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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KARI LAKE *Plaintiff,* v. KATIE HOBBS, *et al.*, *Defendants.*	No. CV2022-095403 **BRIEF OF AMICUS CURIAE DAVID MAST IN SUPPORT OF PLAINTIFF KARI LAKE'S ELECTION CONTEST**

IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

David Mast ("Mast" and/or "Mr. Mast") is an Arizona voter residing in Maricopa County ("Maricopa"). As a registered "Independent" voter, he has no partisan interest in the outcome of the election at issue here. As an Arizona voter and someone whose political beliefs are seldom represented in his elected leaders, Mast has a strong interest in ensuring that the outcomes of elections are free and fair.[2]

Dated May 9, 2023

Respectfully Submitted,

/s/ Ryan L. Heath

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[1] This *amicus curiae* brief is filed with the consent of Petitioner. Respondents did not consent.

[2] Mr. Mast previously filed *amicus curiae* briefs before the Arizona court of appeals and Arizona Supreme Court in this action without any objection from Respondents. He believes the facts and issues raised therein remain relevant to this Court's consideration. To that end, a true and correct copy of Mast's brief filed before the court of appeals is attached hereto and incorporated herein by this reference as Exhibit "1." A true and correct copy of Mast's brief before the Supreme Court is attached hereto and incorporated herein by this reference as Exhibit "2."

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INTRODUCTION

The eyes of the Nation are upon this Honorable Court. This case squarely presents the question of whether State laws that govern elections mean what they say—or whether they are meaningless guidelines to be tossed aside out of convenience. In this case, the Court must apply the law and strike all votes from Maricopa County for the November 2022 gubernatorial race. This is so, even though Ms. Hobbs has been sworn in as Arizona's "Governor" because of the wrongdoing by Maricopa County Defendants and because the relief requested by Plaintiff Kari Lake ("Lake" and/or "Ms. Lake"), is supported by over a century of clear precedent here in Arizona. *See Hunt v. Campbell*, 19 Ariz. 254 (1917); *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994); *Reyes v. Cuming*, 952 P.2d 329 (Ariz. Ct. App. 1997). If this Court fails to apply the law, it condones clear acts of mischief, errors, omissions, and gross negligence and thereby invites acts of similar misconduct in the future. For the sake of this Nation, *amicus* David Mast respectfully requests that this Court apply Arizona's election laws, follow binding precedent, and set aside the results from Maricopa County's November 2022 gubernatorial election.

The Arizona Supreme Court, in its Order dated March 22, 2023 (the "Order") ruled that Count III of Lake's complaint, challenging to Maricopa County's ("Maricopa") application of signature verification policies during the 2022 Arizona general election was not barred by laches "because Lake could not have brought this challenge before the election." Order at 3. The Supreme Court then remanded this issue to the trial court to determine whether "votes [were] affected in sufficient numbers to alter the outcome of the election based on a competent mathematical basis

to conclude that the outcome would plausibly have been different, not simply an untethered assertion of uncertainty." Order at 3-4 (internal quotations omitted). Ms. Lake's complaint alleges facts sufficient to state a claim on this issue and the Court should allow her to present evidence on this issue. Moreover, based upon the evidence already considered by this court, Ms. Lake has actually shown far more than necessary on the merits, and this Court should rule in Ms. Lake's favor on Count III as a matter of law.

LEGAL ARGUMENT

I. TO PROVIDE A "COMPETENT MATHEMATICAL BASIS" FOR THE COURT TO CONCLUDE THAT THE OUTCOME WOULD "PLAUSIBLY HAVE BEEN DIFFERENT," MS. LAKE NEED ONLY DEMONSTRATE THAT THE NUMBER IMPROPERLY VERIFIED BALLOTS EXCEEDS THE MARGIN OF VICTORY, WHICH SHE HAS DONE.

Here, based on testimony already before this Court from three witnesses with direct knowledge of the rejection and acceptance rates at both levels of Maricopa County's needlessly complex, multi-step signature verification process, [3] this Court can now conclude as a matter of

[3] Maricopa County's Election Plan § 6.3.8 explains, "[d]uring the first level review, trained staff [compare the affidavit envelope signature] to up to three signatures on file[(which is arguably illegal for the reasons set forth below, but further information on where, specifically, these three signatures come from is not necessary to resolve this dispute)]." These first-level staff "can only select one of two of the following options: 1) Approve the signature (if it matches one of the signatures used for this initial review)[, o]r move it to 'exception' status (if it does not). If an envelope is moved to an 'exception' status, the manager *can review every signature sample we have on file for that voter.* When a signature is initially, deemed an exception, the record is systematically triaged to the 'Manager's Mode' queue where higher level management staff are tasked with performing an additional review using *all historical signatures on file for the voter.*" Instead of "curing" rejected ballots, as required by law, in the "Manager's Mode" queue, staff

law (without any additional proceedings), that Maricopa County illegally tabulated a material number of signatures thus requiring the setting aside of the County's gubernatorial results for the 2022 general election. Consequently, the remainder of legal votes from across the State of Arizona should decide the outcome of this election—in favor of Ms. Lake. The math is straightforward—enough so—that even attorneys can understand.

Attached to Ms. Lake's Complaint are three affidavits from witnesses who were involved in Maricopa County's signature verification process. These witnesses have testified to their perceived rejection rates while verifying signatures, and they also testified as to their perceptions of their co-workers' rejection rates. These rejection rates, per these witnesses with first-hand knowledge of the first level of Maricopa's signature verification process, ranged from 15–40% (35-40%, Onigkeit Decl. ¶¶ 19-22; 15%-30%, Myers Decl. ¶¶ 18, 21; and 35%-40%, Nystrom

---

can either accept the signature (the manager deems the ballot affidavit signature as a "good signature") or reject the signature (designating that signature for the "curing" process). Notably, Maricopa County's Election Plan does not even attempt to explain how prior signatures were "verified" as "good." Although an obviously mismatching signature can be rejected at the initial level because of clear differences between the ballot affidavit signature and those available for review to level-one employees, Maricopa County makes it easy for its full-time managers to nevertheless override their rejection (in lieu of curing, as required by law) and verify the mismatched signature for tabulation by comparing the affidavit signature to unenumerated and illegal criteria. Per this Plan, [t]hese historical documents *may include voter registration forms, in-person roster signatures and early voting affidavits from previous elections." Id.* For the reasons set forth below, these documents are not a part of the elector's "registration record" as contemplated by A.R.S. § 16-550 (A). *See* https://elections.maricopa.gov/asset/jcr:5cd67713-a05b-4ac7-896a-649a6790934f/FINAL%20-%202022%20Elections%20Plan.pdf (accessed May 9, 2023).

Decl. ¶ 13).[4] By way of example, Jacqueline Onigkeit reviewed approximately 42,500 ballots at the first level of Mariopa County's signature verification process and rejected about 13,000 to 15,000 of those, with rejection rates in the 25% - 40% range. Her co-workers complained of similar rejection rates. Onigkeit Decl. ¶¶ 23, 25.

Considering that Maricopa County processed approximately 1.3 million mail-in-ballot packets in the 2022 general election, means that anywhere from 195,000 (15%) to 520,000 (40%) of those processed (in total) were marked as "exception status." Consequently, those ballots were sent to Maricopa County's "Manager's Mode" queue for a second-chance comparison to illegitimate criteria. According to the testimony of Andy Myers, who was employed by Maricopa County to cure ballots not approved by the "Manager Mode" queue for a mismatching signature,

> ***The math never added up***. Typically, we [referring to the part-time employees working at the first level of Maricopa's signature verification process, which he also spent a short time doing] were processing about 60,000 signatures a day. ***I would hear that people were rejecting 20-30% which means I would expect to see 12,000 to 15,000 ballots in my pile for curing the next day.*** However, I would consistently see every morning only about 1000 envelopes to be cured. ***We typically saw about one tenth of the rejected ballots we were told we would see.***
>
> Andrew, one of the signature reviewers, would tell me every day that I was going to get crushed the next day because he was excepting (rejecting) a "ton" of bad signatures. However, we never saw a correlation.
>
> The most likely explanation for this discrepancy is that the level 2 managers who re-reviewed the rejections of the level 1 workers ***were reversing and approving signatures that the level 1 workers excepted and rejected***. This seems to me to be the more likely explanation. ***If this is the case, then the level 2 managers were changing about 90% of the rejected signatures to accepted.***

[4] *See* Declarations are consolidated and attached hereto as Exhibit 5 and are incorporated herein by this reference. For the Court's convenience, additional records from this matter are available here: https://www.clerkofcourt.maricopa.gov/records/election-2022/cv2022-095403

Myers Decl. ¶¶ 21-23 (emphasis added).

Thus, this Court can easily find that Maricopa County illegally accepted between (approximately, which is all that is possible here) 170,000 (90% of 195,000) and 468,000 (90% of 520,000) ballots for tabulation in the November 2022 gubernatorial race. These numbers, *the low end of which is more than ten times higher than the margin of victory*, clearly demonstrate sufficient mathematical uncertainty for Ms. Lake to succeed on Count III.

The fact that Ms. Lake has no way of knowing the precise number of votes that were accepted that should not have been, or the fact that she does not know to which candidate those votes were attributed, should not be sufficient to defeat her claim. Dismissing Ms. Lake's claim because she has not proven these things would be an egregious error for this Court, as it would render electoral misconduct effectively beyond review without so much as allowing contestants to examine the evidence from persons with the best access to it – in this case, Maricopa.

The importance of considering the evidence carefully in this matter cannot be overstated. There are few things of more value in our system of government than the people's faith in the fair outcome of elections. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined").

The issues presented in this case are of critical importance to the State of Arizona and to the Nation as they concern the integrity of the electoral process and the public's confidence in the fundamental fairness and honesty of our system of government. Maricopa's failure to comply with

Arizona's laws in its conduct of the 2022 general election, especially its unlawful counting of mail-in ballots that were not verified in accordance with Arizona law, puts this guarantee at great risk. It is now incumbent upon this Court to ensure that the electoral process is conducted in accordance with the law and that the will of the voters is upheld. Therefore, it is critical that this Court apply the law correctly to indisputable facts. Mr. Mast, as a non-partisan voter of the State of Arizona, implores this Court to steadfastly maintain the rule of law.

Misconduct rising to a level "affect[ing] the result [of an election], or at least render[ing] it uncertain" is sufficient to invalidate the results of an election. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Applied, this standard is met when the "violation of a non-technical statute" occurs in "sufficient numbers to alter the outcome of the election." *Miller*, 179 Ariz. at 180. Put simply, Lake need only show that the number of affected votes exceeds the margin of victory. *See Reyes*, 191 Ariz. at 93 (holding that "even without a showing of actual fraud, the election had to be set aside because (1) absentee ballots were procured in violation of a non-technical statute and (2) those ballots were in sufficient numbers to alter the outcome of the election"); *Williams v. Fink*, 2019 Ariz. App. Unpub. LEXIS 827, at *8–9 (Ariz. Ct. App. July 22, 2019), (omissions and irregularities void the result of an election when they rise to such a level that they "*may have*" affected the result of the election) (emphasis added); *see also Moore v. City of Page*, 148 Ariz. 151, 159, (Ct. App. 1986) ("Moore is obliged to show that the alleged disenfranchisement *may have* affected the result of the election") (emphasis added).[5] Regardless of the credibility one

[5] Indeed, the only contrary example to this plain pattern was in the case of *Huggins v. Superior Court,* Ariz. 348, 352-53 (1990). However, the court of appeals ignored the fact that the only reason that the mere margin for victory was insufficient to invalidate the election results in that

attributes to Lake's expert witnesses or the other evidence upon which Lake's Complaint rests, the Complaint undeniably raises triable issues of material fact demonstrating that a sum of votes far greater than the margin of victory was affected by electoral misconduct in Maricopa. Because Lake has raised sufficient facts to show that the electoral results are uncertain as a matter of law, this issue should be ruled upon in Ms. Lake's favor or—at least—proceed to trial.

II. REQUIRING THAT LAKE SHOW THE NUMBER OF BALLOTS ERRONEOUSLY ACCEPTED AS A RESULT OF MARICOPA'S DEFECTIVE VERIFICATION PROCEDURES, RATHER THAN SIMPLY THE NUMBER OF BALLOTS AFFECTED, WOULD HAVE DIRE CONSEQUENCES FOR ELECTORAL INTEGRITY.

When a material number of voters are simply unable to cast their ballots, as occurred here, determining precisely how the election would have gone with the inclusion of such votes is impossible. With the secret ballot, the same difficulty arises even when the votes have been cast but are counted in error, as occurred during the signature verification process. *Montana Republican Party v. Jacobsen*, 230 F.3d 920, 926 (9th Cir. 2000) ("we do not, and cannot, ascertain how [the impacted voters] would have voted if provided with the opportunity").

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case was that, once a pro-rata deduction of illegal votes had been made, the new total *no longer exceeded the margin for victory. Id.* The direct implication of this is that, had the affected votes exceeded the margin of victory, then the challenge would have been sufficient to invalidate the results, as has been recognized, consistently, in every other Arizona case on this subject.

Requiring Lake to demonstrate that the affected votes would have been cast for a particular candidate imposes an insurmountable burden that, in effect, nullifies the "uncertainty" standard, rendering the vast majority of electoral conduct unreviewable, because it necessitates Lake to establish how every voter would have voted absent the misconduct or irregularity. The "uncertainty" standard has never been held to mandate such proof and imposing such a requirement constitutes a gross deviation from established legal precedent. *Reyes*, 191 Ariz. at 93.

Given the inherent significance of fair elections to our system of government, placing misconduct beyond review would be a grave mistake. This Court should uphold the law as it has been consistently recognized in Arizona and acknowledge that, because Lake has raised facts indicating that a huge number of votes—far exceeding the margin of victory—were tainted by the misconduct of Maricopa elections officials, the matter must at least proceed to trial.

III. MARICOPA COUNTY'S FAILURE TO COMPLY WITH THE "NON-TECHNICAL" SIGNATURE VERIFICATION PROCESSES SET FORTH IN A.R.S. § 16-550(A) NECESSITATES THAT THE NOVEMBER 2022 GUBERNATORIAL ELECTION RESULTS BE SET ASIDE AS A MATTER OF LAW.

The binding precedent in the *Reyes* case bears directly upon this case. There, the Arizona court of appeals unanimously set aside the results of an election in which Yuma County failed to comply with the signature verification requirements established by A.R.S. §16-550(A), finding explicitly that the statute was "non-technical" and that "impracticability" was no excuse for noncompliance, because such requirements "set[] forth procedural safeguards to prevent undue

influence, fraud, ballot tampering, and intimidation." *Reyes*, 191 Ariz. at 331 (quoting Ariz. Const. Art. VII §1). In other words, the requirements of A.R.S. §16-550(A) are precisely the sort that, if ignored (as here), justly undermine public faith in the integrity of the electoral process and run substantial risk of destabilizing civil society.

Maricopa's signature verification process for mail-in ballots unquestionably allowed for the inclusion of illegal votes in the 2022 general election for Arizona Governor. Contrary to A.R.S. §16-550(A), testimony before the superior court showed that Maricopa did not compare ballot signatures against each elector's "registration record" alone. Instead, Maricopa used an ambiguous standard that allowed for the comparison of ballot affidavit signatures with legally prohibited documents.[6] This resulted in the acceptance of mail-in ballot packets containing statutorily unverified signatures.

Therefore, as a matter of law, the court in *Reyes* ruled that the violation of A.R.S. §16-550(A) is, *per se*, "misconduct" within the meaning of the law and thus, when violations of that statute are found, such necessitates the invalidation of votes affected. 191 Ariz. at 331. "To rule otherwise," explained the court of appeals, would "'affect the result *or at least render it uncertain*.'" *Id.* (*quoting Miller*, 197 Ariz. at 180).

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[6] The Election Plan allowed "historical reference signature[s] that was previously verified and determined to be a good signature for the voter. These historical documents may include voter registration forms, in-person roster signatures and early voting affidavits from previous elections." See Election Plan §6.3.8. However, Arizona law only allows comparison of the signature on the affidavit accompanying a mail-in ballot to the signature on the elector's "registration record." A.R.S. §16-550(A). The use of historical reference signatures other than the voter's registration record is contrary to the plain language and intent of A.R.S. §16-550(A).

Here, if the number of tabulated votes affected exceeds the margin of victory (which it clearly does), setting aside those votes would necessarily require setting aside the results from Maricopa for the 2022 General Election for Governor. It is true that "strong public policy favor[s] stability and finality of election results," *Donaghey v. Att'y Gen*., 120 Ariz. 93, 95 (1978), and the remedy of setting aside an election is usually a radical one, however, the circumstances here make this remedy no more radical than in *Reyes*. Firstly, *Reyes* set aside the results of an election over a year after that election had taken place. *Reyes*, 191 Ariz. at 331. Comparatively, this election took place less than six months ago. Secondly, the margin for victory originally returned in *Reyes* was almost identical to the margin in this case – a mere fraction of a percent.[7] The primary difference in the two cases is that the race for Governor is a more powerful and significant position, which only further stresses the importance of an accurate count based on the application of policies consistent with Arizona law. Because the unusual remedy of setting aside an election's results was appropriate in *Reyes,* it is also appropriate here. In short, "because A.R.S. section 16-550(A) is a non-technical statute and because absentee ballots counted in violation of that statute have rendered the outcome of this election uncertain," the only appropriate remedy—*as a matter of law*—is for the results from the Maricopa election for Arizona Governor to be "set aside." *Reyes*, 191 Ariz. at 331 (*quoting Miller*, 179 Ariz. at 180).

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[7] In *Reyes*, the margin for victory was 0.62179% (23 votes); here, the margin for victory is 0.668982% (17,117).

IV. ARIZONA LAW HAS ALWAYS UNAMBIGUOUSLY REQUIRED COMPARISON AGAINST A SINGLE VOTER RECORD, IRRESPECTIVE OF THE TERMINOLOGY USED TO DESCRIBE THAT RECORD. THE LEGISLATURE HAS NEVER EXPANDED THE SCOPE OF SIGNATURE VERIFICATION TO COMPARISON AGAINST MULTIPLE SIGNATURES FROM DIFFERENT DOCUMENTS.

In 2019, the Arizona legislature revised the language of A.R.S. § 16-550. Prior to August 26, 2019, the statute read as follows:

> Upon receipt of the envelope containing the early ballot and the completed affidavit, the county recorder or other election officer in charge of elections shall compare the signatures thereon with the signature of the *elector on his registration* ***form***. ….

Laws 2019, Ch. 39, § 2 (emphasis added). The statute now reads as follows:

> [O]n receipt of the envelope containing the early ballot and the ballot affidavit, the county recorder or other officer in charge of elections shall compare the signatures thereon *with the signature of the elector on the elector's registration* ***record***. ….

This Court has long refused to interpret statutes in such a way "that would lead to a result at odds with the legislature's intent." *See State v. Estrada*, 201 Ariz. 247, 251 ¶ 19 (2001) (cleaned up and citations omitted). Despite the altered language, nothing in either version of the text suggests a comparison against more than one record (the word "record," like the word "form," is singular) and, more significantly, nothing from the legislative record even suggests that this change was anything more than a mere happenstance use of a synonym. https://apps.azleg.gov/BillStatus/BillOverview/71131.

As for intent, the sponsor of SB 1054, Senator Michelle Ugenti-Rita, called this the "cure period bill," which was merely intended to create uniformity in curing during the early voting period.[8] The changes contemplated by the Legislature had nothing to do with expanding the number of comparative criteria for signature verification. This concept was not mentioned once—by anyone—from either the House or the Senate while considering SB 1054.[9] If the Legislature intended to expand the pool of signatures for signature verification under A.R.S. § 16-550(A)—then they should have said so. This could have easily been accomplished by explaining that the signatures appearing on mail-in-ballot-packets may be compared to multiple signatures (*plural*, instead of its *current and unchanged singular* form "signature") from locations that is not, exclusively, "*on the registration record*" (as opposed to "in" or "from" the voter's "historical record"). Instead of expanding the criteria, the Legislature specified a singular comparison, that is from whatever "signatures" (plural) that are on the ballot envelope (allowing for multiple sample signatures on a ballot envelope for verification purposes) to the singular "signature of the elector on the elector's registration record."

Indeed, the Final Fact Sheet for S.B. 1054 even explains, "the county recorder or other officer in charge of elections shall compare the signatures on completed early ballot affidavits *with the signature on the elector's registration form*. If the signatures match, the ballot is tallied. If the signatures do not match, the county recorder or other officer in charge of elections shall

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[8] *See* Hr'g Before the House of Representatives Comm. on Elections Regarding SB 1054, Fifty-fourth Legislature, at 7:10 (statement of Senator Ugenti-Rita Concerning SB 1054) (Mar. 5, 2019) https://www.azleg.gov/videoplayer/?eventID=2019031365&startStreamAt=96

[9] *See* Bill Status Inquiry SB 1054: https://apps.azleg.gov/BillStatus/BillOverview/71131

make a reasonable attempt to contact the voter.[10] Therefore, any argument that the legislature intended to relax the signature verification requirements by changing the word "form" to "record" is entirely specious and without merit.

V. CONCLUSION: DISMISSING LAKE'S CLAIM RENDERS ELECTORAL MISCONDUCT ABOVE THE LAW AND UNDERMINES PUBLIC CONFIDENCE IN THE ELECTORAL PROCESS

The ideals of integrity and reliability relative to our electoral process depend at least as much on their perception, as tangible concepts to the public, as their existence in fact. Election integrity requires that the public view elections as reliable. For this and the foregoing reasons, this Court should deny the Motion to Dismiss and rule in Ms. Lake's favor as a matter of law or, at least, ensure that Ms. Lake's case is heard.

Dated May 9, 2023

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[10] *See* https://www.azleg.gov/legtext/54leg/1R/summary/S.1054JUD_ASPASSEDCOW.pdf (accessed January 6, 2023) (emphasis added).

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EXHIBIT 1

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ARIZONA COURT OF APPEALS
DIVISION 1

KARI LAKE, *Plaintiff/Appellant,* v. KATIE HOBBS, et al., *Defendants/Appellees.*	No. 1 CA-CV 22-0779 Maricopa Co. Case No. CV2022-095403

BRIEF OF AMICUS CURIAE DAVID MAST

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INTRODUCTION

Although the American political system remains partisan, in Arizona, the number of Independents exceeds the number of registered Democrats and ranks a close second to the number of registered Republicans.[1] In Maricopa County, however, Independents make up the largest bloc of voters.[2] Thus, the failures of election administration that occurred in Maricopa County during the 2022 General Election impacted not only Republicans but also a significant number of Independents. Indeed, the impact on Independents was *greater* than on partisan voters. "Only about 5% of independents statewide voted in either the Republican or Democratic primary in 2018, the last election for which the Secretary of State's Office separated such data."[3] This is because "primary elections are designed as

[1] Ariz. Sec'y of State, *Voter Registration Statistics – November 2022 (General Election)*, https://azsos.gov/elections/results-data/voter-registration-statistics (last accessed Dec. 30, 2022).
[2] Kevin Stone, *Independents make up largest bloc of Maricopa County voters registered for primary*, KTAR NEWS (Jul. 11, 2022, 2:00 PM), https://ktar.com/story/5150005/independents-make-up-largest-bloc-of-maricopa-county-voters-registered-for-primary/.
[3] Abe Kwok, *Independent voters have a lot of power in Arizona's primary election – if they show up*, ARIZ. REPUBLIC (June 5, 2022, 7:00 AM), https://www.azcentral.com/story/opinion/op-ed/abekwok/2022/06/05/independent-voters-could-change-primary-

partisan affairs—an intraparty process by which Democrats compete against fellow Democrats, and Republicans against Republicans, for the nod to be their party's nominee(s) on the general election ballot."[4]

For most Independents, the general election is the one and only time they express their preferences at the ballot box. And, though Maricopa County has repeatedly blamed the Republican Party's promotion of election-day voting for the County's failures of administration,[5] historically, election-day voting has been regarded as the most secure way of casting a vote by all

election-if-they-show-up/7488913001/ (further noting that the number was a slightly higher 12% in Maricopa County in 2020).

[4] *Id*.

[5] *See, e.g.*, AZFamily|3TV and CBS 5 News, *Part 1: First day of hearings in Kari Lake Election Lawsuit*, YOUTUBE (Dec. 21, 2022) at 1:30:11-1:30:44, https://www.youtube.com/watch?v=493fAoBJn4U:

> "Q: [Deputy County Attorney Joe LaRue]: Are you aware that one of the political parties urged their voters to forgo early voting and vote in person on election day?
> A: [Maricopa County Election Day Director Scott Jarrett]: Yes I'm aware of that.
> …
> Q: Were you aware of that when you prepared your analysis for the election day plan?
> A: No, I was not.
> Q: So I'm assuming…this urging by a political party was not factored into your election day plan, is that correct?
> A: That's correct."

voters regardless of partisan affiliation.[6] Indeed, almost twice as many Independents as Democrats chose to vote in person on election day in Maricopa County in the 2022 General Election.

Many others, however, confused by reports of the County's closure of certain polling places or deterred by long lines at others,[7] were unable to vote in this election. Whether this result stemmed from Defendants' *intentional* acts or simply from their *mistakes or carelessness* may be gravely concerning to partisans. But it is irrelevant under the law because a showing of intent is not required to prevail in a challenge under A.R.S. § 16-672(A)(1).

Rather, what matters is whether Plaintiff produced sufficient evidence below to demonstrate that it is "at least…uncertain" whether the results of such a close election would have been different had Maricopa County's failures of administration not occurred. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). If the answer to that question is yes, then the fair, just, and legally

[6] *See, e.g.*, Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").
[7] *See Tracking potential issues at voting centers, ballot drop-off locations*, ABC15 (Nov. 8, 2022), https://www.abc15.com/news/political/elections/tracking-potential-issues-at-voting-centers-ballot-drop-off-locations.

supported remedy is simply to hold a properly administered re-vote in Maricopa County. In this way, the Court can ensure that voters have chosen the next governor of Arizona under a properly administered election rather than establishing a precedent whereby the largest county in Arizona (and one of the largest counties in the nation) is permitted to thwart voters who choose to cast their ballots on election day so long as the County's failures are merely accidental or negligent and not *intentional*. Such a precedent would mean that election-day voters (and their political preferences) would be disadvantaged compared to those who vote by different means.

INTERESTS OF AMICUS CURIAE

David Mast is an individual who resides in Maricopa County. As a registered "Independent" voter, he has a strong interest in ensuring the perspective of non-partisan or "unaffiliated" voters is considered in this appeal, which presents a dispute between two major partisan figures—the Republican and Democratic candidates for Arizona Governor. The Maricopa County Board of Supervisors and Recorder, meanwhile, are elected officials with a political interest in minimizing the problems that occurred on their watch. In such disputes, the perspectives and interests of

ordinary voters and non-partisans necessarily get short shrift absent the participation of amici.[8]

ARGUMENT

I. A.R.S. § 16-672(A)(1) does not require a showing of *intentional* misconduct for the court to set aside the election.

In Count VI of her Complaint, Plaintiff Kari Lake alleged that intentional misconduct was not required for an award of relief under either A.R.S. § 16-672 or the Fourteenth Amendment. Compl. ¶ 171. In its ruling on Defendants' motions to dismiss, the trial court dismissed this claim and held that Plaintiffs were required to prove at trial that the "printer malfunctions were intentional, and directed to affect the results of the election, and that such actions did actually affect the outcome" of the election to obtain relief under A.R.S. § 16-672(A)(1). Under Advisement Ruling (Dec. 19, 2022) at 6-7.

