CLERK OF THE SUPERIOR COURT RECEIVED CCC #3 NIGHT DEPOSITORY

21 JUL -9 PM 2:57

FILED BY B. Miller DEP.

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
John "Jack" D. Wilenchik, #029353
Jordan C. Wolff, #034110
admin@wb-law.com
Attorneys for Defendant Cyber Ninjas, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO, **Plaintiffs,** **vs.** **ARIZONA STATE SENATE, a public body of the State of Arizona; KAREN FANN, in her official capacity as President of the Arizona State Senate; WARREN PETERSEN, in his official capacity as the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.;** **Defendants, and** **CYBER NINJAS, INC.,** **Real Party in Interest.**	**Case No.: LC2021-00180-001** **NOTICE OF CHANGE OF JUDGE AS A MATTER OF RIGHT PURSUANT TO A.R.S. § 12-409; OR, IN THE ALTERNATIVE, MOTION TO DISQUALIFY JOHN HANNAH** **(Assigned to Judge John Hannah, the "Noticed Judge")** **(To be Referred to Civil Presiding Judge, the Honorable Pamela Gates)**

Defendant Cyber Ninjas, Inc. ("Defendant," or "CNI"), by and through undersigned counsel, hereby files this Notice of Change of Judge as a Matter of Right Pursuant to A.R.S. § 12-409, or in the alternative Motion to Disqualify John Hannah.

I. A.O. 2021-77'S SUSPENSION OF RULE 42.1 IS INEFFECTIVE TO SUSPEND A LITIGANT'S RIGHT TO AN AUTOMATIC CHANGE OF JUDGE, AND/OR IT IS "OF NO LEGAL FORCE"

Arizona Supreme Court Chief Justice Brutinel's Administrative Order 2021-77 (hereinafter referred to as the "AO") states at Section I(4) (page 3) that "Rule 42.1, Rules of Civil Procedure…and any local rule that provides litigants with a change of judge as a matter of right are suspended until further order to reduce the risk of virus exposure inherent in out-of-county judges' travel, and to ensure adequate judicial resources for backlog reduction."

However, as carefully explained below, this provision was ineffective to actually suspend the "valuable substantive right" to an automatic change of judge—a right that originated in the common law, and is still recognized under A.R.S. §§ 12-309, 12-411. *Del Castillo v. Wells*, 22 Ariz. App. 41, 44, 523 P.2d 92, 95 (1974); *Marsin v. Udall*, 78 Ariz. 309, 312, 279 P.2d 721, 723 (1955); *Hofstra v. Mahoney*, 108 Ariz. 498, 498–99, 502 P.2d 1317, 1317–18 (1972) (all discussed *infra*).

The right to an "automatic," or "peremptory" change of judge ("as a matter of right")[1] is found at A.R.S. § 12-409. But the wording of this statute, as well as its long-forgotten history and meaning, require some explanation. Before Rule 42.1 was added to the Rules of Civil Procedure in 1971 (which was originally designated as Rule 42(f)), the means by which a litigant exercised his or her right to an automatic change of judge was by filing a fictional "affidavit of bias and prejudice," in accordance with A.R.S. § 12-409. *Hofstra*, 108 Ariz. at 498–99, 502 P.2d at 1317–18; *see also Del Castillo,* 22 Ariz. App. at 44, 523 P.2d at 95. The content and truth of the "affidavit of bias and prejudice" did not matter; upon filing the affidavit, the litigant was entitled to an automatic change of judge. *Id.*; *see also e.g. Conkling v. Crosby*, 29 Ariz. 60, 68, 239 P. 506, 509 (1925)("It is not even necessary to state any disqualifying facts if the affidavit be filed…If it is seasonably filed the judge may no longer sit in the case, the affidavit operating as a peremptory challenge to the judge.") When Rule 42.1 was added to the Rules of Civil Procedure, its intent

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

---

[1] For the avoidance of doubt: a "peremptory" change of judge means the same thing as an "automatic" change of judge, or a change "as of right." Per Black's Law: "peremptory" means "[n]ot requiring any shown cause; arbitrary <peremptory challenges>."

was to "eliminate the fiction" of having to file an "affidavit of bias and prejudice," as well as to set procedural limitations on when the filing could be made; the Rule also gave the filing a new name, a "Notice of Change of Judge." *Del Castillo*, 22 Ariz. App. at 44–45, 523 P.2d at 95–96; *Hofstra*, 108 Ariz. at 498–99, 502 P.2d at 1317–18. In the latter case (*Hofstra*), the Arizona Supreme Court provided a succinct summary of the somewhat confusing history to the right to an automatic change of judge, as well as the relationship in between the right and A.R.S. § 12-409, as well as Rule 42.1: "Under [A.R.S. § 12-409] we have consistently held that the filing of an affidavit of prejudice entitled a party to an automatic change of judge—that the affidavit need not be true and was, in effect, a peremptory challenge to the judge....Rule 42(f) [now 42.1] merely codified these holdings, eliminating the fiction of bias and prejudice and making the change automatic on request, without the necessity of any affidavit." *Id.*

This leads us to the first serious problem with A.O. 2021-77: which is that by merely suspending Rule 42.1, the A.O. fails to actually impact the substantive right to an automatic change of judge, as found in A.R.S. § 12-409. Strictly all that the A.O. did was suspend Rule 42.1—a procedural rule that merely re-codified the right to a preemptory change of judge that already existed by virtue of A.R.S. § 12-409, and made the filing of a fictional "affidavit of bias and prejudice" under the statute unnecessary. Rule 42.1 also imposed certain time limitations on when the right to an automatic change of judge may be exercised; and so technically, the effect of suspending Rule 42.1 is to lift these time limitations as well. (Note that nevertheless, this Notice was filed within the time limitations imposed by Rule 42.1.)

With that said, it is fairly apparent that the intent of A.O. 2021-77 was to suspend the right to a peremptory change of judge entirely, despite the technical deficiency in its wording. But the Arizona Supreme Court and Court of Appeals have both recognized, in a number of binding published decisions over the last century, that the right to a peremptory change of judge is a "valuable substantive right" that the Supreme Court cannot abridge or modify. "The courts of this jurisdiction" have "recogniz[ed] that the provision for a peremptory change of judge outlined in A.R.S. § 12-409 is a valuable substantive right." *Del Castillo*, 22 Ariz. App. at 44, 523 P.2d at 95; *see also Marsin*, 78 Ariz. at 312, 279 P.2d at 723. In *Marsin*, the Arizona Supreme Court expressly

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

held that the right to file an affidavit of bias and prejudice under A.R.S. § 12-409 (i.e., to exercise a peremptory change of judge) was a "valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases," and that "[n]either this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right. Courts cannot enact substantive law. A court is limited to passing rules which prescribe procedure for exercising the right. Any rule of court that operates to lessen or eliminate the right is of no legal force." *Id.*, 78 Ariz. at 312, 279 P.2d at 723. The Supreme Court also went on to note that denial of the right (including in criminal cases) could implicate serious federal due process concerns. *Id.*

Therefore, to the extent that the questioned provision in the AO was intended to suspend the right to a peremptory change of judge entirely, it is "of no legal force" because it acted to abridge a "valuable substantive right" belonging to litigants. This Court must begin giving effect to requests for a peremptory change of judge immediately, because the failure to do so will only continue to create serious due process problems and potential grounds for reversal, including in criminal cases. (*See Marsin*, 78 Ariz. at 312, 279 P.2d at 723, *citing Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243.)

