, Ned Norris, Regina Romero, Sandra D. Kennedy, Stephen Roe Lewis, and Steve Gallardo (collectively, the "Biden Elector Defendants") are represented by counsel, Sarah Gonski, Bruce Spiva (*pro hac vice*), Daniel Arellano, and Roy Herrera.

- Intervenors Adrian Fontes (in his official capacity as Maricopa County Recorder) and Maricopa County Board of Supervisors (collectively, "County Intervenors") and are represented by counsel, Thomas Liddy, Emily Craiger, and Joseph La Rue.

- Intervenor Katie Hobbs (in her official capacity as the Arizona Secretary of State) is represented by counsel, Rooplai Desai and Kristen Yost. State Election Director Sambo "Bo" Dul is also present.

Counsel for Biden Elector Defendants addresses the court as to the court's ruling denying any Rule 50 motion practice after the conclusion of Plaintiff's case. Discussion is held thereon and counsel for Biden Elector Defendants states his position on the record. The court affirms its prior ruling denying the request for any Rule 50 motion practice.

A record of the proceedings is made digitally in lieu of a court reporter.

Biden Elector Defendants' Case:

Linton Mohammed is sworn and testifies.

Biden Elector Defendants' exhibit 16 is received in evidence.

Linton Mohammed is excused.

Biden Elector Defendants rest.

Intervenor Secretary of State's Case:

Sambo "Bo" Dul is sworn and testifies.

Intervenor Secretary of State's exhibit 32 is received in evidence.

Sambo "Bo" Dul is excused.

Intervenor Secretary of State rests.

LET THE RECORD REFLECT that the court notes its prior acquaintance with County Intervenors' witness, Reynaldo Valenzuela, due to election matters while serving previously as the civil presiding judge.

County Intervenors' Case:

Reynaldo Valenzuela is sworn and testifies.

County Intervenors' exhibit 29 is received in evidence.

10:31 a.m. The court stands at recess.

10:41 a.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Reynaldo Valenzuela continues to testify.

County Intervenors' exhibit 30 is received on evidence.

Reynaldo Venezuela is excused.

Scott Jarrett is recalled and testifies further.

Scott Jarrett is excused.

County Intervenors rest.

Plaintiff's Rebuttal:

Liesl Emerson is sworn and testifies.

Liesl Emerson is excused.

Plaintiff rests.

11:30 a.m. The court stands at recess.

11:36 a.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made digitally in lieu of a court reporter.

Closing arguments are presented.

Based on the testimony and evidence presented,

IT IS ORDERED taking this matter under advisement with a written ruling to be issued as a "**LATER**:" to this minute entry.

Pursuant to the orders entered, and there being no further need to retain the exhibits not offered in evidence in the custody of the Clerk of Court,

LET THE RECORD FURTHER REFLECT counsel indicate on the record that the courtroom clerk may dispose of Plaintiff's exhibits 2 through 13 and 15; County Intervenors' exhibit 21; and Intervenor Secretary of State's exhibits 33 and 34 not offered or received in evidence.

12:22 p.m. Matter concludes.

LATER:

Based on the evidence presented, the Court makes the following findings, conclusions, and orders. For reasons that follow, the relief requested in the Petition is denied.

1. Background.

On November 30, 2020, Governor Ducey certified the results of Arizona's 2020 general election, and the Biden/Harris ticket was declared the winner of Arizona's 11 electoral votes. The same day, Plaintiff filed this election challenge under A.R.S. § 16-672. In order to permit this matter to be heard and appealed (if necessary) to the Arizona Supreme Court before the Electoral College meets on December 14, 2020, the Court held an accelerated evidentiary hearing on December 3 and 4, 2020.

2. <u>The Burden Of Proof In An Election Contest</u>.

A.R.S. § 16-672 specifies five grounds on which an election may be contested, three of which are alleged here:

> A. Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the following grounds:
>
> 1. For misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election.
>
> . . .
>
> 4. On account of illegal votes.
>
> 5. That by reason of erroneous count of votes the person declared elected or the initiative or referred measure, or proposal to amend the constitution, or other question or proposal submitted, which has been declared carried, did not in fact receive the highest number of votes for the office or a sufficient number of votes to carry the measure, amendment, question or proposal.

A.R.S. § 16-672(A)(1). Arizona law provides two remedies for a successful election contest. One is setting aside the election. A.R.S. § 16-676(B). The other is to declare the other candidate the winner if "it appears that a person other than the contestee has the highest number of legal votes." A.R.S. § 16-676(C).

The Plaintiff in an election contest has a high burden of proof and the actions of election officials are presumed to be free from fraud and misconduct. *See Hunt v. Campbell*, 19 Ariz. 254, 268, 169 P. 596, 602 (1917) ("the returns of the election officers are prima facie correct and free from the imputation of fraud"); *Moore v. City of Page*, 148 Ariz. 151, 156, 713 P.2d 813, 818 (App. 1986) ("One who contests an election has the burden of proving that if illegal votes were cast the illegal votes were sufficient to change the outcome of the election."). A plaintiff alleging misconduct must prove that the misconduct rose to the level of fraud, or that the result would have been different had proper procedures been used. *Moore*, 148 Ariz. at 159, 713 P.2d

at 821. "[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain." *Findley v. Sorenson*, 35 Ariz. 265, 269, 276 P. 843, 844 (1929).

These standards derive, in large part, from Arizona's constitutional commitment to separation of powers. Ariz. Const. Art. 3. The State Legislature enacts the statutes that set the rules for conducting elections. The Executive Branch, including the Secretary of State and county election officials, determine how to implement those legislative directives. These decisions are made by balancing policy considerations, including the need to protect against fraud and illegal voting, the need to preserve citizens' legitimate right to vote, public resource considerations, and—in 2020—the need to protect election workers' health. It is not the Court's role to second-guess these decisions. And for the Court to nullify an election that State election officials have declared valid is an extraordinary act to be undertaken only in extraordinary circumstances.

3. <u>The Evidence Does Not Show Fraud Or Misconduct</u>.

A.R.S. § 16-672(A)(1) permits an election contest "[f]or misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election." Plaintiff alleges misconduct in three respects. First is that insufficient opportunity was given to observe the actions of election officials. The Court previously dismissed that claim as untimely. *See Lubin v. Thomas*, 213 Ariz. 496, 497, 144 P.3d 510, 511 (2006) ("In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice."). The observation procedures for the November general election were materially the same as for the August primary election, and any objection to them should have been brought at a time when any legal deficiencies could have been cured.

Second, Plaintiff alleges that election officials overcounted mail-in ballots by not being sufficiently skeptical in their comparison of signatures on the mail-in envelope/affidavits with signatures on file. Under Arizona law, voters who vote by mail submit their ballot inside an envelope that is also an affidavit signed by the voter. Election officials review all mail-in envelope/affidavits to compare the signature on them with the signature in voter registration records. If the official is "satisfied that the signatures correspond," the unopened envelope is held until the time for counting votes. If not, officials attempt to contact the voter to validate the ballot. A.R.S. § 16-550(A).

This legislatively-prescribed process is elaborated on in the Secretary of State's Election Procedures Manual. The signature comparison is just one part of the verification process. Other

safeguards include the fact that mail-in ballots are mailed to the voter's address as listed in voter registration records, and that voters can put their phone number on the envelope/affidavit, which allows election officials to compare that number to the phone number on file from voter registration records or prior ballots.

Maricopa County election officials followed this process faithfully in 2020. Approximately 1.9 million mail-in ballots were cast and, of these, approximately 20,000 were identified that required contacting the voter. Of those, only 587 ultimately could not be validated.

The Court ordered that counsel and their forensic document examiners could review 100 randomly selected envelope/affidavits to do a signature comparison. These were envelope/affidavits as to which election officials had found a signature match, so the ballots were long ago removed and tabulated. Because voter names are on the envelope/affidavits, the Court ordered them sealed. But because the ballots were separated from the envelope/affidavits, there is no way to know how any particular voter voted. The secrecy of their votes was preserved.

Two forensic document examiners testified, one for Plaintiff and one for Defendants. The process forensic document examiners use to testify in court for purposes of criminal guilt or civil liability is much different from the review Arizona election law requires. A document examiner might take hours on a single signature to be able to provide a professional opinion to the required degree of certainty.

Of the 100 envelope/affidavits reviewed, Plaintiff's forensic document examiner found 6 signatures to be "inconclusive," meaning she could not testify that the signature on the envelope/affidavit matched the signature on file. She found no sign of forgery or simulation as to any of these ballots.

Defendants' expert testified that 11 of the 100 envelopes were inconclusive, mostly because there were insufficient specimens to which to compare them. He too found no sign of forgery or simulation, and found no basis for rejecting any of the signatures.

These ballots were admitted at trial and the Court heard testimony about them and reviewed them. None of them shows an abuse of discretion on the part of the reviewer. Every one of them listed a phone number that matched a phone number already on file, either through voter registration records or from a prior ballot. The evidence does not show that these affidavits are fraudulent, or that someone other than the voter signed them. There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots.

Third, Plaintiff alleges errors in the duplication of ballots. Arizona law requires election officials to duplicate a ballot under a number of circumstances. One is where the voter is overseas and submits a ballot under UOCAVA, the Uniformed And Overseas Citizens Absentee Voting Act. Another is where the ballot is damaged or otherwise cannot be machine-tabulated. When a duplicate is necessary, a bipartisan board creates a duplicate ballot based on the original. A.R.S. § 16-621(A). In 2020, Maricopa County had 27,869 duplicate ballots out of more than 2 million total ballots. The vast majority of these were either mail-in ballots or UOCAVA ballots. 999 of them came from polling places.

The Court ordered that counsel could review 100 duplicate ballots. Maricopa County voluntarily made another 1,526 duplicate ballots available for review. These ballots do not identify the voter so, again, there is no way to know how any individual voter voted. Of the 1,626 ballots reviewed, 9 had an error in the duplication of the vote for president.

Plaintiff called a number of witnesses who observed the duplication process as credentialed election observers. There was credible testimony that they saw errors in which the duplicated ballot did not accurately reflect the voter's apparent intent as reflected on the original ballot. This testimony is corroborated by the review of the 1,626 duplicate ballots in this case, and it confirms both that there were mistakes in the duplication process, and that the mistakes were few. When mistakes were brought to the attention of election workers, they were fixed.

The duplication process prescribed by the Legislature necessarily requires manual action and human judgment, which entail a risk of human error. Despite that, the duplication process for the presidential election was 99.45% accurate. And there is no evidence that the inaccuracies were intentional or part of a fraudulent scheme. They were mistakes. And given both the small number of duplicate ballots and the low error rate, the evidence does not show any impact on the outcome.