However, (A)(1) states that any "elector of the state may contest the election of any person declared elected to a state office" for "misconduct," period. The plain meaning of "misconduct" is "1: mismanagement especially of governmental or military responsibilities." *Misconduct*, Merriam-Webster Dictionary (2022), https://www.merriam-webster.com/dictionary/miscon

[8] *See* Ariz. R. Civ. App. P. 16(b)(1)(C)(iii).

duct. Accordingly, "honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters" are still sufficient to "void an election" so long as they "affect the result, or at least render it uncertain." *Findley*, 35 Ariz. at 269. This rule continues to govern election contests in Arizona. *See Williams v. Fink*, 2019 Ariz. App. Unpub. LEXIS 827, at *8-9 (Ct. App. July 22, 2019).[9] Thus, a showing of negligent maladministration or substantive election irregularities can void an election that, as here, has been rendered at least *uncertain* by their effects.

For example, in *Miller v. Picacho*, the Arizona Supreme Court explained that even "a showing of fraud [was] not necessary to invalidate absentee balloting" when substantive irregularities caused voters to cast ballots that may have never been cast at all if school district employees had not delivered ballots to electors whom they knew, encouraging them to vote for a budget override. 179 Ariz. 178, 180 (1994). The court thus held that the election must be set aside. *Id. Miller* is instructive here because it underscores the proposition that even "substantive irregularities" can affect the outcome of

[9] Cited pursuant to Supreme Court Rule 111. Copy available free of charge at https://law.justia.com/cases/arizona/court-of-appeals-division-two-unpublished/2019/2-ca-cv-2018-0200.html.

an election.

The court noted that, "[a]lthough these electors did not ask for ballots" and "[e]ven if the elector voted his or her conscience, the ballots still would never have been cast but for the procedures adopted by the district." *Id.* This was enough to affect the outcome of the election due to the introduction of votes that otherwise would not been counted. Here, the outcome of the election has been affected due to the *absence* of votes that otherwise *would* have been counted. As set forth below, an indeterminate but substantial number of eligible election-day voters were deterred from voting because of entirely avoidable issues with election administration.

Former President Donald Trump, "[t]he most influential figure on the American right," has spent the last several years vociferously urging conservatives to vote in person on election day rather than by mail.[10] Accordingly, the attitudes of both Republicans and conservative-leaning independent voters towards early voting have steadily worsened over the

[10] Eric Cortellessa, *After Midterm Losses, GOP Leaders Move to Embrace Mail Voting. Trump May Not Let Them*, TIME (Dec. 9, 2022, 8:42 AM), https://time.com/6240015/republican-mail-in-voting-rethink-trump/.

past several years.[11] This manifested in election-day voters skewing heavily towards Republican *and* Independent voters.[12]

It was therefore eminently foreseeable that any problems with election-day administration would disproportionately prejudice Ms. Lake. Indeed, the County forthrightly acknowledged this in closing arguments, saying:

> ***In this particular election there were a significant number of printer errors***…and those did cause real inconvenience for a lot of people…. But those errors or those mishaps by machines if you will…the effect that had on election day voters was ***compounded***…by months and months and months of communication from the current leadership of the Republican Party of Arizona and the communications specialist of the Kari Lake for Governor Campaign that said do not vote early![13]

[11] *Republicans and Democrats Mover Further Apart in Views of Voting Access*, PEW RESEARCH CENTER (Apr. 22, 2021), https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access/.

[12] Garrett Archer, *2022 Maricopa voters by party and ballot type*, TWITTER (Dec. 7, 2022), https://twitter.com/Garrett_Archer/status/1600558683586723840. Accordingly, though Mr. Mast was able to cast a ballot, these failures disproportionately diluted the voices of Independents like him. As the *Bell* Court recognized, it is "the body politic as a whole" that suffers from election misconduct, regardless of whether any particular voter was able to cast a ballot. *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967).

[13] Fox 10 Phoenix, *Kari Lake election lawsuit trial underway | Day 2, Pt. 2*, YOUTUBE (Dec. 22, 2022) at 3:18:00-3:19:10, https://www.youtube.com/watch?v=Inw7VyREtLQ.

The County then went on to make fun of voters and politicians who had expressed a preference for election-day voting. It mocked them, in open court, for (supposedly) watching the film *Two-Thousand Mules* and for being "terrified" that the County's failures of administration precluded on-site tabulation.[14]

What the County fails to grasp is that voters have a *right* to vote in-person on election day. And political figures have a *right* to both ask their supporters to vote in this secure and ancient manner and to expect that when they do so, the system will work as well for them as it does for those to choose to vote by other means.

In addition, the problems that occurred at the polls on election day were *also* entirely foreseeable and avoidable. Indeed, Maricopa County's director of election-day operations acknowledged that printing issues impacting the readability of the timing marks on election-day ballots frustrated the ability of tabulators at polling sites to read ballots in the 2020 general election. *See* App. 000049, 000088-89.[15] In other words, Maricopa

[14] *Id*. at 3:19:10-3:20-24.
[15] Q. So let's talk about Drawer Number 3. If I'm understanding correctly, those are for ballots that that the tabulator for some reason can't read, correct?

County has known about the issue for at least *two years*.[16] The County also

A. Yes. A damaged or defective ballot.
Q. So give me some examples of when that occurs.
A. So that could occur if the voter makes a mark in those tiny marks, those hash marks that go down the sides of the ballots. That wouldn't allow it. If our printers were running potentially low on ink and some of those timing marks weren't dark enough for the tabulators to read, that would also create a time when that ballot couldn't be read by the tabulator…
…
Q. And what do those visual inspectors look for?
A. They look for if there may be a ballot that was printed slightly misaligned. So that would -- if it is misaligned, that would need to go through duplication, but if they can't visually determine why the ballot would have needed to go to duplication or was not read by the tabulator, it would then attempt to run it through our central count tabulator.
Q. … Approximately, how many ballots would you say are printed misaligned in any given cycle?
…
A. So there were just around 2,000 ballots that came back to us in misread envelopes, but those could have been based off of when tabulators were inoperable. And just when we went through them, we had to manually duplicate about 1,000 ballots. The other 1,000 went through our central count tabulators.
Q. But fair to say that at least a few ballots this election cycle were printed misaligned, correct?
A. Yes, that's correct.
Q. And the machines wouldn't have been able to read those, correct?
A. That's correct.

[16] It should also be noted that, in 2018, over one hundred polling locations were impacted and at least four had to be closed when the County encountered problems with the machines then in use for which it had failed to secure adequate trouble-shooting technicians. Lorraine Longhi et al., *Arizona election: At least 4 polling locations closed due to machine malfunctions*, AZCENTRAL.COM (Aug. 28, 2018, 12:09 PM),

knew that if the issue reoccurred, candidates preferred by Republicans and conservative-leaning Independents would be disproportionately prejudiced. Yet for two years, County election officials failed to fix the problem. Perhaps they were hoping it would get better. Or perhaps, viewing election-day voters as worthy of ridicule, the County simply did not care if they experienced problems in exercising their franchise at the polls on election day. Whatever the reason, the problem, unsurprisingly, did not resolve itself; it festered and got worse.

Procedural errors in administering an election, even in the absence of outright vote denial or fraud, can support an election challenge. In such an instance, the test is not whether the contestant can prove that enough voters were deterred to have changed the result but whether there was a widespread coercive impact on voters. *Hunt v. Campbell*, 19 Ariz. 254, 265-66, (1917). As the *Hunt* Court explained:

> It would be to encourage such things as part of the ordinary machinery of political contests to hold that they shall avoid [*sic*] only to the extent that their influence may be computed. So wherever such practices or influences are shown to have prevailed, not slightly and in individual cases, but generally, so as to render the result uncertain, the entire vote so affected must

https://www.azcentral.com/story/news/politics/elections/2018/08/28/arizona-election-primary-polling-places-closed/1123879002/.

be rejected.

Id.

In the context of a 14th Amendment challenge to the results of the election, the Fifth Circuit has engaged in similar analysis, recognizing that the trial court made a "fundamental mistake" in holding that Plaintiffs' 14th Amendment claim was subject to the ordinary rules for election contests "in which the winner is challenged because of ineligibility, fraud or irregularities in the conduct of the election, the receipt or counting of illegal ballots which would change the result and the like." *Bell*, 376 at 664. Rather, where Plaintiff "did not seek to be selected over" her opponents but sought, as a remedy, a lawfully administered election "it was not the usual simple case of counting votes and denying relief for want of affirmative proof of a different result." *Id. at* 664-65.[17]

In this case, as even the County acknowledged, its misconduct

[17] Irrespective of whether political affiliation is a "suspect classification," it is a perfectly adequate ground to support a 14th Amendment challenge to election practices. The question, even in the stricter federal court litigation context, is whether the benefit conferred by the unlawful election procedures is of sufficient magnitude to confer an "unfair political advantage on certain candidates solely because of their partisan affiliation." *Mecinas v. Hobbs*, 30 F.4th 890, 904-05 (9th Cir. 2022).

(intentional or not) deterred a large number of voters from casting a ballot. As the County further acknowledged, these putative votes disproportionately favored Ms. Lake. This is enough to entitle Plaintiff to relief.

The trial court's error here was similar to that of the trial court in *Bell*. After first finding that an element of entitlement to relief was "[t]hat the misconduct did, in fact, change the result of [the] election," Under Advisement Ruling (Dec 24., 2022) at 3, the trial court found dispositive as to this element that Plaintiff's expert statistician could not definitively say that but for the maladministration, the results of the election would have been different, *id.* at 7-8 ("Taking Mr. Baris's claims at face value, this does not nearly approach the degree of precision that would provide clear and convincing evidence that the result did change as a result of BOD printer failures."). Under *Hunt* and *Bell*, however, such certainty of computation is not required. But for the County's maladministration, turnout would have been 25,000–40,000 votes higher, meaning that "the outcome could be between a 2,000-vote margin for Hobbs to a 4,000-vote margin for Plaintiff." *Id*. at 7. Thus, it was eminently possible that but for these failures, the result would have been different. This is sufficient to entitle Plaintiffs to relief on

Count VI. And, while the trial court was correct that it would be unjust to declare Lake the winner given this uncertainty, it is an eminently just and appropriate remedy to require the election to be re-run in Maricopa County as further set forth below.

II. The Court can and should grant Ms. Lake's proposed alternative form of relief by requiring Maricopa County to re-conduct the gubernatorial election in conformance with all applicable law.

"[A]s a last resort where it is found impossible to compute the wrong" and "imperative public necessity requires," a court will "will exercise the power to reject the votes of an entire precinct" even if doing so will "disfranchise a body of electors[.]" *Hunt*, 19 Ariz. at 266. Here, as the trial court correctly found, it is impossible to compute the wrong. Therefore, public necessity requires that the returns from Maricopa County be rejected. But public necessity does *not* require that the voters be disenfranchised. Rather, just as the court in *Bell* found, they can simply be given the opportunity to vote again in the context of a properly administered election:

> This leaves only a tag end. There is a suggestion that the District Court enjoining Southwell from taking office pursuant to the election would be powerless to grant affirmative relief requiring that the Ordinary call a special election. In this vital area of vindication of precious constitutional rights, we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the coercive order is cast.

> If affirmative relief is essential, the Court has the power and should employ it.

Bell, 376 F.2d at 665 (citing *Alabama v. United States*, 304 F.2d 583, 589 (5th Cir. 1962), *affirmed*, 371 U.S. 37; *Hamer v. Campbell*, 358 F.2d 215, 221 (5th Cir. 1966)).[18]

Just as the 5th Circuit did in *Bell*, this Court also has the "inherent power to do all things reasonably necessary for administration of justice." *Schavey v. Roylston*, 8 Ariz. App. 574, 575 (1968). Indeed, while the *Bell* court was constrained by the fact that it was a federal court wading into issues of state election law, this Court faces no such constraint in crafting relief. Thus, the Arizona Supreme Court has found that the Arizona Constitution gives courts broad latitude in crafting relief for successful litigants in election challenges. *Huggins v. Superior Court*, 163 Ariz. 348, 353 (1990) ("The problem we confront is practical; the solution we choose is 'workable.' The Arizona Constitution, in our view, permits us room to make this choice.").[19]

[18] Although a recount of the race at issue in this case has been completed, the result of the recount cannot establish whether substantive irregularities affected the outcome of the election for the simple reason that a recount will not capture how many voters were deterred from voting by the County's misconduct. Thus, without a re-vote in Maricopa County, it will be impossible to determine the will of voters.
[19] Citation omitted.

The primary form of relief that Ms. Lake sought below is "[a]n order setting aside the certified result of the 2022 Arizona gubernatorial election and declaring that Kari Lake is the winner of the 2022 Arizona gubernatorial election, pursuant to A.R.S. § 16-676." Lake Compl. 67:1-4. In contrast, Ms. Hobbs sought complete dismissal and sanctions, arguing that to do anything else would frustrate the will of Arizona voters. *See* Contestee Katie Hobbs's Mot. to Dismiss at 17:8-10. Obviously, both parties, in making these arguments, are seeking the relief that best serves their interests as candidates. However, this Court is empowered to adopt this sensible, middle-ground approach, which defers not to any particular candidate but to the voters of Arizona.

CONCLUSION

In politics, campaigns are often decided by chance: a favorable news cycle, a botched debate performance, an opponent's scandal. But there is one element of randomness that must never be permitted to influence election results—failures of election administration. No election is perfect, but rarely has there been a case where the failures of election administration were so widespread and so disproportionately favored one candidate over another.

If the will of the voters is truly to have Katie Hobbs as their governor,

then a re-vote in Maricopa County will not change that result. If, however, the will of the voters was frustrated by Maricopa County's well-publicized failures, then that too will be clear.

RESPECTFULLY SUBMITTED December 31, 2022, by:

By /s/ Veronica Lucero
Veronica Lucero
Arno Naeckel
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Attorneys for Amicus Curiae

APPENDIX

Trial Transcript

Laurie Aguilera, Donovan Drobina v. Adrian Fontes et al.
No. CV 2020-014562
Phoenix, Arizona
November 20, 2020

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAURIE AGUILERA DONOVAN DROBINA, Plaintiffs, v. ADRIAN FONTES, et al., Defendants.	)))))))))))	No. CV 2020-014562

Phoenix, Arizona
November 20, 2020

BEFORE THE HONORABLE MARGARET MAHONEY

REPORTER'S TRANSCRIPT OF PROCEEDINGS VIA GOTOMEETING

ORAL ARGUMENT
DISPOSITIVE MOTIONS AND EVIDENTIARY HEARING

REPORTED BY:

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21

22 * * *

23

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25

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1 Phoenix, Arizona
November 20, 2020
2
3
4 P R O C E E D I N G S
5
6 (Whereupon, the following proceedings
7 commenced on Go To Meeting:)
8
9 THE COURT: Good morning. I'm calling
10 Number 1 on the calendar, which is CV2020-014562. And it
11 is time set for both oral argument and the evidentiary
12 hearing in this matter. Appearances, please.
13 MR. KOLODIN: Your Honor, on behalf of
14 plaintiffs, Alexander Kolodin, Chris Viskovic, Kolodin Law
15 Group, LLC. Joining us are co-counsel, Sue Becker, Public
16 Interest Legal Foundation.
17 THE COURT: Thank you.
18 MS. CRAIGER: Good morning, Your Honor, on
19 behalf of defendants, the county defendants, and County
20 Attorney, Allister Adel, Emily Craiger. And also in the
21 room with me are Joe LaRue and Tom Liddy.
22 THE COURT: All right. Ms. Craiger, you
23 look 100 miles away. And I can't see Mr. Liddy and
24 Mr. LaRue. I don't need to, but just as an FYI, if any of
25 you are doing an examination or whatever, you might want

1 to be a little more visible. As long as I can hear you,
2 it's not really a big deal. I'm just alerting you what it
3 looks like from my end.
4 I'm sorry. I'm seeing Mr. LaRue. I'm just
5 not seeing Mr. Liddy. Okay, who else is on the line?
6 MS. GONSKI: Good morning, Your Honor. This
7 is Sarah Gonski on behalf of intervenor, the Arizona
8 Democratic Party. And with me are co-counsel, Daniel
9 Arellano and Roy Herrera.
10 THE COURT: All right. Thank you.
11 Mr. Herrera is just on the phone line, correct?
12 MS. GONSKI: That's right, Your Honor.
13 THE COURT: Thank you. So folks, let me
14 just tell you up front I have read the Maricopa County
15 defendant's motion to dismiss, as well as the intervenor,
16 ADP's motion to dismiss, and plaintiff's separate
17 responses to each of those motions. There on for oral
18 argument as well as the evidence.
19 I know we've got a little bit of time
20 constraints on the evidence in that, at least, there's one
21 witness -- I think it was Mr. Jarrett who has to be done
22 this morning.
23 Ms. Craiger, I can't see you nodding your
24 head or anything because you're so far away. So just be
25 aware if Mr. LaRue needs to do hand signals or something,

1 I'll pay attention to him because he's more visible.
2 So in terms of how we use our time, I was
3 giving some thought to whether it made sense to do oral
4 argument or the evidence first. We are going to do both,
5 just so nobody worries that, hey, if we do one first, that
6 may negate the other. We're going to get all on the
7 record. I've made that determination, if that's
8 appropriate procedurally, but does anybody have any strong
9 views about which we should do first?
10 MS. CRAIGER: Good morning, Your Honor.
11 This is Emily Craiger. It would be our position that we
12 combine the oral argument on the motion to dismiss with
13 our closing arguments and do that at the end of the day so
14 we can proceed with getting evidence on as soon as we can.
15 THE COURT: Okay. Ms. Craiger, that sounds
16 like a good approach. Mr. Kolodin?
17 MR. KOLODIN: Agreed, Your Honor.
18 THE COURT: Great. Anybody else have any
19 objections to that?
20 MS. GONSKI: No objection from intervenor.
21 THE COURT: Okay, great. That's what we'll
22 do then.
23 So folks, I'm familiar with the complaint.
24 I'm familiar with what all we've covered in recent
25 hearings. Does anybody feel a need to give me any kind of

1 opening statement to frame the issues, or you just want to
2 begin with the first witness?
3 MR. KOLODIN: Let's jump right in.
4 MS. CRAIGER: I'm sorry, Your Honor. One
5 housekeeping item. We would like to invoke the rule, and
6 at the moment, I believe Mr. Sneeringer is on the line,
7 who has been designated as a witness. And also
8 Mr. Atkinson, who is also designated as a witness in this
9 case is also on the line right now.
10 THE COURT: Okay, Mr. Kolodin.
11 MR. KOLODIN: Your Honor, as a practical
12 matter I'm not sure that that's really going to be
13 possible. As the Court knows, there's a public call in
14 line. We also have a relatively small office, and several
15 of our witnesses are here in person, so I'm not really
16 sure how we would exclude them from hearing the
17 proceedings anyway.
18 As the county puts on their case after ours,
19 this is largely to benefit the county, but practically, I
20 just don't see how we could do it. Especially because, in
21 the interest of time, we're going to try to put witnesses
22 on deck, the ones who are calling in and have them call
23 into the proceeding when the last witness is speaking so
24 we can minimize lag time as much as possible. It will
25 just go a lot smoother that way.

1 THE COURT: Mr. Kolodin, give me just a
2 moment because I'm probably the least knowledgeable
3 technology wise of the people in my courtroom, but I
4 certainly understood that witnesses could be put in a room
5 so that they're not entitled -- we've even done it in a
6 prior hearing, an evidentiary hearing -- so that they're
7 not listening to anything until they are allowed in from
8 that room in which they're waiting.
9 Is that not accurate? Okay. How do we do
10 that? Do we do it at our end or do they have to do it at
11 their end?
12 (Inaudible discussion with courtroom
13 assistant.)
14 THE COURT: Mr. Kolodin, I think you might
15 have been the one to raise the question about whether that
16 can be done technology wise. It certainly can. My
17 bailiff is able -- Ana, here in the courtroom, is able to
18 do that. So she's able to send Mr. Sneeringer and
19 Mr. Atkinson, the two witnesses, out of the proceedings.
20 I think the way I've heard it described is
21 basically, they're waiting in a room, you know, a virtual
22 room, and then when they're being called, she can allow
23 them back in.
24 MR. KOLODIN: Yes, Your Honor, but there's
25 still a public access point. So we really have no idea if

1 anybody who's not in that room is listening. And, of
2 course, we have a small office, and I don't know how we
3 can avoid some of the witnesses that are waiting in this
4 office from hearing the ongoing proceedings given our
5 space constraints, especially during Covid. I can jam
6 them all into a small back office or something. It seems
7 impractical from our perspective. I'm not really sure how
8 we would accomplish it.
9 If the concern is the expert hearing, that I
10 understand. We'll put them in a different room, but with
11 respect to our lay witnesses, I'm just not really sure how
12 we would do it.
13 THE COURT: Well, that's a problem I wish I
14 had been alerted to beforehand because they need to be --
15 this is an evidentiary hearing. If the rule is being
16 invoked, they need to be out of hearing distance. It
17 doesn't allow them to still sit and listen.
18 So I certainly tell Mr. Atkinson, who is a
19 -- he's not a lawyer, I guess. He's a paralegal, isn't
20 he?
21 MR. KOLODIN: Yes.
22 THE COURT: I was guessing he was a lawyer
23 for a moment there, and I was thinking I could get him to
24 avow to me as an officer of the court that he will
25 distance himself so he does not hear. I don't really have

1 the same ability to rely upon any other witness. Not that
2 others aren't just as trust worthy, but they just don't
3 have the same thing on the line as a lawyer does.
4 However, the other witnesses, fact
5 witnesses, the expert witness, Mr. Atkinson, those people
6 need to be in the room not listening. When the rule is
7 invoked, they need to not be hearing the proceedings.
8 MR. KOLODIN: Okay. Sean, what I'll ask you
9 to do then, Sean, why don't you go into Alfredo's office.
10 That's the farthest away in our office that you can get
11 away from the witnesses. And go to the second desk in his
12 office. That should resolve the problem. Yeah, that
13 should resolve the problem and shut the door.
14 MR. ATKINSON: Okay, I'll do that.
15 THE COURT: Mr. Kolodin, what about other --
16 any witnesses you might have there like lay witnesses?
17 MR. KOLODIN: So we'll have them in our
18 reception area, and then we'll have the testimony being
19 taken in the back office.
20 THE COURT: Okay, and all the doors will be
21 shut so there won't be just noise coming down the hall for
22 people to understand?
23 MR. KOLODIN: Yes, Your Honor. Sean, I
24 instruct you to please shut the door.
25 THE COURT: And you said your office is

1 small. I don't know how small it is, but if you please
2 take any and all measures you can to ensure that no one is
3 hearing the proceedings, I would appreciate that.
4 MR. KOLODIN: We will do so, Your Honor.
5 THE COURT: Now what about Mr. Sneeringer?
6 Is he not in your office? Is he elsewhere?
7 MR. KOLODIN: He is elsewhere, Your Honor.
8 THE COURT: Okay. So I think as to
9 Mr. Sneeringer, we don't have any problem with Ana putting
10 him in the waiting room virtually.
11 Is that right, Ana? Do you need -- can you
12 do that right now, or do we need to accommodate anything
13 at our end here?
14 Okay. So Mr. Sneeringer, that is what's
15 going to happen, sir. You won't be hearing the
16 proceedings or participating in them until you're called
17 as a witness. Understand, sir?
18 (Mr. Sneeringer nods head.)
19 THE COURT: Thank you. Okay.
20 Ms. Craiger, that was your housekeeping
21 matter. Is there anything else we need before the first
22 witness gets called? I don't know. I just lost Ms.
23 Craiger. Oh, there she is.
24 I don't know if this happens at your end,
25 folks, but people move around in boxes as people come and

1 go, and it's a little disorienting.
2 Ms. Craiger, anything else before we start?
3 And then I'll ask Mr. Kolodin and Ms. Gonski as well.
4 MS. CRAIGER: Just as a reminder, which I
5 think you already stated, we have the time constraints
6 with Mr. Jarrett, so he does need to have his testimony
7 completed by noon today. We're ready to take him first or
8 could, you know, wait probably as late at 10:30, but after
9 that, it would probably not be sufficient time for his
10 testimony.
11 THE COURT: So Mr. Kolodin, you're putting
12 on your witnesses first, correct, sir?
13 MR. KOLODIN: That's right, Your Honor.
14 THE COURT: Are you calling Mr. Jarrett?
15 MR. KOLODIN: We are not, Your Honor.
16 THE COURT: All right. How do you envision
17 us getting Mr. Jarrett done and out by noon?
18 MR. KOLODIN: Well, Your Honor, again, we
19 certainly could have accommodated a different date. I
20 understand the urgency here. We would probably suggest
21 that we put on Mr. Jarrett first and hear what he has to
22 say, and then we proceed with -- well, I don't know.
23 Because we've got witnesses here that are waiting.
24 Let's put on -- no. Let's put on
25 Mr. Jarrett first. That just makes more sense logically.

1 THE COURT: Okay. Thank you. And
2 Mr. Kolodin, just so the record is clear, we did discuss
3 this on the record yesterday. And it was in writing, I
4 think, perhaps even as well from Ms. Craiger. I'm not
5 certain about that, but she certainly raised it. And I
6 did not understand at that point that it was going to be a
7 logistical, you know, order of witnesses problem. So
8 let's hope we can get that done.
9 Do you remember, Mr. Kolodin, we discussed
10 that briefly yesterday?
11 MR. KOLODIN: Yes, I do, Your Honor.
12 THE COURT: Okay. So you are going to call
13 Mr. Jarrett first as your witness, Mr. Kolodin, or are you
14 asking to take him out of order and have Ms. Craiger put
15 him on?
16 MR. KOLODIN: Well, no, Your Honor. I mean,
17 we would like to put on all of our witnesses before
18 Mr. Jarrett, but if the Court is ordering him done by
19 noon, then I think it makes sense to have him go first.
20 THE COURT: Mr. Kolodin, let me clarify my
21 question. First, this was discussed/raised by the county
22 defendants yesterday. There was no objection or concern
23 or issue raised by defendants or anybody else about, hey,
24 that's going to mess up how we put on our case. We don't
25 like that. Let's see if we can figure out a solution.

1 So he does need to be gone by noon. That's
2 basically the implicit commitment we made to the county
3 defendants yesterday by nobody saying it was a problem.
4 I'm asking you though, would you prefer that
5 Ms. Craiger just be allowed to take him out of order
6 because it's not defendant case until plaintiffs have
7 rested -- take him out of order and put him on first in
8 the county defendant's case starting right now, or would
9 you prefer to call him yourself in your case?
10 MR. KOLODIN: Okay. That makes much more
11 sense. We will not be calling him in our case. We're
12 going to be limited to cross for him. So if Ms. Craiger
13 is going to call him, she could call him.
14 THE COURT: Understood. Okay, so Ms.
15 Craiger, you are going to begin with Mr. Jarrett, correct?
16 MS. CRAIGER: Yes. Thank you, Your Honor.
17 THE COURT: And none of the witnesses have
18 been sworn, have they, Ana?
19 All right. So once we have Mr. Jarrett,
20 hopefully visible, we will -- my clerk, you can see up
21 there. Kathy Ballard is our deputy clerk, and she will
22 get each and every witness sworn in as they appear.
23 MS. CRAIGER: Your Honor, also, if it's
24 possible, we would need to have Mr. LaRue be made the
25 presenter for our exhibits to be presented.

