ARIZONA SUPREME COURT

KELLI WARD, Plaintiff-Appellant, v. CONSTANCE JACKSON, et al., Defendants-Appellees.	No. CV-20-0343-AP/EL Maricopa County Superior Court No. CV2020-015285

BRIEF OF MARICOPA COUNTY INTERVENORS

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When the Appeal Must Be Decided

This appeal concerns whose presidential electors should be sent by Arizona to the electoral college, which meets on December 14, 2020. 3 U.S.C. § 7. A decision by December 8, 2020, will be conclusive, and cannot be disturbed by Congress. 3 U.S.C. § 5; *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000). The County urges the Court to decide this appeal by that date. At the latest, the appeal must be decided before December 14, 2020.

Introduction

Plaintiff-Appellant Kelli Ward requests that this Court supplant the power of the trial court to find facts, the power of the Arizona legislature to prescribe elections laws, the power of the Secretary of State to ensure their uniform implementation, the power of Arizona's fifteen counties and fifteen county recorders to administer them, and the power—more than that, the "fundamental" right "preservative of all rights"[1]—of the voters of Arizona to select their representatives.

Based on what? A mere 9 "mistakes," found in a random sample of 1,626 duplicated ballots, from a pool of 27,869 ballots required by law to be duplicated where the tabulator could not read the ballot (for example where the ballot is damaged or the voter is overseas)—for a 99.45% duplication accuracy rate. (Trial

[1] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Court's Dec. 4, 2020 Order at 8). The trial court found they had "no effect on the outcome of the election" where more than 2 million total ballots were cast in Maricopa County. (*See id.*). Further, Ward's forensic document examiner looked at signatures on ballot envelope affidavits, and "found no sign of forgery or simulation as to any of these ballots." (*Id.* at 7).

Arizona law does not permit mistakes by elections officials to void an election. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). And this Court has long-recognized "the strong public policy favoring stability and finality of election results." *Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978).

This Court can quickly dispose of this appeal in either of two ways: (1) the Court should conclude that it lacks jurisdiction to hear this matter because presidential electors are not subject to a contest under A.R.S. § 16-672(A); or (2) the Court should affirm the trial court's considered findings of fact showing that Maricopa County elections officials ran a free and fair election.

Statement of the Case and Facts[2]

After certification of the slate of presidential electors for the Biden/Harris ticket, Ward filed a contest under A.R.S. § 16-672. Arizona Secretary of State

[2] With the accelerated pace of this expedited election matter, Maricopa County requests that this Court forgive its failure to follow ARCAP 13(d)'s record citation requirement. Further, because the Parties will mutually file and exchange their briefs, the County does not know whether and to what extent Ward disputes any of the trial court's thorough fact-findings; the County discusses the facts with argument in Section II below.

Katie Hobbs and Maricopa County intervened. Consistent with the trial court's orders, Maricopa County allowed the Parties to inspect a sample of ballot envelope affidavits and duplicate ballots. Indeed, Maricopa County voluntarily gave the Parties access to a sample of duplicate ballots an order of magnitude larger than that required by the court.

On December 3 and 4, 2020, the trial court conducted a hearing. At its conclusion, the trial court found that there was no evidence of fraud, misconduct, or illegal votes, and found that the certified presidential candidate received the highest vote count. (Trial Court's Dec. 4, 2020 Order at 8, 9) ["Order"]. The trial court rejected Ward's request for relief, denied her request for further discovery, and "confirm[ed]" the election. (*Id.* at 9). Ward appeals that decision.

Statement of the Issues

1. "[E]lection contests are purely statutory," giving courts jurisdiction to hear them only if statutory terms are strictly met. *Brown v. Superior Court*, 81 Ariz. 236, 239 (1956). Appellate jurisdiction is derivative: if the trial court lacked jurisdiction, this Court lacks jurisdiction too. *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 208 (1946). Here, Ward attempts to contest the certification of Arizona's presidential electors, but § 16-672(A) permits a "contest" of "state"—not federal—"office," and presidential electors hold federal office. Does this Court lack jurisdiction to hear this appeal?

2. Trial courts find facts; this Court defers to those findings unless they are clearly erroneous. *Shooter v. Farmer*, 235 Ariz. 199, 200, ¶ 4 (2014). After a two-day hearing, the trial court found that there was no evidence of fraud, misconduct, or illegal votes, and found that the certified presidential candidate received the highest vote count. Did the trial court err when it made these findings, such that Ward is entitled to the extraordinary relief of voiding Arizona's presidential election?

Argument

I. This Court lacks jurisdiction over this appeal because the Arizona election contest statute does not apply to presidential electors, a federal office established by Article II of the U.S. Constitution.

"[E]lection contests are purely statutory." *Brown*, 81 Ariz. at 239. Thus, if the putative contest does not meet the statutory requirements, courts lack jurisdiction to hear it. *Id.*; *see also Olds Bros.*, 64 Ariz. at 208 (appellate jurisdiction derivative). Here, the trial court lacked jurisdiction over Ward's appeals because: (1) § 16-672(A) permits a "contest" of an election to "state office," but not federal office; and (2) a presidential elector holds a federal office.