The Court finds no misconduct, no fraud, and no effect on the outcome of the election.

4. <u>The Evidence Does Not Show Illegal Votes</u>.

A.R.S. § 16-672(A)(2) permits an election contest "[o]n account of illegal votes." Based on the facts found above, the evidence did not prove illegal votes, much less enough to affect the outcome of the election. As a matter of law, mistakes in the duplication of ballots that do not affect the outcome of the election do not satisfy the burden of proof under Section 16-672(A)(2).

5. The Evidence Does Not Show An Erroneous Vote Count.

A.R.S. § 16-672(A)(5) permits an election contest on the ground that, "by reason of erroneous count of votes" the candidate certified as the winner "did not in fact receive the highest number of votes." Plaintiff has not proven that the Biden/Harris ticket did not receive the highest number of votes.

6. Orders.

Based on the foregoing,

IT IS ORDERED denying the relief requested in the Petition.

IT IS FURTHER ORDERED denying the request to continue the hearing and permit additional inspection of ballots.

IT IS FURTHER ORDERED, as required by A.R.S. § 16-676(B), confirming the election.

IT IS FURTHER ORDERED that any request for costs and/or attorneys' fees be filed, and a form of final judgment be lodged, no later than January 5, 2020. If none of these is filed or lodged, the Court will issue a minute entry with Rule 54(c) language dismissing all remaining claims.

The Court finds no just reason for delay and enters this partial final judgment under Ariz. R. Civ. P. 54(b). The Court makes this finding for purposes of permitting an immediate appeal to the Arizona Supreme Court.

/ s / RANDALL H. WARNER

JUDGE OF THE SUPERIOR COURT

3 U.S. Code § 15 - Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide

is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KELLI WARD, **Plaintiff/Contestant;** **vs.** **CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO;** **Defendants/Contestees.**	**Case No. CV2020-015285** **MOTION TO COMPEL,** **OR** **MOTION FOR CONTINUED INSPECTION** **(Elections Matter)** **(Expedited Relief Requested)**

Plaintiff/Contestant ("Plaintiff") hereby files this Motion to Compel, or Motion for Continued Inspection.

On Tuesday, December 1, 2020, representatives of Plaintiffs, Defendants, and Intervenor Hobbs attended an inspection of ballots at the Maricopa County Tabulation and Election Center ("MCTEC"). The inspection of "duplicate" ballots began at around 4:30 PM (shortly after the

court hearing on Defendants' request to exclude credentialed observers). The inspection concluded at around 6:00 P.M., with one credentialed observer and undersigned counsel present and observing the review of duplicate ballots, on behalf of Plaintiff. (Counsel Gonski and Desai were present on behalf of Defendants and Intervenor Hobbs, respectively.)

Of the one hundred (100) duplicate ballots that were inspected and compared to their "originals," a ballot was identified where the original was clearly a vote for Trump, and the duplicate ballot switched the vote to Biden.

A second ballot was also identified on which the original ballot was clearly a vote only for Trump, but the duplicate ballot had a vote for both Trump and a "blank" write-in candidate, causing the "Trump" vote to be cancelled (due to an "over-vote").

There were no errors observed in the sample which granted a vote to Trump, or which cancelled out a Biden vote.

Given the extremely small sample size – and the fact that candidates Trump and Biden are apart by less than one half of one percent apart in the official statewide canvas (0.03%, or zero point zero three percent)[1] – a *prima facie* error rate of two percent against Trump alone is obviously of serious concern.[2]

Plaintiff therefore asks the Court to order that the inspection of duplicate ballots continue, on a larger scale (of more ballots, e.g. 2,500), and that a trial of the matter be continued pending its result.

[1] According to the Secretary of State's canvass, there were 3,333,829 total votes cast statewide for candidates Trump and Biden (1,661,686 for Trump, 1,672,143 for Biden).

[2] With respect to the separate analysis of one hundred signed ballot envelopes – two handwriting experts attended, along with lawyers. The result of that analysis appears to be that around eight to ten percent of the mail-in ballots had "inconclusive" matches – which is not to say that the signatures were invalid or fraudulent, simply that that the experts cannot say to a professional standard one way or the other, apparently because there were too few signatures on file.

On average, it took around only one minute for each duplicate ballot to be reviewed, by a single observer. (As briefly discussed in the Tuesday "discovery" hearing, the county just made one table/computer available for the review.) With a team of five observers, a larger twenty-five hundred (2,500) sample could be reviewed in a single day (eight hours. Plaintiff actually brought a team of five observers to this inspection; but again, the county accommodated only one ballot being inspected at a time).

As of this writing, the county has not committed to what the total number of duplicate ballots is for Maricopa County. Further, the total number of duplicate ballots statewide is unknown. Plaintiff asks that the Court order the Secretary of State to produce that information, to the extent known or knowable. If the number of statewide duplicate ballots is significant, as Plaintiff believes, then Plaintiff asks to perform a reasonable inspection of duplicate ballots statewide.

Finally, to the extent that the Court remains concerned about whether additional discovery will impinge on the so-called "safe harbor" date of December 8th in 3 U.S.C. § 5 (the date that was discussed during the Monday hearing, and also the subject of much discussion in *Bush v. Gore*) – a short legal brief and argument on the issue follows (which will also be repeated in Plaintiff's Proposed Findings of Fact and Conclusions of Law):

The "Safe Harbor" Date

The so-called "safe harbor" date of December 8th, 2020 is "not serious" enough to defeat further inquiry into the validity of the ballots. *Bush v. Gore*, 531 U.S. 98, 130 (2000)(Souter, J., dissenting). If that date were to pass without a resolution of this case, then Arizona "would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes 'ha[d] not been regularly given.'" *Id.*, 531 U.S. at 143 (emphasis original). Further, in contrast to the State of Florida in *Bush v. Gore*, neither Arizona's legislature nor its courts have expressed a "wish" that Arizona must resolve judicial disputes regarding the selection of presidential electors

by the federal "safe harbor" date—to the contrary, Arizona's statute regarding the selection of presidential-electors, A.R.S. § 16 212, merely states that electors shall cast their vote "[a]fter the secretary of state issues the statewide canvass containing the results of a presidential election." A.R.S. § 16-212(B). Also, while December 14th is the date under federal law for presidential electors to "meet and give" their vote in each state, which is then transmitted to Congress (3 U.S.C. §§ 7, 9, 11) – and while the "fourth Wednesday in December," i.e. December 23rd, is the date on which Congress must "request the state secretary of state to send a certified return immediately" if Congress has not already received those votes (3 U.S.C. § 12) – "none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes." *Bush*, 531 U.S. at 143 (Ginsburg, J., dissenting); *see also* 3 U.S.C. § 15. In other words, the only deadline of any practical significance is January 6th, which is when Congress actually meets to count the electoral votes (and even after that, there is the "truly" final constitutional deadline of January 20th for inauguration of the President, per the 20th Amendment).

So the bottom line is: even if a final judicial decision comes after the "safe harbor" date of December 8th, then the court's decision "must" still stand, unless there is (1) a formal objection to it in the U.S. Congress (by both a Senator and Representative), and (2) *both* Houses of Congress determine that the electors' vote was not "regularly given." *See* 3 U.S.C.A. § 15. For both Houses of Congress to agree to set aside the Court's ruling would be an unlikely, unprecedented, and – for the reasons that follow – unconstitutional act.

Article II, Section 1, clause two of the United States Constitution expressly vests authority in the State legislature to appoint presidential electors "in such Manner as the Legislature thereof may direct." The federal statutes at issue – 3 U.S.C. §§ 7, 9, 11 – unconstitutionally infringe on the power of the State legislature to direct the "manner" of appointing presidential electors, including when they are applied to create "deadlines" on the

appointment of electors and on the resolution of presidential-elector disputes that interfere with deadlines that the legislature has already set for election contests under Arizona law. A.R.S. §§ 16-676, -677 provide that the Court shall set a time for the hearing of an election contest within ten days of the certification of the vote (which just happened Monday); that "either party may have the ballots inspected before preparing for trial"; that "[t]he court shall continue in session to hear and determine all issues arising in contested elections"; and that "[a]fter hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment…" Where the result of the federal statutes is to hold a trial within only three days of the contest being filed, with a very limited opportunity for an inspection of ballots, Congress has unconstitutionally infringed on the right of the state legislature to direct the "manner" in which presidential electors are chosen.

Finally, "[d]ue process requires that a party have an opportunity to be heard at a meaningful time and in a meaningful manner." *McClung v. Bennett*, 225 Ariz. 154, 156, 235 P.3d 1037, 1039 (2010); U.S.C.A. Const.Amend. 14. Again, to hold a trial within only three days of a major elections contest being filed—and with the opportunity to inspect only hundreds out of millions of ballots—denies Plaintiff the opportunity to be meaningfully heard.

RESPECTFULLY SUBMITTED this 2nd day of December, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John "Jack" D. Wilenchik

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By *__/s/ Christine M. Ferreira__*

IN THE SUPREME COURT

STATE OF ARIZONA

KELLI WARD, **Plaintiff/Contestant;** **vs.** **CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and STEVE GALLARDO;** **Defendants/Contestees**	**Arizona Supreme Court** **Case No. CV-20-0343** **Maricopa County Superior Court** **Case No. CV2020-015285** **(Expedited Elections Matter)**

OPENING BRIEF

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Plaintiff hereby appeals from the trial court's orders (1) denying her requests to permit the additional inspection of ballots[1] and (2) sealing Trial Exhibits 14 and 35.[2]

1. When The Appeal Needs To Be Decided (with Respect to Issue No. 1)[3]

This issue is at the heart of the case. The Court must decide whether December 8th presents a meaningful legal deadline for a "final determination" of the case. *See* 3 U.S.C. § 5 (referred to as the "safe harbor" statute in *Bush v. Gore*). If the Court's answer is "yes," then the Court should decide this case on or by December 8th. If the Court's answer to that question is "no" (as Plaintiff urges), then Plaintiff respectfully requests a ruling on or before Thursday, December 10th.[4]

The "safe harbor" date found in 3 U.S.C. § 5 has been looming over this case since "day one" (as well as the dates found in the Electoral Count Act in general, 3 U.S.C. §§ 5, 6, 7, 15). Even though this elections contest was filed on the first

[1] *See* Appendix 1, p.9 (M.E. and Judgment dated 12-4); Appendix 2, p.4, ¶¶ 1-2 (M.E. dated 12-3); Appendix 3, p.2, last 5 paragraphs (M.E. dated 12-2); Appendix 4, p.2, last paragraph to p.3, paragraphs 1-2 (M.E. dated 11-30).