1 THE COURT: All right, Ana can do that.
2 Excuse me one second. Mr. LaRue, Ana is working on that.
3 Give us just a minute.
4 MR. LARUE: Thank you, Your Honor.
5 THE COURT: We're good. Mr. LaRue should be
6 now enabled as the presenter.
7 So Kathy, I think we are ready to swear in
8 the witness.
9 SCOTT JARRETT,
10 called as a witness, having been duly sworn,
11 testified as follows:
12 MR. KOLODIN: Your Honor, Mr. Jarrett is not
13 visible to us. I'm not sure why.
14 THE COURT: Isn't he sitting right next to
15 Ms. Craiger?
16 MR. KOLODIN: Oh, that's why. Thank you.
17 Sorry.
18 THE COURT: All right. Go ahead.
19 MS. CRAIGER: Thank you, Your Honor.
20 DIRECT EXAMINATION
21 BY MS. CRAIGER:
22 Q. Thank you, Mr. Jarrett. Good morning.
23 A. Good morning.
24 Q. What is your title?
25 A. So my title is the Director of Election Day and

1 Emergency Voting for the Maricopa County Election
2 Department.
3 Q. How long have you held that position?
4 A. So I've been in this possession since July of
5 2019.
6 Q. What are your duties generally in that position?
7 A. So I oversee the divisions that provide poll
8 worker training, that provide poll worker recruitment,
9 that provide warehouse functions. I oversee election day
10 and emergency voting. Then I have shared oversight for
11 early voting. And I also provide oversight for central
12 count calculation as well as calculation in voting
13 locations.
14 Q. So let's just talk generally a little bit about
15 general election day processes and procedures. When did
16 you and your team first start preparing for the
17 November 2020 general election?
18 A. Well over six months in advance of the November
19 election.
20 Q. So by you, you have what's marked as exhibit or
21 tabbed as Exhibit 41. Do you recognize that document,
22 Mr. Jarrett?
23 A. Yes, I do.
24 Q. What is it?
25 A. This is the election day and emergency voting

1 plan that I prepared in conjunction with my team and then
2 presented to the Board of Supervisors in September for
3 their approval.
4 THE COURT: Ms. Craiger, excuse me to
5 interrupt for just a moment. I should have asked counsel
6 this in the beginning. I neglected to. I had it on my
7 check list. Have the parties stipulated to the admission
8 of any exhibits, or are we going to have to move in and
9 debate each and every one, potentially?
10 MS. CRAIGER: Your Honor, we were -- I'm
11 sorry. We weren't able to stipulate --
12 THE COURT: Ms. Craiger, you go first
13 because it's your witness I'm speaking about right now.
14 MS. CRAIGER: So we were able to stipulate
15 to three exhibits. One is the poll worker training
16 manual, which we have marked as Exhibit Number 41. No.
17 I'm sorry. Number 40. Exhibit Number 40.
18 THE COURT: Exhibit Number 40, poll worker
19 training, November general election.
20 MS. CRAIGER: Correct.
21 THE COURT: Is the way it shows on the
22 exhibit list. Do you folks have a copy of the exhibit
23 list there, the one I'm looking at, from my clerk.
24 Did you say yes, Mr. Kolodin?
25 MR. KOLODIN: We have a copy of the joint

1 witness and exhibit list; is that the same one?
2 THE COURT: No. This is what it looks like.
3 It's a sheet like, you know, you see when you're in trial.
4 You don't have that? Okay.
5 MR. KOLODIN: No, Your Honor.
6 MS. CRAIGER: I can quickly get a printout
7 of that, if that would be helpful to the Court.
8 THE COURT: Well, I think it will be helpful
9 to the parties. I've got mine so I'm good to go. It's
10 just whether it will enable you folks to move along, but,
11 you know, we're still talking about same tagged exhibit,
12 Number 40, and that's being received on stipulation,
13 correct, Counsel?
14 MR. KOLODIN: Yes, Your Honor. That was
15 also Plaintiff's Number 21. It's the same document.
16 THE COURT: All right. So 21 I'm going to
17 receive as well. It could be a duplicate, but we're not
18 going to spend the time to sort that out right now.
19 So Ms. Craiger -- I'm sorry. I'm
20 overlooking Ms. Gonski.
21 Ms. Gonski, you jump in any time you either
22 need to make a record of agreeing or disagreeing. In the
23 silence, I'll assume you are in agreement; is that fair?
24 MS. GONSKI: Thank you, Your Honor. We
25 weren't party to the any of the stipulations, but we

1 really don't have any objection to the stipulations.
2 THE COURT: Okay. Thanks for clarifying.
3 So Ms. Craiger, any objection to 21 and 40 coming in on
4 stipulation?
5 MS. CRAIGER: No objection, Your Honor.
6 THE COURT: All right. Those are received
7 on stipulation. There were two more, were there?
8 MS. CRAIGER: Yes. It was plaintiff's and
9 -- it was the elections procedure manual. I'm sorry
10 Mr. Kolodin, what number was that?
11 MR. KOLODIN: We have the MS23.
12 MS. CRAIGER: 23 and the addendum to the
13 election's procedures manual which --
14 MR. KOLODIN: 24.
15 MS. CRAIGER: -- we also are willing to
16 stipulate to those being entered as exhibits.
17 THE COURT: Okay. Mr. Kolodin, you wish to
18 move those in, yes?
19 MR. KOLODIN: Yes, Your Honor.
20 THE COURT: All right. 23 and 24 are
21 received on stipulation. Any others, Counsel, or just
22 those few?
23 MS. CRAIGER: Those are the ones we
24 discussed, Your Honor.
25 THE COURT: All right. Mr. Kolodin, you

1 agree nothing else has been agreed to yet?
2 MR. KOLODIN: I agree. Although, as we go
3 through the day, there may be certain documents that are
4 matters of public record that we stipulate to in the
5 interest of time and counsel is agreeable. So we'll see
6 how that goes.
7 THE COURT: Good. Please, whatever you can
8 do to move it along so I have more time to hear you folks
9 substantively, I would urge you to think down that road as
10 we go.
11 Okay, so Ms. Craiger, sorry for the
12 interruption. Back to you and your witness.
13 MS. CRAIGER: Well, Your Honor, while we're
14 on the topic, this is actually one of those documents that
15 is of public record. So perhaps this may be one that we
16 could also stipulate to. Is that something plaintiff's
17 counsel --
18 MR. KOLODIN: We have no objection to that.
19 THE COURT: All right. Is it 41?
20 MS. CRAIGER: Correct.
21 THE COURT: 41 is received without
22 objection. You can continue, Ms. Craiger.
23 Q. (BY MS. CRAIGER) All right. Mr. Jarrett, so I
24 believe you were explaining what the purpose of this
25 document is.

1 A. So the purpose of this document is to provide a
2 plan, detailed plan, for how we will administer the
3 election. And it's to inform the public, as well as our
4 department staff. And it is -- it describes those
5 procedures. It includes plans that outline things for
6 poll worker training, items for poll worker recruitment.
7 How we're going to communicate information to the public.
8 How we will set up our polling locations, as well as how
9 we will tabulate in the polling locations, as well as in
10 the central count proceedings.
11 Q. In the 2020 general election, did the county use
12 new equipment to tabulate?
13 A. So new equipment as far as different equipment
14 from 2016, we've used this equipment in prior elections,
15 including in the March presidential preference election,
16 and the March jurisdictional elections, the May
17 jurisdictional elections, and the August primary election.
18 Q. So thank you for that clarification, sir. This
19 is new equipment for the 2020 election cycle?
20 A. That's correct.
21 Q. Okay. And what was that new equipment?
22 A. So it is -- the equipment that we are currently
23 leasing from our vendor Dominion, it's Democracy Suite,
24 5.5-B.
25 Q. I'm going to direct you now to what's been marked

1 as Exhibit 47. Do you recognize that document, Mr.
2 Jarrett?
3 A. Yes, I do.
4 MS. CRAIGER: Your Honor, this is also --
5 this document is also of public record. I don't know if
6 Mr. Kolodin is willing to stipulate to its entry.
7 MR. KOLODIN: This one I'm not familiar
8 with, so I would not stipulate to this.
9 MS. CRAIGER: All right.
10 Q. (BY MS. CRAIGER) Thank you, Scott. Could you
11 explain to me what this document is.
12 A. So this is a certification letter from the
13 Secretary of State's office certifying that the equipment
14 that we were or leasing from Dominion can be used in
15 elections in the state of Arizona.
16 Q. Just to point to you to -- it's the second line
17 of that first paragraph, this is talking about the
18 Democracy Suite 5.5-B voting system that you were
19 referring to; is that right?
20 A. That's correct.
21 Q. So this document dated November 5th of 2019, this
22 certification occurred prior to the 2020 election cycle
23 beginning; is that correct?
24 A. That's correct.
25 Q. So Scott --

1 MS. CRAIGER: So Your Honor, did I move to
2 -- I'd like to move the exhibit into evidence.
3 THE COURT: Mr. Kolodin, any objections to
4 the Court receiving 47?
5 MR. KOLODIN: No, Your Honor.
6 THE COURT: 47 is received without
7 objection.
8 Q. (BY MS. CRAIGER) Scott, what is logic and
9 accuracy testing?
10 A. Logic and accuracy testing is a provision set
11 forth in state statute as well as the Arizona elections
12 procedure manual. It is -- it occurs before each election
13 and after each election. And this type of testing is
14 actually conducted by the Secretary of State's office, as
15 well as each county. And it is the process that the
16 Secretary of State's office does and the county do to
17 confirm the accuracy of the equipment, the tabulation
18 equipment that would be used for each election.
19 So an election system report is submitted to
20 the Secretary of State's office. They develop a test deck
21 of ballots to come into our central count tabulate -- or
22 our ballot calculation center, as well as they also select
23 a random sampling of both centers or what we call
24 precinct-based tabulators. And they will run that test
25 deck through.

1 We are unaware of what those results should
2 look like. We just know that they brought these test
3 decks in. They run them through. They know how the
4 results should be tallied. They go through that process.
5 It's not our staff that performs that test. It's the
6 Secretary of State's staff, an independent party. They
7 run those ballots through our central count tabulators,
8 the random sampling of our precinct-based tabulators. And
9 then they compare the results that are reported based on
10 this test to the predetermined tallied amount before the
11 test to ensure that it's accurate.
12 Then the county, after the Secretary of
13 State performs those tests, does its own test on 100
14 percent of the equipment. So every central count
15 tabulator, every precinct-based tabulator, we perform this
16 test not only on the federal contest, the state contest
17 but all down ballot contests as well.
18 THE COURT: Mr. Jarrett, to clarify, what's
19 the difference between those two referenced tabulators you
20 just referred to?
21 A. So, Your Honor, the central count tabulators are
22 primarily used for just early ballots. So any ballots
23 that would come back to us through the mail that were
24 dropped off at one of our drop boxes or vote centers or
25 that were voted in person during early voting.

1 The precinct-based tabulator are used on
2 election day in the vote centers where voters then insert
3 their ballots into that tabulator, and that's where the
4 tabulation occurs at the vote center.
5 THE COURT: Thank you.
6 Q. (BY MS. CRAIGER) Scott, I'm going to direct you
7 to what's been marked as Exhibit 45. And what is this
8 document? Do you recognize it?
9 A. So this document is the certificate of accuracy
10 that was provided by the Secretary of State's office on
11 October 6th. So the first day -- one day before early
12 voting began for the November general 2020 election. So
13 this is a certifying the accuracy of our equipment at that
14 time.
15 Q. And am I accurate in saying this is the
16 certificate that is produced after the logic and accuracy
17 testing is completed; is that correct?
18 A. That's correct. So the political parties, as
19 well as the Secretary of State are present during this
20 testing, and then they sign this document after the test
21 is complete, attesting to the accuracy of the equipment.
22 Q. On this, there are signatures and designation of
23 party or agents. I think you've already testified that
24 there's party representatives, but on this one, there's --
25 I noticed there is no Republican Party representative.

1 Were they invited to participate in this process?
2 A. That's correct. They were invited. We held a
3 meeting on September 10th with all parties. So the county
4 parties, as well as the state parties. And in that
5 meeting, we laid out all the opportunities for being able
6 to provide their representatives to observe during the
7 voting process. And at that meeting, the logic and
8 accuracy test was listed. We discussed the importance of
9 having representatives there to observe this process, that
10 they would play a role in signing off on the certificate
11 of accuracy.
12 MS. CRAIGER: Your Honor, I'd like to move
13 to enter Exhibit 45 into evidence.
14 THE COURT: Just a quick question. I missed
15 what you said was the date, Ms. Craiger, of that meeting?
16 September -- I'm sorry -- Mr. Jarrett, September what?
17 A. Your Honor, it was September 10th.
18 THE COURT: Thank you. Mr. Kolodin, any
19 objection to Exhibit 45 being received?
20 MR. KOLODIN: Your Honor, we have no
21 objection to it being part --
22 THE COURT: I'm sorry.
23 MR. KOLODIN: Your Honor, we have no
24 objection to it being part of the record. Not necessarily
25 obviously for the purpose for which it's been offered, but

1 forming part of the record we don't have an issue.
2 THE COURT: So it's either being received,
3 or it's not being received, and then people can debate it
4 or argue about it or cross examine about it. My question
5 is, do you object to the Court receiving it?
6 MR. KOLODIN: No, not at all, Your Honor.
7 THE COURT: Okay. 45 is received without
8 objection.
9 MS. CRAIGER: Thank you, Your Honor.
10 Q. (BY MS. CRAIGER) I'd like to turn your attention
11 now to Exhibit 46. And Mr. Jarrett, do you recognize this
12 document?
13 A. Yes, I do.
14 Q. What is that document?
15 A. So this is a document provided to the county from
16 the Secretary of State's office certifying the accuracy.
17 So based on the process I described before, the logic and
18 accuracy test. So certifying the accuracy of the Maricopa
19 County tabulation equipment. So both the central count
20 tabulation equipment, as well as the precinct-based
21 tabulation equipment based on their testing that occurred
22 on Wednesday, November 18th, after the election.
23 It was designed to confirm that the system
24 and the program that was used on October 6th was indeed
25 the same system and tabulated ballots exactly the same way

1 post the election.
2 Q. And in this case, also there are several names
3 listed and signatures with parties listed. In this case,
4 did both -- were, actually, all parties, political
5 parties, represented at this logic and accuracy test?
6 A. Yes. So we invited members of the state party,
7 as well as the county party for all three political
8 parties; the Libertarian party, the Democratic party, and
9 the Republican Party. And they all sent representatives
10 that attended. At least at the county side of it, and we
11 did have some representation from the state parties as
12 well. And they all signed this document.
13 MS. CRAIGER: Your Honor, I would like to
14 move to have Exhibit 46 entered into evidence.
15 THE COURT: Any objection, Mr. Kolodin?
16 MR. KOLODIN: Can I get a look at the text.
17 Could they scroll up just a little bit. Okay. No
18 objection, Your Honor.
19 THE COURT: 46 is received without
20 objection.
21 Q. (BY MS. CRAIGER) So getting back to the
22 preparation for the 2020 general election. Did Covid-19
23 have any impact on how you prepared for this election?
24 A. Yes. Covid-19 had a significant impact on how we
25 were preparing for this election.

1 Q. Can you describe a little bit, you know, what
2 sort of changes had to be made because of issues related
3 to Covid-19.
4 A. So going into the March presidential preference
5 election, we were conducting election based off of
6 precinct voting, and we were encountering significant
7 issues with our poll workers as well as our polling
8 locations cancelling on us for that election. We had to
9 redesign an election in five days to serve Maricopa County
10 voters.
11 So we took the lessons that we learned from
12 March and applied them to the future elections. So August
13 primary and the November general election. So in doing
14 that, we designed -- we redesigned how we provide voters
15 and serve voters in Maricopa County. We provided a
16 100 percent vote center mall. That required us to
17 purchase additional and new ballot-on-demand technology.
18 So every one of our vote centers could serve any voter in
19 the county, be able to produce that exact ballot for that
20 voter.
21 We also had to work with and partner with
22 the county public health department to establish safety
23 protocols for our vote centers. That required us to use
24 much larger facilities than what we used in past so we
25 would implement physical distancing. We also had to

1 procure PPE, all that equipment so we could keep our poll
2 workers and voters safe as they progressed through the
3 voting process.
4 Q. Just to be clear, I think maybe Your Honor
5 already covered this, but when you talk about
6 precinct-based tabulators, you are describing the
7 tabulators that were used in vote centers on election day;
8 is that correct?
9 A. That's correct. So that's the name branding of
10 -- that's provided by Dominion. They're calling it
11 precinct-based tabulator, and they do tabulate precinct
12 ballots. So every voter is issued a ballot with a
13 precinct code on it, but they are programed to accept any
14 precinct.
15 So they are in our vote centers. They are a
16 vote center tabulator, but the main branding is a
17 precinct-based tabulator.
18 Q. Okay. So what does MCTEC stand for?
19 A. It's the Maricopa County Elections and Tabulation
20 Center.
21 Q. And when you're referring to central tabulation,
22 is that located at MCTEC?
23 A. Yes, it is. It's in a secured room in the center
24 of MCTEC or our elections department, and it has even
25 higher access restrictions. It's under camera 24/7, 365

1 days a year.
2 Q. What occurs in the central tabulation?
3 A. So that is where all programming of equipment
4 occurs. That is where actual -- the counting of early
5 ballots occur, and that is also where we have adjudication
6 stations where we hire bipartisan adjudication boards to
7 come in and perform adjudication actions on ballots that
8 over votes, ambiguous marks. If there are write-in
9 candidates, those adjudication boards perform that.
10 If there is duplication of a ballot that's
11 needed. So that would be a damaged ballot that can't be
12 read by our precinct-based tabulator or central count
13 tabulator, that duplication process occurs in that central
14 count tabulation center.
15 Q. Is that essential tabulation room visible to the
16 public?
17 A. Yes, it is. It's under -- we have several
18 different camera views that can observe the entire room,
19 including those adjudication stations, our central count
20 tabulators, and other areas within that room.
21 Q. So you mentioned that there are cameras. Where
22 is the public able to go to view what's being recorded on
23 those cameras?
24 A. So they can go to the Maricopa County Elections
25 Department website, and we have a link available. So

1 anyone from the public can log on to our website --
2 Maricopa.vote -- and find that link, and then they will
3 have different views to able to look at that room and
4 observe all the activities going on within that room.
5 Q. In the central tabulation room, I assume there
6 are election employees working in there, but are there any
7 other members or any other individuals that are allowed to
8 be in that room also when the tabulation is occurring?
9 A. So we do have access restrictions. So we don't
10 just let any member from the public in. That's why we
11 offer the online viewing, but we do also allow party
12 representatives into that room. So these are appointees
13 from the political parties, and they can enter as long as
14 we can confirm that they are registered to vote in
15 Arizona. And we do that to confirm that they don't have a
16 felony or a criminal background before we let them in
17 because we hold that room to a high stringent standard of
18 security.
19 Q. And you had mentioned the word duplication of
20 ballots. Why would a ballot need to be duplicated?
21 A. So if that ballot is damaged or defective and
22 can't be read by our tabulation equipment -- and this does
23 occur. We will get back ballots to us that have been
24 ripped. So that can't be read by our tabulation
25 equipment, or it could be ambiguous marks or stray marks

1 that are made in -- so on every ballot we have on the
2 edges of it, we have timing marks. So these are hash
3 marks. They are what tell the tabulator where each oval
4 is, where to read the contest, and how to tabulate that,
5 but if there's a stray mark in one those timing marks, it
6 cannot be read by the tabulator. It would have to be
7 manually duplicated.
8 THE COURT: Mr. Jarrett, could you shift
9 your microphone just slightly. When you're looking at Ms.
10 Craiger, I can hear the vast majority of what you're
11 saying, but every now and then a word, when you've turned
12 your head too far in her direction, I lose.
13 A. Your Honor, I'll do a better job of projecting to
14 the microphone.
15 THE COURT: That's perfect. Thank you.
16 Q. (BY MS. CRAIGER) Thank you. Scott, we were
17 talking before about the cameras, allowing people to view
18 the room. Were there any other restrictions put into
19 place due to Covid-19 in terms of access to viewing that
20 central tabulation room?
21 A. So, yes. We did make every attempt to implement
22 physical distancing requirements within the tabulation
23 center as well. When our adjudication boards performed
24 that function, they do have to sit together to perform it.
25 We did implement, you know, Plexiglass barriers between

1 each board, but then we also needed to keep them safe from
2 -- so those political party observers that did come in to
3 observe. So we asked those political party observers to
4 maintain six feet of physical distancing, but if they
5 wanted to actually go observe close up, they just needed
6 to ask permission from our tabulation manager prior, and
7 then they would authorize it.
8 Q. So you mentioned earlier about poll worker
9 training and your involvement in the poll worker training
10 process. I'm going to direct you to what's been marked as
11 Exhibit 40.
12 MS. CRAIGER: Your Honor, I believe this is
13 an exhibit that's been stipulated to by the parties.
14 THE COURT: Ms. Craiger, that's already
15 received.
16 MS. CRAIGER: Thank you.
17 Q. (BY MS. CRAIGER) So can you explain, Scott, what
18 this document is.
19 A. So this document is the training manual that the
20 Maricopa County training team prepared after my review and
21 review of other experts on our staff to provide to all of
22 our poll workers that sets out procedures for how early
23 voting and election day operations should be conducted in
24 our in-person voting locations.
25 Q. And in addition to receiving this manual, what

1 other training did poll workers get for the 2020 general
2 election?
3 A. So they were provided with online training. So
4 we designed customized modules that provided a general
5 overview of what the November general election entailed.
6 We also provided role-base specific training. So for
7 inspectors and judges -- inspectors are the supervisors of
8 our voting locations. The judges are the backup
9 inspectors or supervisors. They had one set of training.
10 Our marshals had another set of training. Our clerks had
11 a different set of training. So each one of them had
12 their own online training module.
13 We also provided a third module that
14 detailed equipment-specific training. And then we did
15 also in-person training. The in-person training was
16 provided to any person that took on a new role. So we did
17 expand. So in the August primary, we had 99 voting
18 locations. In the November general election, we had 175.
19 So if there was an inspector that worked in
20 August, they were only asked to take the online training.
21 However, if we promoted one of our poll workers to an
22 inspector, we asked them to come into in-person training.
23 If they were new, and they did not work in the August
24 election, we also asked them to come in to in-person
25 training.

1 Q. So can I direct you now -- well, to what's called
2 Exhibit 44. And you'll have to look on the screen for
3 this one, Scott. Do you recognize what that is?
4 A. Yes, I do. This is the PowerPoint slide that was
5 provided to poll workers that attended in-person training.
6 And it describes how to use the precinct-based tabulator.
7 MS. CRAIGER: Your Honor, with permission,
8 I'd like to play the video that's embedded in this slide.
9 THE COURT: Okay. Has 44 -- has not yet
10 been received. Mr. Kolodin, any objection?
11 MR. KOLODIN: A clarifying question, Your
12 Honor. Will the video be able to be part of the record?
13 THE COURT: What I'm looking at right here
14 on my end, Mr. Kolodin -- I'm not sure what you got -- is
15 a CD. Can you see what I'm holding up?
16 MR. KOLODIN: Yes, Your Honor.
17 THE COURT: And Kathy, my clerk, is there.
18 Kathy, I assume what you've got is marked as
19 Exhibit 44 is precisely what Ms. Craiger is going to -- I
20 guess I should ask Ms. Craiger.
21 Ms. Craiger, what you want to run now as the
22 PowerPoint presentation, that's on this CD, correct?
23 MS. CRAIGER: That is correct.
24 THE COURT: And Kathy, we have that as the
25 -- as one of the -- as a piece of this original exhibit,

1 yes?
2 THE COURTROOM CLERK: I have a CD just as
3 you do.
4 THE COURT: Okay. So Mr. Kolodin, Ms.
5 Craiger's confirmed it is here. It is on the CD which
6 means, yes, it's part of the record like all the other
7 exhibits.
8 MR. KOLODIN: Then we're perfectly happy to
9 see it played, Your Honor.
10 THE COURT: Are you fine with it being
11 received in evidence at this time, 44?
12 MR. KOLODIN: We'll pass judgment on that
13 after we've seen what's on it.
14 THE COURT: Mr. Kolodin, the Court cannot
15 allow an exhibit to be displayed to the fact finder, i.e.,
16 me, unless it's been received in evidence.
17 MR. KOLODIN: Then, Your Honor, we would
18 object to this exhibit because -- on the basis of
19 foundation.
20 THE COURT: What foundation is lacking, Mr.
21 Kolodin? I just heard the witness testify about it.
22 MR. KOLODIN: We really don't know what it
23 is until we see it.
24 MS. CRAIGER: Your Honor, this was disclosed
25 to plaintiff's counsel with all the other exhibits as

1 required.
2 MR. KOLODIN: Yes. The Court will recall,
3 we had some technical issues accessing it. And so, again,
4 I just have to object unless we get to the end of the
5 slide.
6 THE COURT: Hold on just one minute. Mr.
7 Kolodin, you said, as I will recall, you had some
8 technical --
9 MR. KOLODIN: Some technical issues where we
10 didn't get these until relatively late in the day. So I
11 haven't seen what's on this slide. I've seen sort of an
12 image of it. So I don't have the foundation to agree to
13 it being moved into evidence. That's really all I can
14 say.
15 THE COURT: So your evidentiary objection is
16 what?
17 MR. KOLODIN: Foundation of the exhibit.
18 THE COURT: But the foundation is, you
19 haven't had a chance to look at it?
20 MR. KOLODIN: The foundation is we haven't
21 substantiated what's on it, right? And so that's my
22 objection.
23 THE COURT: Okay. Ms. Craiger, you want to
24 respond?
25 MS. CRAIGER: Sure. I believe Mr. Jarrett

1 has already testified that this is the training that was
2 used for poll workers, and that this was done in person,
3 and that he was part of the process of creating this
4 training. I don't know what other additional foundation
5 the Court would need.
6 THE COURT: I don't believe I need any more,
7 and I'm not really understanding Mr. Kolodin's objection
8 to truly be foundation. It sounds like it's more he's
9 unfamiliar with the exhibit for, you know, lack of time to
10 review it, but the witness now has provided me with
11 sufficient testimony to establish foundation. So I'm
12 going to overrule that objection. I'm going to receive 44
13 at this time.
14 MS. CRAIGER: Thank you, Your Honor. We'll
15 play that video. Sorry, Your Honor. Hold on one minute.
16 The sound isn't playing.
17 THE COURT: Take your time.
18 MS. BECKER: Your Honor, this is Ms. Becker.
19 THE COURT: Yes.
20 MS. BECKER: I would just like
21 clarification. Was it the testimony of the witness that
22 this was created and prepared by inhouse -- by himself and
23 others? I just want to confirm this wasn't from the
24 voting equipment manufacturer. If Ms. Craiger could
25 confirm that, I'd appreciate it.

