

1 Timothy A. La Sota, Ariz. Bar No. 020539
2 **TIMOTHY A. LA SOTA, PLC**
3 2198 East Camelback Road, Suite 305
4 Phoenix, Arizona 85016
5 (602) 515-2649
6 tim@timlasota.com

7 *Attorney for Plaintiffs/Contestants*

8 Alexander Kolodin (030826)
9 Veronica Lucero (030292)
10 Arno Naeckel (026158)
11 James C. Sabalos (*pro hac to be submitted*)

12 **Davillier Law Group, LLC**
13 4105 North 20th Street, Suite 110
14 Phoenix, AZ 85016
15 T: (602) 730-2985
16 F: (602) 801-2539
17 akolodin@davillierlawgroup.com
18 vlucero@davillierlawgroup.com
19 anaeckel@davillierlawgroup.com
20 jsabalos@davillierlawgroup.com
21 phxadmin@davillierlawgroup.com

22 *Attorneys for Plaintiffs/Contestant Abraham Hamadeh*

23 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
24 **IN AND FOR THE COUNTY OF MOHAVE**

25 JEANNE KENTCH, an individual; TED
26 BOYD, an individual; ABRAHAM
27 HAMADEH, an individual; and
28 REPUBLICAN NATIONAL COMMITTEE,
a federal political party committee

Plaintiffs/Contestants,

v.

KRIS MAYES,

Defendant/Contestee,

and

No. CV-2022-01468

MOTION FOR A NEW TRIAL

(assigned to the Honorable Lee F.
Jantzen)

(ORAL ARGUMENT REQUESTED)

1 KATIE HOBBS, in her official capacity as the
2 Secretary of State; LARRY NOBLE, in his
3 official capacity as the Apache County
4 Recorder; APACHE COUNTY BOARD OF
5 SUPERVISORS, in their official capacity;
6 DAVID W. STEVENS, in his official capacity
7 as Cochise County Recorder; COCHISE
8 COUNTY BOARD OF SUPERVISORS, in
9 their official capacity; PATTY HANSEN, in
10 her official capacity as the Coconino County
11 Recorder; COCONINO COUNTY BOARD
12 OF SUPERVISORS, in their official capacity;
13 SADIE JO BINGHAM, in her official
14 capacity as Gila County Recorder; GILA
15 COUNTY BOARD OF SUPERVISORS, in
16 their official capacity; WENDY JOHN, in her
17 official capacity as Graham County Recorder;
18 GRAHAM COUNTY BOARD OF
19 SUPERVISORS, in their official capacity;
20 SHARIE MILHEIRO, in her official capacity
21 as Greenlee County Recorder; GREENLEE
22 COUNTY BOARD OF SUPERVISORS, in
23 their official capacity; RICHARD GARCIA,
24 in his capacity as the La Paz County Recorder;
25 LA PAZ COUNTY BOARD OF
26 SUPERVISORS, in their official capacity;
27 STEPHEN RICHER, in his official capacity as
28 the Maricopa County Recorder; MARICOPA
COUNTY BOARD OF SUPERVISORS, in
their official capacity; KRISTI BLAIR, in her
official capacity as the Mohave County
Recorder; MOHAVE COUNTY BOARD OF
SUPERVISORS, in their official capacity;
MICHAEL SAMPLE, in his official capacity
as Navajo County Recorder; NAVAJO
COUNTY BOARD OF SUPERVISORS, in
their official capacity; GABRIELLA
CAZARES-KELLY, in her official capacity
as the Pima County Recorder; PIMA
COUNTY BOARD OF SUPERVISORS, in
their official capacity; DANA LEWIS, in her
official capacity as the Pinal County Recorder;
PINAL COUNTY BOARD OF
SUPERVISORS, in their official capacity;

1 SUZANNE SAINZ, in her official capacity as
2 the Santa Cruz County Recorder; SANTA
3 CRUZ COUNTY BOARD OF
4 SUPERVISORS, in their official capacity;
5 MICHELLE M. BURCHILL, in her official
6 capacity as the Yavapai County Recorder;
7 YAVAPAI COUNTY BOARD OF
8 SUPERVISORS, in their official capacity,

9 Defendants.

10
11 There is new and compelling information that not all legal votes were counted in the
12 Attorney General race. For this reason, as well as those set forth more fully below,
13 Contestants hereby move for a new trial on the following grounds permitted by Rule
14 59(a)(1):

15
16 (A) any irregularity in the proceedings or abuse of discretion depriving the
17 party of a fair trial;

18 ...

19 (D) newly discovered material evidence that could not have been
20 discovered and produced at the trial with reasonable diligence; [and]

21 ...

22 (F) error in the admission or rejection of evidence, error in giving or
23 refusing jury instructions, or other errors of law at the trial or during the
24 action.

25 (Emphasis added).

26 As this Court ruled from the bench and has not yet entered final judgement
27 containing Rule 54(c) language, this Motion should, if necessary, be treated as a motion
28 made pursuant to Rule 60(b). The grounds for relief under Rule 60(b) are substantially
similar to the grounds set forth in Rule 59(a)(1). If necessary, this motion should also be
treated as a motion pursuant to Rule 60(b) for relief from this Court's order limiting

1 discovery. Contestants further move that entry of final judgement be stayed, pursuant to
2 Rule 62(a) until a new trial can be held.