Finally—and again, to the extent that the AO was intended to suspend the right to a peremptory change of judge entirely—the AO did not constitute a valid exercise of the Chief Justice's unilateral authority to issue administrative orders. According to Arizona Supreme Court precedent, administrative orders may only provide for "an internal statement of policy not directly applicable to litigants or their counsel." *State, ex rel. Romley v. Ballinger*, 209 Ariz. 1, 3, 97 P.3d 101, 103 (2004). If an "administrative order" is, in actuality, something that "potentially deprive[s] the parties of 'substantial rights,'" then it must instead be deemed a court rule. *Id.* However, Arizona Supreme Court rules require the approval of the entire Court. *See* Rule 28, Rules of the Supreme Court of Arizona. And in this case, only Chief Justice Brutinel purportedly signed the Order. Therefore, its provisions are not effective as a rule of the Arizona Supreme Court. And because the Chief Justice exceeded his authority to issue an administrative order with respect to the provision in question, the provision is without legal effect.

For all of the foregoing reasons, Defendant has the right to exercise a peremptory change of judge in this action, as a matter of right.

Out of deference to the notion that, as the technical result of suspending Rule 42.1, the exercise of the right to a peremptory change of judge must be accomplished by the filing of a traditional "affidavit of bias and prejudice" under A.R.S. § 12-409, Defendant also submits such an affidavit together with this filing. *See* Affidavit attached hereto as **Exhibit 1**.

II. IN THE ALTERNATIVE, JOHN HANNAH MUST BE DISQUALIFIED FOR ACTUAL BIAS AND PREJUDICE

Finally, and in the alternative, the Judge in question – John Hannah – must be disqualified as the result of actual bias and prejudice, in accordance with Rule 42.2. The case at bar involves public records requests that were purportedly made by the Arizona Republic newspaper staff (a.k.a. Phoenix Newspapers Inc., or "PNI") to Defendants for certain items regarding the Senate's election-related audit of Maricopa County ballots, equipment, and other materials being conducted in Phoenix. In November 2020, John Hannah sat in an unrelated elections case involving the Arizona Republican Party's demand that Maricopa County redo its post-election "hand-count" of a sample of ballots, Case No. CV2020-014553. In general, Hannah's orders and conduct in that case showed an unacceptable degree of intemperance, as well as a plain bias against the Arizona Republican Party and conservative causes—and in a plainly bizarre ruling that is currently under appeal,[2] he saw fit to sanction the Party and its counsel for filing a case based on plain statutory language, and for advancing arguments that have since been validated by the Arizona Supreme Court. (Mr. Hannah is believed to be a registered Democrat, and he is personally represented by the law firm of Osborn Maledon—a firm that also represents the Democratic Secretary of State.) But, as is most relevant to the instant Motion: in his final Judgment in that case (filed on March 15, 2021), he deemed it appropriate to include a gratuitous, *sua sponte* comment about this Senate audit – even though nobody in that case had even brought up, and it had no genuine relationship to the legal or factual issues that were actually in front of

[2] The Opening Brief of the appeal is attached hereto as **Exhibit 2**.

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

him. He wrote, at footnote 3 on page 5 of his final Ruling: "The Court is aware that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes of 'assessing electoral integrity' and 'examining potential reforms to the electoral process' and apparently also 'to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome.' *Maricopa County v. Fann,* Maricopa County Superior Court No. CV2020-016840, Order entered 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not the courts." Of course, Hannah had no genuine reason to call attention to the "wisdom" of the Senate's audit – or to even bring up the audit at all – except to express his skepticism of it; and he clearly learned about it from news media, since it was never mentioned in the case. What this clearly shows is that, months before the commencement of this litigation, Hannah had already formed opinions about the "wisdom" and "purposes" of the Senate's audit – which is the very definition of prejudice by a judicial officer – even though he coyly pretended not to be expressing them. And the fact that he had formed such opinions – which again, had nothing to do with the facts of the case in front of him – disqualifies him from serving as the judge in this matter. This prejudice is material, because the plaintiff in this case claims that it needs the "public records" at issue in order to investigate the exact same things – the "purposes" and "wisdom" of the audit. Finally, litigants (as well as the public at large) clearly deserve better than to be assigned a prejudiced and intemperate judge like this – the Court is otherwise full of hard-working, principled jurists with integrity who are more than capable of serving on this case, without any notion of bias or prejudice whatsoever.

III. CONCLUSION

For the foregoing reasons, John Hannah must be removed/disqualified from this case and a new judge assigned.

. . .

. . .

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

WILENCHIK & BARTNESS, P.C.

Dennis I. Wilenchik, Esq.
John "Jack" D. Wilenchik, Esq.
Jordan C. Wolff, Esq
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004
admin@wb-law.com
Attorneys for Defendant Cyber Ninjas, Inc.

ORIGINAL of the foregoing filed on
July 9, 2021 with the Clerk of the Maricopa
County Superior Court

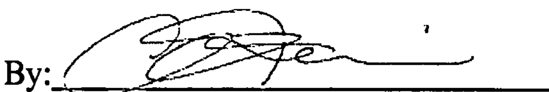
COPY of the foregoing hand-delivered on
July 9, 2021 to the Presiding Judge Pamela Gates
and Judge John Hannah, Court Administration

COPY of the foregoing emailed and mailed on
July 9, 2021 to:

Kory Langhofer, Esq.
Thomas Basile, Esq.
STATECRAFT PLLC
649 N. Fourth Ave., 1st Fl.
Phoenix, Arizona 85003
kory@statecraftlaw.com
tom@statecraftlaw.com
Attorneys for Karen Fann, Warren Petersen, and Ken Bennett

David J. Bodney, Esq.
Craig C. Hoffman, Esq.
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
bodneyd@ballardspahr.com
hoffmanc@ballardspahr.com
Attorneys for Phoenix Newspapers, Inc. and Kathy Tulumello

By:



WILENCHIK & BARTNESS
— A PROFESSIONAL CORPORATION —

EXHIBIT 1

DocuSign Envelope ID: DA126D59-0B4F-4B9D-B69F-819C3DB6BC26

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004
Telephone: 602-606-2810 Facsimile: 602-606-2811
Dennis I. Wilenchik, #005350
John "Jack" D. Wilenchik, #029353
Jordan C. Wolff, #034110
admin@wb-law.com
Attorneys for Defendant Cyber Ninjas, Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