[2] *See* Appendix 2, p.4, ¶¶ 3-4.

[3] Issue No. 2 is straightforward and can be decided in due course. The two sealed exhibits are submitted as Exhibits 5 and 6 to the Appendix, and the issue is addressed at the bottom of this brief.

[4] This would allow time for further inspection of the ballots, as well as a re-trial of this matter, before Congress meets to count the electoral votes on January 6th, 2021.

possible date[5] (and in fact earlier[6]), the lower court believed that it had to decide this case (and allow time for an appeal) before December 8th (and/or before December 14th, the date for electors to "meet and give their votes" in each state per 3 U.S.C. § 7).[7] The lower court therefore set a trial date within only *two full days* of this elections contest being filed. As a direct result, only a very limited inspection of ballots was allowed and able to be performed.

Perhaps needless to say—litigating over three million, three hundred thirty-three thousand, eight hundred twenty-nine (3,333,829) ballots, with only two days of discovery and a day-and-a-half trial, was nothing short of impossible and raises major due process concerns. *See McClung v. Bennett*, 225 Ariz. 154, 156 (2010)(due process required in elections matters); U.S.C.A. Const.Amend. 14. But even in the two days of discovery (and the small amount of discovery that was allowed – a sampling of 100, and then 1,525 "duplicated" ballots), Plaintiff was able to prove

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[5] *See* A.R.S. § 16-673(A), providing that an elections-contest is filed "after completion of the canvass…" *See also Nicol v. Superior Court, Maricopa Cty.*, 106 Ariz. 208, 211–12 (1970)(finding contest filed prematurely). The statewide canvass was completed and declared on November 30th, 2020; and this elections contest was filed within hours after.

[6] In an effort to "get ahead" of this timing issue, Plaintiff filed a Verified Petition for Rule 27 Discovery (to obtain and preserve evidence) on November 24th, 2020; but due to the holidays, a hearing on the Rule 27 Petition was not set until November 30th, which was the first date on which Plaintiff could file a formal elections contest anyway under A.R.S. § 16-673(A). On that same date, Plaintiff "converted" the Rule 27 Petition into a formal elections contest by filing an Amended Complaint.

[7] Electors then transmit their votes to the Senate by December 23rd, per 3 U.S.C.A. §§ 11, 12; Congress meets to count the votes on January 6th, 2021, per 3 U.S.C. § 15; and the President is inaugurated on January 20th, 2021, per the 20th Amendment.

that candidate Trump received at least hundreds more votes in Maricopa County than candidate Biden as the result of uncounted or even "flipped" votes; and that the ratio of uncounted votes for Trump as compared to Biden was eight to one.[8] Based on these rates of error in "duplicated" ballots, Plaintiff sought to expand discovery into an inspection of all "duplicated" countywide and statewide, as well as into all "adjudicated" ballots statewide (which may be prone to similar rates of "human error," according to trial testimony)—likely over four hundred fifty thousand ballots statewide, and potentially enough to change the outcome of the election. However, at that point the trial date was up; and the trial court declined to stay the trial. As a result, and with only this limited "hard" evidence (a few hundred miscounted/flipped

[8] On Monday December 7th, the trial court allowed a random sampling of 100 "duplicate" ballots, which was conducted on Tuesday, December 8th. Of the initial sample of 100 ballots, two (2) were found to have been miscounted to Trump's prejudice, and none to Biden's prejudice (with one vote being erroneously "flipped" from Trump to Biden, and the other simply uncounted). This was a two percent (2%) error in the sample.

On December 9th, the county agreed in open court to sample an additional 2,500 "duplicate" ballots; and 1,525 were sampled that same day. Of the 1,525 ballots that were sampled that day, seven were found to have been erroneously counted – with five to the prejudice of Trump, and two to the prejudice of Biden. This brought the total rate of error to just over half a percentile (0.5%) – which is still a material rate of error, given that the candidates' total vote counts statewide were less than half a percentile apart (0.3%).

A quick note on the numbers: the ratio of errors to the prejudice of Trump vs. errors to the prejudice of Biden would at first appear to be 7 to 2 (or 3.5 to 1); but since one of the uncounted votes for Trump was actually "flipped" to Biden, then the rate of "prejudice" is actually eight to one (8 to 1) based on this sample. Finally, the total number of "duplicated" ballots in Maricopa County appears to be around 27,859 – and so based on this sampling, at least several hundred votes for Trump went uncounted or were "flipped" to Biden (in just the Maricopa County "duplicate" ballots alone).

votes), the lower court declined to de-certify the election.

Plaintiff first raised the "safe harbor" date out of candor to the lower court, and continues to do so here. The nature of the date is described below, as well as Plaintiff's argument that the date lacks "ultimate significance" and/or is unconstitutional. *Bush v. Gore*, 531 U.S. 98, 122–124, 142, 144 (2000)(Stevens, J., dissenting; Ginsburg, J., dissenting). If the Court agrees with Plaintiff, then it must find that 3 U.S.C. § 5 does not prohibit the lower court from allowing further inspection of the ballots (i.e., from counting "legal votes until a bona fide winner is determined," as Justice Stevens wrote in his dissent to *Bush v. Gore*). *Id.*, 531 U.S. at 127 (Stevens, J., dissenting). Plaintiff asks that the judgment be reversed, and the case remanded to the trial court, with orders to allow a reasonable amount of time for continued inspection and discovery of the ballots. If the Court finds instead that a "final determination" of this matter must be made on or by December 8th (per 3 U.S.C. § 5), then Plaintiff asks that the Court decide this matter quickly (on or by that date), so that (1) the vote of the people of Arizona is not subject to any potential prejudice; and (2) Plaintiff can proceed forward with an appeal of these issue(s) to the United States Supreme Court.

A. <u>The "3 U.S.C. § 5 issue is not serious."</u>

In *Bush v. Gore*, the United States Supreme Court reversed the Florida Supreme Court's order of a manual recount, on the grounds that the Florida court's remedy was not "appropriate" (under a Florida elections-contest statute) because the recount could not be completed by the "safe harbor" date found in 3 U.S.C. § 5. *Id.*, 531 U.S. at 122. The majority's decision rested on (1) a prior Florida Supreme Court

decision which concluded that Florida counties must produce their election canvasses to the Secretary of State "on time" so as not to "preclude Florida's voters from participating fully in the federal electoral process"[9] under 3 U.S.C. § 5; and (2) a dissent to the Florida Supreme Court's decision in *Gore v. Harris*, 772 So. 2d 1243, 1269 (Fla.)(Wells, C.J., dissenting).[10] *See Bush*, 531 U.S. at 110. In that dissent, a Justice of the Florida Supreme Court wrote that additional recounts could not "be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day." *Gore v. Harris*, 772 So. 2d at 1269 (Wells, C.J., dissenting). The majority in *Bush v. Gore* pointed to this as evidence that the state of Florida "intended [its] electors to participat[e] fully in the federal electoral process as provided in 3 U.S.C. § 5"; and it reversed the Florida Supreme Court's order allowing a recount to proceed beyond the "safe harbor" date, effectively ending the election. *Bush*, 531 U.S. at 111.

However, here in Arizona, neither the legislature nor this Court has ever attributed such significance to the "safe harbor" statute or date found in 3 U.S.C. § 5. First – the "safe harbor" statute does not establish a true deadline of any kind, as even its own awkward description (as a "safe harbor") already indicates. *See Bush*, 531 U.S. at 124 ("[i]t hardly needs stating that Congress, pursuant to 3 U.S.C. § 5,

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[9] *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1237 (Fla.2000).

[10] Note that the United States Supreme Court's decision in *Bush v. Gore* mis-cites the page for the *Harris* decision as 1289 instead of 1269 (and also fails to state that it is quoting from a *dissent*, even though the citation is referred to as being from "The Supreme Court of Florida").

did not impose any affirmative duties upon the States that their governmental branches could 'violate'"). The "safe harbor" statute merely provides that if a State has established a process for the judicial resolution of disputes concerning presidential-election contests (which Arizona has done – *see* A.R.S. §§ 16-676 *et seq*.), then the State courts' "final determination…shall govern," so long as that determination is made at least six days before the date on which electors meet (which is the first Monday after the second Wednesday in December, i.e. December 14th, per 3 U.S.C.A. § 7. Six days prior to that would be December 8th.) Of course, this begs the question of why the state courts' final determination ever would *not* govern. The only answer, per 3 U.S.C. § 15, is that if the "safe harbor" date passes, then the State is still "entitled to deliver electoral votes [that] Congress *must* count" – unless *both* Houses of Congress "find that the votes had not been regularly given." *Bush*, 531 U.S. at 143 (J. Ginsburg, dissenting)(emphasis original, quotation marks and ellipses omitted). In other words, if the "safe harbor" date of December 8th passes without a "final determination" from this Court, then it means nothing, unless (1) both Houses of Congress agree (2) to set aside the final judicial determination of this case (3) on the grounds that the votes were not "regularly given."

This is a highly unlikely outcome, as a practical (political) matter. The putative winner of the presidential race is a Democrat, and a majority of the House of Representatives are Democrats. Republicans control fifty seats in the Senate, and Democrats forty-eight – with two seats presently up for contest in Georgia. No matter the result of the Georgia elections, the Senate will either have a Republican majority or it will be evenly divided, with a Democratic-controlled House – making

the notion that both Houses could agree to set aside the presidential election in this State highly unlikely, on any grounds. And again, that is the only scenario under which the "safe harbor" statute (3 U.S.C. § 5) would have any effect whatsoever.

Against this remote and unlikely possibility, the Court must weigh the importance of ensuring that the vote was correctly tabulated; encouraging public confidence in our elections; and conducting a fair election-contest suit, with the level of due process that a contest over the presidential election deserves. Here, the trial court was pressured into allowing only two days of discovery, for a race in which three million, three hundred thirty-three thousand, eight hundred twenty-nine (3,333,829) votes were cast statewide. Whether such litigation presents a meaningful opportunity for the parties to develop a record, or to seek proper discovery into the counting of the vote, is a question that hardly needs to be answered. Nevertheless, even in that short time, Plaintiff was able to discover evidence of serious error in the processing of actual ballots and seeks to discover more. If the Court denies relief, then the fact is that – despite the government's shrill insistence as to its own infallibility – "we may never know with complete certainty the identity of the winner of this year's Presidential election." *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

B. 3 U.S.C. § 5 (and related provisions in the Electoral Count Act) are Unconstitutional

U.S. Const., Art. II, §1, cl. 2 provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," the electors for President.