3 This Motion is supported by the following Memorandum of Points and Authorities.
4

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 I. Introduction

7 Arizonans are entitled to have their votes accurately and properly counted. *Chavez*
8 *v. Brewer*, 222 Ariz. 309, 320 (App. 2009). And the purpose of an election contest under
9 Arizona law is to ensure the will of Arizona voters is determined and the byproduct of a
10 contest is an accurate counting of votes that produces confidence in the result. *See* A.R.S.
11 §§ 16-672, *et seq.* Unfortunately, the recount identified more problems in an election
12 already riddled with process failures. This further demonstrated that the vote count totals
13 are likely inaccurate, with thousands of Arizonans' votes not counted, thus casting further
14 doubt about the actual result.¹

15 Even more unfortunately, this information that was not available to this Court at the
16 time of trial. The Maricopa County Superior Court read the results in open court, and the
17 Secretary of State's Office announced the results of the statewide recount on Thursday,
18 December 29, 2022. (Exhibit A). This reduced Mr. Hamadeh's previous 511 vote deficit
19 by over 45% and it now stands at only 280 votes. *Id.* In other words, Mr. Hamadeh's vote
20

21 ¹ Without rehashing past issues, the Pinal County Elections Director—not Contestants—
22 explained that “[o]ne factor underlying this disparity is that the canvass was filed prior to taking
23 an adequate opportunity to investigate any possible anomalies we could discern from polling
24 place returns.” (Exhibit C at 5). The Pinal County Elections Director also identified even more
25 election day process failures that cloud this entire process: “for several hours on election day
26 some poll pads were not scanning 60/drivers licenses,” and “[t]here were multiple paper jams that
27 were observed on election day” that “may not have been interpreted correctly.” (*Id.* at 5-6). To be
28 sure, Contestants understand that we cannot unwind the clock to November 8 and hold an
election without these issues. But when an election official identifies even more process failures
that operated to confuse and convolute the admittedly hasty vote count process, there must be an
available remedy to ensure the accuracy of the vote count across the State. If this election with a
280 vote margin is not worth the additional process to ensure accuracy, it is hard to see an
election that would be, or much of a reason to have an election contest statute in the first instance,
at least in a statewide race, as considerations of time would nearly always make a real contest
unworkable.

1 total is within **.01%** of Ms. Mayes'. Given this new margin the tiniest errors in counting are
2 enough to change the results, or at least cast them into doubt. And there are now new reasons
3 to believe that such errors occurred. The recount results identified significant, material
4 discrepancies that cast doubt upon the completeness and accuracy of the election results.
5 And at least some Defendants, including the Secretary of State, knew about these material
6 discrepancies no later than December 21—*eight days before she made the results available*
7 *to Contestants and the public.* (Exhibit B – Pinal County Recount Variance Report (“Pinal
8 Report”). Yet, they were not made known to the public until after this matter was tried. If
9 this is not grounds for a new trial, then nothing is.

10 The statewide automatic recount was primarily conducted by machine. However,
11 during the course of this recount at least one county, Pinal, was conducting a parallel audit
12 of its own elections processes which discovered discrepancies significant in the context of
13 this race. As the Pinal County elections director explained in her report, dated December
14 21st, but only unsealed after trial in this matter (along with the results of the recount): “One
15 factor underlying this disparity is that the canvass was filed prior to taking an adequate
16 opportunity to investigate any possible anomalies we could discern from polling place
17 returns.” (Exhibit B – Pinal Report). In other words, given more time, new evidence, and
18 the physical inspection of ballots - the results changed.

19 *Partial* investigation into these anomalies, which primarily impacted
20 disproportionately conservative election day voters, resulted in a net gain of 277 votes for
21 Mr. Hamadeh. As Pinal County explained:

22
23 Learning of the poll pad check-in problem, we began to research this concern
24 and started with Precinct 01 which showed a difference between poll pad
25 check-ins and number of votes counted. Unfortunately, before the analysis
26 was completed, the canvass was downloaded and filed. While analyzing this
27 concern, we ultimately decided to open up the locked Precinct 01 ballot box.
28 Upon examination, it appeared to contain more than 422 ballot cards which
was indicated as number of cards tabulated on election day. Therefore, we
physically hand counted the number of ballot cards in that box. Our hand
count revealed 600 ballot cards- not 422. We selected 3 additional precincts

1 with similar disparities (Precinct 26, 109, 15) and physically counted the
2 number of ballots they contained. **All 3 had more ballots than were**
3 **reported on election day.**

4 (Exhibit B at pg. 6.) The County further explained that this problem was largely caused by
5 difficulties that the County’s polling place tabulators had with reading ballots, combined
6 with human error:

7 [W]e believe that when a machine jammed or a jam led to an error message,
8 it may not have been interpreted correctly. Thus, we believe this led to ballots
9 the operator thought were counted were not actually counted and needed to
10 be returned from the output trays to the input tray to be rescanned.

11 (Exhibit B at pg. 6.) In trial in this case on December 23, 2022, Scott Jarrett testified that
12 Maricopa County did not adjudicate election day ballots which were tabulated as completely
13 blank ballots, instead relying on the machines and poll workers to inform voters that an
14 undervote had been read on their ballot. The evidence presented by Maricopa County is
15 especially significant because another cause of the discrepancy in Pinal County was that
16 “Ballots with unclear marks were not sorted out for adjudication on Election Day.” (Exhibit
17 B-Pinal Report.) As Pinal County recognized, in circumstances such as these, taking the
18 time to perform a physical inspection of ballots plays a key role in identifying miscounts
19 and ensuring that all votes are properly tabulated.