1. Arizona's contest statute states:

> Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the following grounds . . . .

A.R.S. § 16-672(A). By its terms, the Arizona legislature intended § 16-672 to apply to "state"—not federal—"office." If it had intended to include federal office within the ambit of § 16-672(A), it would have said so. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211, ¶ 13 (2019) (explaining that "the expression of one item implies the exclusion of others" where "one term is reasonably understood as an expression of all terms included in the statutory grant or prohibition").

2. This Court has not squarely addressed whether the legislature intended to include presidential electors under § 16-672(A)'s "state office" provision. But it does not address this question without guidance.

Within Arizona law, the legislature expressly distinguished between the "office of presidential elector" and "state office." *See* A.R.S. § 16-311(E) (establishing filing deadline for "nomination paper of a candidate for the office of United States senator or representative in Congress, for the office of presidential elector *or* for a state office") (emphasis added). And in *Kannarr v. Hardy*, this Court expressly excluded from consideration "votes cast for presidential electors, United States Senator or United States Representative" when determining whether a political party seeking official state recognition met the statutory threshold of "total votes cast" for "candidates for state office." 118 Ariz. 224, 226 (1978).

The U.S. Constitution likewise indicates that presidential electors hold a

federal—not state—office through its creation of presidential electors:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .
>
> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

U.S. Const. art. II, § 1, cl. 2, 4. The U.S. Constitution also establishes presidential electors' powers, *see* U.S. Const. amend. XII,[3] and sets qualifications for office, U.S. Const. art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."). Federal statutory law further specifies the responsibilities of presidential electors. *See, e.g.*, 3 U.S.C. § 9.

In contrast, Arizona law does not establish separate powers for presidential electors. *See, e.g.,* A.R.S. § 16-212(B). The Arizona legislature established the method of appointing presidential electors, A.R.S. § 16-212(A); A.R.S. § 16-344(A), because the U.S. Constitution commands it, U.S. Const. art. II, § 1, cl. 2.

The U.S. Supreme Court's recent decision in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), does not prompt a different outcome. There, the Supreme Court clarified that the U.S. Constitution grants "States broad power over electors" to

[3] The Twelfth Amendment altered the powers originally established in Article II, Section 1, Clause 3.

bind electors to the choices made by the voters. *Id.* at 2328. Such pledge laws, however, do not convert a fundamentally federal office into a state office.

In sum, Ward cannot contest the certification of presidential electors because § 16-672(A) did not establish such a contest. Therefore, this Court—like the trial court—lacks jurisdiction to hear this matter, and it should deny the appeal.

II. The trial court correctly found no reason to grant Ward relief.

Even if this Court concludes it has jurisdiction, this Court should affirm the trial court's denial of the ridiculous relief requested by Ward and the trial court's confirmation of the election under A.R.S. § 16-676(B). The trial court correctly found that Maricopa County elections officials ran a free and fair election. (*See* Order at 8–9).

A. The trial court applied the proper legal standard of review.

The trial court accurately summarized the role of the judiciary—founded on separation of powers principles—in an election contest. (*See* Order at 5–6). Ward cannot rely on garden-variety elections irregularities to overturn a certified election. *See, e.g.*, *Findley*, 35 Ariz. at 269 ("[H]onest mistakes or mere omissions on the part of the election officers . . . even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.").

Indeed, in this elections contest Ward faced an even steeper uphill climb than most plaintiffs bringing civil suit because "the returns of the election officers

are prima facie correct and free from the imputation of fraud." *See Hunt v. Campbell*, 19 Ariz. 254, 268 (1917). "One who contests an election has the burden of proving that if illegal votes were cast the illegal votes were sufficient to change the outcome of the election." *Moore v. City of Page*, 148 Ariz. 151, 156 (App. 1986). As the trial court aptly put it: "for the Court to nullify an election that State election officials have declared valid is an extraordinary act to be undertaken only in extraordinary circumstances." (Order at 6).

B. The trial court correctly found no basis for overturning the results of the election under A.R.S. § 16-672(A)(1).

Under § 16-672(A)(1) an elector "may contest the election" based on "misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election."

1. To begin with, the trial court did not abuse its discretion when it determined that the doctrine of laches barred Ward's claim that observers had insufficient opportunity to observe the actions of election officials. (*See* Order at 7); *see also McLaughlin v. Bennett*, 225 Ariz. 351, 353, ¶ 5 (2010) (abuse of discretion review). "In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497, ¶ 10 (2006). Here, the trial court correctly recognized that

Maricopa County employed the same observation procedures in the August primary election and the November general election. (Order at 7). By waiting until after the completion of the November general election, Ward waited far too long to challenge those procedures.

