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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KARI LAKE,

Contestant/Petitioner,

vs.

KATIE HOBBS, et al.,

Defendants.

No. CV2022-095403

**MOTION TO QUASH SUBPOENA OF
STEPHEN RICHER**

(Expedited Election Matter)

(Honorable Peter Thompson)

1 On December 15, 2022, at 2:02 pm, a process server delivered to the office of
2 Maricopa County Recorder Stephen Richer a Subpoena for Appearance at Hearing (the
3 “Subpoena”) issued by counsel for Plaintiff/Contestant Kari Lake (“Lake” or “Plaintiff”).
4 The Subpoena commands Recorder Richer’s attendance at the trial of this election contest
5 on December 21 and 22, 2022, beginning at 9:00 am. Because (1) Recorder Richer will be
6 out of the country on a long-planned vacation on December 21 and 22, 2022, (2) other
7 employees of the Maricopa County Recorder’s Office are well-situated to testify regarding
8 the claims in this action that concern the County Recorder’s election-related duties, and
9 (3) Plaintiff’s claims regarding a violation of the First Amendment are not properly before
10 this Court in an election contest, the Maricopa County Defendants move to quash the
11 Subpoena.

12 First, being required to appear for the trial of this election contest will unduly burden
13 Recorder Richer. *See* Ariz. R. Civ. P. 45(e)(2)(A)(4). Beginning the week of December 19,
14 2022, Recorder Richer will be out of the country on a long-planned family vacation, his first
15 since taking office in January 2021. [Declaration of Stephen Richer, ¶ 4 (attached as Exhibit
16 A)] Recorder Richer will have limited internet access while outside the United States, and
17 it will be very difficult, if not impossible, for him to testify remotely in this matter on
18 December 21 or 22, 2022. [*Id.*]

19 Second, even if Recorder Richer were available to testify, under the “apex” doctrine,
20 he should not be required to appear to testify when other county employees are similarly or
21 better situated to respond to questions regarding the operations of the Recorder’s Office. *See*
22 *Kyle Eng’g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (noting that “[h]eads of
23 government agencies are not normally subject to deposition”).

24 Neither the Arizona Supreme Court nor the Arizona Court of Appeals has yet
25 considered whether to adopt the apex doctrine in Arizona. However, this Court may consider
26 the federal cases cited herein, which interpret the Rules of Evidence. As the Arizona
27 Supreme Court recognized, “[a]lthough the federal courts’ interpretation of the Federal
28 Rules of Evidence does not control our interpretation of our own evidentiary rules, federal

1 precedent is particularly persuasive given that we have expressly sought to conform our rules
2 to the federal rules.” *State v. Winegardner*, 243 Ariz. 482, ¶8, 413 P.3d 683, ¶8 (2018).

3 Federal courts have regularly held that elected to top-level government offices
4 warrant apex protection. *See, e.g., Hernandez v. Tex. Dep’t of Aging & Disability Servs.*, No.
5 A-11-CV-856 LY, 2011 WL 6300852, at *2 (W.D. Tex. Dec. 16, 2011) (governor); *Thomas*
6 *v. Cate*, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010); *New York v. Oneida Indian Nation of*
7 *N.Y.*, No. 95-CV0554 (LEK/RFT), 2001 WL 1708804 at *3 (N.D.N.Y. Nov. 9, 2001);
8 *Fitzpatrick v. Sec’y of State*, 440 N.W.2d 45, 46-47 (Mich. Ct. App. 1989) (per curiam)
9 (noting that “there [was] no doubt” that the Secretary of State was a high-ranking official,
10 because (1) the office was established by the state constitution and (2) the Secretary was the
11 head of the department of state). As in *Fitzpatrick*, so here: the office of the Maricopa
12 County Recorder is established by the Arizona Constitution, Ariz. Const. art. XII, § 3, 4; *see*
13 *also* A.R.S. Title 11, Ch. 3, Art. 3 (setting forth the duties of the County Recorder). Because
14 “lesser officials in the Department . . . presumably [could] supply plaintiff with the
15 information he seeks,” the Court should quash the Subpoena. *Id.* at 47 (concluding that the
16 “defendant Secretary of State should not be required to personally give testimony”).

17 Although the apex doctrine is most often used to prevent depositions of high-ranking
18 government officials, its underlying principles also prevent high-ranking government
19 officials from being compelled to testify at trial. *See, e.g., Simplex Time Recorder Co. v.*
20 *Sec’y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (affirming ALJ’s refusal to allow plaintiff
21 to call “top” Labor Department officials as witnesses); *Bogan v. City of Boston*, 489 F.3d
22 417, 423 (1st Cir. 2007) (noting that “other courts [had] concluded that top executive
23 department officials should not, absent extraordinary circumstances, be called to testify or
24 [be] deposed regarding their reasons for taking official action.”) (citations omitted).

25 Plaintiff’s Complaint includes a claim regarding Maricopa County’s process for
26 conducting signature verification of early ballots. [Compl. ¶¶ 150-55] Early ballots, and the
27 signature verification thereof, are within the purview of the Recorder. Like all the other
28

1 claims in Plaintiff’s Complaint, the Maricopa County Defendants have moved to dismiss
2 that claim because:

3 (a) Even if true, it would not alter the outcome of the election, A.R.S. § 16-
4 672(A)(5); *Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183, 186 ¶ 10 (App.
5 2005);

6 (b) Plaintiff’s claims are wholly speculative because they relate to an analysis of
7 early ballots from 2020, not those actually cast in the 2022 general election, which falls far
8 below the “clear and satisfactory proof” standard required of an election contestant, *see Hunt*
9 *v. Campbell*, 19 Ariz. 254, 268 (1917); and

10 (c) Laches bars the Court from determining claims about the signature verification
11 process after an election. *Sherman v. City of Tempe*, 202 Ariz. 339, 342 ¶ 9 (2002) (citation
12 omitted) (“Challenges concerning alleged procedural violations of the election process must
13 be brought prior to the actual election.”); [See Maricopa County Defendants’ Motion to
14 Dismiss, at 7-9]

15 As such, no testimony regarding signature verification should be required. If the
16 Court declines to dismiss Count III, however, employees of the Maricopa County Recorder’s
17 Office with long experience of the signature verification process can be made available to
18 testify. *See Fitzpatrick*, 440 N.W.2d at 47.

19 Third, to the extent that Plaintiff seeks testimony from Recorder Richer related to
20 her allegations regarding his participation in the March 29, 2022 CISA Cybersecurity
21 Advisory Committee Protecting Critical Infrastructure from Misinformation &
22 Disinformation Subcommittee meeting or his involvement with a political action committee,
23 which relate to her First Amendment claim, such claim is wholly inappropriate in an election
24 contest. [See Mot. to Dismiss, at 3-4] It would unduly burden Recorder Richer to require
25 him to cancel his vacation in order to testify about a meeting held nearly nine months ago or
26 his own personal First Amendment activity that could not possibly constitute evidence of
27 (1) misconduct by election boards, (2) illegal votes, or (3) an erroneous count of votes. *See*
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1 A.R.S. § 16-672(A). Because this claim is outside the strict statutory confines of an election
2 contest, the Subpoena should be quashed.

3 For the foregoing reasons, the Court should enter an order quashing the Subpoena to
4 Stephen Richer.

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6 RESPECTFULLY SUBMITTED this 16th day of December, 2022.

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21 ORIGINAL of the foregoing E-FILED
22 this 16th day of December 2022 with
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