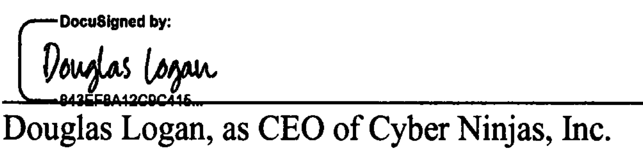
PHOENIX NEWSPAPERS, INC., an Arizona corporation, and KATHY TULUMELLO, **Plaintiffs,** **vs.** **ARIZONA STATE SENATE, a public body of the State of Arizona; KAREN FANN, in her official capacity as President of the Arizona State Senate; WARREN PETERSEN, in his official capacity as the Chairman of the Arizona Senate Committee on the Judiciary; SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate; and CYBER NINJAS, INC.;** **Defendants, and** **CYBER NINJAS, INC.,** **Real Party in Interest.**	**Case No.: LC2021-00180-001** **AFFIDAVIT PURSUANT TO A.R.S. § 12-409** **(Assigned to Judge John Hannah, the "Noticed Judge")** **(Civil Presiding Judge, the Honorable Pamela Gates)**

Defendant Cyber Ninjas, Inc. ("Defendant," or "CNI"), by and through undersigned counsel, hereby files this Affidavit in accordance with A.R.S. § 12-409 and Rule 42.2.

1. In a Ruling (and Judgment) filed on March 15, 2021 in Maricopa County Superior Court Case No. CV2020-014553 (which is incorporated as if set forth herein), John Hannah wrote the following: "The Court is aware that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes of 'assessing electoral integrity' and 'examining potential reforms to the electoral process' and apparently also 'to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome.' *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Order entered 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not the courts."
2. John Hannah made the above comment even though the Senate audit was not raised in that case or even mentioned by anyone but him, and the Senate audit had no genuine relevance to the issues before him.
3. Hannah's comment was clearly intended to express that he doubted the "wisdom" of the audit and its "avowed" purposes. He had no other reason to call attention to the "wisdom" of the audit and its purposes, much less a genuine reason to be talking about the Senate's audit at all.
4. On account of the bias, prejudice, or interest of the judge, CNI believes that it cannot obtain a fair and impartial trial in this matter.

I declare under penalty of perjury under the laws of the State of Arizona that I have read the above Affidavit, am familiar with its contents, and know the same to be true and correct of my own personal knowledge.

DATED: 7/9/2021



Douglas Logan, as CEO of Cyber Ninjas, Inc.

EXHIBIT 2

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ARIZONA REPUBLICAN PARTY; Plaintiff/Appellant, vs. ADRIAN FONTES, at al., Defendants/Appellees.	**Court of Appeals** **Division One** **No. 1 CA-CV 21-0201** **Maricopa County** **Superior Court** **No. CV2020-014553**
ARIZONA DEMOCRATIC PARTY, et al., Intervenors/Appellees.	

OPENING BRIEF

Dennis Wilenchik, #005350
Lee Miller, #012530
John D. Wilenchik, #029353
Wilenchik & Bartness, P.C.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, AZ 85004
admin@wb-law.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 13

STANDARD OF REVIEW 13

ARGUMENT 14

1. A.R.S. § 16-602(B) prescribes sampling by "precinct" and not "polling place" in a general election. 14

2. Sanctions Must be Reversed 17

   a. Appellant's Argument was Not Groundless 17

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Comm. for Pres. of Established Neighborhoods v. Riffel, 213 Ariz. 247, 141 P.3d 422 (App. 2006) 14, 15

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882 (App. 2004) 23

Findley v. Sorenson, 35 Ariz. 265, 276 P. 843 (1929) 18

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 12, 22

Goldman v. Sahl, 248 Ariz. 512, 462 P.3d 1017 (App. 2020), *review denied* (Aug. 25, 2020) 13, 17

Home Builders Ass'n v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993 (1997) 15

Hughes v. Jorgenson, 203 Ariz. 71, 50 P.3d 821, (2002) 14

Hunt v. Campbell, 19 Ariz. 254, 169 P. 596 (1917) 19

Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) 21

Johnson v. Mohave Cty., 206 Ariz. 330, 78 P.3d 1051 (App. 2003) 17

Kerby v. Griffin, 48 Ariz. 434, 62 P.2d 1131 (1936) 19

LaFaro v. Cahill, 203 Ariz. 482, 56 P.3d 56 (App. 2002) 21

Lamie v. U.S. Trustee, 540 U.S. 526 (2004) 15

Leach v. Hobbs, No. CV-20-0233-AP/EL, 2021 WL 1217116 (Ariz. Mar. 31, 2021) 16

Lynch v. Lynch, 164 Ariz. 127, 791 P.2d 653 (App.1990) 17, 18

McKenna v. Soto, 481 P.3d 695 (February 17, 2021) 16

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) 21

Nienstedt v. Wetzel, 133 Ariz. 348, 651 P.2d 876 (App. 1982) 23

Oakes v. Finlay, 5 Ariz. 390 P. 173 (1898) 19

Phoenix Newspapers, Inc. v. Dep't of Corr., State of Ariz., 188 Ariz. 237, 934 P.2d 801 (App. 1997) 13

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) 22

Sherman v. City of Tempe, 202 Ariz. 339, 45 P.3d 336 (2002) 19

State v. Christian, 205 Ariz. 64, 66 P.3d 1241 (2003) 15

Swenson v. County of Pinal, 243 Ariz. 122, 402 P.3d 1007 (App. 2017) 13

Tilson v. Mofford, 153 Ariz. 468, 737 P.2d 1367 (1987) 19
W. Devcor, Inc. v. City of Scottsdale, 168 Ariz. 426, 814 P.2d 767 (1991)..............16

Statutes

A.R.S. § 12-349.. passim
A.R.S. § 16-248...3
A.R.S. § 16-602.. passim
A.R.S. § 16-642...1
A.R.S. § 16-673..9, 18

Other Authorities

AZ LEGIS 1 (2020), 2020 Ariz. Legis. Serv. Ch. 1 (S.B. 1135) (WEST)...............4

Constitutional Provisions

A.R.S. Const. Art. 5 § 1 15

STATEMENT OF THE CASE

This is the appeal from lower court judge John R. Hannah, Jr.'s award of sanctions against the Arizona Republican Party ("Appellant") under A.R.S. § 12-349, in which he found that "public mistrust following [the November election]" amounted to "bad faith," and that an argument based on the plain wording of the election-audit statute, A.R.S. § 16-642(B)(1), was "groundless." The lower court's order showed an unmistakable degree of intemperance and even went out of its way to mention the ongoing Senate audit of election results and "the wisdom of that endeavor," even though it had nothing to do with the merits of the suit and was not raised by any party. Worse, the trial court's interpretation of the election-audit statute is incorrect under the principles announced in a recent decision of the Arizona Supreme Court, and according to the plain wording of the statute.