1 THE COURT: Ms. Craiger, did the witness
2 already testify to that? If so, can we just confirm or
3 clarify.
4 A. Your Honor, this was created by the training team
5 within the Maricopa County Elections Department. It was
6 not created by the manufacturer.
7 THE COURT: Okay. Thanks for clarifying.
8 MS. BECKER: Thank you.
9 (Video played.)
10 THE COURT: We're having trouble with the
11 audio there.
12 MS. CRAIGER: Just one minute, Your Honor.
13 We'll back it up.
14 THE COURT: All right.
15 MS. CRAIGER: Your Honor, we are trying to
16 reload that.
17 THE COURT: Understood.
18 (Video played.)
19 Q. (BY MS. CRAIGER) Scott, I'm going to ask you
20 more -- Mr. Jarrett, I'm going to ask you a few more
21 detailed questions about some of the information that was
22 provided in there, but does that accurately represent how
23 poll workers were trained on the precinct-based
24 tabulators?
25 A. Yes. This video is a very similar video that was

1 used in online training as well, but this was the exact
2 video that was used for in-person training.
3 Q. And the video referenced troubleshooters at the
4 end. Can you explain what the troubleshooters are
5 responsible for.
6 A. So we hire troubleshooters to serve to provide
7 support for about four to five locations. So they're
8 responsible for getting additional supplies. So if a
9 polling location ran out of some affidavit envelopes or
10 any paper, or any of those things, they could then go to a
11 close-by supply depot to obtain those and bring those back
12 to the polling location.
13 They're also there to help in case there was
14 a situation with a voter, that there needed to be
15 additional explanation on exactly a law or procedure. Our
16 troubleshooters are some of our most seasoned and
17 experienced poll workers that we promoted into these
18 roles.
19 Q. How many troubleshooters were employed for
20 election day, roughly?
21 A. Roughly, 50 troubleshooters.
22 Q. I'm going to direct you now to what was marked as
23 Exhibit Number 42. Do you recognize this document,
24 Mr. Jarrett?
25 A. Yes, I do.

1 Q. What is it?
2 A. So as part of our in-person training, we went
3 through a slide deck, which included that video as part of
4 the slide deck, but the second portion of the in-person
5 training included hands-on experience that we provided to
6 our poll workers for all of our equipment, including the
7 precinct-based tabulator.
8 So this is the talking points that our
9 training team used as they went through the hands-on
10 portion of the in-person training.
11 MS. CRAIGER: Your Honor, I'd like to have
12 this Exhibit 42 entered into evidence.
13 THE COURT: Mr. Kolodin, any objections to
14 42?
15 MR. KOLODIN: No, Your Honor.
16 THE COURT: 42 is received.
17 MS. CRAIGER: Thank you.
18 Q. (BY MS. CRAIGER) Scott, I'd like to direct you
19 to under tabulator. It's this thick sort of bullet point
20 there. I'm going to read this to make sure I'm reading
21 this accurately.
22 Show misread and clear official envelopes
23 and discuss what will go inside of each. Discuss how
24 misreads will be counted and spoiled ballots will not.
25 Could you just explain a little bit about

1 the process for misread ballots and how those -- how poll
2 workers are trained on how to handle those.
3 A. So if a voter were to insert their ballot into
4 the precinct-based tabulator and got that invalid ballot
5 message or another message that the tabulator would not
6 accept that ballot, it would then feed that ballot back
7 out to the voter.
8 Then the poll workers are trained to
9 instruct that voter to try to insert that ballot in
10 different directions. Maybe feet first or turn the ballot
11 over to see if that would then allow the ballot to be
12 accepted by the tabulator.
13 If the ballot at that point in time still
14 would not be, after those several attempts, then the poll
15 workers are trained to ask the voter if they want to spoil
16 that ballot, which if they select to do that, then they
17 would write spoiled on that ballot. They would take that
18 voter to the check-in station to recheck in and have a
19 brand new ballot reprinted.
20 If the voter chooses that they want to still
21 allow that ballot to go through, be inserted into Drawer
22 3, the poll worker explained that that ballot will then be
23 counted back at the central count tabulation center, and
24 it would potentially need to be duplicated.
25 Q. We'll get into some details about that process in

1 a little while here, but this is something that poll
2 workers were trained on, correct?
3 A. Yes, that's correct.
4 Q. So I'd like to sort of direct your attention to
5 how a person votes on election day. So when a voter walks
6 into a vote center in this past election, walk into a vote
7 center, what was the first step of the process for a voter
8 to cast a ballot?
9 A. So they would be greeted by one of our poll
10 workers and then be offered -- so if they weren't wearing
11 a mask, they didn't have gloves, they didn't have any of
12 those protective gear that we're providing our poll
13 workers and also offering to voters, they would be offered
14 those items.
15 And then they would wait until then the next
16 check-in station -- what we refer to as site books -- were
17 open. They would then progress to a site book to check
18 in. They are self check-in stations up until a certain
19 point. They allow voters to scan their driver's license
20 for an ID. That gets them to start progressing through
21 the process, but as soon as it -- as soon as they get to
22 where the ID verification has to occur, the site books
23 have a blinking light that would come over, and they're
24 not allow to progress any further unless an inspector or a
25 judge come over. They verify the ID. The inspector or

1 judge would then be required to insert into the site book
2 what ID they viewed to confirm that voter's identity.
3 After they complete that check-in process,
4 then they would go to the next station, which is to obtain
5 their ballot. So that would be printed from a ballot on
6 demand printer. There is a control slip also printed.
7 That control slip shows the voter's name, the ballot,
8 precinct number. That would then match the precinct
9 number on the ballot. And that's how the poll workers
10 marry up to ensure that the voter received the correct
11 ballot.
12 The ballot has no identifying information on
13 it because it is a secret ballot. That voter would be
14 issued that ballot. They would go to any one of our
15 voting booths that were six feet apart to maintain
16 physical distancing. Voters would be able to fill out
17 that ballot. There are instructions in the voting booth
18 that tell the voter how they can complete that ballot.
19 After they've completed the ballot, they
20 would then go to one of the two precinct-based tabulators.
21 They would either wait in line if there was a voter that's
22 inserting it, or they would progress to that
23 precinct-based tabulator, insert their ballot themselves.
24 (Audio distortion) if happened over voted,
25 then that over voted ballot would -- the precinct-based

1 tabulator would send that alert on the screen. Two
2 buttons would light up. The poll worker would then
3 instruct the voter to look at the screen. If there was
4 more then one -- the precinct-based tabulator tells the
5 voter the specific -- the exact contest that was over
6 voted. If it was more than one, it would alert them to
7 all the contests that were over voted, and they'd have to
8 scroll through the screen to identify.
9 Then the voter is provided a choice. Do
10 they want to cast the ballot? That would be the green
11 button, or do they want to return the ballot. That would
12 be the red button. That ballot would then -- depending on
13 the voter's choice, the voter would press those buttons.
14 If they did return back out to themselves,
15 many times the voter would look to see, okay, which
16 contest was it. Even though the screen told them which
17 one. They'd still want to look at it. And then they
18 might decide to put it back and insert it back into the
19 tabulator, and then cast that ballot knowing that the
20 contest was over voted.
21 If not, then as I described before, they
22 would have the opportunity to spoil that ballot, recheck
23 in and follow that same process again.
24 Q. Okay. So I'm going to just break down a few
25 other things that you said just so we're clear. When a

1 voter places their ballot into the tabulator and it is not
2 rejected and no red or green lights come on, what does
3 that mean?
4 A. That means that their ballot was accepted by the
5 tabulation equipment, and it was counted.
6 Q. And what happens -- is there any indication on
7 the machine when that occurs?
8 A. Yes. So there's a little check mark that will
9 appear. It's there for just momentarily, and then there's
10 a sound that accompanies it.
11 Q. And if a ballot is a misread, what occurs after
12 the ballot's placed into the tabulator?
13 A. So then the -- well, the ballot will then --
14 won't even be accepted by the tabulator. It will
15 immediately feed that ballot and return it to back to the
16 voter. Then there's a screen that appears on the
17 tabulator that describes whether it was an invalid ballot
18 or a misread ballot.
19 Q. And I think you described the direction given to
20 poll workers and what they do in an instance when a ballot
21 is rejected and comes out of the tabulator. What happens?
22 A. So then the poll worker directs the voter to try
23 to reinsert that ballot, whether it be face down, face up,
24 feet first, head first, varying different ways to insert
25 that ballot to see if the tabulator will accept it.

1 If it doesn't accept it, that's when the
2 voter is offered a choice to either put that ballot into
3 secure Drawer Number 3 or to go revote the ballot,
4 spoiling the first one and getting a new ballot.
5 Q. So let's talk about Drawer Number 3. If I'm
6 understanding correctly, those are for ballots that that
7 the tabulator for some reason can't read, correct?
8 A. Yes. A damaged or defective ballot.
9 Q. So give me some examples of when that occurs.
10 A. So that could occur if the voter makes a mark in
11 those tiny marks, those hash marks that go down the sides
12 of the ballots. That wouldn't allow it. If our printers
13 were running potentially low on ink and some of those
14 timing marks weren't dark enough for the tabulators to
15 read, that would also create a time when that ballot
16 couldn't be read by the tabulator.
17 Sometimes even in our voting locations,
18 voters might damage the ballot themselves. Tear it, or
19 they might spill something on the ballot. Those types of
20 things would potentially create situations where a ballot
21 couldn't be read by the tabulator.
22 Q. So if a voter chooses not to spoil that ballot
23 that they have in their hand and put it into Drawer Number
24 3, what happens to the ballots that are placed into Drawer
25 3?

1 A. So as the video showed, there's an insert in the
2 tabulator, that brown insert. That separates those
3 ballots from all the ballots that went through the
4 tabulator itself and were counted.
5 So at the end of the night, the poll workers
6 would take those ballots out of Drawer Number 3. They are
7 trained to try to insert them back. There would be -- so
8 if -- let's say the tabulator was inoperable for some
9 time. If someone would have used a ball point pen, and
10 that ball point pen had some wet ink on it, that would
11 cause our tabulator to be inoperable. So then we would
12 have to replace that tabulator.
13 Well, in going to one of our supply depots
14 to replace that tabulator, that could have been
15 30 minutes, 45 minutes, an hour that there was no
16 operating tabulator in that voting location. Especially
17 if ball point pen were used on both.
18 So that means that during that period of
19 time, the voters would have the choice to wait inside the
20 voting location for that tabulator to be replaced or to
21 insert their ballot into Drawer Number 3.
22 Q. Are there any other -- other than the place where
23 you place your ballot into the tabulator or in Drawer
24 Number 3, are there any other slots that you could put a
25 ballot into on the tabulation machine?

1 A. Those are the only two slots.
2 Q. And so you talked about if the ballots can't be
3 read at the precinct-based tabulator at the end of the
4 night. What happens to those ballots? What's the process
5 for tabulating those ballots?
6 A. So at the end of the night, the poll workers
7 would try to insert them into the tabulator. If they
8 confirm they can't be read, then they would be placed into
9 an envelope, the misread ballot envelope. They count
10 those. They write the number of ballots that were
11 misread.
12 Those come back to the elections department
13 on election night. And then over the following days after
14 the election, we will then -- we hire five partisan
15 duplication boards. Members of different parties to go
16 through and to duplicate those ballots. So they would
17 have to duplicate every single contest on that ballot
18 looking for voter intent.
19 They will write a serial number on the
20 original ballot. They will then have a new serial number
21 affixed to the new ballot, so you can audit that and trace
22 that back. Then that new ballot, the duplicated ballot
23 that's no longer damaged, that will be run thorough our
24 central count tabulation equipment.
25 And then it would -- if there are write-in

1 contest that needed to be adjudicated, those would then go
2 through our electronic communication, but voters do look
3 for intent for those damaged ballots when they're
4 duplicated. They're not voters. Our central board
5 duplicators look for voter intent when they're duplicating
6 those ballots on to the new ballot.
7 Q. So I'm clear, then a new ballot is created which
8 would be the voter intent, correct?
9 A. That's correct.
10 Q. And then what happens to that new duplicated
11 ballot?
12 A. It does get counted through our central count
13 process.
14 Q. What happens if someone puts a ballot into a
15 tabulator that's completely blank?
16 A. So that would also notify the voter that they
17 voted an entirely blank ballot. And so it would -- those
18 red and green buttons would light up. The voter would be
19 instructed to let them know that they voted an entirely
20 blank ballot. And then they would have the choice to
21 either cast it or return to themselves and revote.
22 Q. And (audio distortion) voted for some but not all
23 of the races only?
24 A. It would not notify the voter. There's many
25 times where voters do not complete a whole ballot,

1 especially in those judicial contests, or the voter only
2 wants to vote for president or senate.
3 Q. You've been talking about over votes. Just to be
4 clear for the record, what is an over vote?
5 A. So an over vote is when a voter votes for more
6 candidates than allowed. So if it were president, the
7 presidential electors, it's a vote for one. So if they
8 would have voted for Trump and Biden or Biden and
9 Jorgenson, that would create an over vote situation, and
10 that's when the tabulator alerts the voter that they over
11 voted and cannot.
12 Q. And that's what you're referring to, the red and
13 green buttons light up, and the voter can identify where
14 the over voted race is; is that correct?
15 A. That's correct.
16 THE COURT: Ms. Craiger. Let me just
17 interject for a moment. I did not take note of this this
18 morning. I wasn't given any name by anybody, but do we
19 have a court reporter?
20 MS. CRAIGER: I believe so.
21 MR. KOLODIN: I think Ms. Gonski arranged
22 for it, Your Honor.
23 THE COURT: Okay. Folks, we need to --
24 we're at an hour and a half. Maybe five minutes shy or
25 so, but we need to take a 15-minute break for the court

1 reporter.
2 Ms. Yeager, that's where we are at this
3 point, correct?
4 (Off-the-record response by court reporter.)
5 THE COURT: Okay. We're going to stop for
6 15 minutes, folks. And we will resume in 15 minutes.
7 Please don't anybody disappear on me over the break. We
8 don't want to have to send out a mission to track you
9 down, but we'll need you all back. Thank you. We'll
10 stand at recess for 15 minutes.
11 (Off the record.)
12 THE COURT: Counsel, we are -- I'm told
13 still have everyone that we had previously announce. So
14 we will just continue on.
15 Ms. Craiger, just pay close attention to the
16 time. I think, at least, what I wrote down is you started
17 about 9:30. It lasted just shy of an hour, maybe 10:28 or
18 so.
19 MR. KOLODIN: And Your Honor, on that issue,
20 we have a bit of problem because they're going
21 significantly over time. Now, the defendants have put
22 down 40 minutes for direct and redirect. So obviously no
23 problem if they take more. However, when we agreed to
24 have Jarrett go first, we didn't realize it was going to
25 be this long. And Ms. Aguilera actually has to leave at

1 1:00 to go to work. And I know there's a lunch break
2 coming up and all that.
3 So we would ask the Court to allow direct
4 and redirect of Jarrett after we put on -- or cross and
5 redirect of Mr. Jarrett after we put on Ms. Aguilera so
6 that we can get her out of here by 1:00.
7 THE COURT: Mr. Kolodin, you said that the
8 county defendants had estimated 40 minutes on direct; is
9 that what you said?
10 MR. KOLODIN: Direct and redirect.
11 THE COURT: Oh, Ms. Craiger, are you running
12 way over? This is the first I'm hearing about Ms.
13 Aguilera having a time constraint. Hopefully, there are
14 no other witnesses because it's not good to hear about it
15 piecemeal.
16 Let me just ask right now. Are there any
17 other witnesses, anybody who's presenting that have told
18 you but I've not been informed, have time constraints?
19 MS. CRAIGER: No, Your Honor.
20 MR. KOLODIN: No, Your Honor.
21 THE COURT: So Ms. Craiger, how much longer
22 do you have with Mr. Jarrett on direct?
23 MS. CRAIGER: I would say I have, at the
24 most, 15 more minutes. And I will let you know, Your
25 Honor, we've decided because of the time constraints that

1 we were working with here that Kelly Dixon's testimony is
2 going to be substantially limited, if needed at all. So
3 that's a little bit of the extra time we're using here,
4 but certainly we're within our two-and-a-half hours. And
5 we did inform the Court of this time constraint as soon as
6 we become aware of it.
7 THE COURT: Okay. Mr. Kolodin, what are you
8 asking for specifically having just heard what Ms. Craiger
9 had to say? Just because this time is valuable.
10 MR. KOLODIN: Just that we handle cross and
11 redirect of Mr. Jarrett after we put Ms. Aguilera on.
12 THE COURT: How long is Ms. Aguilera going
13 to be start to finish?
14 MR. KOLODIN: We have her -- our estimates
15 for Ms. Aguilera are 27.5 for direct and redirect and 10
16 minutes for cross. That was the county's estimate on
17 cross. So substantially less than Jarrett on cross.
18 THE COURT: So about a -- you said roughly
19 about 37 minutes total?
20 MR. KOLODIN: Yes, Your Honor.
21 THE COURT: And she needs to be gone by
22 when, Mr. Kolodin?
23 MR. KOLODIN: 1:00, Your Honor.
24 THE COURT: So Mr. Kolodin, how long do you
25 anticipate to cross Mr. Jarrett?

1 MR. KOLODIN: We had estimated 30 minutes
2 for Mr. Jarrett's cross, Your Honor, in, you know,
3 scheduling order joint report.
4 THE COURT: So Ms. Craiger, can we get -- I
5 don't know. You folks are giving me a dilemma here. Can
6 we get Ms. Aguilera on and off and then continue on with
7 Mr. Jarrett?
8 MS. CRAIGER: Well, Mr. Jarrett has to leave
9 by noon, which is what we provided to the Court. So, I
10 mean, we're willing to bleed into the lunch hour to take
11 Ms. Aguilera's if that's possible for the Court, but, you
12 know, she's the plaintiff in this case and brought this
13 suit. So, you know, and we were not aware of any time
14 constraint related to her, but switching around and taking
15 Ms. Aguilera before we finish Mr. Jarrett doesn't allow
16 for Mr. Jarrett's time constraint that we need at this
17 point.
18 THE COURT: So folks, surprises are not easy
19 to work with for everybody.
20 So Mr. Kolodin, here's what we'll do. We'll
21 -- since your client is available until 1:00 -- I mean,
22 she's the plaintiff. I fully expected her to be here the
23 whole proceeding. And that's a reasonable presumption I
24 think most judges would make.
25 So just for future reference, absolutely

1 alert the Court if your own client who brought the lawsuit
2 is not going to be available the whole time. It may be a
3 good day for her to take off from work if she's able to.
4 I'm not pressuring you to do that. I'm just saying that's
5 what I would have just kind of presumed would be
6 happening.
7 That being said, let's go ahead and finish
8 with Mr. Jarrett. And then if your client can be here
9 until 1:00, we will pick up with her as soon as we're done
10 with Mr. Jarrett.
11 I still have to give the court reporter a
12 15-minute break every hour and a half or a five-minute
13 break every hour. So wherever that happens to fall from
14 when we started -- Ana, what time did we start?
15 Ana says we went on the record at 10:41. I
16 was out here at 10:41? Okay. 10:49. I misheard her. I
17 was thinking, no way. It hasn't been that long. Okay.
18 10:49.
19 So let's get Mr. Jarrett done, and then
20 we'll take Ms. Aguilera. If we have to do a break in
21 there for the court reporter, we'll have to do that break.
22 Mr. Kolodin, that will work, won't it?
23 MR. KOLODIN: I'm sorry.
24 THE COURT: That will work, won't it?
25 MR. KOLODIN: If he's done by noon, that may

1 require the county to not have or severely limit redirect.
2 THE COURT: Okay. Let's go forward. We're
3 trying to put too much into the future because I honestly
4 don't know how it will play out.
5 Ms. Craiger, you keep track of your time
6 constraints, and we will intend -- I think it should work.
7 We will intend to get Mr. Jarrett done by noon. That's an
8 hour plus from now, and Ms. Aguilera done by 1:00. It
9 looks feasible to me. So let's charge forward.
10 Ms. Craiger, you want to continue at this
11 point?
12 MS. CRAIGER: Yes, Your Honor. I just want
13 to be clear that this discussion that took place related
14 to Ms. Aguilera's time frames didn't come out of our time,
15 the defendant's --
16 THE COURT: It did not. I'm going to start
17 your time when you get your witness's first question to
18 him.
19 MS. CRAIGER: Wonderful. Thank you.
20 Q. (BY MS. CRAIGER) Okay. So Mr. Jarrett, you had
21 talked about stray marks. And I just want to understand
22 if there's a stray mark, how much of an oval would need to
23 be filled in in order for that stray mark to be read as an
24 over vote?
25 A. So to be read --

1 MR. KOLODIN: Objection. Foundation.
2 MS. CRAIGER: Mr. Jarrett has already
3 testified significantly about his role in election day and
4 understanding of how the tabulation equipment works. So
5 I'm not clear on the basis for the foundational objection.
6 MR. KOLODIN: Are you tendering him --
7 THE COURT: Mr. Kolodin, let me -- always
8 give me an opportunity to either rule or give you further
9 direction. I also do not understand, given what the
10 witness has already told us about his background,
11 experience, job duties, et cetera, what foundation is
12 missing. Identify the missing foundation.
13 MR. KOLODIN: There's been no testimony as
14 to the witness's technical expertise with these machines
15 or his technical background. This seems like a technical
16 question.
17 THE COURT: What's the question again,
18 Ms. Craiger?
19 MS. CRAIGER: I asked Mr. Jarrett how much
20 of an oval would need to be filled in order for a stray
21 mark to register as an over vote.
22 THE COURT: Mr. Jarrett, do you have the
23 experience and the training to answer that question?
24 A. Well, Your Honor, I've had oversight over this
25 function and the staff that report to me. And when we set

1 the parameters for the tabulation equipment, I was
2 involved in making those decisions.
3 THE COURT: So is the direct answer yes, you
4 do have the experience and the training, knowledge?
5 A. Yes, Your Honor.
6 THE COURT: Okay. Mr. Kolodin, I'm going to
7 overrule the objection. If you want to cross on that,
8 you're welcome to when we get to you. Go ahead and
9 proceed, please.
10 Q. (BY MS. CRAIGER) All right. So Mr. Jarrett, how
11 much of an oval would need to be filled in in order for a
12 stray mark to register as an over vote?
13 A. Over 35 percent of that oval would need to be
14 filled in. So first there would need to be the first oval
15 in the contest filled in over 35 percent, and then the
16 second oval would also need to be filled in that much to
17 register as an over vote.
18 Q. So we talked a bit the about the option of voters
19 to spoil ballots. So I want to talk about what it means
20 to spoil a ballot. You know, what's the process for a
21 poll worker to actually spoil a ballot?
22 A. So the poll worker would need to be notified from
23 the voter that it's the voter's intent to spoil that
24 ballot. That could happen when the voter is in the voting
25 booth and they've made a mistake and -- before they even

1 get to the tabulation equipment, or if the voter has
2 inserted their ballot into the tabulation equipment, then
3 notified that it's an over vote or a ballot that can't be
4 read by the tabulator. Then they would go and notify a
5 poll worker. The poll worker would then take that ballot,
6 that original ballot. They would need to write spoil on
7 it, put it in a clear, official envelope, all other
8 spoiled ballots that were voted in that voting location.
9 They would then take the voter back to the
10 site book check-in location. The voter would need to
11 rescan their ID, check in, and then get a new ballot
12 printed so the voter could then vote a new ballot.
13 Q. All right. So I'd like to direct your attention
14 back to Exhibit 40, Page 112 of that exhibit. And so this
15 is the page in the manual, the training manual that talks
16 about spoiling a ballot; is that correct?
17 A. That's correct.
18 Q. On this page, there is a picture -- well, there
19 are two pictures. Just -- when you talk about writing on
20 a ballot, is there one of these on this that is what
21 you're referencing here, the process?
22 A. Yes. It's the right picture. Writing on the
23 actual ballot itself, not the affidavit envelope.
24 Q. This is how the poll workers are trained to spoil
25 a ballot; is that correct?

1 A. On election day, that was the process I was
2 referring to. Early voting, they would need to also spoil
3 the envelope.
4 Q. So and you talked about the ballot. One of the
5 steps of the process is that it's spoiled in the site
6 book, correct?
7 A. That's correct.
8 Q. So can you describe to me, I guess are the site
9 books and the tabulators connected at all?
10 A. No, they are not. As part of the EAC
11 certification and the Secretary of State certification,
12 the tabulation equipment cannot be connected to the
13 internet or any external device that's not part of the
14 system itself. The site book stand are stand-alone
15 equipment that connect to our ballot on demand printers
16 but not the tabulation equipment.
17 Q. So there is no real connection if it's indicated
18 in the site book that a ballot has been spoiled to an
19 actual physical ballot. That's just a tracking mechanism
20 for you; is that correct?
21 A. That's correct.
22 Q. What if a voter wanted to spoil her ballot after
23 it had been inserted into and accepted by the tabulator?
24 A. It's not possible to spoil that actual ballot.
25 MR. KOLODIN: Foundation.