3 U.S.C. § 5 can be traced back to the "Electoral Count Act of 1887," which was enacted "after the close 1876 Hayes–Tilden Presidential election." *Bush*, 531 U.S. at 153–54. As detailed above, the "safe harbor" statute (and its related

provisions in the Electoral Count Act, inclusive of 3 U.S.C.§ 7 and the last clause of the sixth sentence in § 15)[11] impose limitations on the "manner" in which electors are appointed, including the State's final judicial determination of disputes over choosing electors. The statutes therefore constitute an unconstitutional infringement on the State's unfettered right to "appoint, in such Manner as the Legislature thereof may direct," its own electors for President.

The language in Art. II, §1, cl. 2 stands in distinction to the language used in Article I, §4, which describes the States' authority to hold Congressional elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators*." (Emphasis added.) The latter clause ("Congress may at any time by Law make or alter such Regulations…") does not appear in the presidential-elector clause, Article II, §1, cl. 2; and its omission must be seen as deliberate. *See e.g. National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974)(discussing related principles of statutory construction). Therefore, while the States' power to control the manner of Congressional elections is subject to a degree of constitutional "interference" by Congress, the States' power to choose presidential electors – including the manner by which disputes over presidential electors are resolved – does not brook of any interference by Congress whatsoever, rendering unconstitutional 3 U.S.C. § 5 and

[11] "…[B]ut the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." 3 U.S.C.A. § 15.

its related provisions in the Electoral Count Act.

Congress cannot constitutionally impose any penalty on a State for not choosing its electors by a given date or deadline—other than the consequences that naturally ensue from not transmitting votes to the Senate by the time that votes are counted in accordance with Art. II, §1, cl.3. (Their votes would not be counted.)

C. Plaintiff has the right to inspect the ballots

Finally, A.R.S. § 16-677 and the general rules of civil discovery plainly provide that Plaintiff has the right to have ballots inspected before preparing for trial. The lower court curtailed this right because of what it perceived to be the deadlines imposed by 3 U.S.C. § 5 and the Electoral Count Act. One of the Intervenors in the case, Maricopa County, even expressly agreed in open court to allow an inspection of 2,500 ballots (which is binding under Rule 80); but the county could only finish inspection of 1,526 ballots before trial. Plaintiff moved the lower court to continue the trial so as to allow the county to process the remaining 974 ballots; but the Court declined to move the trial due to the Electoral Count Act "deadlines."

2. Trial Exhibits 14 and 25 Must be Unsealed

Trial Exhibits 14 and 35 consist of copies of original ballots along with incorrectly "duplicated" versions of the same ballots, and the exhibits have no personally-identifiable information of any kind. The "style" of the ballot is identifiable to a general precinct, and a precinct stamp appears on the original ballot; but there is absolutely nothing to connect to the identity of actual voters. The trial court erroneously sealed these documents, despite the clearly compelling public interest in seeing that the county mis-duplicated voter ballots and in trying to

understand the reasons how or why. (See Appendix 2, Minute Entry.) The trial court apparently reasoned that ballots are "secret"; but of course, the votes that were cast (and mis-counted) are not, nor is the mere form of the ballot, especially when there is no even remotely ascertainable connection to the identity of actual voters. Plaintiff therefore asks the Court to reverse the lower court's order sealing trial exhibits 14, 35 and order them unsealed.

CONCLUSION

Plaintiff asks the Court to reverse the lower court's judgment and remand this case to the superior court with orders to allow for continued inspection and discovery; and to unseal trial exhibits 14 and 35.

RESPECTFULLY SUBMITTED December 7, 2020.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KELLI WARD, Plaintiff, vs. CONSTANCE JACKSON, ET AL., Defendants.	No. CV2020-015285

Phoenix, Arizona
November 30, 2020
10:34 a.m.

BEFORE THE HONORABLE RANDALL H. WARNER

TRANSCRIPT OF PROCEEDINGS

Hearing on Plaintiff's Verified Petition for Rule 27 Discovery

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

KAREN RAILE
Transcriptionist
CDLT-105

I N D E X

November 30, 2020

M I S C E L L A N E O U S

APPEARANCES

(All present by video or telephone)

November 30, 2020

Judge: Randall H. Warner

For the Plaintiff:

Dennis I. Wilenchik

Witnesses:

None

For the Defendants:

Sarah R. Gonski

Roy Herrera

Bruce Spiva

Witnesses:

None

For the Proposed Intervenor Katie Hobbs:

Roopali Desai

Witnesses:

None

Also Present:

Joseph La Rue, Deputy County Attorney

Phoenix, Arizona

November 30, 2020

(The Honorable Randall H. Warner Presiding)

HEARING ON PLAINTIFF'S VERIFIED PETITION FOR RULE 27 DISCOVERY:

THE COURT: All right. Welcome, everybody. Let's get started and get everybody with our cameras on, and I'll call this case.

This is Civil 2020-015285. It's a hearing on a Rule 27 request for production of some documents. For the record, I'm Judge Warner speaking, and let's figure out who is present. First of all, counsel for Plaintiff, please.

MR. WILENCHIK: Thank you, Your Honor. This is John Jack Wilenchik on behalf of Plaintiff Kelli Ward.

THE COURT: Thank you, Mr. Wilenchik. And then let me figure out who's representing whom. And so let's go with Ms. Gonski, please.

MS. GONSKI: Sure. Your Honor, this is Sarah Gonski from Perkins Coie, and I'm joined by co-counsel Roy Herrera and Bruce Spiva, and we are representing collectively the Biden Elector Defendants.

THE COURT: So I want to be clear, you and Mr. Spiva and Mr. Herrera are all representing the Biden Elector Defendants.

MS. GONSKI: That's correct, Your Honor.

THE COURT: Okay.

MS. GONSKI: And just as a matter of housekeeping, Mr. Spiva's pro hac application is on its way to the state bar. We understand that they've been having some COVID-related processing delays, so we would ask that he be permitted to appear this week just given the time frames while his pro hac application is pending (audio interference).

THE COURT: Let me put that on my list of things to talk to everyone about.

MS. GONSKI: Okay, thank you.

THE COURT: All right, thank you. I don't think I have anybody here from the County. Do I have any County representative? All right. Ms. Desai, let's have you announce.

MS. DESAI: Morning, Your Honor, Roopali Desai on behalf of proposed Intervenor Secretary of State Katie Hobbs.

THE COURT: Thank you. And I have one person who's called in and I don't know who that person is. Do you want to tell me who you are? Okay. Apparently they're going to use the listening line.

Okay. Let's deal first with the intervention. Mr. Wilenchik, do you object to the motion to intervene by the Secretary of State?

MR. WILENCHIK: Plaintiff does not object.

THE COURT: Okay. I'm granting that motion to intervene. I'm going to decide -- that just crossed my desk in

the last few minutes. I've had a chance to glance at your opposition to the Rule 27 petition. We'll talk a little bit more about that in a bit. And Mr. Wilenchik, do you have any objection to sort of temporary pro hac for Mr. Spiva?

MR. WILENCHIK: No objection.

THE COURT: Okay. So I'm going to grant on a temporary basis Mr. Spiva permission to appear in this matter pro hac vice. Okay.

Before we talk about the discovery I want to kind of talk about the end point. The election contest statutes, it's clear to me, were not written with this time frame in mind. And we can talk later about whether it applies to this case, I think it probably does.

But it seems to contemplate longer time frames than we have available. Am I correct, Mr. Wilenchik, that the canvass is going to be today and the electoral college is meeting two weeks from today, correct?

MR. WILENCHIK: I believe the canvass is scheduled at 11 o'clock a.m. today, that is correct, and the date under law for the electoral college to cast its vote for the electoral -- electors, I should say, in Arizona to cast their vote is December 14th.

THE COURT: All right. And I -- that's just my understanding of when the electoral college is going to meet. So you need this decided and have an opportunity to get to the

Supreme Court of Arizona in advance of the electoral college meeting; am I right, Mr. Wilenchik?

MR. WILENCHIK: Well, this was a subject of a lot of discussion and debate in the infamous Bush v. Gore opinion and its dissents. My position would be to take the position of the late Justice Ginsburg who said that the significant date here is really January 6th. In her dissent to the Bush v. Gore decision she stated that, you know, that's the date on which Congress actually counts the votes.

So what we actually have here is a series of, I'd say, four dates that have some legal significance, starting with, out of candor to the Court, I should mention, and I'm sure the other parties will bring up, we have a December 8th, quote, safe harbor date that was the subject of, again, a lot of discussion in Bush v. Gore. That date comes out of 3 U.S.C., section 5.

Our position as Plaintiff on the significance of that date is that it has very little, if any. Again, we would adopt the position of Justice Ginsburg and Souter in the Bush v. Gore decision. To quote Justice Ginsburg, she said -- well, first to quote Souter, he said, that's not a serious issue, it's not a serious deadline, the one which they all refer to as a safe harbor deadline.

The reason he referred to it -- the justices in Bush v. Gore refer to it as a, quote, safe harbor deadline is well

summarized by Justice Ginsburg in her dissent. She says, well, it's just a deadline for, you know, if the -- if judicial disputes about the vote are resolved by that deadline, then there's only one thing that that means and it's not much. It just means that Congress must count that vote unless both houses of Congress find the vote was, quote, not regular given.

So again, as Ginsburg, Souter, Breyer state in their dissents, that doesn't mean much. I mean, you know, if that date comes and goes, that in our case December 8th, quote, safe harbor deadline comes and goes, it's of very little if any practical meaning. Again, Souter refers to this being not a serious date. But that's the first date I should mention, again, out of candor to the Court, that, quote, safe harbor date.

Following that is the date the Court identified, which in our case is December 14th, that is the date for the electors to actually cast their vote which then gets -- and that's -- that by the way is under 3 U.S.C., Section 7. That's that December 14th date.

Following that the vote gets transmitted to Congress, and then finally we have the deadline that everybody in the Bush v. Gore decision seemed to agree was of real significance, which is January 6th. That is the date on which congress meets to count the votes under 3 U.S.C., section 15. And then I mentioned there were four dates. Well, the fourth of course

would be January 20th, the actual inauguration of the president.

But January 6th, in our view, Plaintiff's view, is that date that has the real significance, again, that all justices in that case could agree upon. That is the day on which Congress meets to count the vote. Again, 3 U.S.C., section 15 lays out a lot of processes that happen if, you know, there's issues with the vote on that date. And that is the date that matters.