STATEMENT OF FACTS

As an action filed during election season, this case was initially filed and decided very quickly, within one week between November 12th and November 19th, 2020.[1] However, the lower-court judge took an additional month to explain his decision by issuing another order, in which he invited the Intervenor Secretary of State to ask for sanctions; and it was not until March 15, 2021 that he entered an order granting sanctions and certifying the matter for appeal under Rule 54(c). (IR 51; Appendix 51.)

For background, Election Day last year was on November 3, 2020. As of the

---

[1] IR 33; Appendix 35, November 16, 2020 Order.

date this lawsuit was filed (November 12th, 2020), news media were reporting that Maricopa County was still in the process of tabulating (counting) its ballots.[2] News media also reported that around one-third of the general population – as well as between fifty and sixty-eight percent of the Republican Party – had been polled as saying that they believed the election was "the result of illegal voting or election rigging."[3] A poll by Politico found that distrust was especially high in this State.[4]

In the State of Arizona, there is only one mandatory "audit" that a county is obligated to conduct on the process by which it counts ballots, and that is the "hand count" audit of a sample of ballots that is prescribed by A.R.S. § 16-602(B). For apparent reasons, this "audit" became subject to enhanced attention and scrutiny during this election.

The statute plainly prescribes that the first step in the audit is that "[a]t least two percent of the precincts in [the] county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in that county." A.R.S. § 16-602(B)(1). The ballots from those precincts are then counted by hand and compared to the initial results (which were counted by machine), to determine if votes were miscounted. A.R.S. § 16-602(B), (C). The same data is also useful for other purposes, such as comparing the total number of votes in the sampled precincts to the total number of registered voters in each precinct, in order

---

[2] IR 47; Appendix 82, Response to Motion for Sanctions filed on December 28th, 2021, page 4 line 25 to page 5 line 7; see also Declaration of John D. Wilenchik attached thereto, page 2, paragraphs 4 and 11.
[3] IR 47; Appendix 82, Plaintiff's Response to Motion for Sanctions, page 11 line 19 to page 12 line 1, and footnote 5; see also Declaration of Kelli Ward attached to the Response, paragraph 6 on page 2.
[4] *Id.*

to determine whether more people voted than were registered (i.e. whether illegal voting occurred). Finally, the statute provides that when auditing a "presidential-preference election" (a presidential primary), the county shall—instead of selecting "[a]t least two percent of the precincts in the county"—"select by lot two percent of the ***polling places***...and perform the hand count of those ballots." A.R.S. § 16-602(B)(3) (emphasis added).

Historically, voters in Maricopa County have been assigned to vote at a polling place located in their precinct[5]; and historically, the hand count has sampled "[a]t least two percent of the precincts," as required by the statute. There are 748 precincts in Maricopa County, and therefore there were around 748 polling places, of which at least two percent (15 precincts) would be sampled.[6] However, during this past election and due to the COVID-19 pandemic, Maricopa County significantly reduced the number of polling places, from over 748 to only 175; and it allowed voters from any precinct to vote in any polling place.[7] This "new" kind of polling place, which was not specific to any precinct, was referred to as a "vote center."[8]

The idea that a "polling place" might not necessarily be associated with a single precinct was clearly within the contemplation of legislators, because they went out of their way to say that in the case of a "presidential-preference" election – in which polling places for multiple precincts are expressly allowed by A.R.S. §

[5] IR 4; Appendix 37, Application for Order to Show Cause, page 2 line 16 – page 3.
[6] *Id.*, at page 6.
[7] *Id.*
[8] *Id.*

16-248 – the sampling for the hand count shall be done from "two percent of the polling places…" A.R.S. § 16-602(B)(3). And the statute has been amended as recently as February 2020, with the sole change to the relevant language being that the words "per cent" were shortened to "percent." *See* AZ LEGIS 1 (2020), 2020 Ariz. Legis. Serv. Ch. 1 (S.B. 1135) (WEST). In other words, if the legislature had intended for the audit sampling to be done by "polling place," and not by "precinct," in anything but a presidential-preference election, then it certainly could have said so, and it certainly knew how to say so. But even to date, the statute has not been so amended.

Instead, the Secretary of State unilaterally published a directive in its manual which states that "[i]n counties that utilize vote centers, each vote center is considered to be a ***precinct***/polling location and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers, or 2 vote centers, whichever is greater."[9] (Emphasis added.) In other words, the Secretary of State directed that when vote centers are used in a general election, the county may sample two percent of "polling places" instead of "precincts." In doing so, it literally inserted a word into the statute which is simply not there – it replaced "precincts" with "precincts/polling location[s]."

A Republican candidate for office raised this problem with the Arizona Republican Party, in the day(s) before it filed suit.[10] The statute provides that the

---

[9] IR 4; Appendix 37, Application for Order to Show Cause, page 1 line 19 to page 2, line 5.

[10] IR 48; Appendix 99, Response to Motion for Sanctions, Declaration of Kelli Ward attached thereto (as Exhibit B), paragraph 2.

hand-count audit process "shall not begin until all ballots voted in the precinct polling places have been delivered to the central counting center," and "[t]he unofficial vote totals from all precincts shall be made public..." A.R.S. § 16-602(B)(1). The counting of votes did not finish, and unofficial vote totals from all precincts were not made public, until several days after the Republican Party filed suit.[11] However, after the suit was filed, the county promptly disclosed that it had already conducted a hand-count audit early, well before all ballots were counted and in apparent violation of the statute; and that it had followed the Secretary's manual rather than the statute, by sampling based on "polling place" (vote center) instead of "precinct." (The county also claimed that its audit had revealed no errors, and that the audit had been observed by members of the Maricopa County Republican Party.[12]) The county generally argued that its audit was legal because the statute provides that "the hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state," despite the conflict in between the statute and the Secretary's manual; and that the case should be dismissed with prejudice on grounds of laches, because

[11] IR 48; Appendix 99, Response to Motion for Sanctions, Exhibit A at paragraphs 4, 11.

[12] In its original Complaint, Appellant (which is the statewide Party) mistakenly alleged that an audit was still forthcoming. This was based both on the plain wording of the statute (which provides that an audit shall not begin until all votes are counted, and they had not been); it was also because the county Party, which operates independently of the State Party, had not communicated its participation in any such audit to the State Party. See IR 47; Appendix 81, Response to Motion for Sanctions, page 5 line 12 to page 6 line 4. While any "mistake" by the Appellant seemed to be of intense interest to the lower judge, this is of no relevance whatsoever to the merits of the suit; and in fact, the only reason why Appellant mentioned that it believed an audit was still forthcoming was to emphasize the urgency of the case, from a practical perspective.

the audit had already occurred and the conflict between the statute and the manual had existed for a number of years.