1 THE COURT: What foundation is lacking,
2 Mr. Kolodin?
3 MR. KOLODIN: Same objection as before. The
4 technical knowledge, Your Honor. Just putting it for the
5 record.
6 THE COURT: I think it's been sufficiently
7 established. Overrule. You can cross if you'd like, sir,
8 later.
9 Q. (BY MS. CRAIGER) So the question was, what if a
10 voter wanted to spoil her ballot after it was inserted and
11 accepted in the tabulator?
12 A. We cannot spoil that actual ballot because the
13 ballot is secret. So it's gone into the tabulator. It's
14 in the tabulator -- into the ballot box with all the other
15 ballots that have been voted that day. So there's no way
16 to identify truly that that was that voter's ballot.
17 Q. And if it's been accepted into the tabulator, has
18 that ballot been counted?
19 A. Yes.
20 Q. So what if a poll worker spoiled someone's ballot
21 on the site book but realized there was no physical ballot
22 to be able to spoil, could that voter get another ballot
23 to vote?
24 A. They should not get another ballot to vote
25 because they've already voted and that would be allowing

1 them to vote twice.
2 Q. All right. I'm going to direct your attention
3 quickly to Exhibit Number 43. And do you recognize this
4 document?
5 A. Yes, I do.
6 Q. What is that?
7 A. It's a document that we prepare to inform the
8 poll workers on how to use the tabulator, set up the
9 tabulator for election day.
10 Q. And where would this document -- how was it
11 provided to the poll workers?
12 A. So it was on a laminated sheet that was provided
13 to the poll workers. We do this for several pieces of
14 equipment. It's just an additional aid to make sure that
15 the poll workers have the information readily accessible
16 when they're using the (audio distortion).
17 MS. CRAIGER: Your Honor, I'd like to have
18 Exhibit 43 marked into evidence, please.
19 THE COURT: Give me just a moment, Counsel.
20 Are you folks getting that kind of bubbling sound, almost
21 like you're under water? Ms. Becker is nodding her head
22 yes.
23 MR. LARUE: Your Honor, I believe it may be
24 that Mr. Kolodin is unmuted. On my screen, it showed him
25 as talking but I believe there may have just been some

1 noise.
2 THE COURT: Okay. Ms. Craiger, can you just
3 repeat the end to make sure we got it on the record
4 because it was rough at this end.
5 MS. CRAIGER: I had just asked, Your Honor,
6 to have Exhibit Number 43 marked into evidence, please.
7 THE COURT: Oh, that's right. Mr. Kolodin,
8 you will have to unmute, sir.
9 MR. KOLODIN: No objection.
10 THE COURT: Thank you. 43 is received.
11 Q. (BY MS. CRAIGER) Okay. I'd like to talk to you
12 about the recorder's website briefly. Are voters able to
13 check the status of their voting on the recorders website?
14 A. Yes, they are.
15 Q. Explain what information is provided for election
16 day voters.
17 A. So if a voter were to visit a voting location and
18 vote and check in through the site book, that would
19 reflect that the voter voted on election day and their
20 ballot was counted.
21 Q. So if a voter checked in and received a ballot
22 that day, the website indicates that they voted, correct?
23 A. That's correct.
24 Q. And why is -- I guess, is there any indication
25 that the ballot was actually fed into the tabulator? Is

1 that part of what is the information that's provided on
2 the recorder's website?
3 A. No. That's not provided because it's the secrecy
4 of the ballot going into the tabulator. We view that if a
5 voter checked in and then that wasn't -- didn't
6 subsequently spoil a ballot, then that voter voted on
7 election day and their ballot was counted.
8 Q. So if a voter informs a poll worker that she
9 wants to spoil her ballot but does not want to go through
10 the process of getting a second ballot, what would be
11 reflected on the recorder website in that situation?
12 A. So if the voter did go and sign or check in with
13 their ID and spoiled that initial ballot, but then did not
14 print out a new ballot, then it would show that that voter
15 did not vote on election day.
16 Q. Does that happen sometimes?
17 A. That can happen sometimes. That decision lies
18 with the voter to make that decision. If they choose
19 after we've already spoiled that first ballot in the
20 system, not that was actually counted in the tabulator,
21 then that is -- that decision rests with the voter, and
22 they can make that decision.
23 THE COURT: Mr. Jarrett, let me be sure I
24 understood what you said, sir. You said if a voter
25 checked in and spoiled the ballot but then elected not to

1 cast a new ballot, they would show in the system on the
2 recorder's website as what, sir?
3 A. As soon as that ballot is indicated in site book
4 as spoiled, it would show that they have not voted.
5 THE COURT: The fact that they're in the
6 site book, does it show that they checked but they didn't
7 vote.
8 A. No. It shows that they did -- as they did not
9 vote at all that day because the status on our Be Ballot
10 Ready site that shows their check in status or their
11 voting status is based off their check in. As soon as
12 they spoil their ballot, it's essentially voiding that
13 check in, that first check in.
14 THE COURT: And that's consistent then with
15 your earlier testimony that if they want to spoil a ballot
16 and vote a new ballot, they have to go back through the
17 presentation of their identification, et cetera. That's
18 to basically show them, again, checking in.
19 A. That's correct. And then they would need to then
20 have that second ballot printed. And as soon as that
21 happens, then the status on the website would then go to
22 you voted on election day, and your ballot was counted.
23 THE COURT: I see. Okay, thank you.
24 Q. (BY MS. CRAIGER) So let's quickly talk about
25 Sharpies. How did the election department make the

1 decision to provide in-person voters with Sharpie markers
2 to mark the ballots?
3 A. This decision was made back in February of 2020
4 when we were actually testing our equipment and using it
5 for its voting. It identified that other -- our ballot
6 marking pens that we've used in prior elections were
7 causing issues with our tabulators as far as smudging on
8 this mylar film when those ballots were being inserted
9 into the tabulator.
10 So then we went to our vendor and asked them
11 to provide us what was the best instrument. They had done
12 research. When they had submitted the equipment for the
13 EAC certification, a Sharpie fine point pen was the
14 recommended ballot marking device or ink to be used on the
15 tabulators. They informed us of that.
16 Then we went through and did a test. The
17 elections department did a test of our -- the ballot
18 marking pen that we had used for prior elections, the ball
19 point pen and the Sharpie, to determine which would be the
20 most reliable ink to be used with our tabulators on
21 election day. And it was overwhelmingly the Sharpie pen
22 because its ink dried the fastest.
23 Q. And I just want to be clear when you talked about
24 smudging occurring as a result of the ball point pens,
25 you're talking about at the precinct-based tabulators; is

1 that correct?
2 A. That's correct. Because a voter within moments
3 of completing their ballot would be inserting it into the
4 precinct-based tabulator. If the ink is still wet, it
5 could cause smudging on the precinct-based tabulator.
6 During early voting, the ballots go into an
7 envelope, and it could be days before those ballots are
8 received by the election department after the voter voted
9 them. So the ink has been allowed time to dry.
10 Q. So I'd like to direct your attention to
11 Exhibit 52.
12 A. I'm not seeing --
13 Q. Do you recognize this document?
14 A. Yes, I do.
15 Q. What is it?
16 A. It is a letter that Dominion provided to us in
17 February that was stated previously that described what
18 was the preferred ballot marking pen to be used with our
19 precinct-based tabulators. And it identifies the Sharpie
20 fine point black pen to be that preferred marking device.
21 MS. CRAIGER: Your Honor, I'd like to mark
22 Exhibit 52 into evidence, please.
23 THE COURT: Any objection, Mr. Kolodin?
24 MR. KOLODIN: No, Your Honor.
25 THE COURT: 52 is received.

1 Q. (BY MS. CRAIGER) So are there any concerns that
2 if the Sharpie did bleed through, that that could cause
3 the vote tabulator to register an over vote?
4 A. No. It would not because we off set the ovals on
5 the front of the ballot and the back of the ballot. So if
6 bleed through were to occur, it doesn't occur in the
7 actual oval.
8 As I testified earlier, it would need to be
9 35 percent of the oval to be completed to create an over
10 vote and two ovals in a single contest. It's not possible
11 when you're filling in the ovals because they're off set.
12 They're not overlapping from the front and the back of the
13 ballot.
14 THE COURT: Mr. Jarrett, do I understand you
15 to be then effectively saying -- you know, sometimes
16 people will have a random mark somewhere else on the
17 ballot just mistakenly there. So long as the mark is not
18 inside an oval, the tabulator reading it will not even
19 recognize that? It will not be viewed as anything related
20 to a voter's choice in a contest; is that correct?
21 A. Your Honor, you're correct.
22 THE COURT: Thank you.
23 Q. (BY MS. CRAIGER) I'd like to direct you to
24 what's marked as Exhibit 22. Do you recognize this
25 document?

1 A. Yes, I do.
2 Q. What is it?
3 A. It is an email sent from Ms. Dixon to our
4 troubleshooters during the early voting period,
5 instructing -- or thanking our troubleshooters for the
6 service that they've been providing for Maricopa County
7 voters. And then instructing them to inform the
8 inspectors at each of the polling locations that they're
9 supporting to use ball point pens during the early voting
10 period only, but then to ensure on election day to use the
11 markie -- or the Sharpie markers.
12 And this email was sent out at my direction,
13 because we had heard concerns from poll workers from
14 voters that they were concerned about the bleed.
15 Q. And who is Kelly Dixon?
16 A. Kelly Dixon is the Assistant Director for
17 Training and Recruitment for the Maricopa County Elections
18 Department. She reports to me.
19 MS. CRAIGER: Your Honor, I'd like to mark
20 Exhibit 22 into evidence, please.
21 THE COURT: Any objection, Mr. Kolodin?
22 MR. KOLODIN: No, no objection, Your Honor.
23 THE COURT: Thank you. 22 is received
24 without objection.
25 Q. (BY MS. CRAIGER) And just to be clear, ball

1 point -- I'm sorry. Early ballots are not run through
2 precinct-based tabulators, correct?
3 A. That's correct. They are inserted into affidavit
4 envelopes and then returned to the election department to
5 be tabulated later.
6 Q. And that process, am I correct in understanding,
7 allows the ball point pen ink to dry so that it won't
8 cause any smudges or issues with the tabulation equipment
9 at the central tabulation; is that correct?
10 A. That's correct.
11 Q. I'd like to direct your attention to Exhibit
12 Number 51. Do you recognize these documents?
13 A. Yes, I do.
14 Q. What are they, Mr. Jarrett?
15 A. They are correspondence between the Arizona
16 Attorney General's office and Maricopa County asking about
17 the use of Sharpies during the November general 2020
18 election.
19 Q. Were you involved in writing of the second letter
20 here, that if you turn to the third page of the second
21 letter, came from the civil services division of the
22 County Attorney's office. Did you provide anything put
23 into that letter?
24 A. Yes. These questions were directed to me from
25 the Attorney General's office, and I assisted in preparing

1 the responses working through the Maricopa County
2 Attorney's office.
3 MS. CRAIGER: I'd like to have Exhibit 51
4 marked into evidence, please.
5 MR. KOLODIN: We object, Your Honor.
6 Specifically with respect to the third letter in the
7 series, which is hearsay. The Attorney General's office
8 misstated it was basing that letter on the representations
9 made by defendants, who, of course, are party to this
10 litigation. So that letter is hearsay and inadmissible
11 and certainly not probative.
12 MS. CRAIGER: Your Honor, this is a public
13 document, so it's an exception to the hearsay rule.
14 THE COURT: Mr. Kolodin, respond to that
15 exception explanation.
16 MR. KOLODIN: Well, certainly. I would
17 still say that admissible evidence has to be relevant.
18 Obviously, if a letter that says, okay, well, you've told
19 us you did nothing wrong, and we believe you from a party
20 it's not probative, right? It's just saying, well, based
21 on your representations. And the question is, of course,
22 whether what defendant's position is is actually true. So
23 it's not probative to the litigation.
24 THE COURT: So you're not objecting that it
25 fails to satisfy 803(8) as an exception to the rule

1 against hearsay because it's a public record. You're not
2 saying -- you're not disputing that. You're just saying
3 it's not relevant; it's not material?
4 MR. KOLODIN: You know, Your Honor, I'd have
5 to look at 803, but I simply don't have anything more
6 intelligent to say on that point at this point, but I'd
7 also say in addition to my objection for the record on the
8 hearsay question that it's not probative because it's
9 basically a letter written accepting defendant's position
10 at face value. We don't have any objection to the other
11 two letters. It's that letter specifically we object to.
12 THE COURT: All right. I will overrule the
13 objection and receive Exhibit 51.
14 MS. CRAIGER: Thank you, Your Honor.
15 Q. (BY MS. CRAIGER) So Scott, I'd like to direct
16 you to the third paragraph of the last letter, the letter
17 from the Attorney General's office. I'm going to read
18 this to you.
19 Having received and reviewed your
20 correspondence, AGO is satisfied that the mere use of
21 Sharpie brand markers at voting centers in Maricopa County
22 did not result in disenfranchisement.
23 Did I read that correctly?
24 A. That's correct.
25 Q. Thank you.

1 MS. CRAIGER: We have no further questions,
2 Your Honor.
3 THE COURT: All right. Mr. Kolodin,
4 cross-examination, sir.
5 MR. LARUE: Your Honor, we give control back
6 to your courtroom.
7 MR. ARELLANO: Your Honor, if I may,
8 intervenor will have a few questions for Mr. Jarrett. I'm
9 happy to do those now or on a redirect after Mr. Kolodin
10 finishes his cross.
11 THE COURT: Okay. Mr. Kolodin, does it
12 matter to you whether it's before or after your cross.
13 MR. KOLODIN: Yeah. We'd like to do our
14 cross first, Your Honor.
15 THE COURT: Okay. You won't have the
16 benefit of hearing Mr. Arellano's questions before you do
17 your cross, just so you're thinking that forward. If you
18 want to do your cross first, that's fine with me.
19 MR. KOLODIN: Yes, Your Honor, we'll do our
20 cross first.
21 THE COURT: Mr. Arellano, you can hold then
22 until after cross?
23 MR. ARELLANO: Yes, Your Honor. Thank you.
24 THE COURT: Go ahead, Mr. Kolodin.
25 CROSS-EXAMINATION

1 BY MR. KOLODIN:
2 Q. Mr. Jarrett, you testified earlier that members
3 of the public are not permitted to be physically present
4 when electronic adjudication is taking place; is that
5 correct?
6 A. Members of the public that are not appointed by
7 the parties, the county parties that are official
8 observers that come in. The members of the public can
9 view from our website via the live --
10 Q. We'll get to that in a second. I just wanted to
11 make sure I was clear on that point. Electronic
12 adjudication, that takes place on screens, right?
13 A. On computers, yes. And then it's a computer
14 screen that the bipartisan adjudication boards are viewing
15 when they're performing the electronic adjudication.
16 Q. What displays on that screen?
17 A. So the ballot is displayed on that screen and
18 overlays that provide assistance to the board to identify
19 which specific contest may have been over voted.
20 Q. Okay. So if someone is there watching that
21 screen, does that screen give them the information to
22 decide for themselves, hey, did these adjudicators
23 adjudicate this ballot right?
24 A. So --
25 MS. CRAIGER: Objection, Your Honor.

1 MR. KOLODIN: I'll rephrase the question.
2 Q. (BY MR. KOLODIN) If I am watching the screen,
3 does it show me the basis on which the adjudicator has
4 made their decisions regarding the adjudication?
5 MS. CRAIGER: Objection, Your Honor. That
6 calls for speculation.
7 THE COURT: Well, if Mr. -- I don't know if
8 that calls for speculation. Mr. Jarrett, I think, has
9 indicated that he has knowledge of this process.
10 Aren't you asking a process question,
11 Mr. Kolodin, what actually displays on the screen?
12 MR. KOLODIN: Yes, Your Honor. Whether the
13 adjudicators are basing their decision off of what's
14 displaying on that screen. That's what I'm asking.
15 THE COURT: Okay. All right. So that was a
16 little different than what I understood. I thought you
17 were saying what's displayed. You're saying does the
18 adjudicator decide just based on what's on the screen?
19 MR. KOLODIN: Yes.
20 THE COURT: Mr. Jarrett, are you able to
21 answer that? And perhaps, I don't know if you've ever
22 been an adjudicator, but you've talked about training
23 people. So from that perspective, can you answer that
24 question, sir?
25 A. Yes, Your Honor.

1 THE COURT: Go ahead, sir.
2 A. So the adjudicators would be making decisions
3 based off the training we provided and what they're
4 viewing on the screen. An observer, one of the political
5 party observers would be able to view what the
6 adjudicators are looking at and overhear any conversations
7 that the adjudicators are having to make their
8 determinations.
9 Q. (BY MR. KOLODIN) Thank you. Now, the cameras
10 that are set up in the room where this takes place, they
11 don't display the screen; isn't that right?
12 A. That's correct.
13 Q. Okay. What's the point of having cameras in the
14 room for the public to use if they can't see what's going
15 on on the screen?
16 A. So the public can view what's occurring within
17 the tabulator room as a whole, but they cannot look at
18 specific ballots that are being adjudicated. We start
19 tabulating 14 days before the election day. We cannot
20 release results to the public until after election day.
21 And having cameras viewing those ballots before election
22 day and even subsequent to election day would be releasing
23 results prior to election day, which is not allowed
24 through statute.
25 Q. But I thought you had testified earlier that most

1 ballots aren't adjudicated; isn't that right?
2 A. I don't recall testifying to that earlier, but
3 that is correct. Most ballots do not go through
4 adjudicating.
5 Q. Right. And so adjudication is not necessarily
6 going to give you a representative sample of what's going
7 on with the overall vote, right?
8 A. People can infer from small limited samples of
9 ballots of what the results may look like, and we cannot
10 release any results, even whether it's one ballot or a
11 large grouping of all the ballots to the public.
12 Q. Are political parties permitted by statute to
13 access results before election day?
14 A. So the political parties can observe the process
15 that is occurring with adjudication.
16 Q. That's not what I'm asking. The same statute
17 that you're referencing, are political parties permitted
18 to receive election results prior to election?
19 A. Result themselves, no, they are not.
20 Q. Thank you, Mr. Jarrett. Mr. Jarrett, what is
21 your education -- educational background?
22 A. So have gone to college. I have a bachelor's
23 degree in accounting. I'm a certified fraud examiner.
24 I'm a certified internal auditor, and I am -- background
25 mostly accounting and business process, risk mitigation.

1 That's my background.
2 Q. Very good. Do you have any technical training on
3 the tabulator machines? For instance, could you maintain
4 one of those machines yourself?
5 A. No, I could not.
6 Q. Could you troubleshoot one of those machines
7 yourself?
8 A. The basic troubleshooting that we would provide
9 our -- training for our troubleshooters and our poll
10 workers, I could, yes.
11 Q. But you don't have any knowledge beyond what a
12 poll worker would have, right?
13 A. I think maybe some knowledge beyond what a poll
14 worker, but not an extensive amount to troubleshoot more
15 technical issues, that's correct.
16 Q. Now, you had testified that you're involved with
17 setting the parameters for these machines reading an over
18 vote, right?
19 A. That's correct.
20 Q. Okay. And you set a 35 percent perimeter, is
21 that right?
22 A. That's correct.
23 Q. What is involved with setting that parameter?
24 A. So it's working with our vendor, Dominion,
25 working with our ballot tabulation manager staff, deciding

1 on exactly the ink levels that will be used, whether we're
2 using black ink or red ink. And then that will then
3 forward those ballots through adjudication based on those
4 thresholds that we set. We rely on recommendations from
5 our vendors to set those parameters.
6 Q. Understood, but when you actually set the
7 parameter at the end of the day, do you do anything more
8 than send an email to the vendor or something to that
9 effect, saying, we'd like the parameter to be set at 35
10 percent. Make it happen?
11 A. No -- yes. I do not do anything. I do not make
12 that change specifically myself.
13 Q. And you don't have the technical expertise to
14 know if those machines are actually following the
15 35 percent perimeter or maybe they're actually going off
16 36 or 34, and they shouldn't be?
17 A. Well, when they go through adjudication, the
18 machine actually displays that information. So the
19 adjudication boards can hover over the ovals, and then
20 that tells the adjudicators how much that oval is
21 completed or filled in.
22 THE COURT: Mr. Jarrett, are you saying that
23 there would be a number displayed that the adjudicators
24 see that would be 20 percent, 50 percent, or are you
25 saying they just eyeball it?

1 A. Your Honor, so they could hover the mouse over
2 that specific oval, and when they do that a number -- so
3 if it's 13 percent or 14 percent, it will show that, just
4 as you described.
5 THE COURT: Thank you.
6 Q. (BY MR. KOLODIN) Mr. Jarrett, is -- well, we'll
7 get to that. Mr. Jarrett, what's a logic and accuracy
8 test?
9 A. So logic and accuracy test is -- there's two
10 logic and accuracy tests that are performed at two
11 different points in the election process, but the purpose
12 of it is to verify the accuracy of the tabulation
13 equipment both used at the voting locations, as well as
14 central count tabulation.
15 And it is running preprinted ballots and
16 test ballots through the system, through the program to
17 verify that what is run through the tabulators is the
18 expected result, and it confirms the accuracy of the
19 system.
20 Q. Now, do any of those test ballots have stray
21 marks on them?
22 A. No, they do not.
23 Q. What about over votes? Any of those test ballots
24 have over votes on them?
25 A. Yes, they do.

1 THE COURT: Mr. Jarrett, sometimes you say
2 tabulators. Sometimes you say tabulator equipment. Is
3 there something beyond the actual tabulator that falls
4 under the umbrella of tabulator equipment, or are you just
5 using that synonymously?
6 A. I am using that synonymously, but we do have the
7 tabulator system itself includes the adjudication station.
8 So a tabulator itself, that would be the precinct-based
9 tabulator or central count tabulator. The entire
10 equipment and system could include the servers, the other
11 supporting computers for the system.
12 THE COURT: I see, but the pictures we saw
13 in that training manual of the tabulator, generally
14 speaking, we're talking about ballots going in and coming
15 out, et cetera, that's what you're describing, yes?
16 A. Correct, Your Honor.
17 THE COURT: Thank you. Sorry, Mr. Kolodin,
18 go ahead, sir.
19 MR. KOLODIN: Thank you, Your Honor.
20 Q. (BY MR. KOLODIN) What happens when you insert a
21 ballot into a tabulator before the please insert ballot
22 message is shown?
23 A. So the tabulator would not accept it. Usually,
24 that's the case when a voter, a prior voter has inserted
25 their ballot, is still being fed in and dropped into the

1 ballot box. So it would not start the feeding process of
2 the next ballot. So a voter would not be able to insert
3 that ballot into that tabulator.
4 Q. Correct. Poll workers are county employees,
5 right?
6 A. Yes, they are.
7 Q. Okay. Your testimony earlier was that a check
8 mark and a sound always accompanies an accepted ballot,
9 correct?
10 A. As the system is designed, that's correct.
11 Q. Drawer 3, if I refer to Drawer 3, you know what
12 I'm talking about, right?
13 A. Yes.
14 Q. Okay. Drawer 3, you testified earlier is for
15 damage or defective ballots, correct?
16 A. That's correct.
17 Q. Okay. And would you agree with me then that if a
18 ballot is not damaged or defective, it should not end up
19 in Drawer 3?
20 A. Other than if the tabulator was inoperable. So
21 there are instances where a ballot would go into Drawer 3
22 if the tabulator was not functioning when the voter was
23 there to insert their ballot into the tabulator.
24 Q. So let me see if I understand this correctly.
25 What you're saying is, the only three circumstances in

1 which a ballot should go into Drawer 3 is if a ballot is
2 damaged, the ballot is defective, or the tabulator is
3 inoperable; is that correct?
4 A. That's correct.
5 Q. Now, once the ballots in Drawer 3 go to MCTEC,
6 they're duplicated at that point and another attempt is
7 made to run them through the tabulators at MCTEC; do I
8 have that right?
9 A. So we will do a visual assertation of the ballot
10 to see if they could be read potentially by our central
11 count tabulators before making a determination whether we
12 would duplicate them.
13 So our central count tabulators are much
14 more expensive equipment. They may be able to actually
15 read a ballot that our precinct-based tabulator could not
16 read.
17 Q. Is that process the same for both early ballots
18 and election day ballots?
19 A. It is a similar process because when early
20 ballots come through, they go through an early ballot
21 processing board, and they are inspecting the ballots for
22 damage. And they may manually out stack ballots to be
23 duplicated before they go through the tabulation
24 equipment.
25 Q. Okay. So an election day ballot is placed in

1 Drawer 3, your testimony is proper procedure is first that
2 the poll workers at the polling location try to run it
3 through the tabulators at the location again after the
4 polls close, right?
5 A. That's correct.
6 Q. And then if that's not successful, that ballot is
7 taken to MCTEC, right?
8 A. That's correct.
9 Q. And then some of those ballots are -- an attempt
10 is made with respect to some of those ballots to run them
11 through a tabulator again, and others go directly to
12 manual duplication, correct?
13 A. That's correct.
14 Q. Okay. And that manual duplication process
15 involves human beings attempting to ascertain voter
16 intent, correct?
17 A. That's correct.
18 Q. Okay. And some of the ballots that are attempted
19 -- that you attempt to run through the tabulation
20 equipment at MCTEC, those end up going to the human
21 duplication process as well, correct?
22 A. Yes, that's correct.
23 Q. And there's a visual inspection of those ballots
24 at the time that they're taken in at MCTEC to determine
25 whether a third attempt will be made to run them through

1 tabulation equipment, or whether they will proceed
2 directly to human duplication; is that correct?
3 A. Which ballots are you referring to.
4 Q. The election day ballots in Drawer 3 that are
5 taken to MCTEC.
6 A. Yes.
7 Q. You said there was a visual inspection of them
8 prior to you guys deciding whether there's going to be an
9 attempt made to run them through the machines at MCTEC, or
10 whether they're going to go into the human duplication
11 course; do I have that right?
12 A. That's correct.
13 Q. And what do those visual inspectors look for?
14 A. They look for if there may be a ballot that was
15 printed slightly misaligned. So that would -- if it is
16 misaligned, that would need to go through duplication, but
17 if they can't visually determine why the ballot would have
18 needed to go to duplication or was not read by the
19 tabulator, it would then attempt to run it through our
20 central count tabulator.
21 Q. So are some ballots -- strike the question.
22 Approximately, how many ballots would you say are printed
23 misaligned in any given cycle?
24 A. I don't have an exact estimate for you but --
25 Q. At least -- sorry I didn't mean to interrupt.

1 Please continue.
2 A. So there were just around 2,000 ballots that came
3 back to us in misread envelopes, but those could have been
4 based off of when tabulators were inoperable. And just
5 when we went through them, we had to manually duplicate
6 about 1,000 ballots. The other 1,000 went through our
7 central count tabulators.
8 Q. But fair to say that at least a few ballots this
9 election cycle were printed misaligned, correct?
10 A. Yes, that's correct.
11 Q. And the machines wouldn't have been able to read
12 those, correct?
13 A. That's correct.
14 THE COURT: Mr. Jarrett, how many ballots
15 altogether in this election cycle came back? How many
16 ballots were voted in this election cycle? Is a better
17 way to put it.
18 A. So total ballots were over two million ballots
19 voted in this election cycle. On election day, we had
20 167,000 ballots, plus another approximately 18,000
21 provisional ballots.
22 THE COURT: Okay. Thank you.
23 Q. (BY MR. KOLODIN) Okay. Is it your testimony
24 that a bleed through can never be read as -- well, strike
25 the question.

1 Let me distinguish first. I'm not asking
2 about over votes. I understand your offset printing
3 process with respect to over votes. Is it your testimony
4 that a bleed through on the ballot could never be read as
5 a stray mark?
6 A. That's not my testimony. There could be
7 instances where bleed through could create, you know, a
8 stray mark.
9 Q. Okay. What would those instances be?
10 A. If someone were to -- well, bleed throughs will
11 always create a stray mark. It would just not be in the
12 over vote if someone was filling out an O. If someone
13 were to write us a letter on a ballot, which voters do,
14 those would then create stray marks. If someone were to
15 mark somewhere else on the ballot that wasn't in an oval,
16 those would also create stray marks on the front and the
17 back of the ballot.
18 Q. And that's not all of the examples of instances
19 where that could happen. That's just a few, right?
20 A. Yeah. That's probably not a complete inventory
21 of every single instance, but that could happen.
22 THE COURT: Mr. Kolodin, this time is not
23 counting against you but I can't let this pass. Why do
24 voters write you letters on their ballots?
25 A. Your Honor, I do not know why voters choose to do

1 that, but sometimes they do. Instead of voting, they
2 would like to send us other messages.
3 THE COURT: Do you respond to those letters?
4 A. No, we do not, Your Honor.
5 THE COURT: Okay. Thank you. Back to you,
6 Mr. Kolodin.
7 MR. KOLODIN: Your Honor, let me just review
8 my notes briefly to see if I have additional questions.
9 Q. (BY MR. KOLODIN) Is there -- do all the voting
10 centers in Maricopa County utilize the same type of
11 tabulation machines?
12 A. Yes, they do.
13 Q. You testified earlier that you had to completely
14 rearrange this election in five days due to Covid, right?
15 A. That's incorrect. That was referring to the
16 March presidential preferential election.
17 Q. My apologies.
18 MR. KOLODIN: Your Honor, we'll tender the
19 witness.
20 THE COURT: All right. Redirect. I'm
21 sorry. Mr. Arellano, you're next, sir.
22 MR. ARELLANO: And if Your Honor wouldn't
23 mind having your court staff hand me presentation rights,
24 I want to show this one exhibit, if I may.
25 THE COURT: Yes. Just one second,

1 Mr. Arellano. Okay. You are good to go.
2 MR. ARELLANO: Thank you.
3 CROSS-EXAMINATION
4 BY MR. ARELLANO:
5 Q. Mr. Jarrett, good afternoon or good morning, I
6 should say. I have up on my screen here what has been
7 received in evidence as Exhibit 41. Do you recognize this
8 exhibit?
9 A. Yes, I do.
10 Q. What is it?
11 A. It's the election day and emergency voting plan
12 that I created in conjunction with my team and presented
13 to the Board of Supervisors for their approval in
14 September.
15 Q. I'm going to scroll down to Page 43. And you're
16 welcome to look at your paper copy you have in front of
17 you if that might be easier, but I want to direct -- on
18 Page 43, I want to direct your attention to Section 7.1.
19 And specifically, the third sentence of that paragraph
20 that says to assist with meeting this timeline.
21 Would you read that sentence for the Court
22 and the record.
23 A. So could you direct me to where you're referring
24 to again.
25 Q. Sure. It's on Page 43. It's Section 7.1, which

1 is titled, Tabulation Approach and Strategy.
2 A. Yes. The third sentence.
3 Q. The third sentence that begins with to assist.
4 A. To assist with meeting this timeline, the board
5 approved the lease of a new tabulation system. Dominion
6 Democracy 5.5-B Suite to replace the prior tabulation
7 system purchased in 1996. The new system will improve --
8 Q. That was the only portion I needed. Thank you.
9 You testified earlier that Maricopa County used the same
10 vote center tabulation system throughout the county; is
11 that right?
12 A. Yes, that's correct.
13 Q. Was that the Dominion Democracy 5.5-B Suite?
14 A. Yes, that is correct.
15 Q. For the avoidance of doubt, Maricopa County did
16 not use any other Dominion voting system this election; is
17 that correct?
18 A. Maricopa County did not use any other voting
19 system other than the Democracy 5.5-B Suite.
20 Q. Do you know if Dominion voting systems has other
21 models of voting systems?
22 A. Yes, they do.
23 Q. But, again, Maricopa County did not use those; is
24 that right?
25 A. They -- we did not.