20 Contestants applaud the process Pinal County completed to identify and correct the
21 vote tally discrepancies. Contestants further assert that, had this information been available
22 to Contestants when it was available to the Secretary of State, Contestants would have had
23 the opportunity to present an even more compelling case to this Court for wider ballot
24 inspection and thus would have had access to additional evidence to prove its case at trial.
25 With this information imbalance, Contestants were further hamstrung in their effort to
26 ensure election officials counted every vote *accurately* to determine the rightful winner of
27 this contest.
28

1 Mr. Hamadeh does not ask this Court to alter the vote totals or election results on a
2 whim. Rather, Pinal County’s more thorough process unearthed new evidence—new to
3 Contestants, but not the Secretary of State—that indicates further ballot inspection is
4 necessary to ensure the accuracy of the Attorney General election results. To be clear,
5 Contestants seek an accurate vote total—nothing more, nothing less—when we now *know*
6 *for a fact* that the actual variance Pinal County discovered means that a similar issue
7 elsewhere would tip the balance in this race. In fact, the hand counts in both Yavapai, Gila,
8 Pima and Santa Cruze Counties also suggest tabulators failed to count all votes in the
9 Attorney General’s race (instead recording the race as an undervote) and/or misidentified
10 marks by voters as overvotes. (Exhibit D – Yavapai Recount Hand Count Report & Pima
11 Early Ballot Audit – Hand County Report – Recount.) The hand audit results in all of these
12 counties except Santa Cruz County favored Abe Hamadeh, meaning the machines failed to
13 properly tabulate votes to his detriment. As set forth below, there is reason to believe that
14 Maricopa County’s recount process apparently would not have detected any variance
15 stemming from the same or similar causes.

16 With an election that is this close, even small errors in the vote count can make the
17 difference. There are still close to 50,000 undervotes in Maricopa County that Contestants
18 asked to examine. The relatively small amount that was examined showed a number of clear
19 votes that were improperly not counted, and, based on the exhibits and the testimony
20 offered, a small net gain for Mr. Hamadeh.² Furthermore, Contestants are statutorily
21 entitled to inspect *all* ballots, not just a sample – and such opportunity was not afforded to
22 Contestants in preparation for trial. *See* A.R.S. § 16-667.

24 ² Contestants understand that there were a total of fourteen ballots submitted by the parties, and
25 also acknowledge that there were votes that were improperly counted as an undervote that should
26 have counted as a vote for the Contestee. That fact makes the need to meticulously inspect each
27 contested ballot all the more important. The Contestee deserves to have all votes in her favor
28 counted just as much as the Contestant does. Most importantly, Arizonans deserve to have all
votes counted accurately in an election when one “human error” that would be immaterial in one
context makes all the difference to the outcome in this election with a 280-vote margin. And such
a request is not unprecedented. In *Hunt v. Campbell*, a meticulous review of the votes cast in the
governor’s race was, in fact, outcome determinative. 9 Ariz. 254 (1917).

1 Importantly, a gain for Mr. Hamadeh makes logical sense based on the December 23
2 trial testimony from Maricopa County Elections Director Scott Jarrett. Mr. Jarrett testified
3 that he would count, and Maricopa County does count, undervotes differently based on
4 whether it is an Election Day vote or an early ballot. Specifically, Mr. Jarrett explained that,
5 with a completely undervoted election day ballot (i.e. if the tabulator machine indicates the
6 ballot is completely blank - perhaps because the voter checked the ovals instead of filling
7 them in), officials do not adjudicate the ballot because the voter was theoretically informed
8 of the issue at the voting center and did not cast a new ballot. But officials adjudicate early
9 ballots with this same issue. Further, in Maricopa County, a voter is never informed that a
10 machine read a ballot as undervoted as long as there were *some* votes on the ballot the
11 machine could read. Because Election Day votes went for Mr. Hamadeh by a wide margin,
12 it stands to reasons that the failure to adjudicate and count supposed undervotes on Election
13 Day would affect the vote total for Mr. Hamadeh most severely.

14 In contrast, an early ballot would be adjudicated because the voter mails in the ballot
15 without an opportunity for officials to tell the voter that his or her ballot is blank. In short,
16 according to Mr. Jarrett's testimony, Election Day ballots that are characterized initially
17 and improperly as an undervote are far less likely to be counted than early ballots. Whereas
18 Mr. Hamadeh lost early ballots by about 15%, he won Election Day voting by 40%, so such
19 disparate treatment would have a significant impact. This disparate treatment of voters'
20 ballots based solely on whether they were cast on Election Day or beforehand is
21 unjustifiable by the Constitution and a violation of those voters' rights. "[T]he State may
22 not . . . by later arbitrary and disparate treatment, value one person's vote over that of
23 another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (internal citations omitted).

24 With the current margin, even a slight difference between the candidates is enough
25 to change the outcome. Regardless, ballots improperly tabulated as an undervote *must* be
26 counted where the race is this close. In most races, a few hundred votes to one candidate or
27 the other would not matter. Materiality is relative to the margin in the race. Here it would.

1 Additionally, a new trial would allow Contestants to present evidence on provisional
2 ballots and early ballots that Contestants believe remain (improperly) uncoun-
3 ted. Maricopa County finally delivered the list of provisional ballot voters last week pursuant to a public
4 records request made well in advance of trial, as well as information related to uncoun-
5 ted early ballots dropped off on Election Day.³ So that information—previously available to
6 Maricopa County but new to Contestants—will help target the review and evidence
7 concerning ballots that improperly went uncoun-
8 ted. Again, in an election this close, such a
9 discrepancy could undoubtedly tip the balance of votes.

10 **II. The Court Now Has Time to Conduct a Complete Contest**

11 Kris Mayes has now taken the oath of office for Attorney General. Even so, that does
12 not change the fact that thousands of Arizonans did not have their votes counted—no matter
13 who they voted for. Those disenfranchised voters are entitled to have their votes counted
14 under Arizona law, especially when such a small number of votes controls the outcome of
15 an election. *Chavez v. Brewer*, 222 Ariz. 309, 320 (App. 2009). The proceedings
16 Contestants requested—apparently, like the initial count according to the Pinal County
17 Elections Director—were rushed according to an artificial timetable over concerns of
18 interfering with the transfer of power of the office of Attorney General. Given that Ms.
19 Mayes has now taken office, any concerns about completing the contest up front are no
20 longer an issue. Yet, under *Hunt v. Campbell*, a contestee’s act of taking office does not
21 moot an election contest. 9 Ariz. 254 (1917); *see also Reyes v. Cuming*, 191 Ariz. 91 (Ariz.
22 App. 1997) (setting aside the results of a contested election thirteen months after the
23 election, and eleven months after the previously declared winner had taken office).