Recognizing that the county had a certain deadline to certify its election results (less than two weeks after the case was filed), Appellant proposed a number of alternative ways that the lower court could grant relief, including (1) that the court could order an expedited audit that complies with the statute; (2) that if that were impracticable (due to time limits), then the county could at least identify the numbers of ballots cast for each precinct, so that this data could be compared both to the actual number of voters registered in each precinct, and to historical data on voting by precinct. (As noted above, this data could then be used to determine whether illegal voting occurred.)[13] (3) If no relief were granted with respect to the 2020 election, the Complaint still requested a declaratory judgment on the issue of how general-election audits must be conducted, i.e. that sampling must be by "precinct" instead of by "polling place."[14]

Instead, the lower court denied all relief, including any declaratory-judgment relief. The lower court denied any relief with respect to the election on the grounds of laches, finding that it did not have time to schedule a trial—which, while questionable (the lower court certainly had time to schedule a lengthy hearing on a motion to dismiss), the Party does not appeal here due to mootness. But the lower court also denied Appellant's claim for declaratory judgment with

---

[13] See IR 4, Application for Order to Show Cause filed Nov. 12, page 5, lines 7-12 (IR 4; Appendix 37); see also IR 42, "Plaintiff's Reply re: Injunctive Relief" filed on November 18, 2020 (IR 42; Appendix 77).

[14] IR 1; Appendix 62, Verified Complaint filed on Nov. 12, page 5, lines 12-13.

prejudice, and shockingly invited and then issued sanctions under A.R.S. § 12-349 – which Appellants (including counsel) are also now appealing.

First, the lower court found that Appellant had no right to even question how the audit was conducted, unless Appellant already had evidence of fraud. This was based on the trial court's clearly erroneous application of the caselaw surrounding election contests, which is clearly distinguishable. Election contests are lawsuits in which the losing candidate directly challenges the results of an election and asks the court to declare a new winner. This lawsuit was none of those things – it simply challenged the method by which the county was conducting a statutorily-required audit, on the grounds that the method did not comply with statute. During a hearing on this case, the lower-court judge openly questioned what evidence there was of fraud, even though Appellant did not allege fraud and it was not germane to the action; and even more bizarrely, he sanctioned the party and its counsel because he claimed that the lack of evidence of actual fraud made the suit "groundless." In the same order, he also implied that he doubted "the wisdom" of an ongoing audit by the Senate of election results, even though no party raised that audit and it had nothing to do with the case. Further, his ruling made bizarre and intemperate allegations that he believed he was a victim of "gaslighting"; he believed that Appellant's arguments were "sophistry"; and he flippantly characterized the public's concern with "voter fraud" as a "theory for which no evidence exists,"[15] even though his opinion on that was not germane to the suit. He also accused the "Arizona Republican Party" of not "participat[ing]

[15] IR 46; Appendix 37, 12-21-20 Ruling, page 9, third full paragraph, fourth sentence.

respectfully" in the "electoral process," while pointing to nothing other than the legal arguments that it made in this case, above, and his own belief that the Party was trying to "cast false shadows on the legitimacy of the election." This is even though the Party did not even challenge the results of the election in this case, and the election's "legitimacy" was not an issue that was properly before the lower court. The lower-court judge also ruled that Appellant's argument – which was based on the plain wording of the statute – was "groundless," for which he cited only his theory that actual evidence of fraud was somehow required to file the suit.

Finally—and most disturbingly, from a constitutional perspective—the judge identified the party's requisite "bad faith" under A.R.S. § 12-349 as "fil[ing] this lawsuit for political reasons," which he characterized as "public mistrust following this election."[16] In doing so, the judge directly equated a widely-held political belief with "bad faith"—which cannot possibly (and constitutionally) be within the contemplation of A.R.S. § 12-349's definition of "bad faith." In his order inviting Appellee to ask for sanctions, the lower-court judge framed his view of the Party's alleged "bad faith" in an equally disturbing way: he questioned whether the Party's bad faith consisted of trying "to cast false shadows on the election's legitimacy,"[17] even though this case did not even seek to contest the result of the election, much less allege actual illegal voting or miscounting of the vote. (These issues were not germane to the actual issue before the lower court, which was how to audit the counting of votes.) In other words, this case did not

---

[16] IR 51; Appendix 51, 3-15-21 Ruling, page 6, second and third full paragraph.
[17] IR 46; Appendix 37, 12-21-20 Ruling, page 2, second full paragraph.

require him to weigh in on the "election's legitimacy" in any way[18]; but it was apparent that the judge had personally concluded that the reported results of the election were not only correct but that it would constitute "bad faith" to even question them. (By the way, if the lower-court judge were correct, then statutes like A.R.S. § 16-673 – which expressly allows any voter to file an action contesting the result of an election after it has been certified by county officials – would be meaningless. A.R.S. § 16-673, which has been on the books for over a hundred years, plainly allows any voter to file an "elections contest" questioning the "legitimacy" of a certified election, based on alleged miscounting of the vote or illegal voting, *inter alia.*) What was fairly apparent is that the lower-court judge disagreed with the one-third of the American public who believe the election was "rigged" – but this was neither the forum nor the case for him to demand that such things be litigated, or to sanction the Party for refusing to take his bait. (The Arizona Republican Party Chair did later file an elections-contest suit concerning the presidential race, based on evidence gathered from actual election observers.[19] That suit revealed a rate of error of over half a percentile in Maricopa County's hand-counted, a.k.a. "duplicated" ballots[20]—which was not insignificant, given that the statewide presidential race was only half a percentile apart. Of course,

---

[18] On the other hand, an elections-contest action under A.R.S. § 16-673 *does* require the judicial officer to weigh in on the "legitimacy" of the results of an election. Again, this was not that case. (The Chair of the Republican Party did later file such a case, and it was assigned to another judicial officer who behaved with temperance and integrity.)

[19] Maricopa County Superior Court Case No. CV2020-015285, *Kelli Ward v. Constance Jackson, et al.* (hereinafter referred to as "*Trump v. Biden*").

[20] Appendix 113, Minute Entry dated and filed on December 4, 2020 in *Trump v. Biden*, page 8, second and third full paragraphs.

none of that could have come to light with a judge like this, who sanctioned the Party for even daring to "think" about questioning the "legitimacy" the election's results, even though it was not an issue in the actual case before him.)