THE COURT: So assuming that the date for the meeting of the electoral college comes and goes on the 14th and the Biden electors are there, and if there should be a subsequent ruling from an Arizona court and a final ruling by the Supreme Court that it should have been the Trump electors instead of the Biden electors, your view is that Congress still counts the Trump electors in that circumstance on January 6th despite the December 14th meeting of the electoral college; is that what I heard you say?

MR. WILENCHIK: I think you have it right except you said Trump electors (audio interference) Biden electors, and that's correct. The only, only exception is if Congress finds both -- if both houses of Congress find that the vote is, quote, not regularly given, which you know, like Ginsburg was saying in Bush v. Gore, you know, fat chance of that. So that all sounds correct, I think you just made a mistake, you said

Trump instead of Biden but --

THE COURT: Okay.

MR. WILENCHIK: -- Biden.

THE COURT: I get the two of them confused sometimes. Again, in terms of practicalities, your view is, I don't have to get this case tried in the next week so that we can get it to the Supreme Court in advance of December 14th as long as we do all that before January 6th?

MR. WILENCHIK: That's our view, correct.

THE COURT: All right. I'd like other people's view on that issue, and I'm talking about this in advance of the discovery issue just so we can get some dates set and work backwards. Ms. Gonski, are you going to speak or is Mr. Spiva going to speak?

MS. GONSKI: I'll speak for us today, Your Honor. And yeah, so I think for (audio interference) I'm certainly -- I think at the outset it's important to recalibrate a little bit, that I do think that it is vital that we get a decision in this case before the safe harbor deadline and before the meeting of the electoral college on December 14th. I don't understand Mr. Wilenchik to be citing any authority that the electoral college can somehow reconvene and that Arizona electors would have a chance to re-participate if the December 14th date comes and goes with either the wrong slate of Arizona electors or no Arizona electors present at all.

It also seems inconsistent, frankly, with the -- with Arizona's election contest statute if a -- if anybody, if any Arizona elector could file an election contest for a presidential race and therefore jeopardize the state's participation in the electoral college. There's 3.4 million Arizonans that cast ballots in this election, and of course allowing litigation to defeat their ability to participate in the selection of the next president seems like it wouldn't make sense.

I'd also point out just briefly that Mr. Wilenchik repeatedly referenced Bush v. Gore but he is speaking about a dissenting opinion. And so by necessity or by definition, I should say, that the dissenters failed to get a majority of their colleagues to sign on to the viewpoint that the safe harbor deadline is not important or significant here, in fact, I think courts have absolutely recognized that the safe harbor deadline is an important fail safe and that litigation needs to be resolved by then. So we would push for an expedient resolution as quick as possible.

THE COURT: If I was going to set an evidentiary hearing, what date would you pick? Thursday, Friday of this week?

MS. GONSKI: Yes, Your Honor. We could be prepared to be in here as soon as Wednesday, but we absolutely think Wednesday, Thursday, I think that there's no reason why we

couldn't get this resolved very quickly and get this resolved this week.

THE COURT: You know, and part of the challenge, the issue that Mr. Wilenchik is talking about, he may be right on the law, I haven't even looked at that issue, but I'm not going to have the final say on it. It's either going to be the Arizona Supreme Court or the United States Supreme Court if it gets that far.

And I want to make sure that I do what's appropriate to make sure we have a record and those issues in a proper form so that if somebody wants to say -- I'd hate to get to the 23rd of December and then everybody says, well, now it's too late. But I also want to give it enough time. So let me give that some thought.

My assumption in every election case, and I've done a lot of these, is that at some point folks want to go to the Arizona Supreme Court. And my job is mostly in the position of making sure there's a record on which that Court can make its ultimate decision.

So that's helpful. Let me turn to Ms. Desai and see if she disagrees or agrees.

MS. DESAI: Your Honor, I don't have much to add to what Ms. Gonski said. We agree that the safe harbor date is an important date, and from the Secretary's operative, there are two goals that she's trying to achieve. One is to have

finality, the canvass is occurring this morning at 11:00 a.m. It is important that the state and its voters have finality with respect to the results, which are clear and will be finalized in a state-wide canvass this morning.

The second goal of course is to make sure that the will of Arizona voters are upheld, and if there is any risk whatsoever, that that not happen, you know, that's of great concern to the Secretary. So having this case ultimately and finally decided prior to the safe harbor deadline is of utmost importance.

THE COURT: All right. My inclination is to set an evidentiary hearing for either Thursday or Friday. I don't know how long the hearing is going to last so I guess I'm inclined to set it Thursday in case it spills over to Friday.

The other problem with the Friday hearing is that if we go until the end of the day, you don't get a decision -- I guess you're going to get a decision from me from the bench but then nothing gets filed until Monday in terms of a written decision or a Supreme Court appeal, whereas if we can get it decided by at least midday Friday if not the end of the day Thursday, you guys can get to the Supreme Court. So that's my inclination in the way of timing.

I guess let me ask this to Ms. Gonski and then Ms. Desai. Mr. Wilenchik's petition basically says, our election contest is in the mail and we expect to file it on the

30th, which is today, and I expect he's got folks working on that to file it by this afternoon. Do you have any objection if we set the hearing now, Ms. Gonski?

MS. GONSKI: We have no objection object, Your Honor, to that.

THE COURT: Do you agree, Ms. Desai?

MS. DESAI: I agree, Your Honor, we should set the hearing now.

THE COURT: Mr. Wilenchik, I'll hear from you on whether we ought to set it later than Thursday or Friday of this week. But the preliminary question is do you object to my setting an evidentiary hearing today while we're all here together?

MR. WILENCHIK: We do not object to that at all, no.

THE COURT: All right. So tell me why -- let me just give you my thinking. You may be right on the law, that we've got more time than I think we have, but I'm reluctant to take that chance. And certainly if I set an evidentiary hearing after the 14th of December, I would expect someone to special action me to the Supreme Court and have the Supreme Court tell me, no, we have to do it sooner. But by then they don't move as quickly as we do and we've lost a few days.

And so my inclination is to set it on Thursday. We'll have a little spillover time Friday if we need it, and then if somebody wants to go to the Supreme Court to get them

to tell me -- I mean the Arizona Supreme Court -- that I've got more time and we can do this at a little less breakneck pace, I'm happy to do that.

But the current information I've got I think we've got to get a decision made in advance of that December 14th deadline. So that said, Mr. Wilenchik, I'm happy to hear your argument to the contrary.

MR. WILENCHIK: Sure. I think if the Court is inclined to get this -- get a trial done by the 8th, which is next Tuesday, I would ask at the minimum that we set it instead for next Monday, and here's the reason why. A critical part of this suit, and technically the only part of this suit as we sit here, is this request for inspection.

We're asking to inspect two things in particular. One is signed envelopes for the ballots, and other is reconstructed ballots. So we have a looming discovery issue here that I want to make sure we can get taken care of before any trial date, both the right to do the discovery and its scope.

What we have been contemplating on our end, and what we ask for is a reasonable inspection, something that would probably take, depending on whether it's two percent of signed envelopes or one percent, one to two and a half days. So that's a long way of saying I want to make sure we actually have time to do that discovery.

I sure wish the County people were here, I've certainly been in contact with them, because we have asked them repeatedly for how many of these reconstructed ballots are there. I can't even commit as I sit here to any kind of timeline or how long that would take. Again, our thinking is, well, if it's a big number we're going to have to do is sampling. If it's a small number we can get it done.

So that's what's driving, there's a practical matter, Plaintiff's request for more time. I think if we were to, you know, have a trial on Thursday, we've got that obvious issue to me, and if we haven't been able to do the discovery, I -- you know, our case is severely handicapped.

So what I would ask for this time is that we set it for Monday pending a resolution of that discovery issue, which hopefully we can get very quickly, hopefully we can get our discovery done this week and present it for trial on Monday. That would satisfy the safe harbor date, to the extent it is a legal issue, and you know, then if appeals ensue, well, I think that the safe harbor deadline can become an issue for the Supreme Court, Arizona or federal, just as it was in the Bush v. Gore case.

THE COURT: Let me ask you -- let's drift into the discovery that you're asking for. I don't know how many mail-in ballots there were. What was the number from Maricopa County, do you know?

MR. WILENCHIK: It was approximately 1.6 to 1.8 million. We gave a conservative number in there for a number of reasons. And admittedly, that's not something that's going to get done between now and Monday to inspect all of them. So what we ask for is a reasonable inspection of one percent to two percent.

I have been in contact with a handwriting analyst who says, well, he can organize a team of five people to get a two percent inspection done in two and a half days. So depending on the kind of time we have here, that is something that can be done this week. I don't know if it can be done by Thursday but it can be done this week so long as we clearly have the right to do it and I can, you know, make it happen.

THE COURT: So one percent is 16,000 signatures; is my math right?

MR. WILENCHIK: That's about right, correct.

THE COURT: 16,000 --

MR. WILENCHIK: (Audio interference).

THE COURT: -- (audio interference). And what do you intend to do with those signatures? Is the goal to disqualify a certain number of voters, or is it to get a statistical number by which you think that the people who compare signatures were too generous to the voters?

MR. WILENCHIK: It's exactly the latter of what you said. To do what we were not allowed to see, which is to have

a team, probably of observers, they're volunteers, who are trained by this handwriting expert I talked to, review the same things that the County workers were reviewing, i.e. compare -- it would be nice if we could get originals, but I know the County workers actually compare scans of the signatures on the envelopes to scans of signatures on file.

So the thought here would be to have that kind of inspection done. Again, the one percent could be done in about a day and a half according to my expert. He'll need a little lead time just to make sure his people are trained and ready to go. That's definitely something that can be done this week.

We have ready a separate team, again, of legal observers, poll watchers, who can look at these reconstructed ballots. The issue there, however, is we don't know how many there are.

So I know the County was served here, I don't know why it's not participating today. And I think what I'd ask for this time is an order that they meet and confer with us as to these discovery issues and whether these can be accomplished in the amount of time that we have.

THE COURT: Let me ask you about the duplicated ballots. You said you don't know how many of those there are?

MR. WILENCHIK: That's correct. We don't know -- we don't know how many.

THE COURT: Do you have a ballpark, or I mean are we

talking about in the 50s and the -- and the 50,000s. It can't be a lot.

MR. WILENCHIK: Five to six figures is my understanding. There were a lot more for whatever reason that were observed during this election. They're essentially reconstructed ballots when mail-in ballots were received and you know, they were rejected by the machines because it looks like somebody's dog ate them or issues like that, they just cannot be run.