24 In *Hunt*, the contestant, George Hunt, finally prevailed nearly a year into the
25 contestee’s term, and Hunt took office at the end of the contest. Thus, there are no artificial
26 time restraints on completing the contest process. Ms. Mayes has taken office, but the

27 ³ Importantly, Contestants are statutorily entitled to present *all* evidence before a decision is
28 rendered. *See* A.R.S. § 16-676 (“The court *shall* continue in session to hear and determine *all*
issues arising in contested elections.”)(emphasis added).

1 contest may proceed. There is thus adequate time to conduct the proceedings that
2 Contestants requested, based on the newly discovered evidence from the recount so that the
3 vote totals can be properly verified to confirm whether any additional discrepancies exist
4 as Pinal County discovered. Moreover, the requested proceedings will ensure that
5 disenfranchised voters may have their votes counted (if proper) and the voters of Arizona
6 can have confidence in the accuracy of their elections that is otherwise lacking.

7 Nor are such election contests confined to past eras or relatively small jurisdictions.
8 Al Franken finally took office in July of 2009, six months into his term, following a June
9 30, 2009 decision by the Minnesota Supreme Court that ended any chance the challenger
10 had to succeed. *In re Contest of General Election Held on November 4, 2008, for Purpose*
11 *of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453 (Minn. 2009).
12 Considerations of time are always important, but here they would be less so than in the
13 Minnesota Senate race as the Contestee has taken office.

14 **III. Newly Discovered Material Evidence, Irregularity of the Proceedings,**
15 **and Errors of Law**

16 The Secretary of State requested and received an order from the Maricopa County
17 Superior Court judge that presided over the recount that the counties not disclose their own
18 results individually, even after those counties had completed their tallies: “Apache, Cochise,
19 Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Navajo, Pima, Pinal, Santa
20 Cruz, Yavapai, and Yuma Counties shall not release to the public the results of the recount,
21 including daily vote totals, until the Court has certified the results.” (Exhibit E).

22 But we now know that the Secretary of State, who was a party in this case, was privy
23 to these results before the results were publicly announced. In fact, the Secretary of State
24 received a detailed account of the Pinal County vote total, discrepancies, and processes that
25 identified and corrected the discrepancies on *December 21*. The other parties and this Court
26 did not know the actual vote totals, but we know them now and we know what affected the
27 variance between initial and final totals in Pinal County thanks to the Elections Director’s
28 thorough report. (Exhibit B).

1 A discrepancy revealed by limited ballot inspection and sampling might not have
2 been material to the outcome before, may be material now. This Court should order the full
3 ballot inspections requested by the Contestants to ensure the accuracy of the election
4 outcome. As discussed above, Contestants discovered that the Contestee also would have
5 gained votes had undervotes been counted properly. But the limited inspection coupled with
6 the narrowing margin following Pinal County's revelations necessitates taking a closer look
7 at ballots when only a slight variance—even a smaller one than what Contestants observed
8 in their previous, limited inspection—can now be outcome determinative.

9 In terms of the recount results and lingering questions, Pinal County accounted for
10 the lion's share of the vote difference, and particularly the vote difference favoring Mr.
11 Hamadeh. As Pinal County's report detailed:

12
13 The recount identified 63 ballots that had been processed on Election
14 Day with unclear marks. These ballots were not subject to adjudication
15 on Election Day. On recount and to be consistent with Early Ballot
16 tabulation procedures, these ballots were sent to the top bin of the
17 machines for possible adjudication. These ballots were marked with
18 either a check mark, an "x" or a slash through the chosen candidates.
19 The duplication board discerned that voter intent could be determined,
20 and duplicated these ballots which were then tabulated.

21 (Exhibit B, p. 8).

22 This type of voter activity, of slashing or checking an oval, is seen in some of the
23 ballots that were introduced into evidence in this case. And of course, there is the testimony
24 that Mr. Jarrett himself gave in this matter as to this point. Although Pinal County treats the
25 ballots consistently whether they are Election Day or early ballots, Maricopa County does
26 not. And this disparate treatment favors the Democratic candidate when more Republican
27 voters prefer to vote on Election Day, as occurred here. It can and must be corrected through
28 full inspection without the rush conditions without "an adequate opportunity to investigate
any possible anomalies." (Exhibit B, p. 5).

1 Indeed, Pinal County set the best practice for identifying and fully analyzing
2 potential discrepancies. When confronted with questions about the total number of votes
3 and a possible variance, Pinal County “decided to open up the locked Precinct 01 ballot
4 box.” (Exhibit B, p. 6). “Upon examination, it appeared to contain more” ballot cards than
5 tabulated on Election Day and a “*hand count* revealed 600 ballot cards- not 422.” (*Id.*).
6 Upon completing this process whereby officials “physically counted the number of ballots”
7 contained in precinct boxes, Pinal County appears to have caught and resolved a major
8 discrepancy. (*Id.*). Some counties—Gila, Pima, Santa Cruz, and Yavapai—conducted hand
9 counts that also revealed slight discrepancies. But others did not.⁴ In fact, Santa Cruz’s hand
10 count even yielded an extra vote for Ms. Mayes. The other enumerated counties yielded
11 additional votes for Mr. Hamadeh that, if the trend continued, could be sufficient to tip the
12 balance of this election. Pinal County did it right. The County cracked open the box,
13 physically counted ballots to confirm an error occurred and then corrected the discrepancy
14 with admirable candor. Now that everyone knows what the Secretary of State knew before
15 trial, Contestants simply ask that we be given the opportunity to apply the Pinal County
16 process across the board to conduct a physical inspection and hand count of ballots that—
17 if the Pinal County issue repeats itself anywhere else in the State—could be outcome
18 determinative in this election.

