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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__*