The lower-court judge's actual sanctions order is notable for, other than its intemperance, a complete lack of any relevant evidence other than the above. The lower-court judge drew unpredictable conclusions based on things that were either flatly false, or defied common sense – for example, he concluded that "an audit of voting centers almost certainly was going to recount far *more* ballots than an audit of precincts, since there were more than four times as many precincts as voting centers." (Emphasis original.) But the total number of ballots being sampled would be the same either way – two percent of the total ballots cast. The difference was just in how the two percent would be selected (whether by precinct or by polling place. Appellant was at pains to explain this in its very first filing in the case, which the lower judge apparently did not read. See footnote 6 on page 3 of the Application for Order to Show Cause [IR 4; Appendix 37], which explained that the number of ballots being audited either way is roughly the same. To be technical, it may actually be slightly larger when the ballots are sampled "by precinct," due to a lower "round-off" error—i.e., because there is greater accuracy when sampling 15 parts of 748, or .022% of the total, instead of sampling 4 parts of 175, which is .020%.) Put another way, the lower court determined that the Party acted in bad faith because the lower-court judge believed that 4 parts of 175 (.02%) is "almost certainly" "*more*" than 15 parts of 748 (.022%). To employ the lower court's same logic and intemperate choice of wording, this forceful

conclusion by the lower court is "sophistry" and "invites inquiry into its motives." (See 3-15-21 Ruling, page 4, last sentence of third full paragraph, IR 51; Appendix 51.) As another example, the lower court concluded that the Party's decision to sue only Maricopa County somehow evidenced bad faith, apparently because it felt that the Party should also have sued other counties and/or the Secretary of State. But if the Party had done that, then the lower court could just as well have accused the Party of trying to run up litigation costs and make the case as burdensome as possible, by hailing as many parties into court as possible, even though no relief was actually being requested against them. For the relief that was requested here – which involved only Maricopa County and its audit – there was clearly no party that needed to be named other than the county; and although other parties like the Secretary of State (and the Democratic Party) were of course welcome to intervene in the suit (and the Party readily consented to their intervention), they were not necessary parties and the failure to name them could not considered evidence of bad faith whatsoever. The fact that this piece of "evidence" can be interpreted in completely opposite ways clearly demonstrates that it was not probative of anything, and therefore irrelevant.

The lower court's "motives" in this litigation were clearly to abuse A.R.S. § 12-349 in order to sanction a political party for its political beliefs, which he strenuously disagrees with personally. This cannot be shown any more clearly than his decision to equate a widespread political belief, which is that illegal voting occurred during the last election, with mere "bad faith," calling it an "improper

purpose" and merely a "political issue"[21]—even though it had nothing to do with the actual merits of the suit before him. A political belief is clearly not the kind of "bad faith" contemplated by A.R.S. § 12-349—because if it were, then a judge could characterize any political issue or belief that offends him as "bad faith," and in so doing carry out an express purpose of punishing political or other protected speech. For example, a judge could sanction someone for filing a suit that was in his eyes designed to "cast false shadows on the legitimacy of" gun rights, of abortion, or of religion, and deem it "bad faith" because the Plaintiff filed suit for "political" or "religious" reasons. This is the very definition of the government suppressing political speech and the right to petition. Even if the Party had filed this lawsuit to advocate for something as extreme as dissolving the government or overthrowing our democracy – which it clearly did not – that would be protected activity under the First Amendment, and a county judge could not penalize it as "bad faith" as a matter of law. "As Thomas Jefferson made the point in his first Inaugural Address: 'If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789 n. 8 (1974). And respect for these principles should be nowhere stronger than in our courts. Clearly, the founders of our nation disagreed with the lower court judge's thinking, which is that it is acceptable to sanction or "cancel" someone for filing a suit motivated by political belief. Above all else, our courts

[21] IR 51; Appendix 51, 3-15-21 Ruling, page 6, third full paragraph.

must be kept safe from this kind of oppressive and toxic thinking, and a place where the public can petition for redress on issues of wide public concern without fear of being attacked or sanctioned due to a judge or anyone else's adverse political beliefs.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred by dismissing with prejudice Appellant's claim for declaratory relief, which sought a declaration that the "hand count" sampling in a general election must be of "precincts," pursuant to the plain language of A.R.S. § 16-602.

2. Whether the trial court erred by awarding attorneys' fees and costs against Appellants under A.R.S. § 12-349, where (1) Appellants' claim raised a fairly debatable issue of statutory interpretation and was not "groundless"; and (2) the lower court characterized Appellants' "bad faith" as filing suit over the "political" issue of "public mistrust following [the November election]," which is not the kind of "bad faith" contemplated by A.R.S. § 12-349, and is also violative of Appellants' constitutional free-speech and petition rights.

STANDARD OF REVIEW

The Court reviews *de novo* the dismissal of a Complaint under Rule 12(b)(6). *Swenson v. County of Pinal*, 243 Ariz. 122, ¶ 5, 402 P.3d 1007 (App. 2017). With respect to A.R.S. § 12-349, the Court reviews any findings of fact under a clearly erroneous standard, but the application of the fee statute itself to those facts is a question of law subject to *de novo* review. *Goldman v. Sahl*, 248

Ariz. 512, 531, 462 P.3d 1017, 1036 (App. 2020), *review denied* (Aug. 25, 2020); *see also Phoenix Newspapers, Inc. v. Dep't of Corr., State of Ariz.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997).

ARGUMENT

1. A.R.S. § 16-602(B) prescribes sampling by "precinct" and not "polling place" in a general election.

A.R.S. § 16-602(B)(1) plainly says that the sampling for the "hand count" is to be done by "precinct," not polling place, for a general election. And the two words – "precinct" and "polling place" – clearly do not mean the same thing. Further, in the same statute, the legislature used different language – "polling place," instead of "precinct" – to describe how to perform the sampling for presidential-preference elections, which indicates that the legislature made a deliberate choice in its wording. It may be inconvenient for Maricopa County to sort the ballots from vote centers (where voters can vote from any precinct) back into voters' own separate precincts – and our legislature, if given to consider the issue, might even revise the statute to accommodate such concerns. But the way that the statute presently reads is plain and unmistakable, and it is not the job of the courts to revise the plain language of a statute because of what amounts to a county's objection to doing extra work (or because of the judge's hostility to a certain political belief). "In interpreting statutes, we look to the plain language as the most reliable indicator of meaning." *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249, 141 P.3d 422, 424 (App. 2006). "Accordingly, we assume that when the legislature uses different language within

a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language." *Id.*, 213 Ariz. at 249–50, 141 P.3d at 424–25; *see also Hughes v. Jorgenson*, 203 Ariz. 71, 73, ¶ 11, 50 P.3d 821, 823 (2002) ("assuming that the legislature has said what it means"). "When the plain text of a statute is clear and unambiguous," then that text must control, unless an absurdity or constitutional violation results. *State v. Christian*, 205 Ariz. 64, 66 ¶ 6, 66 P.3d 1241, 1243 (2003). Finally, "where the language of a statute is clear and unambiguous, courts are not warranted in reading into the law words the legislature did not choose to include." *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249, 141 P.3d 422, 424 (App. 2006); *Home Builders Ass'n v. City of Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004)(rejecting an interpretation that "would have [the Court] read an absent word into the statute," because such an interpretation "would result not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court"). When the Secretary's manual says that "each vote center is considered to be a **precinct/polling location** and the officer in charge of elections must conduct a hand count of regular ballots from at least 2% of the vote centers," the Secretary is literally inserting the word "polling place" (or "precinct/polling place") into the statute, where the statute only says "precinct." Neither the Secretary, nor this (or any other) Court, has the power to unilaterally effect such changes in legislation.