2. The trial court—to whom this Court defers on matters of fact, *Shooter*, 235 Ariz. at 200, ¶ 4—found that any errors in Maricopa County's election administration did not result from misconduct or fraud, and had "no effect on the outcome of the election." (Order at 8 (summarizing lack of evidence supporting Ward's allegations)).

The statistics in the record bear this out. Ward challenged Maricopa County's signature verification process. The trial court heard testimony about signature comparison for a random sample of 100 ballot envelope affidavits that Maricopa County elections officials "had found a signature match" and so tabulated the ballot. (Order at 7). Ward's forensic document examiner found 6 signatures to be "inconclusive," "meaning she could not testify that the signature on the envelope/affidavit matched the signature on file." (*Id.*). Yet "[s]he found no sign of forgery or simulation as to any of these ballots." (*Id.*). Similarly, Defendants' expert testified that 11 of the signatures were "inconclusive," but found no sign of forgery or simulation—and "found no basis for rejecting any of the signatures." (*Id.*). On review, the trial court found

> None of [the ballot envelope affidavits] shows an abuse of discretion on the part of the reviewer. . . . The evidence does not show that these affidavits are fraudulent, or that someone other than the voter signed them. There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots.

(*Id.*).

Ward also challenged Maricopa County's ballot duplication process. The trial court took evidence about ballots that are lawfully duplicated by bipartisan duplication boards. *See* A.R.S. § 16-621(A). This process ordinarily occurs when the voter submits a ballot under the Uniformed And Overseas Citizens Absentee Voting Act, or where a ballot is damaged or otherwise unreadable by the tabulation machine. (Order at 8). Although the trial court ordered the review of 100 duplicate ballots, Maricopa County voluntarily made an additional 1,526 randomly-selected, duplicate ballots available for review. (*Id.*). Of the total 1,626 duplicates reviewed, nine contained an error in the duplication of the presidential vote. (*Id.*). That means the duplication process—with only 27,869 ballots duplicated out of over 2 million cast—was 99.45% accurate. (*Id.* at 7–8). True, the trial court found "mistakes" in the administration of the election. (*Id.*). But more importantly the trial court found that "[w]hen mistakes were brought to the attention of election workers, they were fixed." (*Id.*).

C. The trial court correctly found no basis for overturning the results of the election under A.R.S. § 16-672(A)(2) or (A)(5)

Under § 16-672(A)(2), an elector may contest an election "[o]n account of illegal votes." Based on its findings of fact—findings that this Court defers to unless clearly erroneous, *Shooter*, 235 Ariz. at 200, ¶ 4—the trial court correctly found that Ward "did not prove illegal votes, much less enough to affect the outcome of the election." (Order at 8).

Under § 16-672(A)(5), an elector may contest an election on the ground that, "by reason of erroneous count of votes" the candidate certified as the winner "did not in fact receive the highest number of votes." As the trial court succinctly found: "Plaintiff has not proven that the Biden/Harris ticket did not receive the highest number of votes." (Order at 8).

D. The trial court did not abuse its discretion when it refused to prolong Ward's fishing expedition.

Ward also appeals the trial court's decision denying her request to inspect more ballots. This Court reviews evidentiary rulings for an abuse of discretion. *Leach v. Reagan*, 245 Ariz. 430, 440, ¶ 46 (2018). "Arizona has long been committed to a broad interpretation of its discovery rules, but mere 'fishing expeditions' are not countenanced." *State v. Kevil*, 111 Ariz. 240, 242 (1974).

As explained above, the trial court ordered Maricopa County to make 100 duplicate ballots available for review; Maricopa County voluntarily made another

1,526 duplicate ballots available. (Order at 8). Of that total, nine—nine!—contained an error in the duplication of the presidential vote. (*Id.*). The duplication effort was 99.45% accurate. (*Id.*).

Relatedly, Ward's forensic document examiner examined 100 ballots and found six signatures to be "inconclusive" but could find "no sign of forgery or simulation as to any of these ballots." (Order at 7). And the trial court found that "[t]here is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots." (*Id.*).

Ward cannot predicate an election contest on mistakes. *See Findley*, 35 Ariz. at 269. Potentially discovering more honest mistakes does not justify further delay of the "stability and finality of election results" that this Court treasures. *Donaghey*, 120 Ariz. at 95. The trial court did not abuse its discretion when it denied Ward's request.

Conclusion

With these findings in hand, Ward has no basis for requesting that this Court usurp the fundamental right of Arizona's voters to select its presidential electors. Ward had her days in court. Now this Court should dispose of this appeal one of two ways: (1) determine that the trial court (and by extension, this Court) lacks

subject matter jurisdiction under A.R.S. § 16-672(A) to hear an election contest regarding presidential electors; or (2) affirm the trial court's considered decision based on its finding that the record reveals "no misconduct, no fraud, and no effect on the outcome of the election." Regardless of which path this Court chooses, the evidence in the record unmistakably shows that Maricopa County elections officials ran a free and fair election in which voters should have confidence.

RESPECTFULLY SUBMITTED this 7th day of December 2020.

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