1 Q. Okay. My next question relates to the hand count
2 audit; do you know what that is?
3 A. Yes, I do.
4 Q. What is the hand count audit?
5 A. The hand count audit is a statutory requirement
6 that counties do after an election. We work with the
7 parties. The parties appoint their individual appointees
8 to come in and do a hand count of one percent of -- or
9 5,000 early ballots and two percent of both our ballots
10 cast in vote centers -- sorry. Let me rephrase that. Two
11 percent of vote centers in the county and the ballots that
12 were cast at that vote centers.
13 MR. KOLODIN: Your Honor, in the interest of
14 time, we'll object to further questioning along this line.
15 We don't see the relevance. The hand count audit.
16 THE COURT: Mr. Arellano, what's the
17 relevance?
18 MR. ARELLANO: It goes to the accuracy of
19 the voting systems which plaintiffs has called into
20 question.
21 THE COURT: Okay. I'm going to allow it,
22 Mr. Kolodin. Go ahead, Mr. Arellano.
23 Q. (BY MR. ARELLANO) So Mr. Jarrett, how many hand
24 counts have there been in 2020?
25 A. We have had three separate hand counts. One for

1 each of the federal and statewide election. So that would
2 be the March presidential preference election, the August
3 primary election, and the November general election.
4 Q. And each of those elections used the Dominion
5 Democracy 5.5-B Suite tabulation system; is that right?
6 A. That's correct.
7 Q. Were there any discrepancies found in the hand
8 count audit, between what was hand counted and what the
9 tabulators had registered?
10 A. There were no discrepancies identified during
11 these hand counts.
12 Q. None whatsoever?
13 A. None. You're correct.
14 Q. So would you characterize this system as having
15 counted with perfect accuracy?
16 A. Yes.
17 MR. ARELLANO: Thank you. No further
18 questions, Your Honor.
19 THE COURT: All right. Mr. Kolodin, I know
20 you crossed before Mr. Arellano. That was your election.
21 Do you want to do any cross on that?
22 MR. KOLODIN: I've got one question. All
23 right.
24 THE COURT: Go ahead, sir.
25 FURTHER EXAMINATION

1 BY MR. KOLODIN:
2 Q. When you say the hand count audit has perfect
3 accuracy, Mr. Jarrett, what you're saying is that of the
4 ballots the machines could tabulate, they read those
5 ballots the same way as the hand count auditors, correct?
6 A. Of all ballots that were tabulated and counted in
7 this election and that were selected by the political
8 parties to be reviewed, they confirmed that those were
9 accurate.
10 Q. So that -- sorry. Then a couple of follow-up
11 questions. So that then is a mixed sample of ballots read
12 by tabulators and ballots reviewed by human adjudication
13 boards that are being compared to the hand count audit,
14 right?
15 A. So every ballot that is counted and then
16 submitted to the hand count boards was read through a
17 tabulator, whether that be an election day tabulator, one
18 of our central count tabulators.
19 Q. Okay. What -- right but some of those ballots
20 were read after they were duplicated by humans, right?
21 A. That's correct.
22 Q. Okay. And what percentage of ballots were
23 audited in this fashion?
24 A. So there were 5,000 early ballots that were
25 audited in this fashion, and then there were also a two

1 percent of vote centers that were used on election day
2 were audited as well.
3 Q. And when you say vote centers, you mean -- No. I
4 understand what you mean. So even if the machines -- so
5 if you had a ballot that the machines couldn't read for
6 some reason and then it was duplicated and it was run
7 through the tabulators at central, that ballot might
8 potentially be in this audit, right?
9 A. That is correct.
10 Q. Okay. Thank you.
11 THE COURT: Is that everything, Mr. Kolodin?
12 MR. KOLODIN: Yes, Your Honor.
13 THE COURT: All right, Ms. Craiger, do you
14 have any redirect?
15 MS. CRAIGER: Yes. Thank you, Your Honor.
16 Just a few questions.
17 REDIRECT EXAMINATION
18 BY MS. CRAIGER:
19 Q. Do you know how many total ovals were audited?
20 A. Yes. So in the hand count audit there were over
21 47,000 ovals that were reviewed. That included both early
22 ballots and the election day ballots.
23 Q. And are people allowed to photograph their
24 ballots or other people's ballots?
25 A. No, not in the voting location. They are not.

1 Q. And in central tabulation, are people allowed to
2 photographic ballots?
3 A. No, they were not.
4 Q. So the party representatives and other
5 individuals involved in the adjudication process, are they
6 allowed to photograph or film the ballots in close up?
7 A. No, they are not.
8 MS. CRAIGER: No further questions, Your
9 Honor.
10 THE COURT: All right. That is everyone
11 with Mr. Jarrett, I believe. If I am overlooking anyone,
12 speak now or forever hold your peace. Any objection to
13 Mr. Jarrett being released at this time, folks?
14 MR. KOLODIN: No, Your Honor.
15 THE COURT: All right. Mr. Jarrett, thanks
16 for your time, sir. You are free to go.
17 All right. As I understand, folks,
18 Mr. Kolodin, you are now to going to proceed with
19 plaintiff's case, yes?
20 MR. KOLODIN: Yes.
21 THE COURT: All right. You can begin, sir.
22 MR. KOLODIN: All right. Your Honor,
23 inquiry, when does the court reporter take her break?
24 Because this might be a good time, and then we can run
25 straight through Ms. Aguilera.

1 THE COURT: How long do you think total for
2 Ms. Aguilera?
3 MR. KOLODIN: Your Honor, we had estimated
4 for Ms. Aguilera approximately 37.5 minutes.
5 THE COURT: Total or just on direct?
6 MR. KOLODIN: Total.
7 THE COURT: Total. Okay. With Hope's
8 agreement because, Hope, I'm happy to stop right here if
9 you want, but it's up to you.
10 (Off-the-record response by court reporter.)
11 THE COURT: All right. Thank you.
12 Mr. Kolodin, we are going to proceed then with your
13 witness, sir.
14 MR. KOLODIN: Yes, Your Honor. All right.
15 We'll call Laurie Aguilera to the stand. Let me go and
16 put her into the -- tell her to go to the right room.
17 THE COURT: Mr. Kolodin -- all right. Now,
18 we can see Ms. Aguilera.
19 Ms. Aguilera, my clerk is in the top, Kathy
20 Ballard. She's going to swear you in.
21 LAURIE AGUILERA,
22 called as a witness, having been duly sworn,
23 testified as follows:
24 THE COURT: You can proceed, Mr. Kolodin.
25 MR. KOLODIN: Thank you, Your Honor.

1 DIRECT EXAMINATION
2 BY MR. KOLODIN:
3 Q. Now, Ms. Aguilera, what do you do for a living?
4 A. I'm an escrow officer.
5 Q. An escrow officer. How long have you held that
6 position?
7 A. I've been working for a title company for
8 20 years at least.
9 Q. Twenty years. Is being exact important in that
10 line of work?
11 A. Yes.
12 Q. Why is that?
13 A. Because we're dealing with other people's money.
14 And coming from a real estate, you know, legal aspects of
15 real estate transactions, we have to make sure that we
16 take care of everything that needs to in a transaction.
17 Anything that needs to be reconciled so that the new owner
18 doesn't have any title issues.
19 Q. Now, you have to fill out a lot of paperwork in
20 that job, right?
21 A. Yes.
22 Q. And what could the consequences be of making a
23 mistake on this paperwork?
24 A. Well, could be a multiple -- a number of things.
25 Title doesn't transfer properly. There could be debts

1 that weren't picked up that transferred to the new owner.
2 Those are a couple of issues.
3 Q. Okay. I want to take you back in time just a
4 little bit to election. Before I get to that, let me ask
5 you, are you a registered voter in Maricopa County?
6 A. Yes.
7 Q. Are you on the early ballot list?
8 A. No.
9 Q. Okay. Did you vote in the general election held
10 earlier this month?
11 A. Yes.
12 Q. Okay. Where did you vote?
13 A. At my precinct at the Sheraton Hotel on Dunlap
14 and 26th Avenue.
15 Q. What city is that in?
16 A. Phoenix.
17 Q. Do you also live in Phoenix?
18 A. I do.
19 Q. How did you get to the polling place?
20 A. I drove -- well, I rode in the car with my
21 husband. We went together.
22 Q. Why did your husband come with you?
23 A. We go together every election. That's been our
24 habit. We go early in the morning.
25 Q. Does he also vote?

1 A. Yes.
2 Q. Do you know if he also voted in this past general
3 election?
4 A. Yes, he did.
5 Q. Okay. About what time did you arrive at the
6 polling place?
7 A. About 5:30 in the morning.
8 Q. How do you know?
9 A. Well, when we left the house, we left at 5:30. I
10 knew that because I looked at the clock. And, you know,
11 we got there and waited in line for, I mean, a good 20,
12 25 minutes.
13 Q. Okay. Was your husband in front of or behind you
14 in line?
15 A. He was in front of me.
16 Q. Was there anybody between you and your husband?
17 A. No.
18 Q. Okay. And your husband's name by the way is
19 what?
20 A. Damian Aguilera.
21 Q. Damian Aguilera, okay. You get to the polling
22 place. You check in at the pack, right?
23 A. Yes.
24 Q. Tell me about that process.
25 A. Well, I walked up to the table and handed them my

1 ID, and they looked through their book and then sent me
2 through the door to go check in at the kiosk.
3 Q. Poll worker there at the kiosk assisting you?
4 A. Yes.
5 Q. Tell me about the check-in process at the kiosk?
6 A. Well, they had me scan my ID and confirm my
7 address and my name. And that was really -- oh, then I
8 signed. And then after that, I proceeded to the table
9 where they printed out my ballot.
10 Q. Okay. Did you take a look at that ballot?
11 A. I did, yeah.
12 Q. Okay. And the piece of paper that they gave you
13 was it -- the ballot, the actual ballot itself, was in
14 good condition?
15 A. Yes.
16 Q. Was there any tears or marks or folds, anything
17 like that, wrinkles?
18 A. No.
19 Q. Okay. What do you do with the ballot then?
20 A. I walked over to a table and proceeded to make my
21 selection. There was a --
22 Q. Well, let me -- before we get there.
23 MR. KOLODIN: Alfredo, can I have you put up
24 the poll worker manual. And specifically, the page of the
25 poll worker manual that has the instructions.

1 THE COURT: Mr. Kolodin, for the record,
2 give us the exhibit number, please.
3 MR. KOLODIN: Chris, can you give them the
4 exhibit number, please. I think it's 21, Your Honor.
5 MR. VISKOVIC: Exhibit 21.
6 THE COURT: Thank you.
7 MR. VISKOVIC: What page was that you wanted
8 up?
9 MR. KOLODIN: It's the one with the -- I'll
10 find it. 38, Page 38.
11 MR. VISKOVIC: All right. Perfect.
12 MR. KOLODIN: Is it possible to zoom in on
13 those instructions?
14 MR. VISKOVIC: Of course.
15 MR. KOLODIN: Thank you so such. As big as
16 you can get them where they're not off the screen.
17 Q. (BY MR. KOLODIN) Okay. Now, Ms. Aguilera, I'm
18 displaying something that's already been marked as an
19 exhibit, but a particular portion that says instructions
20 at the top. Have you ever seen -- particularly, the
21 document to the left. It's in the English language, have
22 you ever seen that document before?
23 A. It looks familiar.
24 Q. Okay. Any idea if you saw it at your polling
25 place?

1 A. I'm pretty sure that was on the ballot itself.
2 Q. Okay, but suffice it to say, you saw it somewhere
3 during the voting process, right?
4 A. Yes, correct.
5 Q. So now you're at the voting booth. You're
6 filling out your ballot, okay. Do you fill out the front
7 and back side of the ballot?
8 A. Yes, I did.
9 Q. Okay. And did you vote for every race?
10 A. Well, not for some judges, but every other race,
11 yes.
12 Q. But and some of the judicial races, you left
13 blank, right?
14 A. I did.
15 Q. Now, are you familiar with what the term over
16 vote means?
17 A. Not really. I mean, I've heard it but --
18 Q. Okay. I'm going to represent to you that the
19 term over vote means that you vote for more candidates
20 than are allowed in a given race; do you understand that
21 description?
22 A. Yes.
23 Q. Okay. On any of the races on your ballot, did
24 you over vote any of those races, either intentionally or
25 unintentionally?

1 A. No.
2 Q. How would you remember?
3 A. Well, I remember reading, you know, the ballot.
4 And there were some elections that -- or some position, I
5 guess you could say, that allowed for more than one
6 selection. I paid attention to that.
7 Q. Okay. Taking the third instruction out of order
8 -- and I apologize for that, but let's start with the
9 first one.
10 Did you use the pen or marking device,
11 whatever it was, provided to you by the poll workers?
12 Well, strike the question.
13 Did the poll workers provide you with a
14 marking device?
15 A. Well, they didn't hand it to me, but when I asked
16 where the pens were, they said they were on the tables
17 so...
18 Q. So you didn't bring your own, right?
19 A. No.
20 Q. Okay. And the marking device that was provided
21 on the table, that was in the booth, right?
22 A. Yes.
23 Q. Okay. And that marking device, what was it?
24 A. It was a fine point Sharpie.
25 Q. Okay. Now, when you are filling in the ovals on

1 your ballot, did you make any marks outside of the ovals
2 or outside of the lines?
3 A. No. I was very careful not to.
4 Q. Okay. And how would you know?
5 A. Well, like I said, I was very careful not to.
6 That's how I know.
7 Q. Did you fill in the bubbles completely on your
8 ballot?
9 A. Yes. I would say pretty much completely. There
10 may have been like maybe a little that was not completed
11 but no. Yeah, completely, I would say.
12 Q. Did you vote for any write-in candidates on your
13 ballot?
14 A. No.
15 Q. Okay. After you got done with your ballot, did
16 you look it over?
17 A. I did.
18 Q. Front and back?
19 A. Yes.
20 Q. And then what did you do with it?
21 A. I walked over to where you check out, and I was
22 directed to a machine. And I asked the poll worker about
23 the bleeding, if that was going to be an issue.
24 Q. Okay. And was it a he or a she, the poll worker?
25 A. It was a he.

1 Q. It was a he, okay. What did he say?
2 A. He said let's try it. Put your ballot in.
3 Q. Okay. And did you?
4 A. I did.
5 Q. Okay. What happened?
6 A. Well, the machine took my ballot.
7 MR. KOLODIN: Now, Alfredo, I want you to go
8 to the page of the poll worker manual that shows the
9 tabulators, please.
10 MR. ALFREDO: Do you have the page number
11 down for that one?
12 MR. KOLODIN: 64.
13 MR. VISKOVIC: 54, all right.
14 THE COURT: Did you say 64, Mr. Kolodin?
15 MR. KOLODIN: 6-4, Your Honor.
16 THE COURT: And for the record, this is
17 still Exhibit 21, yes?
18 MR. KOLODIN: Yes, Your Honor.
19 THE COURT: Thank you.
20 MR. KOLODIN: That's not the page. For some
21 reason I have that marked. There's a page with a bigger
22 -- can you control F for tabulator -- oh, wait. No, it
23 does. It's just very small. Can you zoom in on the
24 picture in the bottom left-hand corner, Alfredo. A little
25 bit more. Okay, yeah. And fill the screen with that one.

1 Yeah, perfect.
2 Q. (BY MR. KOLODIN) So taking a look at the image
3 on the left of the screen -- and this is the bottom left
4 most image on the page -- does that look like the
5 tabulator, Ms. Aguilera, into which you attempted to
6 insert your ballot?
7 A. Yes.
8 Q. Okay. Did you attempt to insert your ballot in
9 the top most slot?
10 A. Yes, I did. Where the arrows are?
11 Q. Yes. Where the arrows are.
12 A. Yes.
13 Q. When you inserted your ballot, do you see that
14 screen on the top part of the tabulator?
15 A. I do.
16 Q. When it took your ballot, did anything at all
17 display on that screen?
18 A. No.
19 Q. Were you looking at the screen?
20 A. I was looking at the screen, and the poll worker
21 also commented about -- he asked me if it displayed
22 anything.
23 Q. Okay. Was he looking at it when he -- when you
24 put your ballot in?
25 A. Well, there were people coming in. He was

1 standing right next to me. I was surprised that he asked
2 me. He was looking kind of in the direction, but we were,
3 you know, standing together so...
4 Q. All right. Did a check mark display on the
5 screen --
6 A. No.
7 Q. -- when you inserted your ballot? I'm sorry.
8 Repeat your answer, please.
9 A. No.
10 Q. No, okay. Did the tabulator make a sound when
11 you inserted your ballot?
12 A. No.
13 Q. Okay. After this sort of unusual set of events
14 occurred, what happened then?
15 A. Well, the poll worker said to another poll
16 worker, something's wrong here. It looks like it's ready
17 to receive another ballot.
18 MS. CRAIGER: Objection. This is hearsay.
19 MR. KOLODIN: An exception to hearsay, Your
20 Honor. Admission against interest. As Mr. Jarrett
21 testified, the poll workers were defendant employees.
22 THE COURT: Ms. Craiger, isn't it a
23 statement by a party opponent?
24 MS. CRAIGER: Well, the poll workers don't
25 put on the election, Your Honor. They are temporary

1 employees that work there on election day.
2 THE COURT: I thought Mr. Jarrett testified
3 that they were county employees. He was asked that
4 question on cross to my memory.
5 MS. CRAIGER: That is correct. They are
6 county employees at the time they are working at the
7 polls.
8 THE COURT: And that's the time that's at
9 issue here, because it was working at election when the
10 person made this statement, correct, Mr. Kolodin?
11 MR. KOLODIN: That's right, Your Honor.
12 THE COURT: Okay. I would overrule the
13 objection and allow it under that exception.
14 Q. (BY MR. KOLODIN) So Ms. Aguilera, you were
15 telling us what the poll worker said when these events
16 occurred.
17 A. Right. He said, hey, I think there's a problem.
18 It's acting as if it wants to receive another ballot, or
19 it's ready to receive another ballot. So the other poll
20 worker came over. They looked at the machine for bit, and
21 the second poll worker that he called said, she's going to
22 have to do it again.
23 Q. Okay. And what happened then?
24 A. Well, they put me back in the front of the line
25 where you, you know, wait for the next check-in kiosk, I

1 guess, computer, whatever you call it. And when one
2 become available, I was walked up to the computer, and I
3 was told to scan my ID, which I did. And it indicated
4 that a ballot or vote had already been cast and asked if
5 we wanted to cancel the vote. The poll worker pushed yes
6 and then confirmed yes, and then at that moment, the other
7 poll worker came over and said, no, no, no. I just got
8 off the phone her ballot's in the box. It will be counted
9 tonight.
10 Q. Okay. Did you ask for another ballot?
11 A. I did.
12 Q. So you asked to spoil this ballot cast?
13 A. Yes.
14 Q. Did the pole workers accommodate this request?
15 A. No.
16 Q. No. Okay.
17 MR. KOLODIN: Alfredo, would you display the
18 picture of the ballot that we have as an exhibit, please.
19 That would be 19.
20 MS. CRAIGER: Your Honor, I'd like to -- I
21 don't know whose ballot this is or what the testimony is
22 about to be, but it is a Class 2 misdemeanor to take
23 photographs of ballots.
24 THE COURT: Okay. Everybody hold on for a
25 moment. First, unless an exhibit is received in evidence

1 it shall not be displayed. It's improper to do that. So
2 that needs to come off the screen unless it's been
3 received. Up until now, what you folks have been showing
4 me have been received in evidence. This has not even been
5 offered yet, Mr. Kolodin. So you cannot have your
6 associate display it until I've received it. So go ahead
7 and offer it first.
8 MR. KOLODIN: So Your Honor, we'd like to
9 offer 19 into evidence, essentially for Ms. Aguilera to
10 testify that it looked like her ballot and the bleed
11 through issue looked similar.
12 THE COURT: Exhibit 19, Mr. Kolodin, is what
13 exactly.
14 MR. KOLODIN: It's a photo of one of these
15 completed ballots from election day just to give the Court
16 some idea of, you know, what it looks like and what the
17 bleed through issue looks like. We thought it would be
18 useful.
19 THE COURT: Okay. Ms. Craiger, you have an
20 objection. What is your objection?
21 MS. CRAIGER: Well, it is illegal to take a
22 photo of a ballot.
23 THE COURT: I'm sorry. Ms. Craiger, I'm
24 sorry. You blanked out there. You said it's illegal to
25 what?

1 MS. CRAIGER: It is a Class 2 misdemeanor to
2 take a photo of a ballot. In order to authenticate this
3 ballot, I don't know what testimony Ms. Aguilera is going
4 to provide, but certainly she needs to be advised of her
5 5th Amendment rights if she's going to attempt to
6 authenticate this ballot.
7 So I just wanted to raise this objection
8 before it's placed into evidence.
9 THE COURT: Ms. Craiger, what is the statute
10 under -- I assume it's in Title 13 that makes it a
11 misdemeanor to take a photo of a ballot.
12 MS. CRAIGER: 16-515 G and H.
13 THE COURT: Okay.
14 MS. GONSKI: Your Honor, we'd also have an
15 objection to the foundation here. If it wasn't actually
16 her ballot, then nobody is available to authenticate it.
17 Then it's a foundation issue as well.
18 THE COURT: Mr. Kolodin, you need to address
19 both of those. They would seem to be hurdles for you at
20 this moment.
21 MR. KOLODIN: Okay. Your Honor, first of
22 all, it's very upsetting the government is threatening
23 criminal sanctions for trying to introduce a piece of
24 evidence as unobjectionable as an image of a ballot. Not
25 an imagine of a person but an image of a ballot.

1 THE COURT: Mr. Kolodin, before you leave
2 that response, are you familiar with the statute that
3 counsel, Ms. Craiger, has just cited?
4 MR. KOLODIN: There is a statute that
5 prohibits photography within 75 feet of a polling place to
6 prevent images of voters from being taken and voters from
7 being intimidated. This is just a picture of a ballot.
8 There is no voters in this picture and doesn't show
9 anything like that.
10 THE COURT: Hold on one second. Ms.
11 Craiger, read me that statute, please.
12 MS. CRAIGER: 16-515 G. A person may not
13 take photographs or videos while within the 75 foot limit.
14 Any person violating this section is guilty of a Class 2
15 misdemeanor, but on election day, voters can't leave with
16 their ballots. They're either spoiled, or they're voted.
17 So this photo would have had to have been taken within the
18 75 foot limit.
19 THE COURT: Read me the statute one more
20 time, please. I don't want to miss cite it here when I
21 have a question for Mr. Kolodin.
22 MS. CRAIGER: Not withstanding
23 Section 16-1018, a person may not take photographs or
24 videos while within the 75 foot limit. H is any person
25 violating this section is guilty of a Class 2 misdemeanor.

1 THE COURT: Okay. Mr. Kolodin, that statute
2 does not read that you can't take pictures of people.
3 There's no reference to what you're taking pictures of.
4 And Mr. Kolodin, this is not a minor issue in the sense
5 that there's an ethical issue that the county defendants
6 are properly addressing, which is preventing your client
7 from testifying about something that could put her in
8 criminal jeopardy of a Class 2 misdemeanor if she is not
9 advised ahead of time that she stands to put herself at
10 risk.
11 So it meeds to be taken seriously from the
12 Court's perspective in terms of any advise you give your
13 client, which would you want to do not front of us, but
14 that's not frivolous for your client's personal interests.
15 MR. KOLODIN: Understood, Your Honor. May
16 we have a brief recess?
17 THE COURT: Yes. Thank you. We will stand
18 at recess.
19 (Off the record.)
20 THE COURT: Are you ready to proceed?
21 MR. KOLODIN: Yes, Your Honor. We'll
22 withdraw the exhibit. It's mainly valuable for
23 illustrative purposes to demonstrate potential fraud. We
24 can proceed without it.
25 THE COURT: Mr. Kolodin, hold on a minute.

1 I just want an answer to that, because I don't know that
2 we have everybody back yet.
3 Is there anybody we're still missing? I see
4 Mr. LaRue, Ms. Craiger, Mr. Arellano, Ms. Gonski,
5 Mr. Viskovic, and plaintiff, as well as Mr. Kolodin.
6 There's somebody that we had before. There's Ms. Becker.
7 Is there anyone else we're missing, folks?
8 MR. KOLODIN: No, Your Honor, not to my
9 knowledge.
10 THE COURT: Ms. Craiger, as far as you know,
11 do we have everybody?
12 MS. CRAIGER: Yes, Your Honor.
13 THE COURT: Okay. So Mr. Kolodin, we are
14 now officially back on the record. What is it is you're
15 asking the Court to do with respect to Exhibit 19, sir?
16 MR. KOLODIN: We'll withdraw the exhibit,
17 Your Honor.
18 THE COURT: All right. No objection, Ms.
19 Craiger?
20 MS. CRAIGER: Correct, Your Honor. No
21 objection.
22 THE COURT: All right. The request to move
23 Exhibit 19 is withdrawn.
24 MR. KOLODIN: All right.
25 Q. (BY MR. KOLODIN) Ms. Aguilera, where was your

1 husband when all of this was taking place?
2 A. He was waiting for me in the lobby area.
3 Q. And was there a view in from the lobby area to
4 where you were trying to cast your ballot?
5 A. Yeah, I believe so. It's a double door opening
6 that was wide open.
7 Q. Okay. So if he were to testify that he saw you
8 standing at the voting machine, you would have no reason
9 to disbelieve that testimony?
10 A. Yeah. No reason.
11 Q. How long have you been married to your husband?
12 A. Twenty-three years.
13 Q. Your opinion is that he's -- you believe he's
14 generally an honest guy?
15 A. Yes.
16 Q. Okay.
17 MR. KOLODIN: Alfredo, please put up
18 Exhibit 2.
19 THE COURT: Exhibit 2 has not yet been
20 received.
21 MR. KOLODIN: Sorry. We would offer
22 Exhibit 2 into evidence. This is the material from the
23 county defendant's website demonstrating the status of
24 election day votes for Ms. Aguilera and her husband.
25 THE COURT: Ms. Craiger, any objection or

1 Ms. Gonski, anyone, any objection to Exhibit 2?
2 MS. CRAIGER: No objection, Your Honor.
3 MS. GONSKI: No objection, Your Honor.
4 THE COURT: Two is received.
5 MR. KOLODIN: Your Honor --
6 Q. (BY MR. KOLODIN) So Ms. Aguilera, can you please
7 identify this document.
8 A. You're scrolling down. It looks like it's my
9 husband's.
10 MR. KOLODIN: Alfredo, would you please go
11 to her part of it.
12 A. There we go.
13 Q. (BY KOLODIN) Would you please identify this
14 document.
15 A. It looks like my voter status from the website.
16 Q. Does this document show whether you're on the
17 early voting list?
18 A. Not on that particular page. Oh, right there.
19 Yes, it indicates no, that I'm not.
20 Q. You testified earlier that that's correct
21 information, right?
22 A. That is correct.
23 Q. Does this document show whether, according to
24 county record, you voted on election day?
25 A. Well, it indicates that there is an upcoming

1 election for November 3rd, but it doesn't indicate that I
2 voted.
3 Q. Okay.
4 MR. KOLODIN: One second, Your Honor.
5 Q. (BY KOLODIN) Before you inserted your ballot
6 into the tabulator, you testified you looked it over,
7 right?
8 A. Yes.
9 Q. Did you -- aside from bleed through, did you
10 observe any from stray marks on that ballot?
11 A. No.
12 Q. Now, the message on the screen displayed to the
13 poll worker when he was cancelling out your ballot, tell
14 me as near as you remember how that message read.
15 A. Well, it read something like, do you want to
16 cancel this ballot or vote, yes or no.
17 Q. Ms. Aguilera, if I were to tell you -- and I'm
18 not telling you this is true or false or whatever but I'm
19 just -- it's a hypothetical. If I were to tell you that
20 your ballot ended up being counted but counted by human
21 beings and not a machine, would that satisfy you as to
22 this action?
23 A. No.
24 Q. Why is that?
25 A. Because I have no way of verifying that.