Further, when the Secretary of State's manual conflicts with a statute from which it derives authority, the statute must control, and the Secretary's manual

lacks the force of law. In support of this, Appellant originally cited the constitutional definition of the scope of the Secretary's authority, as well as an Arizona Supreme Court case from 1991 discussing the same. *See* A.R.S. Const. Art. 5 § 1 (providing that the Secretary of State "shall perform such duties as are prescribed by the constitution and as may be provided by law"); *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991) ("our statutes do not authorize, nor would our constitution permit" the Secretary of State's office to pass judgment on the law, because that is a "judicial function"; and a party cannot rely on documentation produced by the Secretary of State which contradicts the law, "any more than they can rely on a statute that conflicts with the constitution"). But the Arizona Supreme Court recently published two opinions which are even more on point: *Leach v. Hobbs*, No. CV-20-0233-AP/EL, 2021 WL 1217116, at ¶ 21 (Ariz. Mar. 31, 2021) (finding that when the Secretary's manual exceeds "the scope of its statutory authorization," then it "does not have the force of law"); and *McKenna v. Soto*, —— Ariz. ——, —— ¶ 20, 481 P.3d 695, 699 (February 17, 2021) (finding that portions of the Secretary's manual which are outside of its statutory mandate are not "pursuant to" the statute, and therefore lack the authority of law). In this case, A.R.S. § 16-602(B) provides that "[t]he hand count shall be conducted *as prescribed by this section* and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452." (Emphasis added.) And where the statute clearly prescribes a hand count by "precinct" and not "polling place" for general elections, the Secretary cannot simply unilaterally

decide that the statute actually prescribes both. Because the Secretary's manual contradicts what is "prescribed" by the statute, the manual lacks the force of law. Again, the legislature could certainly "fix" this by simply amending the statute to say that sampling may be done by "precinct/polling place"; but it is not the province of the judicial or executive branch to unilaterally redefine or enlarge the plain wording of a statute. The statute "prescribes" only a sampling by "precinct" for this kind of election, and any other form of sampling is therefore not "as prescribed by this section" and without legal authority.

2. Sanctions Must be Reversed

a. Appellant's Argument was Not Groundless

Appellant's argument is clearly far from "groundless," as the lower court erroneously concluded.

To warrant sanctions under A.R.S. § 12-349(A)(1), an attorney and/or party must "[b]ring[] or defend[] a claim without substantial justification," which is defined as bringing a claim that is (1) "groundless" **and** (2) "not made in good faith." A.R.S. § 12-349(F). "An objective standard may be utilized to determine groundlessness, but a subjective standard determines ... bad faith." *Goldman*, 248 Ariz. at 531, 462 P.3d at 1036.

"Section 12–349 does not provide a basis for an award of attorneys' fees against a party whose unsuccessful claim was, as [Appellant's], nonetheless fairly debatable." *Johnson v. Mohave Cty.*, 206 Ariz. 330, 335, 78 P.3d 1051, 1056 (Ct. App. 2003); *see also City of Casa Grande,* 199 Ariz. at 556, ¶ 30, 20 P.3d at 599 (upholding the trial court's denial of attorneys' fees in a statutory interpretation

case requiring considerable analysis because the unsuccessful party's position was fairly debatable)(citing *Lynch v. Lynch,* 164 Ariz. 127, 132–33, 791 P.2d 653, 658–59 (App.1990)). This is especially true for cases that raise issues of statutory interpretation and which clearly concern matters of public interest. *Id.* Courts must be "careful in administering § 12–349 and similar statutes not to discourage the assertion of fairly debatable positions." *Id.*, 164 Ariz. at 133, 791 P.2d at 659.

Here, Appellant's arguments are *based on the plain wording of the statute,* and they were clearly not "groundless." But what is interesting is the lower judge's basis for finding that they were groundless – because if nothing else, it offers insight into his "motives" (to borrow his own choice of wording). During the hearing in this matter, the lower-court judge went out his way to question what evidence the Appellant had of actual fraud in the election; and in his Ruling on sanctions, he flippantly characterized the public's concern with "voter fraud" as a "theory for which no evidence exists."[22] The lower-court judge clearly wanted to make a public statement about former President Trump's (and a third of American public's) views on voter fraud, and about whether the election results should have been overturned – but this simply was not "that" case. Again, this case did *not* seek to challenge or overturn the election's results (i.e., it was not an elections contest under A.R.S. § 16-673). Rather, this was about how the county audits its results before they are certified. But in a transparent effort to try to "shoehorn in" his own improper desire to make a political statement about election fraud, the lower-court judge cited a number of irrelevant cases dealing with actual election

---

[22] IR 46; Appendix 37, 12-21-20 Ruling, page 9, third full paragraph, fourth sentence.

contests, i.e. cases in which someone actually sought to overturn the results of an election—because those cases do indeed hold that actual evidence of fraud is needed to overturn an election, and/or that mere irregularities in the process are insufficient to overturn an election. *See e.g. Findley v.* Sorenson, 35 Ariz. 265, 269, 276 P. 843, 844 (1929); *Hunt v. Campbell*, 19 Ariz. 254, 169 P. 596 (1917); *Oakes v. Finlay*, 5 Ariz. 390, 53 P. 173 (1898). Of course, these cases have zero applicability to the case at bar, which did not seek to overturn an election at all but rather challenged the way in which particular post-election procedure was being conducted, the hand count audit. The conclusion that the lower-court judge reached, which was that the Party could not even raise the issue of how the audit should be conducted without first having actual evidence of fraud, belies common sense. First, the county was not statutorily required to have evidence of fraud in order to conduct the audit; and again as a matter of common sense, an audit is designed to *discover* problems with the counting of the vote, including potential fraud. It makes no logical or equitable sense to require proof of fraud in order to search for proof of fraud, and it would clearly result in nobody ever being able to raise in court the issue of how an audit should be conducted. The judge also cited certain election-contest cases which hold that challenges to "pre-election" procedures which could have been raised before the election cannot be raised after the election, in order to justify overturning the election. *See Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987)(holding that "[p]rocedures leading up to an election cannot be questioned after the people have voted, but ... must be challenged before the election is held"); *Kerby v. Griffin*, 48 Ariz. 434, 444–46, 62

P.2d 1131, 1135–36 (1936); *Sherman v. City of Tempe*, 202 Ariz. 339, 342, 45 P.3d 336, 339 (2002). Again, these are all election-contest cases in which the plaintiff sought to overturn an election and which are all clearly distinguishable from the case at bar. But perhaps just as importantly, the audit at issue was clearly not a "procedure[] leading up to an election" – the audit only happens *after* the election, and after the votes have been counted (and the "unofficial vote totals from all precincts [have been] made public"). A.R.S.§ 16-602(B)(1).

