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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
Lee Miller, #012530
John "Jack" D. Wilenchik, #029353 (*lead attorney*)
diw@wb-law.com
leem@wb-law.com
jackw@wb-law.com
admin@wb-law.com
Attorneys for Plaintiff/Contestant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KELLI WARD, **Plaintiff/Contestant;** **vs.** **CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO;** **Defendants/Contestees.**	**Case No. CV2020-015285** **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** **(Elections Matter)**

Plaintiff/Contestant ("Plaintiff") hereby submits these proposed findings of fact and conclusions of law:

1. It is undisputed that Plaintiff is an "elector of the state" of Arizona, within the meaning of A.R.S. § 16-672(A)(the "elections contest" statute).

2. Defendants have been declared elected to the state office of presidential elector, within the meaning of A.R.S. § 16-672. *See also* A.R.S. § 16-212 (defining the office of presidential erector); *Harless v. Lockwood*, 85 Ariz. 97, 101-102, 332 P.2d 887, 889–90 (1958)(finding that the phrase "state office," as used in the elections-contest statute, must be broadly interpreted to include federal offices[1]).

3. A.R.S. § 16-676(B) provides that "[a]fter hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment, either confirming or annulling and setting aside the election."

4. A.R.S. § 16-676(C) further provides that "[i]f in an election contest it appears that a person other than the contestee has the highest number of legal votes, the court

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[1] In *Harless*, the Arizona Supreme Court decided that the holding of elections "for federal offices is strictly a state affair," and therefore that the term "state office" in the elections-contest statute must be construed broadly, to encompass candidates for U.S. Congress. 85 Ariz. at 100, 101, 332 P.2d at 888, 889.

In the case of presidential electors, the election is even more of a "state affair," because Article II, Section 1, clause 2 of the United States Constitution expressly vests the authority to select presidential electors with the state legislature ("[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…").

The reasoning in *Harless* was expressed as follows: "To us it is inconceivable that the legislature in providing for election contests—the very purpose of which is to aid in securing 'the purity of elections and guard against abuses of the elective franchise' (section 12, article 7, supra)—purposely left without redress those who were candidates to represent the State of Arizona in the Congress. Certainly if there is no relief in the state courts petitioner is remediless as the federal law is silent on the subject. We believe that the duty enjoined upon us by A.R.S. § 1–211: 'Statutes shall be liberally construed to effect their objects and promote justice', is applicable here. Hence we hold that the use of the phrase 'state office' appearing in section 16–1201 [now 16-672] can properly be interpreted in its broad sense as encompassing nominees for representatives to the Congress of the United States. The trial court, therefore, improperly divested itself of jurisdiction to entertain and dispose of the instant contest." 85 Ariz. at 102, 332 P.2d at 890. Similarly, if the Court were to find that "presidential electors" are somehow outside the purview of our elections-contest statute, then plaintiffs would be left remediless to challenge a presidential election.

shall declare that person elected and that the certificate of election of the person whose office is contested is of no further legal force or effect."

5. A.R.S. § 16-672(A) provides any of the following grounds may be raised in an elections contest:

   i. 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.

   ii. That the person whose right to the office is contested was not at the time of the election eligible to the office.

   iii. That the person whose right is contested, or any person acting for him, has given to an elector, inspector, judge or clerk of election, a bribe or reward, or has offered such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise.

   iv. "On account of illegal votes."

   v. That by reason of erroneous count of votes the person declared elected or the initiative or referred measure, or proposal to amend the constitution, or other question or proposal submitted, which has been declared carried, did not in fact receive the highest number of votes for the office or a sufficient number of votes to carry the measure, amendment, question or proposal.

6. The language in the elections-contest statute is similar to a California statute, Cal. Elec. Code § 16100. *See Henderson v. Carter*, 34 Ariz. 528, 533, 273 P. 10, 11 (1928)(noting similarity of Arizona elections-contest statute to California code, and analogizing to California caselaw interpreting it). While there is no authority in Arizona squarely interpreting the meaning of "misconduct…on the part of any officer making or participating in a canvass for a state election" in A.R.S. § 16-

672(A)(1), California courts have interpreted their statute (which uses even harsher words, "guilty of malconduct") as being intended "to broadly include erroneous conduct without wrongful intention."