19 Further, Contestants are now in a possession a list of the names of persons who voted
20 provisionally but whose vote was not counted. This list, first requested via public records
21

22 ⁴ Quizzically, Apache, Graham, and La Paz failed to conduct the statutorily required hand count
23 for the recount. *See* A.R.S. § 16-663 (“On completion of the recount... the county chairmen...
24 *shall* select at random... five per cent of the precincts for the recounted race for a hand
25 count.”)(emphasis added)). Although the Secretary of State’s 2022 General Elections Recount
26 Information website suggests that both political parties must agree to participate in the hand
27 count, such a statement is not supported by the statutory requirements.
28 <https://azsos.gov/elections/voters/voting-elections/ballot-processing/2022-general-elections-recount-information> (last accessed 1/2/2023). To the extent the 2019 Elections Procedures Manual might suggest hand counts for recounts and/or elections are optional based on participation of the political party, such instructions are contrary to the plain language of the statutory requirements of both 16-602 and -663, and are therefore invalid. *See Leach v. Hobbs*, 250 Ariz. 572, ¶21 (2021) (“[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does not have the force of law.”).

1 request approximately eleven-days prior to the trial, was only received within the past few
2 days. This new information also proves critical to evaluating any *additional* potential
3 discrepancies and ensuring Arizonans receive an accurate vote total. The Court denied
4 discovery on this without the full information the Secretary of State has since made
5 available, but Contestants pursued it through a public records request, and in combination
6 with the new mix of available evidence, it will be relevant to ensuring the accuracy of
7 election results.

8 Finally, evidence revealed during the *Lake v. Hobbs* trial that concluded on
9 December 22nd (the day before the trial in this instant matter was conducted) revealed that
10 some ballots in Maricopa County were printed in such a way that their timing marks could
11 not be correctly read, which prevented Maricopa County's tabulators from properly reading
12 and tabulating a large number of ballots. See Exhibit F Tr. [*Lake v Hobbs* Day 2] 208:23-
13 25. Indeed, the Cast Vote Record ("CVR") identified a total of **196,113** election day ballot
14 rejections⁵ in Maricopa County alone. See Exhibit F Tr. [*Lake v Hobbs* Day 2] 208:23-25.
15 [Compiled data from CVR].⁶ Some ballots were rejected multiple times before finally being
16 accepted by the machine.

17 On December 21st, in testimony in *Lake v Hobbs*, Maricopa County Election Day
18 Director Scott Jarrett admitted that he has no idea what the ramifications of running an
19 improperly printed ballot through a tabulator would be. Exhibit C Tr. [*Lake v Hobbs* Day
20 1] 53:25-54:8 (but further stating, "I know based on my historical knowledge, the timing
21 marks on the ballot matter[.]"). However, as has recently been revealed, machine-read
22 issues, combined with human error, were a significant cause of the Pinal County
23 discrepancy. This problem was likely compounded with respect to election day ballots cast
24 in Maricopa County. As was stated in trial, voters in Maricopa County are never warned,
25 either by the machine or by an elections worker, that their ballot is being read as containing

26 _____
27 ⁵ Multiple rejections of the same ballot may have been double counted.

28 ⁶ The source data from which this spreadsheet has been prepared is too extensive to attach as an exhibit. Defendants make an offer of proof to produce the source data at trial along with expert testimony to support this calculation.

1 one or more undervotes, unless the ballot is completely blank. Further, once a machine
2 accepts a ballot, a human being will not independently review the ballot to ensure the result
3 has been accurately tabulated. This means that any votes for Mr. Hamadeh which were
4 erroneously read as undervotes would likely not have been properly recorded, as they
5 eventually were in Pinal County. And ballots recorded as containing an undervote for this
6 race would not have been examined by hand during the recount. It supports Contestant's
7 request to inspect all ballots read as undervotes to ensure that all votes for Attorney General
8 are properly counted. Again, any error with respect to the tabulation with such ballots would
9 almost certainly favor Mr. Hamadeh as election-day voters skew much more conservative
10 than the electorate in general.

11 **IV. Conclusion**

12 This matter is clearly in a far different posture than it was before the Court released
13 the election recount results, including the Pinal County report. This new evidence and the
14 arguments set forth herein demonstrate that a new trial, as well as additional discovery, are
15 justified under Rule 59(a) and 60(b), Ariz. R. Civ. P. Contestants respectfully request that
16 one be granted. Contestants further ask that entry of any judgement be stayed pursuant to
17 Rule 62(a) until a new trial is held and the case decided.

18
19 RESPECTFULLY SUBMITTED this 3rd day of January, 2023.

20 By: /s/ Timothy A. La Sota
21 Timothy A La Sota, SBN # 020539
22 **TIMOTHY A. LA SOTA, PLC**
23 2198 East Camelback Road, Suite 305
24 Phoenix, Arizona 85016

Attorney for Plaintiffs/Contestants

25 /s/ Alexander Kolodin
26 Alexander Kolodin (030826)
27 Veronica Lucero (030292)
28 Arno Naeckel (026158)
James C. Sabalos (pro hac to be submitted)
Davillier Law Group, LLC

1 4105 North 20th Street, Suite 110
2 Phoenix, AZ 85016

3 *Attorneys for Plaintiff/Contestant Abraham*
4 *Hamadeh*

5 ORIGINAL efiled and served via electronic means
6 this 3rd day of January, 2023, upon:

7 Honorable Lee F. Jantzen
8 Mohave County Superior Court c/o
9 Danielle Lecher
10 division4@mohavecourts.com

11 D. Andrew Gaona (028414)
12 Kristen Yost (034052)
13 COPPERSMITH BROCKELMAN PLC
14 2800 North Central Avenue, Suite 1900
15 Phoenix, Arizona 85004
16 T: (602) 381-5478
17 agaona@cblawyers.com