And on this issue we've been asking the County for that information for some time, for weeks. I even asked Tom Liddy, county attorney, for that last week. Prior to that I asked Joe La Rue, another county attorney, myself. So we've been dying to have that information. It's of obvious relevance to the suit. You know, if it's a small enough number, I mean, we'll just count them all. If it's a large enough number, again, we'll have to do something on the order of sampling.

THE COURT: And is the goal the same with respect to those as it is with respect to mail-in ballots?

MR. WILENCHIK: So for the reconstructed we would be comparing to the original, you know, I'll call them dog-eaten ballots, you know, the original rejected ballots just to ensure that they are, in fact, the same.

THE COURT: Okay. Let me hear from Ms. Gonski. We've drifted from scheduling into the substantive issue of

what kind of discovery. And so let's talk to you about it, and then I'll hear from Ms. Desai after that.

MS. GONSKI: Thank you, Your Honor. First, at the outset, you know, one issue that you alluded to before that I think is a live issue that we will have to deal with down the road is the issue of jurisdiction and whether the Court has jurisdiction over this contest at all. So certainly that impacts the discovery issues and whether or not the Court has jurisdiction to hear this and order discovery.

But second, I think more importantly, I think some of the issues -- you know, our understanding are that some of the things Mr. Wilenchik is seeking in discovery is actually barred by state law. And I'm sure that Ms. Desai will talk about that in a little bit as well since I noticed that that was covered in her motion. But it looks to us like only ballots are authorized as discovery vehicles here under A.R.S. 16-677.

The envelopes themselves are not authorized as part of discovery in this type of action. And even assuming that they can get the envelopes, it's actually not clear what signatures they would have to compare them to because A.R.S. 15-168(F) says that voter registration signatures are not subject to public inspection, and DMV records are confidential under federal law, that's 18 U.S.C. 2721, which Arizona adopted at 28-455.

So it's not clear to us what the authority they would

have to get these into discovery, but again, I defer to Ms. Desai who I know has briefed this issue and has the ability to talk about state-wide from the perspective of the government.

THE COURT: All right. So let's talk to Ms. Desai.

MS. DESAI: Your Honor, I think there is certainly a threshold issue here that needs to be decided, and that is whether or not Plaintiffs or Petitioners have any entitlement to discovery at all. I think the answer to that question is clearly no. Rule 27 does not authorize the type of fishing expedition that Petitioners are seeking.

And the election contest, even ultimately when that election contest is filed and the discovery requests are considered in that context as opposed to in the context of a Rule 27 petition, there is nothing in Arizona law that authorizes the kind of discovery that Mr. Wilenchik is describing. Even when we get past that threshold issue, and Ms. Gonski's correct, we've already briefed the reasons why discovery is not appropriate or permissible, and it's there on pages 6 and 7 of the opposition that was filed with the Court this morning, even if you get past that threshold issue, the discovery that's being sought is futile.

The number -- and there is a declaration from Mr. Jarrett (phonetic), who is the individual at the Maricopa County Elections Department who has knowledge about both the

process, procedures, and the number of ballots that we're talking about here. Let's start with the duplication number first.

The Petitioners really talk about one particular vote center, and that's the Queen Creek voting center in which they speculate should have had, based on higher voting information, perhaps polling, they hoped or desired or thought there would be a greater number of votes cast for their preferred candidate. When you look at that particular vote center, the County's declaration makes clear that the entire universe of possible ballots that were duplicated are 104. That's probably --

THE COURT: Out of how many?

MS. DESAI: So there are -- the numbers are not in the declaration in their entirety, but my understanding, Your Honor, is there were a total number of 20-something thousand ballots that were duplicated in Maricopa County in total. Some pretty significant number of those are UOCAVA ballots, which are your overseas and military ballots that have to be duplicated because they come in by email. So it's not that there's a defective or problematic ballot, it's just you have to duplicate it using a bipartisan duplication board. So that takes out a large chunk.

Then there are others that are duplicated from other precincts, and of course, as I said, Petitioners have not

sought discovery with respect to or even made any viable allegations of impropriety --

THE COURT: Let me get us back to numbers. I just want to understand the scope. So for the Queen Creek vote center, and if I understand correctly, that's not a precinct, that's a vote center that collects stuff from the precincts and deals with them, right?

MS. DESAI: It's a vote center where they're -- it covers that area and the adjoining area. So --

THE COURT: How many total votes -- how many total votes in that vote center, and you said there's 104 that were duplicated?

MS. DESAI: At most. There were 104 ballots that were taken from that vote center to Nextech (phonetic), which is the tabulation center at the County. At that point, and Mr. Jarrett's separation kind of goes through this process, they put those ballots through a tabulation machine again at the tabulation center. Some of those 104 may have been counted because they were able to be read by the machine.

But -- so at most 104 were duplicated, but I think that number is actually greater than the number that was duplicated because some of those would have been read by the tabulation machine when they were taken to the County tabulation center.

THE COURT: And those are segregated? I'm -- those

are -- they don't get put in the pile where we're not going to be able to find them anymore, right? We know where those are?

MS. DESAI: Duplicated ballots are -- those are -- the original as well as the duplicated ballots are, by statute, segregated and preserved.

THE COURT: Okay. And I'm trying to get a sense of what percentage of ballots are duplicated. Do you know the total number of ballots that came into the Queen Creek vote center?

MS. DESAI: I do not, Your Honor. So your question is of all of the ballots that came into that vote center, is 104 ballots is what percentage of that greater number?

THE COURT: Right.

MS. DESAI: I don't have the answer to that, Your Honor.

THE COURT: Okay. I wanted to ask you some questions, and I would have asked this of the County but since we don't have them here, the next best thing. The envelopes that -- with the signatures on. So my understanding has always been that those envelopes get compared to the signatures on file with the voter registration. You mentioned DMV but they're not comparing to DMV, right?

MS. DESAI: Correct, Your Honor. They're looking at signatures that are for the voter registration file.

THE COURT: Okay. Do the envelopes get separated

from the ballots?

MS. DESAI: Yes, Your Honor.

THE COURT: So if we have an envelope that has Randall Warner on it, you've got no idea -- and you have to look at that envelope and you have to look at my signature, whatever, you don't have any idea what my vote was because the ballot's gone into the big pile, right?

MS. DESAI: That's correct, which is why the same futility argument applies here. Again, the statute doesn't allow for a view of the -- the envelope. The only permissible discovery under the contest statute is a ballot. So there isn't even a right to look at the envelope.

But even if you were to permit this kind of broad discovery, there is absolutely no way to marry an envelope with a ballot. We have secret voting in Arizona. It's anonymous. There's no way to find what ballots are affiliated with those envelopes.

THE COURT: My assumption is that the analysis Mr. Wilenchik is going to do is going to be a statistical analysis, right? So if we take a sample of 10,000 and his handwriting expert says the County people who compared signatures were overinclusive by a factor of this, you can extrapolate that to the rest of the ballots, and we know what the ratio of Trumps to Bidens are on average for mail-in ballot, and we can do that statistically. My assumption is

that that's what he's interested in doing. Am I right, Mr. Wilenchik?

MR. WILENCHIK: That's correct, Your Honor.

THE COURT: Okay. So we're not talking about findings that any particular ballot was fraudulent, it's the process as a whole.

MR. WILENCHIK: Correct. It's really both. I mean, to do that sampling process we would be finding a particular ballot -- I wouldn't necessarily say were fraudulent. I mean, we use the term "defective" as well meaning that maybe they weren't signed or it's just one line or something and it's not a real signature. But yes, we'd be doing a sampling approach to this because there's simply no way we could get 1.8 -- you know, 1.6, 1.8 million mail-in ballot signatures reviewed in time for any of the deadlines we're talking about.

THE COURT: Ms. Desai, if I was going to allow an inspection of the envelopes, what number do you think is appropriate?

MS. DESAI: Your Honor, I don't think it's appropriate at all to --

THE COURT: I know. That's why I put the "if" in front of the sentence.

MS. DESAI: I don't think I can answer that question because, you know, the other point that nobody's raised yet, Your Honor, is that there were observers including folks from

the Republic party who were present during the early ballot processing. That was also -- that's also part of Mr. Jarrett's declaration. So this notion that now, without pointing to anything in particular to be a problem, they should have another opportunity to review some random number of envelopes, it just doesn't make any sense.

THE COURT: Okay. Let me ask you something different about that. So when the person down at the Election Department is taking a stack of envelopes and looking at signatures and matching signatures and saying, this one goes into this pile, that's a good signature; this one, we need to call the voter, if they've given us their phone number, that's questionable. Are the observers looking over that person's shoulder? Do they have the same opportunity as that person to say, yeah, that's a good signature, that's not a bad signature?

MS. DESAI: Your Honor, observers do not have the right to observe or to conduct signature verification themselves. There is -- you know, I think this idea that observation somehow gives the right to the observer, the political party observer to actually conduct the verification is just false.

16-552 is the statute that talks about early ballots, processing, and challenges. There are only two permissible challenges that can be made to the early ballot process, and that is to the fact that the voter is not qualified to vote

under 16-121.01, or that the person has voted before at that election, period. That's it.

There isn't an opportunity to challenge a mismatched signature or the signature does not match. The fact of the matter is that if observers felt those -- that they had some claim, which we don't believe they did, they should have brought that at the time that they were standing and observing this process.

So to answer your question, Your Honor, perhaps an observer might have said, oh, I don't think that signature matches. They don't have the right to do that. They were certainly there and they didn't raise this at that time, which was at this point many, many, many weeks ago.

THE COURT: All right. I've had a couple people come on to the hearing through the phone, and I don't get names when it's on phones. So I want to see if I have somebody from the County. Do I have a County lawyer present?

MR. LA RUE: Your Honor, this is Joseph La Rue. I'm a deputy county attorney.

THE COURT: Thank you, Mr. La Rue, for joining us. I know you --

MR. LA RUE: You're welcome, Your Honor.

THE COURT: I know you came in late but let me just kind of tell you where we are, I want to get your view on it. One, we had a discussion about -- excuse me -- if we're going

to have a hearing when the hearing should be, and my leaning is to have a hearing on Thursday to give enough time for a decision this week and have the Supreme Court have an opportunity to review it. And honestly, that's for both sides because if I rule one way one side wants to appeal, I rule the other way the other side wants to appeal.

And then we were talking specifically about the two items of discovery requested. One consists of envelopes, early ballot envelopes that could be compared to voter registration records so that the signatures could be compared. And my understanding is Mr. Wilenchik's got a handwriting expert on call that's ready to do that. And he's requested 1 point -- sorry, about 16,000 signatures -- or envelopes. And the other consists of a concern number of duplicate ballots, in particular from the Queen Creek precinct.