7. A.R.S. § 16-621(A) provides that "All proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual issued pursuant to § 16-452 under the observation of representatives of each political party and the public…."[2] (Emphasis added.)

8. The 2019 Secretary of State's Elections Procedures Manual ("EPM"),[3] which carries the force of law pursuant to A.R.S. § 16-452, further provides: "[p]olitical party representatives are permitted to observe at voting locations and central counting places for partisan elections.…The County Recorder or other officer in charge of elections may develop additional local procedures governing political party observation. Additional procedures shall allow political party observers to effectively observe the election process...." (Page 139 of the EPM, emphasis added.)

[2] *See also* A.R.S. § 16-552(A),(C),(H), which references the right of observers to be present during the processing of early ballots. (From subsection "A": "the officer in charge of elections may use the procedure prescribed by this section…for processing early ballots." From subsection "C": "[t]he county chairman of each political party represented on the ballot…may designate party representatives and alternates to act as early ballot challengers for the party. No party may have more than the number of such representatives or alternates that were mutually agreed on by each political party to be present at one time…" And, from subsection "H": "[p]arty representatives and alternates may be appointed as provided in subsection C of this section to be present and to challenge the verification of questioned ballots pursuant to § 16-584 on any grounds permitted by this section." Emphasis added.)

[3] The Manual can be found online at: https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf

9. The EPM also provides, at page 141, that "[p]olitical party representatives may observe at a central counting place and at each point where ballots are handled or transferred from one election official to another, including areas where the following activities take place: [r]eceiving the ballots at the County Recorder's office or central counting place; [i]nspecting the ballots; [r]eviewing ballots by the Write-in Tally Board; [d]uplicating ballots by the Ballot Duplication Board; [a]djudicating ballots by the Electronic Vote Adjudication Board; [r]eceiving electronic media or processing voting results by the Accuracy Certification Board; [t]abulation of ballots; and/or [a]ny other significant tabulation or processing activities at a central counting place provided that it does not interfere with or impede the election procedures or staff." (Emphasis added.)

10. Finally, A.R.S. § 16-621(A) provides that "[i]f any ballot, including any ballot received from early voting, is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged or defective ballot in the presence of witnesses and substituted for the damaged or defective ballot. All duplicate ballots created pursuant to this subsection shall be clearly labeled 'duplicate' and shall bear a serial number that shall be recorded on the damaged or defective ballot." (Emphasis added.)

11. Based on the testimony of designated political party representatives with personal knowledge of the processes by which Maricopa County elections officials duplicated ballots (Ken Sampson, Cheri Beltramo, *inter alia*) and verified mail-in ballot signatures (Leeanne Hayward, Liesl Emerson, *inter alia*); and also based on the testimony of county representative(s); I find that:

a. A.R.S. § 16-621(A) was not complied with. That statute provides that "[a]ll proceedings" at the counting center "shall be" "under the observation of representatives of each political party and the public," and shall be in accordance with the Secretary of State's manual (the "EPM"). The EPM further provides that county procedures governing political party observation "shall allow political party observers to effectively observe the election process," and that "[p]olitical party representatives may observe at a central counting place and at each point where ballots are handled or transferred from one election official to another." (Emphasis added.) A.R.S. § 16-621(A) also provides that "duplicate" ballots "shall be made…in the presence of witnesses." Given the reference earlier in the same section to conducting "[a]ll proceedings…under the observation of representations of each political party and the public," the phrase "presence of witnesses" appears to refer to such designated party/public observers.