18 Sambo (Bo) Dul
19 bo@statesuniteddemocracy.org
20 *Attorneys for Secretary of State Katie Hobbs*

21 Daniel C. Barr
22 Alexis E. Danneman
23 Austin Yost
24 Samantha J. Burke
25 Perkins Coie LLP
26 2901 North Central Avenue
27 Suite 2000
28 Phoenix, AZ 85012
dbarr@perkinscoie.com
adanneman@perkinscoie.com
ayost@perkinscoie.com
sburke@perkinscoie.com
Attorneys for Kris Mayes

Joseph La Rue
Joe Branco
Karen Hartman-Tellez
Maricopa County Attorney's Office

1 225 West Madison St.
2 Phoenix, AZ 85003
3 laruej@mcao.maricopa.gov
4 brancoj@mcao.maricopa.gov
5 hartmank@mcao.maricopa.gov
6 c-civilmailbox@mcao.maricopa.gov
7 *Attorneys for Maricopa County*

8 Celeste Robertson
9 Joseph Young
10 Apache County Attorney's Office
11 245 West 1st South
12 St. Johns, AZ 85936
13 crobertson@apachelaw.net
14 jyoung@apachelaw.net
15 *Attorneys for Defendant, Larry Noble, Apache County Recorder, and*
16 *Apache County Board of Supervisors*

17 Christine J. Roberts
18 Paul Correa
19 Cochise County Attorney's Office
20 Bisbee, AZ 85603
21 croberts@cochise.az.gov
22 pcorrea@cochise.az.gov
23 *Attorneys for Defendant, David W. Stevens, Cochise County Recorder, and*
24 *Cochise County Board of Supervisors*

25 Bill Ring
26 Coconino County Attorney's Office 110
27 East Cherry Avenue
28 Flagstaff, AZ 86001
29 wring@coconino.az.gov
30 *Attorney for Defendant, Patty Hansen, Coconino County Recorder, and*
31 *Coconino County Board of Supervisors*

32 Jeff Dalton
33 Gila County Attorney's Office 1400
34 East Ash Street
35 Globe, AZ 85551
36 *Attorney for Defendant, Sadie Jo Bingham, Gila County Recorder, and*
37 *Gila County Board of Supervisors*

38 Jean Roof
39 Graham County Attorney's Office

1 800 West Main Street
2 Safford, AZ 85546
3 jroof@graham.az.gov
4 *Attorneys for Defendant, Wendy John, Graham County Recorder, and*
5 *Graham County Board of Supervisors*

6 Scott Adams
7 Greenlee County Attorney's Office
8 P.O. Box 1717
9 Clifton, AZ 85533
10 sadams@greenlee.az.gov
11 *Attorney for Defendant, Sharie Milheiro, Greenlee County Recorder, and*
12 *Greenlee County Board of Supervisors*

13 Ryan N. Dooley
14 La Paz County Attorney's Office
15 1320 Kofa Avenue
16 Parker, AZ 85344
17 rdooley@lapazcountyaz.org
18 *Attorney for Defendant, Richard Garcia, La Paz County Recorder, and*
19 *La Paz County Board of Supervisors*

20 Ryan Esplin
21 Mohave County Attorney's Office Civil Division
22 P.O. Box 7000
23 Kingman, AZ 86402-7000
24 EspliR@mohave.gov
25 *Attorney for Defendant, Kristi Blair, Mohave County Recorder, and*
26 *Mohave County Board of Supervisors*

27 Jason Moore
28 Navajo County Attorney's Office
P.O. Box 668
Holbrook, AZ 86025-0668
jason.moore@navajocountyaz.gov
Attorney for Defendant, Michael Sample, Navajo County Recorder, and
Navajo County Board of Supervisors

Daniel Jurkowitz
Ellen Brown
Javier Gherna
Pima County Attorney's Office
32 N. Stone #2100

1 Tucson, AZ 85701
2 Daniel.Jurkowitz@pcao.pima.gov
3 Ellen.Brown@pcao.pima.gov
4 Javier.Gherna@pcao.p
5 *Attorney for Gabriela Cázares-Kelley, Pima County Recorder, and Pima*
6 *County Board of Supervisors*

7 Craig Cameron
8 Scott Johnson
9 Allen Quist
10 Jim Mitchell
11 Pinal County Attorney's Office
12 30 North Florence Street
13 Florence, AZ 85132
14 craig.cameron@pinal.gov
15 scott.m.johnson@pinal.gov
16 allen.quist@pinal.gov
17 james.mitchell@pinal.gov
18 *Attorneys for Defendant, Dana Lewis, Pinal County Recorder, and*
19 *Pinal County Board of Supervisors*

20 Kimberly Hunley
21 Laura Roubicek
22 Santa Cruz County Attorney's Office
23 2150 North Congress Drive, Suite 201
24 Nogales, AZ 85621-1090
25 khunley@santacruzcountyaz.gov
26 lroubicek@santacruzcountyaz.gov
27 *Attorneys for Defendant, Suzanne Sainz, Santa Cruz County Recorder, and*
28 *Santa Cruz County Board of Supervisors*

29 Colleen Connor
30 Thomas Stoxen
31 Yavapai County Attorney's Office
32 255 East Gurley Street, 3rd Floor
33 Prescott, AZ 86301
34 Colleen.Connor@yavapaiaz.gov
35 Thomas.Stoxen@yavapaiaz.gov
36 *Attorney for Defendant, Michelle M. Burchill, Yavapai County Recorder, and*
37 *Yavapai County Board of Supervisors*

1 Bill Kerekes
2 Yuma County Attorney's Office
3 198 South Main Street
4 Yuma, AZ 85364
5 bill.kerekes@yumacountyaz.gov
6 *Richard Colwell, Yuma County Recorder, a County Board of
7 Supervisors*

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/ Timothy A. La Sota

RETRIEVED FROM DEMOCRACYDOCKET.COM

Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM



Governor Katie Hobbs @GovernorHobbs · Dec 29, 2022

Today, a court certified results for the recounted races in the 2022 General Election. Here are the vote totals: 1/