1 Q. Okay. Versus if the machine had displayed a
2 check mark, and you would have known your vote counted?
3 A. Well, that would have been an indicator, yes.
4 Q. Okay. One second.
5 MR. KOLODIN: All right, Your Honor. We'll
6 tender the witness for cross.
7 THE COURT: All right. Ms. Craiger, cross
8 examination?
9 MS. CRAIGER: We have no questions, Your
10 Honor.
11 THE COURT: Mr. Arellano, any questions for
12 this witness?
13 MS. GONSKI: Your Honor, this is Ms. Gonski.
14 Just a few questions.
15 THE COURT: Ms. Gonski, go ahead.
16 MS. GONSKI: Sure.
17 CROSS-EXAMINATION
18 BY MS. GONSKI:
19 Q. Ms. Aguilera, I'm going to direct you to the
20 exhibit that's on the screen right now. Did you take this
21 screen shot?
22 A. I did.
23 Q. And when did you take it?
24 A. I don't remember the date. A couple of weeks
25 maybe. A week -- I don't know. A couple of weeks ago.

1 Q. Have you -- did you check, recheck the ballot
2 status that's displayed on the screen before the hearing
3 today?
4 A. Not today, no, but I've checked it since I took
5 that screen shot.
6 Q. When was last time that you checked it,
7 approximately?
8 A. I don't know. Maybe a week ago.
9 Q. Okay. So it's possible that it displays
10 something different today; is that right?
11 A. Well, yeah. I didn't check it today.
12 MR. KOLODIN: Object to foundation.
13 THE COURT: How could there be a foundation
14 objection? It's your client testifying as to whether she
15 checked it.
16 MR. KOLODIN: Well, they asked if it could
17 be possible to display something different today. I don't
18 know how Ms. Aguilera could be expected to know the answer
19 to that question.
20 THE COURT: So your objection is
21 speculation, but I think she said, essentially, she
22 doesn't know what it says today because she didn't check
23 today. That's all I'm taking away from her answer. So I
24 would overrule it on that basis.
25 MS. GONSKI: Thank you, Your Honor.

1 Q. (BY MS. GONSKI) Ms. Aguilera, you are aware that
2 ballot tabulation is available for public observation
3 through cameras; isn't that right?
4 A. I'm not sure what you mean.
5 Q. The ballot tabulation processes in Maricopa
6 County, you are aware that those are available for the
7 public to view on camera?
8 A. Like what I'm seeing on the screen?
9 Q. Well, let me ask it this way. So have you ever
10 gone to the Maricopa County website and attempted to watch
11 videos of ballots being tabulated?
12 A. No. I have never done that.
13 MS. GONSKI: Your Honor, I have no further
14 questions.
15 THE COURT: Okay. Mr. Arellano, you said no
16 questions, correct, sir?
17 MR. ARELLANO: That's right, Your Honor.
18 Ms. Gonski is covering.
19 THE COURT: Mr. Kolodin, any redirect, sir?
20 REDIRECT EXAMINATION
21 BY MR. KOLODIN:
22 Q. Ms. Aguilera, would you like to be able to --
23 would you like to have the option to observe the
24 adjudication process of ballots in person?
25 A. Yes.

1 Q. Now, this exhibit, the documents on this exhibit
2 that you accessed, you accessed those on computer, right?
3 A. Yes.
4 Q. Could you check again right now and see if it
5 says anything different? You're in front of a computer,
6 right?
7 A. Sure. Yes.
8 Q. Let me know when you've got it up.
9 A. Oh, you want me to -- okay. Hang on.
10 MS. GONSKI: Your Honor, we object to this.
11 What the witness is doing is looking up a new document
12 that hasn't actually been disclosed. Certainly there was
13 opportunity before the hearing for her to check her status
14 or to update it, but if she hasn't done so then doing it
15 mid hearing seems like it's inappropriate to say the
16 least.
17 THE COURT: Mr. Kolodin, isn't it sort of
18 the equivalent of sending a witness who is sitting on the
19 witness stand out to find a document somewhere in a box
20 outside the courtroom and then come in with it?
21 MR. KOLODIN: Your Honor, what the other
22 side is doing implicitly is setting up a sort of silly
23 standard, oh, you have to check this every day and provide
24 with us with a copy of this exhibit for every day, right,
25 for us to know. A week ago, that's not good enough.

1 And so in order to sort of circumvent this,
2 oh, you don't know as of exactly now, it is of exactly
3 now, but we sent a very recent copy of this document over
4 to the other side.
5 THE COURT: Is that this exhibit that's been
6 introduced, Exhibit 2? You said you've sent a very recent
7 copy. Is that what --
8 MR. KOLODIN: Yeah. That's Exhibit 2. It's
9 within the past week.
10 THE COURT: Mr. Kolodin, nobody directed me
11 to any date on here. Is there a date on here? Because I
12 was wondering that very thing.
13 MR. KOLODIN: No. We're going off
14 Ms. Aguilera's testimony when she pulled it up.
15 MS. GONSKI: And, Your Honor, to point out,
16 as I think Ms. Aguilera's testimony just established, this
17 is the same -- this document was from at least a week ago,
18 she said, and this is the same exhibit that was submitted
19 with plaintiff's complaint which was filed on
20 November 12th, which at this point, is over a week ago.
21 THE COURT: Okay. So Mr. Kolodin, I'm going
22 to sustain the objection. Your client says she hasn't
23 checked today. She doesn't know what it would say today.
24 There's been no disclosure of what it does say today.
25 That's something -- I agree with you, it could have been

1 done a week ago, and it could have been disclosed then or
2 four days ago or whatever, but I also follow your logic
3 that is sort of silly -- your word -- to expect her to
4 necessarily to have checked every day.
5 So in all of that context, I don't think
6 it's appropriate for her to be looking up something that
7 then you're going to ask me to admit in evidence during
8 the course of the trial. That sounds to me highly
9 improper, so I'm sustaining the objection on that basis.
10 MR. KOLODIN: Okay. I wouldn't ask for it
11 to be admitted. I'd just ask for her to testify as to
12 what it says.
13 THE COURT: Mr. Kolodin, do you have more
14 questions? Or are you making another motion?
15 MR. KOLODIN: No. I just wanted to make
16 sure that that was clear before the objection was
17 sustained.
18 THE COURT: So, again, Mr. Kolodin, I see it
19 as somebody sort of sitting on the witness stand being
20 asked a question and being told -- them, you know,
21 honestly answering I don't know, as I sit here today, I
22 just don't know. And somebody coming up and whispering
23 the answer in their ear and saying, now I knew. Because
24 that's what she's doing. She doesn't know. She hasn't
25 looked previously.

1 This sort of evidence being created live in
2 front of us as she's testifying, in the Court's view, that
3 is improper.
4 MR. KOLODIN: Very good, Your Honor. We
5 have no further questions at this time.
6 THE COURT: All right. And Ms. Aguilera can
7 then be released; is that right everyone?
8 MS. CRAIGER: No objection, Your Honor.
9 MS. GONSKI: Yes, Your Honor.
10 THE COURT: Okay. Ms. Aguilera, we were
11 told by your lawyer that you needed to leave for work. Of
12 course, you're welcome to stay as long as you like, as
13 you're a party in the action, but if you need to go, then
14 you're being released at this time.
15 A. Okay. Thank you.
16 THE COURT: Thank you.
17 MR. KOLODIN: Your Honor, our next witness
18 is Damian Aguilera, or does the Court want to take its
19 lunch recess now?
20 THE COURT: Yes. I think the issue really
21 is the court reporter who's been going now straight since
22 when? 10:49. We did have a brief break there while you
23 went and talked with your client about the misdemeanor
24 issue, but, Hope, we need to stop at this point for a
25 lunch break, correct?

1 (Off-the-record response by court reporter.)
2 THE COURT: Okay. Let's determine that.
3 We're going to stop and give Hope and everybody else time
4 to eat so nobody keels over on us.
5 Mr. Kolodin, Ms. Craiger, other folks, we
6 were scheduled to start again at what time? You know,
7 folks, we were scheduled to start at 1:30. That's less
8 than hour from now anyway. So I think we should just stop
9 right here and start up again at 1:30. People can eat,
10 and we will be back on the record at 1:30.
11 So we'll stand in recess until then. Thank
12 you, everyone.
13 (Lunch recess.)
14
15 -- oOo --
16
17 (Whereupon, the following proceedings
18 commenced on Go To Meeting:)
19
20 THE COURT: Mr. Kolodin, are you ready to
21 call your next witness, sir?
22 MR. KOLODIN: Yes, Your Honor. We call
23 Damian Aguilera to the stand.
24 THE COURT: Okay. Mr. Aguilera, my clerk
25 will swear you in first, sir.

1 DAMIAN AGUILERA,
2 called as a witness, having been duly sworn,
3 testified as follows:
4 THE COURT: Mr. Kolodin, you can proceed.
5 MS. GONSKI: Sorry, Your Honor. Before we
6 get going, I wanted to say one thing before we had another
7 witness. Sorry about that. I just wanted to say that for
8 everybody's -- just for everybody's knowledge, as far as
9 we know, we've been keeping time over on our end, and it
10 seems like plaintiffs and defenses have both used about
11 90 minutes of time. I think each have about an hour of
12 time by our calculations left. Just wanted to let
13 everybody know that's at least what we're looking at on
14 our side.
15 THE COURT: Mr. Kolodin, why are you shaking
16 your head, sir? Is yours different?
17 MR. KOLODIN: That doesn't comport with our
18 calculations. We've calculated that we've used slightly
19 less than an hour. Actually, I was about to inquire what
20 the Court's calculation is.
21 THE COURT: Well, as I told you, I am not
22 the time keeper. I write down rough estimates, but as I
23 warned parties yesterday, that's up to you and your staff
24 to keep tabs. So if you want me to take a moment. You
25 tell me first, what do you have, Mr. Kolodin, for

1 yourselves?
2 MR. KOLODIN: Mr. Chris Viskovic, please
3 tell the Court what we have.
4 MR. VISKOVIC: I had a little under an hour.
5 I haven't been keeping time on a stop watch so I might be
6 off on that.
7 THE COURT: Sir, giving it as close as you
8 can minute wise.
9 MR. VISKOVIC: About 56 minutes, I believe.
10 THE COURT: Okay. And what do you have for
11 defendants?
12 MR. VISKOVIC: I have not been keeping track
13 of defendants.
14 THE COURT: I'm sorry. I meant to say
15 defendants and intervenor.
16 MR. VISKOVIC: I have not been tracking time
17 of defendants and intervenor.
18 THE COURT: Okay. Ms. Craiger, what do the
19 county defendants have?
20 MS. CRAIGER: Hold on one moment.
21 Mr. LaRue.
22 MR. LARUE: Your Honor, I have not been
23 keeping time. We had talked with the democratic party
24 attorneys this morning, and they're at a large firm, and
25 have some resources that we don't. They had offered to

1 keep time for our side.
2 THE COURT: I see, okay. So Ms. Gonski,
3 back to you, give me your split again, please.
4 MS. GONSKI: Your Honor, I have that we have
5 each used up 90 minutes of time so far. So that we are
6 each down to one hour left.
7 THE COURT: All right. Let me take a look
8 here, folks.
9 I don't have any of this totaled up amongst
10 the different examinations of the couple of witnesses
11 we've heard from. So it's going to take me a moment.
12 Okay. Folks, don't hold me to this. If I
13 wasn't put on the spot, I could do it more calmly, but
14 what I come up with looking through the numbers is,
15 defendants and intervenors 90 minutes. So one-and-a-half
16 hours on the nose. And I came up with plaintiffs,
17 58 minutes.
18 I'm certainly willing to double check that
19 later, but what I do is each time a witness is direct,
20 cross, redirect, I put the start time and the end time.
21 And I think I even included in there,
22 Mr. Kolodin, the time that you took out to go and counsel
23 your client, Ms. Aguilera. I think I included that in
24 your time. So I think that 58 minutes attributes that
25 break time for you to talk with your client.

1 MR. KOLODIN: Thank you. And thank you,
2 Chris. All right. Ready to resume for Damian? Chris,
3 get us back on the clock. And all right.
4 DIRECT EXAMINATION
5 BY MR. KOLODIN:
6 Q. Mr. Aguilera, are you married to Laurie Aguilera?
7 A. Yes, I am.
8 Q. How long have you been married to her?
9 A. Twenty-three years last October.
10 Q. What's your opinion of her degree of honesty?
11 A. Very high.
12 Q. Okay. Mr. Aguilera, are you a registered voter
13 in Maricopa County?
14 A. Yes, I am.
15 Q. Okay. On election day earlier this month, did
16 you go in person to vote with your wife?
17 A. Yes, I did.
18 Q. Okay. Did you observe your wife throughout
19 voting process?
20 A. Not throughout, but I was busy voting, but I did
21 see her at the tally machine after I had voted.
22 Q. So you had her -- you saw her standing at the
23 tabulator?
24 A. Yes.
25 Q. Okay.

1 MR. KOLODIN: Alfredo, the exhibit, please.
2 This is one that's already been admitted into evidence.
3 THE COURT: What exhibit number?
4 MR. KOLODIN: This would be back to
5 Exhibit 2.
6 MR. ALFREDO: I need screen sharing.
7 MR. KOLODIN: Mr. Viskovic needs control
8 over the screen sharing, Your Honor.
9 THE COURT: She's working on it. Okay.
10 Good to go.
11 Q. (BY MR. KOLODIN) Mr. Aguilera, could you please
12 identify this document.
13 A. Yup. That's the Be Ballot Ready verification on
14 the county recorder website.
15 Q. Mr. Aguilera, does this document show whether you
16 were on the early voting list?
17 A. It shows that I was not.
18 Q. Okay. You testified you voted on election day
19 with your wife, correct?
20 A. Yes. Yes, I did.
21 Q. Does this document show whether your vote was
22 counted?
23 A. Yes, it does.
24 Q. And was it?
25 A. Yes, it was.

1 Q. It says you voted on election day. Your ballot
2 was counted, right?
3 A. Yes, it does.
4 Q. Did you access this, this information for
5 yourself at the same time your wife accessed her
6 information?
7 A. I accessed mine after she had accessed hers and
8 saw that she had not voted, and it wasn't counted. I
9 accessed mine to see if it said anything different. And
10 it did. It said mine had been counted, and I did vote.
11 Q. When you say after though, after but on the same
12 day, right?
13 A. On the same day but after she had looked. She
14 asked me to jump on and check my status, and I did.
15 Q. So you were trying to compare with her your
16 statuses?
17 A. Yes.
18 Q. Okay. Very good. Now, Mr. Aguilera, when you
19 inserted your ballot into the machine on election day, did
20 the machine take it?
21 A. Yes, it did.
22 Q. Did the machine display a check mark?
23 A. Yeah. I believe it was a check mark, or it said
24 accepted, and it made a little (indicating sound) kind of
25 sound.

1 MR. KOLODIN: Your Honor, we have no further
2 questions for the witness.
3 THE COURT: Mr. Kolodin, before you leave
4 with your witness on Exhibit 2. Direct me to the page --
5 I could find it easily for this witness, but he's
6 testifying about Exhibit 2, which page says Ms. Aguilera's
7 vote did not count or was not counted?
8 MR. KOLODIN: So Your Honor, it's the
9 comparison. Mr. Aguilera's page says, you voted on
10 election day, and your vote counted. Ms. Aguilera's page
11 does not display that information. It doesn't say that.
12 THE COURT: Which page? Where would you
13 expect me to find that if it were here?
14 MR. KOLODIN: Go to where it says it for
15 Damian, Mr. Viskovic.
16 MR. VISKOVIC: I could clarify. Without the
17 cover sheet, Ms. Aguilera's status is on Page 7. With the
18 cover sheet, it's eight. And then Damian's status without
19 the cover sheet is on Page 4. With the cover sheet, it's
20 on Page 5.
21 THE COURT: All right. So what I'm
22 understanding is on Page -- these are not numbered pages,
23 but given what Mr. Viskovic just said, Page 7 states, view
24 all voting locations. And underneath it it says, my
25 ballot status. And then there's a blank area in there

1 where it doesn't say anything. And you're comparing that
2 to the fact that on Page -- I think it was 4 --
3 Mr. Aguilera's portion, it shows view all voting
4 locations. My ballot status, and then it reflects,
5 11/3/2020, you voted on election day. Your ballot was
6 counted. It's the comparison you're contrasting, yes?
7 MR. KOLODIN: Yes, Your Honor.
8 THE COURT: Okay, thank you. Now, that I've
9 asked those questions, anything further for Mr. Aguilera,
10 Mr. Kolodin?
11 MR. KOLODIN: No, Your Honor. Sorry. One
12 more question.
13 Q. (BY MR. KOLODIN) Mr. Aguilera, did ink bleed
14 through your ballot?
15 A. Yes, it did.
16 MR. KOLODIN: No further questions, Your
17 Honor.
18 THE COURT: All right. Ms. Craiger?
19 MS. CRAIGER: I have no questions, Your
20 Honor.
21 THE COURT: Ms. Gonski, any questions for
22 this witness?
23 MS. GONSKI: No questions, Your Honor.
24 THE COURT: All right. I'm not overlooking
25 anyone, am I, folks? Okay. Anyone object to Mr. Aguilera

1 being released?
2 MS. CRAIGER: No objection.
3 THE COURT: Thank you, Mr. Aguilera. You
4 are finished, sir. Thank you for your time, and you are
5 free to go.
6 A. Thank you.
7 THE COURT: You're welcome. Mr. Kolodin,
8 your next witness, sir.
9 MR. KOLODIN: Your Honor, we would call
10 Mr. Drobina to the stand.
11 THE COURT: We have Mr. Drobina out there.
12 Mr. Kolodin, we're still not seeing anybody, at least,
13 identified as Mr. Drobina.
14 MR. KOLODIN: He was just walking over
15 there. I don't know what's going on. I will find out.
16 THE COURT: Mr. Kolodin, you might have to
17 get up one more time because it looks likes he's muted,
18 and there's no camera turned on. Okay. Now he's on video
19 as well. All right.
20 Mr. Drobina, my clerk on the screen right
21 above you with swear you in, sir.
22 DONOVAN DROBINA,
23 called as a witness, having been duly sworn,
24 testified as follows:
25 THE COURT: Go ahead, Mr. Kolodin.

1 DIRECT EXAMINATION
2 BY MR. KOLODIN:
3 Q. All right. Mr. Drobina, let's start with this.
4 Mr. Drobina, what do you do for a living?
5 A. I currently work for Amazon, but I'm a mechanic
6 by trade.
7 Q. Mechanic by trade. What's your vocational
8 experience as a mechanic?
9 A. I was a mechanic for six years in the Navy.
10 That's where I was trained, and I've done some other stuff
11 for other companies since I've gotten out.
12 Q. Okay. And when you were a mechanic with the
13 Navy, what specifically did you do?
14 A. I worked on the 20-milimeter Gatling gun weapon
15 system called CIWS close-in weapon system. It's the
16 Gatling gun that shoots down missiles and slow-moving
17 aircraft and boats.
18 Q. And you maintained that system as a mechanic?
19 A. Yes. Maintained and operated.
20 Q. Okay. When you maintain that system, did you
21 have to work with small parts?
22 A. Yes.
23 Q. Okay. And what could be -- strike the question.
24 What would happen if you didn't work with these small
25 parts in the right way?

1 A. If the weapons system did not function properly
2 when it was needed, a missile could hit the ship and
3 multiple of my crew members would die. It was a last line
4 of defense for a missile attack.
5 Q. Fair to say then that attention to detail was
6 pretty important in that line of work?
7 A. Paramount.
8 Q. What about manual dexterity, making sure that you
9 did things just so with your hands?
10 A. The same. Incredibly important.
11 MR. KOLODIN: Mr. Viskovic, would you please
12 display Exhibit Number 3 for Mr. Drobina.
13 THE COURT: It hasn't been admitted yet.
14 MR. KOLODIN: Sorry. We would like to offer
15 Exhibit Number 3 for Mr. Drobina, Judge. The same ballot
16 status information that we just displayed for the
17 Aguileras, his version.
18 THE COURT: Any objection.
19 MS. CRAIGER: No objection, Your Honor.
20 THE COURT: Ms. Gronski?
21 MS. GONSKI: No objection.
22 THE COURT: All right. I just misspoke. I
23 said Gronski. It's Gonski. Three is received without
24 objection.
25 Q. (BY MR. KOLODIN) All right. Mr. Drobina, can

1 you please identify this document.
2 A. That's the screen shot that I took from my phone
3 of the -- basically, the confirmation that my ballot was
4 counted.
5 Q. Okay. And when did you access this?
6 A. I've accessed it on two separate occasions. If I
7 remember right, this one was two days ago, but it could
8 also have been about a week ago. I don't see a date on
9 there. So it could be one or the other.
10 Q. Okay. Did it look the same on both occasions?
11 A. It did.
12 Q. Okay. Does this exhibit provide any information
13 as to whether you are on the early voting list?
14 A. Yes, it does.
15 Q. What does it say?
16 A. It says I am not on the permanent early voting
17 list.
18 Q. Okay. Is that information correct?
19 A. Yes.
20 Q. Did you receive a ballot by mail this election
21 cycle?
22 A. I did not.
23 Q. Okay.
24 THE COURT: Mr. Kolodin, I only have two
25 pages to Exhibit 3, and I'm not seeing that information.

1 Can you direct me to it.
2 MR. KOLODIN: Chris, Alfredo, help me out
3 here.
4 MR. VISKOVIC: I actually supplemented that
5 because after the original ones went through, it was
6 brought to my attention that I did not include all three
7 pages. So I sent out the email to chambers and parties
8 with this one. And then I re-uploaded this one to the
9 shared box that was provided by the court's website for
10 submitting exhibits.
11 THE COURT: Well, this one and this one is a
12 little imprecise because for the Clerk of the Court's
13 record and my records, I need to know what numbered
14 exhibit. It looks like Exhibit 3 is lacking the
15 information that he just testified about, the witness did.
16 So is there a further exhibit that provides
17 that supplemental information? Has that been marked as an
18 additional exhibit?
19 MR. VISKOVIC: When I uploaded it back into
20 the shared box, the new one was titled Exhibit 3 updated.
21 I'm not sure how they put that into the exhibit list, but
22 that's how it was uploaded into the exhibit list on the
23 electronic filing.
24 THE COURT: Just understand that what I'm
25 looking at is the bench copy of the exhibits that the

1 parties provided me. So I'm looking at the plaintiff's
2 Exhibit Number 3 in the plaintiff's exhibit provided
3 binder. Should I be looking somewhere else?
4 MR. VISKOVIC: My apologies. I believe I
5 gave my paralegal this new one to throw into the exhibit
6 binder that was provided to -- I guess that got lost in
7 translation. I believe I sent it out via email to JJ and
8 Ana.
9 THE COURT: Let me inquire of my clerk
10 because the official exhibit is whatever has the green tag
11 on it.
12 THE COURTROOM CLERK: Judge, I believe the
13 first Exhibit 3 that we received was a one-page document,
14 excluding the cover page. The updated one is two-page
15 document, which is what you have in your notebook. That
16 is all that has been provided. I don't know about a third
17 revised version.
18 THE COURT: So, folks, Kathy is verifying --
19 Kathy, let me be clear. What you show as Exhibit 3 has a
20 cover page that says Exhibit C, as in cat, and then the
21 next page is the very, very top 1005 b+HTTPS
22 recorder.Maricopa, and then the next page starts at the
23 top, upcoming elections? That's what I have in my binder
24 provided by plaintiff's counsel. Is that what you're
25 seeing as the tagged Exhibit 3?

1 THE COURTROOM CLERK: No. My tagged
2 Exhibit 3 is a screen shot. It doesn't have the
3 recorder's address on top. It says 942. It says voter
4 registration status registered. It has Mr. Drobina's
5 name. The second page, again, has the screen shot with
6 the 942 up top. Upcoming election. It has on there, my
7 ballot status later on on that page. That's the totality
8 of the exhibit that I have. That was what was in the box
9 from the clerk's office as the revised Exhibit 3.
10 THE COURT: I think I found it. I think I
11 found it. It looks like a different presentation than I
12 saw on the other one, but it does appear on the last page.
13 My ballot status, 11/3. We are good, folks. Thank you.
14 Q. (BY MR. KOLODIN) All right. Mr. Drobina, so
15 this contains information as to whether you were on the
16 early voting list. And you testified that the information
17 that you are not is correct, correct?
18 A. Yes.
19 Q. Okay. So this also shows whether you voted on
20 election day, right?
21 A. The page that I'm currently seeing doesn't, but
22 the second page that they've shown a couple of times, yes.
23 Q. Okay. So we're going to talk about your vote on
24 election day. First of all, did you vote in person on
25 election day?

1 A. I did.
2 Q. Okay.
3 THE COURT: Mr. Kolodin, I'm sorry to bring
4 us back to this, but I've really got two duplicate pages
5 back to back. I do not have anything that talks about
6 every voter status. That was a question that you asked
7 Mr. Drobina that I was struggling to find. I think
8 there's something missing.
9 MR. KOLODIN: Your Honor, we're happy to
10 stand on the testimony in the interest of time that he is
11 not on the early voting list, and he voted in person on
12 election day. I don't think that's a disputed point. We
13 just wanted to establish it.
14 THE COURT: Fine, Mr. Kolodin. Go ahead
15 sir.
16 Q. (BY MR. KOLODIN) So Mr. Drobina, when you voted
17 on election day, you were handed a ballot, correct?
18 A. Yes.
19 Q. You were not handed an envelope with that ballot,
20 right?
21 A. No.
22 Q. Okay.
23 MR. KOLODIN: And the Court can take
24 judicial notice that in the manual, he would receive an
25 envelope if had it been provisional.