b. The testimony established that the county failed to provide for observation of duplicate ballots "at each point." The county transmitted the electronic information for "duplicate" ballots to an offsite printing company, which proceeded to print the "duplicate" ballots offsite. This was not done in the presence of party observers. Further, when the offsite company dropped "duplicate" ballots back off at the Maricopa County Tabulation and Election Center, a.k.a. "MCTEC" (where the observers were), the ballots were in "batches" that were not connected to the originals in any clearly observable way; and so due to the break in chain-of-custody, observers had no effective way of knowing/confirming whether the duplicates matched the originals. The violation of A.R.S. § 16-621(A) in not allowing observation of "all proceedings" "at each point" constitutes

"misconduct…on the part of any officer making or participating in a canvass for a state election," within the meaning of A.R.S. § 16-672(A)(1).

c. The testimony has also established that the county's procedures did not "allow political party observers to effectively observe the election process" with respect to verifying mail-in ballot signatures. Witness testimony established that observers were unable to effectively observe signature verification, which is performed on computers, because (a) the computer monitors and screens were mostly turned away from them; and (b) observers were made to remain at a card table which was at least ten to twelve feet away from the majority of the computer monitors and screens, making even those screens that were not turned away effectively unreadable due to the distance.

12. However, the Court's inquiry does not end here. "There are two cardinal rules which, in the absence of specific statutory provisions to the contrary, always have governed election contests, not only in Arizona, but elsewhere. The first is that general statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and that honest mistakes or mere omissions on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result or at least render it uncertain." *Moore v. City of Page*, 148 Ariz. 151, 159, 713 P.2d 813, 821 (Ct. App. 1986)(quoting *Findley v. Sorenson*, 35 Ariz. 265, 269, 276 P. 843, 844 (1929); which in turn cites *Stackpole v. Hallahan*, 16 Mont. 40, 40 P. 80, 85 (1895)). In other words, misconduct by elections officials alone is not sufficient to annul or reverse an election (unless a statute expressly says so); otherwise, the misconduct must be of such nature or magnitude as to affect the

result of the election or at least have render the result "uncertain." *See also Stackpole*, 16 Mont. at 40, 40 P. at 85: "[t]he departure from the law in matters which the legislature has not declared of vital importance *must be substantial in order to vitiate the ballots*. This appears to be the general current of all the authorities….If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may, *to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will*." (Emphasis added.)

13. The Court takes it on judicial notice that, according to the Arizona Secretary of State's canvass, the presidential electors for Donald J. Trump received 1,661,686 votes; and the presidential electors for Joseph Biden received 1,672,143 votes. *See e.g. Adams v. Bolin*, 74 Ariz. 269, 271, 247 P.2d 617, 618 (1952)(in which the Arizona Supreme Court took judicial notice of the general election results from records in the office of the Secretary of State). The "spread" in between the two candidates is 10,457 out of a total of 3,333,829 votes cast for both candidates, which equates to a difference of less than one half of one percent (0.3%, or zero point three percent).

14. Based on the testimony at trial, the Court is persuaded that:

    a. The duplication of ballots resulted in serious errors which reversed or nullified the voter's intent. I allowed a relatively small sample of duplicate ballots to be inspected, exactly one hundred (100) ballots. Of that, two percent (2%) of the votes for Donald J. Trump were either incorrectly flipped to Joe Biden, or cancelled out.

b. Of the one hundred (100) signatures that were reviewed, both experts agreed that at least ten percent were inconclusive, i.e. the expert(s) could not verify them as valid.

15. The Court therefore finds:

a. That further inspection of the ballots is warranted, under A.R.S. § 16-677 and/or the civil rules of procedure.