Attorney General	
Abraham "Abe" Hamadeh (REP)	1,254,529
Kris Mayes (DEM)	1,254,809
Superintendent of Public Instruction	
Tom Horne (REP)	1,256,406
Kathy Hoffman (DEM)	1,247,218
State Representative – Legislative District 13	
Jennifer Pawlik (DEM)	47,164
Liz Harris (REP)	43,830
Julie Willoughby (REP)	43,555

135.6K

355

412

2,298



Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

Election Summary Results Report
2022 General Election
November 8, 2022

RECOUNT RESULTS

Pinal County

Statistics	TOTAL	Election Day	Early Voting	Provisional
Election Day Precincts Reporting	109 of 109	109	0	109
Precincts Complete	109 of 109	109	0	109
Precincts Partially Reported	0 of 109	0	0	0
Absentee/ Early Precincts Reporting	109 of 109	0	109	0
Registered Voters - Total	282,572			
Ballots Cast - Total	145,987	36,069	109,324	594
Ballots Cast - Blank	2,122	384	1,723	15
Voter Turnout - Total	51.66%			

RETRIEVED FROM DEMOCRACYDOCKET.COM

Election Summary Results Report
2022 General Election
November 8, 2022

RECOUNT RESULTS

Pinal County

Attorney General

Vote For 1

	TOTAL	Election Day	Early Voting	Provisional
REP HAMADEH, ABRAHAM "ABE"	83,116	26,936	55,759	421
DEM MAYES, KRIS	59,068	8,430	50,487	151
Write-In Totals	188	43	145	0

Superintendent of Public Instruction

Vote For 1

	TOTAL	Election Day	Early Voting	Provisional
REP HORNE, TOM	83,533	27,008	56,101	424
DEM HOFFMAN, KATHY	58,919	8,367	50,402	150
Write-In Totals	169	43	126	0

RETRIEVED FROM DEMOCRACYDOCKET.COM



RECOUNT VARIANCE REPORT
RECOUNT / GENERAL ELECTION / NOVEMBER 8, 2022

Pursuant to A.R.S. §§ 16-661 through 16-664, Pinal County has completed the reconciliation for the automatic recount of the November 8, 2022 General Election. Below is a summary of the variances found between Pinal County's canvassed returns and recount returns.

Ballot Variance

- Election Day Ballots: There was a net variance of 442 ballots that were tabulated in the recount that were not tabulated on election night.
- Early Voting Ballots: There was a net variance of 29 ballots between early ballots tabulated for the General and those tabulated in the recount.
- Provisional Ballots: There was a variance of **-24 ballots** that were counted in the General as provisional ballots that were inadvertently counted as early ballots in the recount.
- The recount identified 63 ballots with unclear marks that were not subject to adjudication on election night but were duplicated in the recount.

The net of these ballot variances are shown below for the two races subject to the recount.

Arizona Attorney General	<u>General</u>	<u>Recount</u>	<u>Variance</u>
Hamadeh, Abraham "Abe"	82,724	83,116	392
Mayes, Kris	58,953	59,068	115
Total Net Variance = 507			

Superintendent of Public Instruction

Horne, Tom	83,148	83,533	385
Hoffman, Kathy	58,802	58,919	117
Total Net Variance = 502			

Geraldine Roll
Pinal County Elections Director

MEMORANDUM

TO: Kori Lorick
Elections Director
Arizona Secretary of State

FROM: Geraldine Roll
Pinal County Elections Director

DATE: December 21, 2022

SUBJECT: RECOUNT DISCREPANCY REPORT

In response to the mandated recount of the Attorney General and the Superintendent of Public Instruction races, Pinal County has completed its recount and supplements the results submitted to the Secretary of State (SOS) with this discrepancy report. The purpose of this report is to assist in explaining differences in the results for the two races submitted to the SOS in the County's November 21, 2022, canvass and the results of this recount. For ease of explanation, this report breaks out the differences in (1) ballots tallied on election day, and (2) early ballots run prior to and after election (early ballots).

The canvass reported 35,627 election day ballots. Recounted election day ballots total 36,069. The difference is 442 additional ballots tallied on recount. The canvass reported early ballots to be 109,341. Recounted early ballots total 109,324. The difference in early votes tallied in the recount is -17. This is a .3% variance from the canvassed results and reflects 99.7% consistency rate.

Additionally, there was a difference of 38 ballots tallied between the canvassed amount of 632 provisional votes and the recounted 594 provisional ballots. This difference is explained as follows: There were 15 Fed only ballots that were originally part of the initial canvass but not counted in the recount because the AG or Superintendent's race were not included on the Fed only ballots. There were 21 write-ins which were tabulated with the early voting write-ins. These write-ins were inadvertently put into one of the boxes labeled as write-ins in the vault. This was not discovered until we had recounted the provisional ballots and were commencing our reconciliation. We view this as a human error because all involved were under pressure to rapidly process the provisional ballots and failed to take additional steps to ensure they were properly segregated from other

ballots. There is a 2 vote difference which we have not been able to reconcile as of yet.

Turning to the count of early ballots submitted, the difference between the canvassed amount of 109,341 early votes tallied and the recounted early votes tallied of 109,324 is -17. Our reconciliation of this discrepancy revealed there were 38 early Fed only ballots that were not counted in the recount. The difference is the 21 provisional write-ins that were erroneously tabulated in the early voting recount tabulation process.

Next, in analyzing the election day ballots that were recounted, and referring to the third tab in the attached Excel workbook entitled "Recount Results," you will find that upon conducting the recount there are 10 precincts that contained a difference of over 5 votes and several precincts that returned with differences over 50. The vote difference in these 10 precincts is 424. One factor underlying this disparity is that the canvass was filed prior to taking an adequate opportunity to investigate any possible anomalies we could discern from polling place returns.