And so I want to ask you about those two items. Does the County have the ability to produce an image of -- I wouldn't order the originals -- an image of a certain number of early ballot envelopes? And then we can talk about the number.

MR. LA RUE: Your Honor, thank you for allowing me to participate. Just so that the Court is aware, I have actually been listening in on the public line. My understanding from the order that the Court issued was that only parties were to participate on the Goto line, and the County is not currently a party to the lawsuit, which is why I was on the public line.

THE COURT: Okay. (Audio interference).

MR. LA RUE: But in answer to Your Honor's question -- thank you, Your Honor. In answer to your question, I would have to check with the client as to how much time it would take to produce those images. The images I do believe are captured, but I also believe it would take -- it would take some time for the County to be able to produce that type of a sample that Mr. Wilenchik is interested in.

THE COURT: Okay. And then with respect to the duplicated ballots, is that -- my guess is since those are segregated that's probably an easier thing to do.

MR. LA RUE: I believe so, Your Honor. And to add to what Ms. Roopali -- or I'm sorry, Ms. Desai, forgive me, Ms. Desai -- to add to what Ms. Desai said is few moments ago, what the Elections Department did, understanding that Dr. Ward was interested in the ballots that were cast in CD 5 with special attention to the Queen Creek area. The Elections Department took a look at the duplicated ballots from the vote centers in Queen Creek and immediately adjacent to Queen Creek.

And what that analysis revealed as reflected in the declaration that Ms. Desai submitted to the Court is that there were only a total of 104 ballots in that vicinity that were misread by the tabulation machine. Now, we have no way of knowing how many of those misread ballots were ultimately duplicated because just of the way the process works, but the

misread ballots are attempted to be fed through the central count tabulator. Some typically will be read by the central count tabulator, the remainder are duplicated.

But we know that 104 ballots were misread in the vote centers in Queen Creek and the immediate adjacent vote centers to Queen Creek. So in terms of what Mr. Wilenchik is looking for with specificity with duplicated ballots, that's really the universe. It's 104 that -- that were duplicated in that Queen Creek area, or potentially duplicated in the Queen Creek area.

THE COURT: But once those ballots come into the central center for duplication, and tell me if I'm making wrong assumptions, are they -- do they continue to be identified by the vote center they came from or do they go into the big pile with others that need duplicating and there's no way to sort out whether these came from Queen Creek or Surprise or wherever?

MR. LA RUE: That's correct, Your Honor. They go into the big pile, that's a good way to think about it. And so at that point it becomes difficult if not impossible, and I'm hedging a little bit, Your Honor, because again, since the County is not a party I've not had these detailed conversations with the Elections Department after this election. But it's -- it's a Herculean task, if not impossible, to reestablish which ballot came from which vote center.

THE COURT: If someone were to review the original

ballot and the duplicated ballot because they wanted to check, as Mr. Wilenchik does, whether folks did a good job of transferring one to the other, is there any way to identify who the voter is?

MR. LA RUE: No, Your Honor. There's no way to identify the voter. The only identification is, there is -- think of it as a serial number that is put on the original ballot and also put on the duplicated ballot so that those two can be married up for audit purposes or things such as that. But there's no way to tie those ballots back to the person who voted them.

THE COURT: Okay. All right. I'm prepared to rule, does anybody else want to be heard before I make my ruling? I -- well, actually, let's do it this way. Let me tell you what I'm inclined to rule and I'm happy to hear arguments against it.

MR. LA RUE: Your Honor?

THE COURT: Yes.

MR. LA RUE: Your Honor? Before you rule may I say one more thing?

THE COURT: Absolutely.

MR. LA RUE: Again, recognizing that the County is not a party, and so I'm treading carefully here. But I do want to point out that those who do the signature review receive training from the same folks who train FBI for signature

analysis, and they do the review with a comparison to the signatures in the voter's voter registration file.

So as Your Honor probably is aware from previous -- previous signature challenges, the County keeps all signatures that a voter submits ever on file in the voter registration file. And the signature reviewers take the signatures on the early ballot affidavit envelope and compare them to those signatures in the file.

To the best of my knowledge as I sit here right now, I believe that Plaintiffs do not have that file, and so it's not clear to me exactly how they would conduct this signature review if the Court ordered the County to turn over early ballot affidavit envelopes. And so I just simply wanted to put that before the Court as it's considering its ruling.

THE COURT: Well, so let me ask Mr. Wilenchik about that. You've not asked for the signatures to compare them to. What's the plan?

MR. WILENCHIK: We did, just to be clear, and I want to clarify a couple things about the request. We did ask to compare a sampling of signed ballots to the signatures on file. And then with respect to duplicate ballots, again, because the uncertainty about just how many we're talking about, we did ask to review all of them, particularly those for Queen Creek, so it's not just the Queen Creek.

I think I heard from Ms. Desai that there's only

20,000 total county-wide apparently, if Joe -- or Mr. La Rue can confirm that, I would hope, for a duplicate ballot. So that's a very manageable number on the duplicates county-wide that we would ask to review.

THE COURT: All right. So here's my proposal. I propose to set an evidentiary hearing on Thursday. Due to things I have on the calendar, I would -- well, let me take a look at my calendar, Thursday. I'd be inclined to start at 10:30 on Thursday. We can go all day Thursday and then spill over to Friday if we need to.

The other option is I clear out some hearings and start at 9, which is -- I'm happy to hear people. These are hearings I can move if I need to. My bigger concern is that there's a lot of scrambling that goes on (audio interference) hearing and maybe an hour ahead of time would be helpful.

So my inclination is to do that, and my inclination is to permit discovery of 100 in each of these sets, and it's my view that that's a manageable amount to do in the time frame that we need to do it in. And also that it's enough to let us know if there are red flags. From a statistical standpoint I don't think you need a huge sample to know whether there are irregularities or misconduct.

And in terms of the legal argument as to why none of this should be allowed, you folks may be right, but I'm inclined to err on the side of transparency and to air these

things out so that whatever the results are we can be confident in them. And so that's where I'm inclined to go on all these, and I'm happy to hear arguments from everybody as to why I should do things differently or more or less or -- want to start, Mr. Wilenchik?

MR. WILENCHIK: Thank you, Your Honor. I'm just looking here at my calendar too. Thursday morning I'm available and immediately after this hearing, of course, I'll get on the line with our volunteers and observers just to make sure we can get this kind of sampling done. I would ask that -- well, a couple procedural things.

One, as soon as that certification is signed, or it probably has been signed while we've been sitting here, we will go ahead and file an amended complaint that formally converts this into an elections contest. Number two, as Mr. La Rue has pointed out, technically the County is not a party and that's just the way these contests are done, unless it seeks to become a party it is not a party. So I would just ask that the Court order the County to meet and confer and just work with me on making sure this happens. I don't want snags there.

THE COURT: So let's do this. You know, from a formal standpoint you've got an issue with subpoena. It's been my experience in all these kinds of cases that the County works with the petitioners and the respondents.

And so I don't think I need to make that order, I

know that they're going to work with you. And if an issue comes up let me know and we can get on the line and deal with it.

MR. WILENCHIK: Yes, Your Honor.

THE COURT: And I interrupted your flow, so go ahead, continue.

MR. WILENCHIK: No, that's it. I mean, I've made the request to do as much as we can do and I appreciate what the Court is saying there. So I'm going to do my best to make sure we can do it.

THE COURT: Right. And I'll add, if you're right about the deadline, if I've got more time, believe me, there's nothing I'd like more than to be able to have a little more time to do this case than four days from now. And so if you can get the Supreme Court to tell me I've got more time, by all means I'll set it for later in the month. But for now I'm going under the assumption that we have the smallest amount of time available.

All right. Ms. Desai, do you want to push back on anything?

MS. DESAI: Your Honor, I do. I think there is a very dangerous precedent that can be set by allowing discovery simply because a party comes in and says, we want to -- to use your words, Your Honor -- to check if they did a good job. There is no basis to check if they did a good job. There has

to be a mechanism by which Plaintiff -- and it's set forth in the law -- by which a petitioner can come in on an election contest.

So what I would propose, Your Honor, if you're inclined at all to adjust your preliminary ruling, is that we have an opportunity to have the Court decide the procedural issue, the threshold matter first. We filed our papers, I know that the Electors have not filed anything substantive yet, but I think the Court ought to read those and consider them more fully before ruling on a discovery request that's frankly not permitted by the law. And then if we need to have a brief oral argument on that tomorrow or even Wednesday morning, I think it is critical not just for this election but for future elections that parties not be permitted to come in and simply ask to peek under the tent for things that they're not entitled to see.

THE COURT: I'm denying that request and I want to explain why. As I said at the beginning, I view all these cases as an exercise in record preservation for the Supreme Court. And assuming I issue a ruling on Friday, the Supreme Court is going to have the case on Monday or Tuesday. By the way, I assume all you guys talked to the Supreme Court staff attorneys, let them know this is coming down the pike so they can be ready for it.

I would rather the Supreme Court, on Tuesday or Wednesday or whatever day they meet, say, Warner erred by

allowing discovery, he shouldn't have done that and here's our legal ruling, than to say, Warner erred by denying discovery and now we need to go back and do it but we don't have time. And that's why I've erred on the side of providing the discovery.

I think you raised some pretty serious issues about precedence and about whether this is the way election contests go in the future, that people get to poke around and look for things. But under the circumstances, I think it's better to give the Supreme Court a more complete record and that's why I've allowed the request. And later on somebody will tell me whether you made the right legal ruling or not.

So I'm denying that request for that reason, or denying your request that I put off the discovery for that reason. Okay. Let me make a couple more orders that I need to make.

First of all, if we're going to have a trial on Thursday, I need witness and exhibit lists exchanged, filed with the Court, and emailed to division staff no later than 4:00 on December 2nd. They also need to be uploaded to the clerk's site, and Cammi (phonetic) will email to you guys -- Cammi, my clerk, will email to you guys the instructions -- I'm sure you know how to do it already but just to be safe -- for uploading exhibits.

Further ordering that the review of the envelopes,

which have people's names on them, be subject to the following confidentiality order. Only counsel and their staff and retained experts may view those documents. They may not be viewed by the parties or any party representative without further leave of Court.

And let me pause from dictating my order and just explain the reason I'm doing that is because I -- you know, 100 people are going to get picked at random to have their signature compared, and I don't think it's fair for those people to get sucked into this lawsuit. They're all people who tried to vote in earnest and good faith and they didn't ask for any extra attention. So those folks should not be contacted in any way and their identities should be kept confidential.

