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

[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. The "3 U.S.C. § 5 issue is not serious."

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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