For example, for several hours on election day some poll pads were not scanning 60/drivers licenses. A software configuration work around was created and synched to the pads to correct the issue. Although poll workers were trained to use the paper poll rosters, poll workers came up with varying ways to handle the issue. Shortly after the election, we were contacted by a voter who explained how his license wouldn't scan on the poll pad and he was given a little piece of paper which he took to the judge's table and was given a ballot. It took a few days to gather information and speak with the polling place inspector to discover that approximately 20 voters in this precinct had not been documented in any fashion such as checking them in or signing the paper roster. If their license would not scan, the marshal would call voter registration who confirmed that they were eligible voters in AVID and had not voted. They were then given a ballot. These voters were never checked in on the poll pads and their voting history was not updated in AVID. Reviewing the materials returned from the polls, it seems likely that this was the experience for possibly a hundred or more voters (an estimate).

After several weeks of investigation, KnowInk and Russ Smith informed us that when we downloaded AVID information to the poll pads we neglected to check the box to include drivers license information. Our solution going forward is to ensure that the poll pads do not leave Elections unless and until they are all checked to ensure they are scanning. We are going to ask that voter registration use a poll pad instead of AVID when checking a voter to foster coordination in getting a voter

checked in. We are going to better train and refine a uniform method for all poll workers to follow for these situations. (This was clearly a human error and processes are being updated to handle this in the future.)

Learning of the poll pad check-in problem, we began to research this concern and started with Precinct 01 which showed a difference between poll pad check-ins and number of votes counted. Unfortunately, before the analysis was completed, the canvass was downloaded and filed. While analyzing this concern, we ultimately decided to open up the locked Precinct 01 ballot box. Upon examination, it appeared to contain more than 422 ballot cards which was indicated as number of cards tabulated on election day. Therefore, we physically hand counted the number of ballot cards in that box. Our hand count revealed 600 ballot cards- not 422. We selected 3 additional precincts with similar disparities (Precinct 26, 109, 15) and physically counted the number of ballots they contained. All 3 had more ballots than were reported on election day.

We have ruled out that additional ballots were somehow added to the locked ballot boxes after they were tabulated on election day and locked in the vault by reviewing video. Since all 4 precincts had been counted on Machine B, there was a concern of a possible machine inconsistency when tabulating on election day. We notified our County Attorney and the vendor, ES&S. ES&S came out, checked the machine and ran ballots through the machine. They were unable to get Machine B to repeat the inconsistencies we experienced on election night. Instead, when batches of ballots were run again by EE&S representatives no errors were evident. (It should also be noted that all three of Pinal County's tabulation machines passed all L&A testing pre-election and post election and for the recount)

After this analysis, we conclude that human error was the cause of our election day miscounts. Machine B was manned by a bipartisan team composed of an individual who had used the machine in previous Pinal elections and was the most experienced of the tabulating team. We reviewed video of this team tabulating the questionable precincts, but could not see where they did not put ballots on the machine to be counted.

There were multiple paper jams that were observed on election day. None of the tabulating teams alerted any election employee about any issues or questions. However, we believe that when a machine jammed or a jam led to an error message, it may not have been interpreted correctly. Thus, we believe this led to ballots the operator thought were counted were not actually counted and needed to

be returned from the output trays to the input tray to be rescanned. Again, human error.

Election night ballots were being tabulated with precinct selection mode on. For that reason, we have ruled out that ballots were mistakenly placed in the wrong pile and tabulated with another precinct. Had that occurred, they would have been out stacked and someone would have noticed. However, no such incident was ever brought to our attention. Likewise we have determined during the recount, which we conducted using precinct selection mode on, as was done during election day tabulation, no ballots were co-mingled with ballots from other precincts.

Finally, 4 of the 10 precincts returning with discrepancy of 5 or more votes were co-located precincts. With precinct selection mode turned on, the machine operator had to select one of the precincts and all ballots were scanned with the precinct not selected being out stacked. These out stacked ballots had to be rescanned or manually sorted through to discern why the machine did not process the ballot. We believe the tabulating team did not properly perform this function resulting in ballots not being scanned. For example, in co-located precinct 68/95, the election day canvass in Precinct 68 was 557 votes. The recount was 640 votes. The election day canvass in Precinct 95 was 417 votes. The recount was 417 votes. It seems clear that a stack of ballots from Precinct 68 was not scanned. Again, human error.

After performing reconciliation of ballots cast, accounting for Fed only and provisional ballots, reviewing multiple hours of video footage, speaking with a number of inspectors and marshals, physically hand counting the number of ballots in a ballot box and reconciling them with the machine results, and consulting with ES&S, we believe our recount to be accurate and the discrepancies between the recount and the canvass were the results of human error. We experienced an error rate of .3% with a consistency rate of 99.7%.

SUPPLEMENT- (DECEMBER 29, 2022)

Re: DECEMBER 21, 2022 RECOUNT VARIANCE REPORT MEMO

The Memorandum sent to the Secretary of State on December 21, 2022, had to be submitted under a deadline. This supplement explains what continued research and investigation produced after that date.

The recount identified 63 ballots that had been processed on Election Day with unclear marks. These ballots were not subject to adjudication on Election Day. On recount and to be consistent with Early Ballot tabulation procedures, these ballots were sent to the top bin of the machines for possible adjudication. These ballots were marked with either a check mark, an "x" or a slash through the chosen candidates. The duplication board discerned that voter intent could be determined, and duplicated these ballots which were then tabulated. The result was that even in precincts where there were no differences in Election Day ballots cast and recount ballots cast, candidates did pick up votes.

We have concluded that when the machines were loaded for Election Day, the sort setting automatically reset to default. The default sort setting does not sort unclear marks. Election staff did not check the sort setting. Ballots with unclear marks were not sorted out for adjudication on Election Day. When the recount election was loaded onto the machines, the sort settings were checked and set to sort unclear marks. Thus, these 63 ballots were sorted out for adjudication during the recount. The failure to properly set the machines on Election Day was due to human error.