The lower court introduced all of this irrelevant caselaw *sua sponte*, and deliberately ignored the obvious problems with it, in order to reach an apparent goal. The lower-court judge clearly wanted to treat this case as if it were an elections challenge, because that it is the only way that he could justify making public statements about his own views of former President Trump's allegations of voter fraud, as well as the public's views on the subject. Ironically, the Party Chair did later file an elections challenge, based on evidence gathered through the only other available mechanism for investigating election results (the testimony of official election observers); and that suit did in fact prove substantial rates of error in certain election results.[23] But in the eyes of our lower-court judge, even thinking about filing such a case was sanctionable, because the "legitimacy" of the election was beyond question and there was "no evidence" to question it. And he expressed these opinions even though there was absolutely no reason for him to be opining on these things, other than that he wanted to make a political statement that would be read and widely published by media.

[23] Appendix 113 [Minute Entry dated and filed on December 4, 2020 in *Trump v. Biden*], page 8, second and third full paragraphs.

This Court probably does not need to reach the compelling issue of whether the lower court's sanction award violated the First Amendment, because the lower court's decision fails on the first prong of "groundlessness" alone. But it may be beneficial for this Court to weigh in on what a finding of "bad faith" under A.R.S. § 12-349 really requires, and when a judge's formulation of it becomes so erroneous as to violate First Amendment rights. Other statutes or laws of broad application – such as the injunction against harassment statute, A.R.S. § 12-1809, or even common-law claims like defamation and intentional infliction of emotional distress – have likewise been found to be unconstitutional as applied to political or other protected speech. *See e.g. LaFaro v. Cahill*, 203 Ariz. 482, 488, 56 P.3d 56, 62 (App. 2002)(finding that the definition of "harassment" in the injunction-against-harassment statute was unconstitutional, as applied to "pure political speech"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (holding that the First and Fourteenth Amendments require "proper safeguards" for freedom of speech in a libel claim); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)(prohibiting recovery on an intentional infliction of emotional distress claim, where it implicated protected speech under the First and Fourteenth Amendments).

Here, the lower court articulated the "bad faith," or "improper purpose" of the Arizona Republican Party and its counsel as "fil[ing] this lawsuit for political reasons," which it characterized as "public mistrust following this election."[24] According to the lower-court judge, "'[p]ublic mistrust' is a political issue, not a

[24] IR 51; Appendix 51 3-15-21 Ruling, page 6, second and third full paragraph.

legal or factual basis for litigation." *Id.* By making the latter statement, the lower court is (1) conflating the two separate elements required for an award of sanctions under A.R.S. § 12-349. The first element ("groundlessness") looks to whether there is a factual or legal basis for the litigation, while the second element ("bad faith") looks to the actual subjective motivation for the claims. If merely lacking a "legal or factual basis" were enough to show bad faith, then it would render this separate requirement of the statute superfluous. (2) The lower court is admitting that it considers a political belief held by one third of the public, as well as the country's former President, to be mere "bad faith." But as noted above, even a belief as extreme (and seemingly pernicious) as that the country should be "dissolve[d]," or that it should "change its republican form," is clearly protected speech. *Gertz*, 418 U.S. at 340, 94 S. Ct. at 3007, 41 L. Ed. 2d at 789, n.8. The strength of this country and its courts is demonstrated by their ability to hear and allow protected speech, even though certain people may find it offensive, and to resist the intemperate urge to suppress or sanction it in any way.

The disturbing consequences to letting the lower court's decision stand in this case are apparent. For example, a religious-freedom group might go to court seeking a ruling that COVID-19 restrictions are being arbitrarily applied to churches, for the purpose of holding more church services.[25] But a judge, following our trial-court judge's lead, could find that the case was brought in bad faith because that is a merely a "religious" reason, and/or because he thinks they are trying to cast "false shadows on the legitimacy of [health mandates]." As

[25] *See generally Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020).

another example, an anti-abortion group might file a lawsuit seeking an injunction against a doctor performing an abortion, for the purpose of lowering the number of abortions. They also run the risk of a judge like this finding that to be a mere "political reason," and ruling that the group was trying to "cast false shadows on the legitimacy of [abortion rights]," in order to find "bad faith" under the statute.

Politically-charged election cases are already hard to file and litigate—they are very fast-moving, and they inevitably attract negative public attention from one side of the aisle or the other (along with the attendant random threats from members of the public, etc.). But because of this, judges need to be even more mindful of their professional obligations to demonstrate temperance and integrity, and to avoid deliberately becoming a part of the "political thicket" – not less mindful. To affirm what the lower-court judge did on this case would to be to endorse this judge's behavior, which only served to inflame and escalate an otherwise straightforward legal issue with his own personal political beliefs; and it only serves to chill lawyers and the public from seeking to raise important issues of obvious public concern in court. It would turn the courts into just another hostile political forum, where people have every right to fear irrational reprisals from biased judges — even though our courts are designed to be the one place where this does not happen.

The "bad faith" that A.R.S. § 12-349 actually (and constitutionally) contemplates are the same sorts of things that constitute an "improper purpose" under the common law in a claim for abuse-of-process: for example, filing a lawsuit primarily to cause "excessive litigation expenses," *see e.g. Nienstedt v.*

Wetzel, 133 Ariz. 348, 354, 651 P.2d 876, 882 (App. 1982); or maintaining litigation for the primary purpose of increasing the other party's costs in order to coerce a settlement, *see Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 260, 92 P.3d 882, 890 (App. 2004). It does not consist of filing a suit over a "political" issue that actively troubles a third of the American people. Again, to allow such a broad definition of bad faith would violate any rational definition of what is permissible under the First Amendment, and would be to allow county judges to liberally sanction people for holding political views that differ from their own—which is exactly what the lower-court judge did in this case.

CONCLUSION

For the foregoing reasons, the Court must reverse the lower court's order dismissing Appellant's claim for declaratory judgment and reverse the lower court's award of sanctions under A.R.S. § 12-349. Appellants reserve their right to seek taxable costs.

RESPECTFULLY SUBMITTED June 4, 2021.

/s/ John D. Wilenchik
John D. Wilenchik, Esq.
WILENCHIK & BARTNESS, P.C.
2810 N. Third St.
Phoenix, AZ 85004
Attorneys for Plaintiffs/Appellants