Further order for the same reason, if those documents are made exhibits they will be filed under seal and will not be presented or discussed publicly. What I anticipate is if somebody wants to talk about a particular signature you can label somebody by initials or you can give it a Bates number or whatever so we can talk about the signatures without revealing people's identities.

MS. DESAI: Your Honor, may I -- I'm sorry, may I ask a question?

THE COURT: Yeah, go ahead.

MS. DESAI: With respect to the 100 envelopes for review, are you -- is your order that the County shall just

randomly select 100 envelopes of any early mail-in ballot that went through the early ballot processing for review?

THE COURT: Yes. Yes, so for one, I don't know that they're a big stack of empty envelopes, or I guess they're a digital stack of envelopes, has it organized in any way so they can pick and choose. But if I didn't use the word "random", that's what was my intention, that they be randomly selected.

MS. DESAI: And Your Honor, the statute that talks about early ballot processing and challenges, and I know this is outside of that statute because this is about signatures, which is not really contemplated, specifically allows for and requires that voters who have a challenge made to their early ballot at the time of the processing be notified and have an opportunity to defend their envelope. I am -- I'm concerned about the fact that the statistical methodology inevitably undermines and reverses somebody's vote, and without the opportunity to be heard and to defend their signature simply because a handwriting expert might say that's not theirs is a problem.

THE COURT: I agree with the point. I think we're not there yet, and if at some point the argument is made that some number of the 100 are being challenged or if we're actually going to get to the point where, of the 1.6 million we're challenging, yeah, voters have a right to be heard on the challenge of their signature. But we're not at that point yet,

and that's an argument that we'll hear in the context of the trial.

I think to kind of look ahead, I think if the result in this case ends up being the invalidation of signatures, you're probably right, Arizona law probably does require time to be given for those people to weigh in on whether their signature (audio interference) or not. But we'll get to that.

MR. LA RUE: Your Honor? Your Honor? Yeah, this is Joe La Rue for the County again. I apologize for interrupting your train of thought, but I just received word from the recorder's office that the easiest thing in light of what Your Honor appears to be planning to order would be to set Mr. Wilenchik and his team up at Nextech and allow them to do the signature review there.

The recorder is very hesitant for reasons that I'm sure the Court can understand, to turn over voters' voter files, you know, including the signatures and all the confidential information. It probably makes the most sense for Plaintiff to do that review at Nextech on the recorder's system looking at the voter registration database. Which we could help them do.

THE COURT: Mr. Wilenchik, are you prepared to agree to that or do you guys want to meet and confer and come back to me if you disagree?

MR. WILENCHIK: I can agree to that. That's how this

kind of thing is typically done, including for, you know, nomination challenges, yeah.

THE COURT: Thank you. I need to make a couple more orders. Let me look at my notes. I gave you a deadline for witness and exhibit lists. I may not have said they were witnesses and exhibits but that's what I meant, of December 2nd at 4 o'clock.

Oh, and finally, I'm directing that by the start of trial, which is 10:30 on December 3rd, Plaintiff lodge proposed findings of fact and conclusions of law. And Defendants -- well, Defendants and Intervenor, you can do that too if you want, but I'm not requiring it. But since the Plaintiffs got the burden of proof I'm requiring it of Plaintiff.

And really what I'm asking for is, I've reviewed the election contest statute and some cases, and I think there is a little bit of lack of clarity on what exactly the standard is, and I'd like to know what people are proposing that I find and that I conclude in terms of legal conclusions in order to set aside the election. I did want to ask Mr. Wilenchik one other thing.

That's it with my orders, Cammi.

Is it your intention -- you've requested two different types of relief, one that I declare the winner of the election to be candidate Trump, and the other is that I just set aside the election. And I'm trying to figure out how

setting aside an election works given the time frame, because even with -- even if the deadline is January 6th, and even if I were to make a ruling on December 4th, you can't put together a new election in that time. And so what happens then?

MR. WILENCHIK: Oh, it's a great question, Your Honor. The Constitution does provide that the legislature is in my view to answer that question. And frankly the legislature's answer may be, well, issues of this election aside we're going to confirm it, or they could have the power to establish some other process for answering the Court's question. So that -- the Constitution vests that power in the legislature is the short answer. How they would resolve the issue is probably beyond all of us.

THE COURT: Do I understand you to be arguing that if the solution to the election challenge, if the outcome of an election challenge is that the judicial branch of government sets aside the election, then the legislature decides who gets Arizona's electoral votes?

MR. WILENCHIK: Let me give you an even better answer. It's actually both the state and federal. And it would ultimately come down to the federal Congress on that date that I gave earlier, January 6th.

To really, you know, get hypertechnical for a moment here, again, this is all in that Bush v. Gore decision, as long and as hard as it is to read, it's a very long decision, this

all goes back to the election of Rutherford B. Hayes, the momentous election of Rutherford B. Hayes in the 19th century where there was a lot of issues in that election with electors. And basically what happened with Rutherford B. Hayes was they had two completely different slates sent up to Congress.

So subsequent to that you had an act pass called the Electoral Counting Act, I believe it was, Electoral College Counting Act, again discussed in Bush v. Gore, the purpose of which was to answer the question the Court just asked. So it ultimately falls to the federal Congress on January 6th to, if they don't have a clear result from any given state or, you know, as I mentioned earlier, if both houses of Congress find that the votes are not regularly given, which is what that means in my mind, there's a very specific process in there by which Congress is basically supposed to answer the question, who are the electors going to be. There's a vote that gets conducted where each state -- it's all laid out in that statute, 3 U.S.C., section 15. I don't want to misrepresent or misquote how it works, but the answer ultimately falls to the federal Congress.

THE COURT: So if Arizona's presidential election is set aside -- and by the way, if the result of an election contest is that the election is set aside we're going to have to talk about whether that sets aside the entire election or just the presidential election, but let's put that aside for

now. If the result is that the election is set aside, then what you just said is that Congress allocates Arizona's electoral votes?

MR. WILENCHIK: That's correct, pursuant to 3 U.S.C., section 15. And what I was saying before that is, well, in general the Constitution vests a certain power in the state legislature to answer the question, but ultimately it is going to be the federal Congress that does so.

THE COURT: All right. I'm getting ahead of myself, I'm just trying to figure out what the end point of (audio interference). I think we've done everything we needed to do today. I've got dates set, we've made a discovery order. Ms. Gonski, is there something else you want to talk about?

MS. GONSKI: Yes, Your Honor. I'd just like to say that it is our intention that we'd like to file a motion to dismiss, but we're happy to combine that with a pre-hearing memorandum or some other type of briefing that would be in advance of trial. And so we proposed that we could file something that would be pre-hearing, our motion to dismiss, by tomorrow at 5. If Plaintiffs are filing their amended complaint by today at some point then we could get our motion to dismiss on file by tomorrow at 5 p.m. and potentially have any responses on Wednesday at 5 p.m., that way the briefing is completed in time for trial on Thursday.

THE COURT: You're welcome to do that, and however

you want to present those issues, it's rare, and I've had this in lots of election cases. My answer is -- has every time been, let's take the evidence and then I'll consider the arguments, which sort of defeats the purpose of a motion to dismiss, I get that. But again, I try to err on the side of having (audio interference) Supreme Court to rule on the legal issues because by the time it gets there it's too late for them to send back.

So I'm just telling you that's normally the way I go on those. If you want to file it as a motion to dismiss, great. If you want to file it as a legal brief, that's fine too.

MS. GONSKI: Okay. Thank you, Your Honor.

THE COURT: Anything else --

MR. LA RUE: Your Honor, may I --

THE COURT: Oh, Mr. La Rue, sorry.

MR. LA RUE: May I ask clarifying (audio interference) please. I'm (audio interference) sure what (audio interference) contemplating (audio interference) to the Court and also (audio interference) Mr. Wilenchik, I (audio interference) meet and confer (audio interference) issue of (audio interference). What's the (audio interference) proposing is (audio interference) Mr. Wilenchik and his team (audio interference) computers where he (audio interference) envelopes hold up (audio interference). The (audio

interference) --

THE COURT: Mr. La Rue, let me stop you for a second. For some reason we've got some connectivity issues on your side, and the rest of us are only hearing about two-thirds of your words. I think I'm getting the gist, but I want to make sure that we're clear. Do you want to see if you can get in a better service area, or do you want to have this conversation with Mr. Wilenchik and then you guys can come back to me if you need to?

MR. LA RUE: No, Your Honor. Just (audio interference) apologize (audio interference) connect (audio interference).

THE COURT: Yeah, sure, sure. Let's see if we can get it done.

MR. LA RUE: Your Honor, can you (audio interference) better now?

THE COURT: Little bit.

MR. LA RUE: Okay. What we're (audio interference) is --

THE COURT: Still not -- still not getting you, Mr. La Rue. I'm sorry.

MR. LA RUE: I apologize. I'll have (audio interference) for Mr. Wilenchik (audio interference).

THE COURT: Right. So my understanding is that it's going to be the digital image that his team, his expert is

going to be looking at. Now, what we're going to do to preserve things if we're actually having a trial about individual signatures, I don't know, but we'll get to that. But yeah, for now --

MR. LA RUE: Thank you, Your Honor.

THE COURT: -- Mr. Wilenchik has agreed that his team will go down to your election center and they can look at signatures. I guess I would add, it hadn't occurred to me, but if the Defendants wanted to send an observer to that observation, I think they probably have a right to do that. Because if this was produced as a subpoena, then you guys would each get copies and you'd each get to observe them yourself. So I'd let you try to work that out as well.

MR. LA RUE: Thank you, Your Honor.

THE COURT: Great. I think I've covered everything. Is there anything else?

MR. WILENCHIK: Nothing from Plaintiff, thank you.

THE COURT: Nobody likes to decide such important matters on a hurried basis, but unfortunately I think the timing necessitates it. And so we've got a schedule in place, I've made some orders. And if something comes up this week please contact -- Michelle's out sick, and so contact Rebekah, who's my courtroom assistant. You should all have her email address and she should be able to get ahold of me, and I can get on the line almost any time. And if nothing else, we'll

see you guys on Thursday at 10:30.

MR. WILENCHIK: Thank you, Your Honor.

MS. GONSKI: Thank you.

THE COURT: We are in recess. Thank you.

(Proceedings concluded at 11:40 a.m.)

CERTIFICATE

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KAREN RAILE, CDLT-105 December 7, 2020
Transcriber