The so-called "safe harbor" date of December 8th, 2020 (per 3 U.S.C. § 5) is "not serious" enough to defeat further inquiry into the validity of the ballots. *Bush v. Gore*, 531 U.S. 98, 130 (2000)(Souter, J., dissenting). If that date were to pass without a judicial resolution, then Arizona "would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes 'ha[d] not been regularly given.'" *Id.*, 531 U.S. at 143 (Ginsburg, J., dissenting)(emphasis original). Further, in contrast to the State of Florida in *Bush v. Gore*, neither Arizona's legislature nor its courts have expressed a "wish" that Arizona must resolve judicial disputes regarding the selection of presidential electors by the federal "safe harbor" date—to the contrary, Arizona's statute regarding the selection of presidential-electors, A.R.S. § 16-212, merely states that electors shall cast their vote "[a]fter the secretary of state issues the statewide canvass containing the results of a presidential election." A.R.S. § 16-212(B). Also, while December 14th is the date under federal law for presidential electors to "meet and give" their vote in each state, which is then transmitted to Congress (3 U.S.C. §§ 7, 9, 11) – and while the "fourth Wednesday in December," i.e. December 23rd, is the date on which Congress must "request the state secretary of state to send a certified return immediately" if Congress has not already received those votes (3 U.S.C. § 12) – "none of these dates has ultimate significance in light of Congress' detailed

provisions for determining, on 'the sixth day of January,' the validity of electoral votes." *Bush*, 531 U.S. at 143 (Ginsburg, J., dissenting); *see also* 3 U.S.C. § 15. In other words, the only "real" deadline of practical significance is January 6th, which is when Congress actually meets to count the electoral votes (and even after that, the "truly" final constitutional deadline of January 20th for inauguration of the President, per the 20th Amendment). So if a final judicial decision comes after the "safe harbor" date of December 8th, then the court's decision will stand unless there is (1) an objection to it in Congress (by both a Senator and Representative), and (2) *both Houses* of Congress determine that the electors' vote was not "regularly given"—an unlikely scenario.[4] *See* 3 U.S.C.A. § 15.

In addition (or in the alternative), I find that 3 U.S.C. §§ 5, 6, and 15 (the Electoral Count Act) is unconstitutional under Article II, Section 1, clause two of the United States Constitution, which expressly vests authority in the State to appoint presidential electors "in such Manner as the Legislature thereof may direct." To the extent that the Electoral Count Act sets "deadlines" on the appointment of electors and on the resolution of presidential-elector disputes – and especially when such deadlines interfere with the deadlines that are already set for election contests under Arizona law – then the federal statutes amount to an unconstitutional infringement on the power of the State legislature to direct the "manner" of appointing presidential electors.

[4] In this unlikely (and unprecedented) scenario, Congress and the courts would likely look to the U.S. Constitution's ultimate grant of authority to the state legislature to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" – in other words, the Arizona state legislature would be left with "re-"selecting the presidential electors. *See* Article II, Section 1, clause 2 of the United States Constitution.

b. [In the alternative to subsection "a"] The Court finds that, because the result of the election is substantially uncertain, the certificate of election of the Biden Electors is of no further legal force or effect, and that the election is annulled and set aside in accordance with A.R.S. § 16-676(B).

c. [In the alternative to subsection "a"] The Court finds that, due to the serious errors in the duplication of ballots, the Trump Electors have the highest number of legal votes and declares those persons elected.

RESPECTFULLY SUBMITTED this 2nd day December, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John "Jack" D. Wilenchik

Dennis I. Wilenchik, Esq.
Lee Miller, Esq.
John "Jack" D. Wilenchik, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004
jackw@wb-law.com
admin@wb-law.com
Attorneys for Plaintiff

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Sarah R. Gonski, Esq., SGonski@perkinscoie.com
Roy Herrera. Esq., HerreraR@ballardspahr.com
Daniel A. Arellano, Esq., ArellanoD@ballardspahr.com
Bruce Spiva (pro hac pending), BSpiva@perkinscoie.com
Attorneys for Defendants

Roopali H. Desai, Esq.
D. Andrew Gaona, Esq.
Kristen Yost, Esq.
rdesai@cblawyers.com
agaona@cblayers.com
kyost@cblawyers.com
Attorney for Intervenor Secretary of State

Thomas P. Liddy, liddyt@mcao.maricopa.gov
Emily Craiger, craigere@mcao.maricopa.gov
Joseph I. Vigil, vigilj@mcao.maricopa.gov
Joseph J. Branco, brancoj@mcao.maricopa.gov
Joseph LaRue, laruej@mcao.maricopa.gov
Attorneys for Maricopa County

By *__/s/ Christine M. Ferreira__*