1 Q. (BY MR. KOLODIN) Mr. Drobina, when you got the
2 ballot, did you look at it?
3 A. Yes.
4 Q. Okay. Did it appear to you to be unmarked?
5 A. Yes.
6 Q. Not even like a from stray accidental pen mark
7 that some poll worker put on it?
8 A. No. It looked clean.
9 Q. Looked clean. Did you look front and back?
10 A. Yes.
11 Q. Did the ballot appear to you to be undamaged?
12 A. Yes.
13 Q. Okay. No wrinkles, no tears, no folds?
14 A. It looked brand new.
15 Q. Okay.
16 MR. KOLODIN: Alfredo -- this has already
17 been admitted, Your Honor. Alfredo, would you please put
18 the poll worker manual back up.
19 THE COURT: You've got to give us the
20 exhibit, sir, for the record.
21 MR. KOLODIN: For the record, this is.
22 MR. VISKOVIC: It's Exhibit 21.
23 MR. KOLODIN: Twenty-one, all right. And
24 specifically, put the page back up with the instructions.
25 MR. VISKOVIC: Do you know what page that

1 was?
2 MR. KOLODIN: It would have been 38.
3 Q. (BY MR. KOLODIN) Okay. Looking at the English
4 language version of these instructions, top left-hand
5 corner, image in the top left-hand corner of this page.
6 Have you ever seen that before?
7 A. Speaking to me?
8 Q. Yes, Mr. Drobina.
9 A. Yes, I have.
10 Q. Where did you see that?
11 A. I believe it was on the top of the ballot.
12 Q. Okay, but suffice it to say, somewhere at the
13 polling place on election day, right?
14 A. Yes.
15 Q. Let's look at the first one of these
16 instructions. Only use the pen provided. Did you use the
17 pen provided by the poll workers?
18 A. Well, they gave me a Sharpie so I guess it wasn't
19 a pen, but, yes. I used the writing utensil that was
20 provided.
21 Q. Very good. And you used that to complete your
22 ballot, right?
23 A. Yes.
24 Q. Okay. Mr. Drobina, did you fill in the ovals
25 next to your selection?

1 A. Yes.
2 Q. Did you fill in those ovals completely?
3 A. Yes.
4 Q. Did you mark outside the lines when you're
5 filling in those ovals?
6 A. No, I did not.
7 Q. Not on any of them?
8 A. No.
9 Q. Okay. Mr. Drobina, are you familiar with what
10 the term over vote means?
11 A. Yes.
12 Q. Okay. What does that term mean?
13 A. So that term over vote means that in some cases
14 on the ballot you're able to vote for more than one person
15 for a position. And it states at the top how many you're
16 able to vote for. And an over vote would be if you voted
17 for more than the maximum amount you're allowed to vote
18 for for that position.
19 Q. Mr. Drobina, when you were voting your ballot,
20 did you make any over votes, intentional, unintentional?
21 A. No.
22 Q. How do you know?
23 A. I very carefully read the ballot. In the first
24 case, I saw that there were multiple people running for
25 both major parties, which confused me for a second. So I

1 made sure to read it again, and that's when I saw you vote
2 for two and no more. So I just voted for two and then
3 moved to the next.
4 Q. Okay. Mr. Drobina, after you had completed your
5 ballot, you testified you looked it over after you
6 complete our ballot; is that right?
7 A. Yes.
8 Q. Okay. After you completed your ballot and you
9 looked it over, did you see any stray marks on the ballot?
10 A. There was some bleed through from the marks that
11 I'd made on the opposite side of the page, but no marks
12 that I wrote came through any of the bubbles that I
13 marked.
14 THE COURT: I'm sorry. The what that you
15 marked?
16 A. Your Honor, when I filled the bubbles in, I did
17 not draw outside the circles, but there was bleed through
18 on the other side of the page.
19 THE COURT: And then you said but none of
20 them -- what was the rest of that answer.
21 A. None of marks that I marked actually went outside
22 of the circles.
23 THE COURT: No. Something about the bleed
24 throughs but none of them --
25 A. I didn't say none of anything about the bleed

1 through, ma'am. That might have been a slip of my tongue,
2 but I didn't.
3 THE COURT: Okay. No worries.
4 Q. (BY MR. KOLODIN) So other than this bleed
5 through though, no stray marks, Mr. Drobina?
6 A. No.
7 Q. What about write-in candidates? Did you write in
8 any candidates on your ballot?
9 A. No.
10 Q. Mr. Drobina, after you had your ballot and you
11 looked it over, did you -- were there any tears, wrinkles,
12 folds on it at that point?
13 A. No.
14 Q. Okay. What did you do with your ballot then?
15 A. I picked it up, and I got -- went over to walk
16 towards the line. At first, I mistook where the front of
17 the line was because everyone was spaced out six feet
18 apart, but I got to the back of the line to wait to put my
19 ballot in the tabulating machines.
20 Q. What happened then?
21 A. When I got to the front of the line, I didn't
22 want to make any mistakes. I haven't voted in person in a
23 while. Yeah. So I just wanted to make sure I did
24 everything right. I was looking at the ballot trying to
25 see if there were any instructions on it for which way to

1 feed it in.
2 One of the poll workers came to help me out
3 because she saw I was struggling. She explained how to do
4 it. She just said I put it in. I fed it into the
5 machine, and it spat it back out. And the poll worker who
6 was helping me said that it didn't read it and to feed it
7 in again. She said that they had been having problems
8 with the markers bleeding through and the machines weren't
9 reading them maybe. So she had me feed it through again.
10 It fed through the second time, and it came
11 back out. Same thing. It didn't read. So she told me
12 just to put it into the slot down, further down in the
13 machine and then said thank you for voting, and I walked
14 out.
15 Q. All right.
16 MR. KOLODIN: Mr. Alfredo, would you please
17 put up the page that has a picture of the tabulators on
18 it. I think that's 64.
19 THE COURT: The page of Exhibit 21?
20 MR. KOLODIN: Yes, Your Honor. Would you
21 blow up that image, please. We're looking at the image,
22 the bottom left most image on this page.
23 Q. (BY MR. KOLODIN) Mr. Drobina, when you initially
24 attempted to insert your ballot into the tabulator, was it
25 on the top -- the top slot or the bottom slot on this

1 image?
2 A. The top slot with the white arrows.
3 Q. You tried to insert it once and it didn't work.
4 Was it the poll worker who tried the second time, or was
5 it you?
6 A. No. I was the only one that touched my ballot.
7 Q. Did the poll worker tell you to try the second
8 time?
9 A. She did.
10 Q. When you inserted your ballot the first time, did
11 a message display on the screen on the top of that
12 tabulator?
13 A. Yes. A message did display.
14 Q. What was the message?
15 A. I didn't get a good look at it. It looked kind
16 of red to me, but because the poll worker was there, I was
17 taking my cues off of her. I wasn't really looking at
18 what the machine said. She said that it didn't read, and
19 that I needed to scan it again. So that's what I did.
20 Q. And it didn't read the second time. Was there
21 another red image?
22 A. Yes. The same thing appeared to come up again,
23 and she said that it didn't read again.
24 Q. And then did poll worker drop your ballot in the
25 slot marked three on that machine?

1 A. No. She told me to do that. She didn't touch my
2 ballot.
3 Q. She told you to do it, and then you did it,
4 right?
5 A. Yes.
6 Q. Okay. Mr. Drobina, if I were to tell you that
7 the -- if I were to represent to you that the ballots in
8 Tray 3 are taken downtown to be duplicated by humans who
9 attempt to figure out your intent, would that satisfy your
10 concerns?
11 A. No.
12 Q. Why is that?
13 A. Well, everyone else's got -- get counted by a
14 machine. Why does mine have to be counted by a person?
15 Why does it have to be interpreted by a person? That's
16 not even the same thing as counted.
17 Q. Okay. Thank you, Mr. Drobina. Mr. Drobina,
18 would you like to have the opportunity to observe the
19 electronic adjudication process in person?
20 A. I would.
21 Q. Okay.
22 MR. KOLODIN: I'm remembering. Your Honor,
23 I am trainable. I'm just slow. I plan to have my
24 associate, Chris Viskovic display Mr. Drobina's
25 declaration and to offer that.

1 THE COURT: So you'd like to offer exhibit
2 which? What number?
3 MR. KOLODIN: Exhibit 4.
4 THE COURT: Ms. Craiger or any one else, is
5 there an objection to Exhibit 4 being admitted?
6 MS. GONSKI: Your Honor, we object on the
7 basis of hearsay. This is Mr. Drobina's declaration?
8 MR. KOLODIN: Yes.
9 THE COURT: Yeah.
10 MS. GONSKI: Well, (audio distortion) is
11 testifying now so we withdraw the objection.
12 THE COURT: All right. Exhibit 4 is not
13 objected to as I understand. So I would receive Exhibit 4
14 without objection.
15 MS. CRAIGER: I believe the defendants
16 object. He's here to provide his testimony today, which
17 is the best evidence that can be provided to the Court. I
18 don't know why his hearsay declaration needs to be
19 admitted into evidence.
20 THE COURT: Who's speaking?
21 MS. GONSKI: Your Honor, I think that's
22 right. I think I withdraw my withdrawal. Sorry. This
23 took me by surprise because I thought we had already
24 talked about declarations before, but yes. I think it's
25 still hearsay even if it's an out-of-court statement.

1 He's here, and he can obviously testify to whatever facts
2 needs to be put in evidence.
3 THE COURT: Ms. Gonski, that's you speaking,
4 correct?
5 MS. GONSKI: That's right.
6 THE COURT: Ms. Gonski, go ahead and give me
7 the rule of evidence that would preclude a testifying
8 witness's declaration from being received in evidence.
9 MS. GONSKI: Well, Your Honor, I think it's
10 as Ms. Craiger just said. I think there's a best evidence
11 rule issue here. If the witness is right here and able to
12 testify live, there's certainly no reason to have an
13 out-of-court statement be introduced for the truth of the
14 matter.
15 THE COURT: Ms. Gonski, too much argument.
16 I just want the rule. Give me the rule that you're
17 relying on so I can be on the same page with you before I
18 hear any argument about it.
19 MS. GONSKI: It's rule 801. It's just the
20 rule against hearsay.
21 THE COURT: You directing me just to rule --
22 I'm sorry. We're getting feedback here. Hold on
23 everybody for a moment.
24 Okay. Folks, let me just see if we're
25 getting that feedback. We sound good now. Okay. I think

1 we've solved the problem on our end.
2 Ms. Gonski, look at 801, if you would.
3 801(d), statements that are not hearsay. The statement
4 that meets the following conditions is not hearsay.
5 1. A declarant witness's prior statement.
6 The declarant testifies and is subject to
7 cross-examination.
8 Obviously, his declaration is a prior
9 statement of his. He's testifying. He's subject to
10 cross-examination about the prior statement, and the
11 statement, it must satisfy one of the following
12 requirements.
13 MS. GONSKI: That's right. And I think --
14 THE COURT: Ms. Gonski, hold on. Are you
15 saying it does not satisfy any of (a), (b), or (c)?
16 MS. GONSKI: That's right, Your Honor. I
17 think that they would have to establish that it's either
18 inconsistent or that it is consistent and is offered for
19 the particular -- to rebut an expressed or implied charge
20 or fabrication, or there's a credibility issue; neither of
21 which are at issue here.
22 So I think it's inadmissible under 801,
23 which defines hearsay, and under 802, which says hearsay
24 is not admissible unless an exception applies, and I'm not
25 aware of what exception they are saying applies here.

1 THE COURT: Before I hear from Mr. Kolodin
2 to see how he believes it fits under 801(d)(1) or under
3 803. 801, I will just note for the record, folks, are
4 what statements are excluded from hearsay. Whereas, 803
5 are exceptions to hearsay. So they're really different
6 rules. Frequently, people confuse them, but one is
7 non-hearsay and one is an exception to the hearsay rule.
8 Ms. Craiger, is the anything that the county
9 defendants want to add to that objection? I don't want to
10 bounce back and forth like a ping pong here. So anything
11 you want to add to what Ms. Gonski just argued?
12 MS. CRAIGER: No, we do not.
13 THE COURT: Okay. Mr. Kolodin, go ahead and
14 address what Ms. Gonski just argued.
15 MR. KOLODIN: Well, Your Honor --
16 THE COURT: Mr. Kolodin, let me put a fine
17 point on the question for efficiency sake. Under what
18 section of Rule 801 (d)(1) does Mr. Drobina's declaration
19 fit? What subsection does it satisfy?
20 MR. KOLODIN: Your Honor, our argument would
21 be Rule 801 simply doesn't apply because it's not hearsay
22 since he's here to testify as to it.
23 THE COURT: Mr. Kolodin, what I just
24 explained was 801 are exclusions from hearsay. So nobody
25 is saying it's hearsay because 801 are non-hearsay versus

1 803, which are exceptions to hearsay. We have two
2 different rules at play here potentially.
3 801(d) is statements that are not hearsay.
4 And if it satisfies, it says the statement that meets the
5 following conditions is not hearsay. A declarant
6 witness's prior statements -- this clearly is
7 Mr. Drobina's prior statement. It's a declaration he
8 previously swore out. And he's here. He's testifying.
9 He's subject to cross-examination, but it must either be
10 (A) inconsistent with his testimony today.
11 So you have to impeach your own witness
12 because he's not telling you the light was green. He
13 previously said it was red. That's inconsistent with his
14 prior testimony, or it's consistent with his testimony,
15 and it's offered for one of those purposes, little Roman
16 i, little Roman ii.
17 MR. KOLODIN: Your Honor, we're willing to
18 withdraw the exhibit. If there's no -- if there's not
19 going to be any sort of question about whether his
20 testimony is consistent, then we're perfectly happy to
21 withdraw it.
22 THE COURT: So that's for you decide, but if
23 you're withdrawing offer of exhibit -- which was it,
24 Mr. Kolodin?
25 MR. KOLODIN: Four, Your Honor. In the

1 interest of time, since we've got a lot evidence to get
2 through, and he is here to testify as to it.
3 THE COURT: All right. The offer of
4 Exhibit 4 is withdrawn. Go ahead, sir.
5 Q. (BY MR. KOLODIN) All right. Mr. Drobina, the
6 tabulator machine -- we're still on now exhibit --
7 MR. KOLODIN: Alfredo, what exhibit are we
8 on?
9 MR. ALFREDO: Twenty-one.
10 MR. KOLODIN: Twenty-one.
11 Q. (BY MR. KOLODIN) So we are still on
12 Exhibit 1[verbatim]. We are looking at a picture of the
13 tabulator machine that is found on Page 64.
14 THE COURT: To correct the record,
15 Exhibit 21. Twenty-one, Mr. Kolodin.
16 MR. KOLODIN: Twenty-one, Your Honor.
17 Q. (BY MR. KOLODIN) A picture of the tabulator
18 machine from Page 64. Does this look like the tabulator
19 machine into which you attempted to insert your ballot?
20 A. Yes, it does.
21 Q. Okay.
22 MR. KOLODIN: We have no additional
23 questions at this time, Your Honor.
24 THE COURT: All right. Cross-examination of
25 Mr. Drobina?

1 MS. CRAIGER: We have no questions, Your
2 Honor.
3 THE COURT: Ms. Gonski?
4 MS. GONSKI: We have no questions, Your
5 Honor.
6 THE COURT: You said none?
7 MS. GONSKI: No questions.
8 THE COURT: All right. May Mr. Drobina be
9 released?
10 MR. KOLODIN: Let me check with my
11 co-counsel really quickly, just to make sure she doesn't
12 have anything.
13 Yes, we are happy to have Mr. Drobina
14 released, Your Honor.
15 THE COURT: Okay. Mr. Drobina, you are
16 released, sir. As a party to the case, you are welcome to
17 stay and watch, but you are no longer required to be
18 present as a witness.
19 A. Thank you, Your Honor.
20 THE COURT: You're welcome.
21 MR. KOLODIN: Your Honor, we would now call
22 Mr. Banko to the stand.
23 THE COURT: All right.
24 MR. KOLODIN: Can someone get Mr. Banko for
25 me. We have Mr. Banko. I don't know why the name still

1 displays as Donovan Drobina, but batter up.
2 THE COURT: Okay. Mr. -- I'm going to call
3 you Mr. Drobina because that's the name under your face,
4 and I know you're not Mr. Drobina, but my clerk is going
5 to swear you in, sir. So listen, please, to Kathy.
6 JOSHUA D. BANKO,
7 called as a witness, having been duly sworn,
8 testified as follows:
9 THE COURT: Go ahead, Mr. Kolodin.
10 DIRECT EXAMINATION
11 BY MR. KOLODIN:
12 Q. Mr. Banko, what is your occupation?
13 A. I'm currently the chief technology center for a
14 local company in Arizona.
15 Q. What kind of company?
16 A. It's a technology IP commercialization company.
17 Q. Okay. And on election day, did you have a
18 different job?
19 A. Yes. I was a clerk in the elections department
20 for Maricopa County serving at the Paradise Valley mall
21 location.
22 Q. Okay. As a clerk, were you paid by the county?
23 A. Yes, I was.
24 Q. Okay. What does an elections clerk do?
25 A. Elections clerk has various job responsibilities.

1 Primarily, they're support staff, main support staff to
2 the poll site. One instance can be to hand the ballots at
3 the On Demand ballots printers to voters. Another one is
4 to be a registration clerk to sign people in to vote.
5 Another is to observe and assist people dropping off early
6 or provisional ballots and do whatever the site inspectors
7 requires you to do.
8 Q. Okay. Mr. Banko, before you became a clerk, an
9 elections clerk, did you receive any training?
10 A. I did. I was required to complete an online
11 training series of modules over the course of
12 approximately four hours.
13 Q. And tell me, what did these modules entail?
14 A. They share basically video summaries and summary
15 questions of things that are contained in the elections
16 poll worker manual. And at the end of certain modules,
17 you are tested on competency. You need to pass a certain
18 requirement to be able to be certified to work in the
19 poll.
20 Q. So we still have Exhibit 21 up on the screen.
21 MR. KOLODIN: Would Mr. Viskovic please show
22 the first page. There we go. The first page of the
23 actual document.
24 Q. (BY MR. KOLODIN) Is this the poll worker manual
25 that you're talking about?

1 A. Yes, it is.
2 Q. Okay. You receive any particular training on
3 tabulator machines?
4 A. Only insofar as what was covered in the modules
5 and any details associated with operating tabulators or
6 replacing paper in the -- some of the paper roll. There's
7 also details in the manual with regard to opening and
8 closing the polls. That some of those things are
9 restricted to the site poll inspector only.
10 Q. Okay. Mr. Drobina[verbatim], so your testimony
11 is that you received some training on operating the
12 tabulator?
13 A. Yes. And it's Mr. Banko.
14 Q. I'm sorry. The name on the screen, it's got me
15 too. Mr. Banko. I apologize.
16 THE COURT: Mr. Kolodin, let me interject.
17 My bailiff is advising me that the individual sitting at
18 the screen has to change his name on the screen. We can't
19 do it from here. I say that only because I know you've
20 got 13 witnesses. So if everybody is going to sit at that
21 screen, we don't want them all showing Mr. Drobina's name
22 because we'll have a confused record. So maybe someone
23 can fix that for Mr. Banko right now.
24 MR. KOLODIN: We're working on it, Your
25 Honor.

1 THE COURT: Good. Thank you.
2 MR. KOLODIN: My associate, Chris Viskovic
3 is highly efficient.
4 THE COURT: Thank you. Go ahead.
5 Q. (BY MR. KOLODIN) All right. Mr. Banko, you
6 testified that you worked at which polling location on
7 election day?
8 A. It was the Paradise Valley mall Entrance Number
9 4.
10 Q. That's in Maricopa County, right?
11 A. It is.
12 Q. Okay. From what time to what time did you work
13 at the polls on election day?
14 A. We're required to be at the polls 30 minutes in
15 advance. The polls open at 6:00 so we were there at 5:30.
16 And we stayed through the end until we were released,
17 which was about 8:15 in the evening on the 3rd.
18 Q. So you're not actually allowed to leave until the
19 day is done and all of the closing stuff is taken care of,
20 right?
21 A. No, we're not. And it's explicitly stated in the
22 manual and in the instructions provided by the Maricopa
23 County, that we need to stay on site so bring our food and
24 water and anything we need throughout the day.
25 Q. Okay. Mr. Banko, did you observe any problems on

1 election day? Let me just put it that way.
2 A. Yes, I did.
3 Q. Okay. When did these problems start in relation
4 to when the polls opened?
5 A. The problem began before the polls open. There
6 were issues with the tabulation machines within the site
7 where the site inspector was not able to zero out the
8 tabulators and was not able the access the tabulators, the
9 tabulators that provided the passwords. And so there was
10 a mad rush, as, you know, people had been lined up for at
11 least an hour before polls opened. For us to open the
12 polls efficiently, the tabulators weren't able to be
13 operational at the start of the day.
14 Q. And then after the polls opened, were there any
15 further problems?
16 A. Yes. Within the first few minutes when the first
17 voters attempted to tabulate their election day ballots,
18 they had issues being able to be accepted and cast without
19 any interaction by the voter.
20 Q. Okay. Let's get to that in a second. How many
21 tabulator machines were on site?
22 A. There are two tabulator machines on site.
23 Q. Okay.
24 MR. KOLODIN: And Mr. Viskovic, can we go
25 back to the page with the machines, 64, I believe. I

1 think I'll have that memorized by the end of the day.
2 Q. (BY MR. KOLODIN) That photo on the bottom
3 left-hand corner of the set of photos, is that what those
4 tabulators look like?
5 A. Yes. The black electronic machine.
6 Q. The voters who came through the door, were they
7 provided marking devices by the county employees?
8 A. Yes, that is correct.
9 Q. And those -- what kind of devices were they?
10 A. On election day, if they're for election day
11 ballots, they are provided Sharpies. And for provisional
12 ballots, they're provided ball point pens.
13 Q. But everybody who voted a regular ballot on
14 election day, they were given Sharpie?
15 A. That is correct.
16 Q. Okay. And the provisional ballots, those aren't
17 run through the tabulator, right?
18 A. No, they're not. They're explicitly folded in a
19 W shape, and they're folded and signed on an affidavit
20 envelope that is sealed and dropped in one of these blue
21 bins, and it's tabulated off site.
22 Q. And you didn't observe anybody voting a regular
23 ballot use a ball point pen, right?
24 A. I didn't observe, but throughout the day, I did
25 observe some people use ball point pens on their ballot

1 marking.
2 Q. But not right at the beginning of the day, right?
3 A. No. There were ballots that were issued by the
4 pens, the Sharpies that were provided by the clerks.
5 Q. And then within the first, would you say, five
6 minutes, there started being problems with the read?
7 A. Yes, that's correct.
8 Q. What were those problems?
9 A. The tabulators wouldn't accept the ballots. They
10 were causing errors, and they were required to make
11 multiple attempts to install the ballots in the different
12 orientations provided by the manual. So they were
13 inserting from the top edge, from the bottom edge of the
14 front side of the ballot and again on the back side of the
15 ballot, top and bottom edge. And in many cases, the
16 ballots were then tried in the second tabulator but with
17 the same issues.
18 Q. Okay. And when you say they inserted, are you
19 referring to the voters?
20 A. Yes. The voters inserted the ballots in the
21 tabulators.
22 Q. Okay. Would you say that these problems
23 increased, decreased, or stayed fairly consistent
24 throughout the day?
25 A. They stayed consistent throughout the day.

1 Q. Okay. Approximately, what percentage of voters
2 would you say experienced these issues at your polling
3 place?
4 A. I think greater than 80 percent experienced
5 issued with their ballots being read.
6 Q. Did you say 80 percent, 8-0?
7 A. 8-0, correct.
8 Q. Did you get a good look at any of these ballots
9 that the machines couldn't seem to read?
10 A. Yes. In the beginning of the day, I was
11 stationed approximately two to three feet away from the
12 tabulation machines, manning the drop box that's for the
13 early voting ballots. And I can see as people would
14 extract their ballots to inspect them, that there was no
15 extraneous votes. No extraneous lines. The bubbles
16 seemed to be marked in completely and appropriately.
17 Q. Okay. Now, speaking of, you know, no extraneous
18 votes, would you have known where, you know, what race is
19 on this ballot, you know, where the voter was supposed to
20 make a single selection versus what race a voter was
21 supposed to choose a couple?
22 A. Yes.
23 Q. How would you have known that?
24 A. Well, I voted a ballot that was provided to me in
25 early voting ballot. And I live in proximity to this

1 polling location.
2 Q. So you would have had similar races to other
3 people who lived in proximity to that voting location?
4 A. Correct.
5 Q. Did you happen to make an observation with
6 respect to the people who came in that day whether there
7 was any sort of pattern and where they came from
8 geographically?
9 A. The majority of the people were in close
10 proximity to this polling site.
11 Q. Okay. And so would have had similar races on
12 their ballot to you?
13 A. Correct.
14 Q. You would have seen ballots with a lot of the
15 same races over and over again throughout the day?
16 A. Correct.
17 Q. So you're sitting two feet away from the
18 tabulator. How many of these ballots would you say that
19 experienced this issue would you say you got a look at?
20 A. I think I got at least a look at -- a good look
21 at 10 ballots. Obviously, I was doing other tasks but,
22 yes, at least 10.
23 Q. Okay. A really good look at 10. And how about,
24 did you get a look at any others?
25 A. Yes. I believe I got a look at least another 15

1 as I was stationed throughout the polling center.
2 Q. Okay. And in what context did you get a look at
3 these ballots? How did it come to be that you got a look
4 at these ballots.
5 A. A lot of times it came to be where a voter would
6 be evaluating their ballot because it had an issue in the
7 tabulator, and they'd be inspecting to make sure there was
8 no extraneous marks or something that they would need to
9 do to cure a ballot. So in the midst of my duties that
10 you see a lot of information, you see what people vote.
11 You see when you check them in, you see anything.
12 Q. Would voters ever hold their ballots up after
13 they had issues feeding them into the tabulator?
14 A. Yes. They'd hold them up to show them to the
15 marshal or the site inspector, look at both sides, and
16 then be evidence of anybody around in close proximity.
17 Q. While they're holding them up, you're two feet
18 away, right?
19 A. Yes.
20 Q. Why would they hold them up? Why not give them
21 to the site inspector?
22 MS. CRAIGER: Objection. Calls for
23 speculation.
24 MR. KOLODIN: Well, I think he knows
25 actually.

1 THE COURT: Hold on. Everybody stop.
2 Ms. Craiger, what is your objection?
3 MS. CRAIGER: He asked why voters held the
4 ballots up to the light. And that calls for speculation.
5 THE COURT: Mr. Kolodin, respond to the
6 objection.
7 MR. KOLODIN: So I proffer the following
8 testimony. It's not speculation what's in the voter's
9 head. It's because of a rule that the county has the poll
10 workers are trained on.
11 THE COURT: All right. I'll allow it on
12 that basis. Go ahead, Mr. Banko.
13 A. So we're not allowed to touch the ballots unless
14 it's a ballot that's going to be spoiled, or there's some
15 condition where the inspector needs to review the ballots.
16 And so we're instructed not to touch the ballots.
17 So if there's an issue they would hold the
18 ballot up to the associated poll worker, and the one in
19 most close proximity and the one responsible for the
20 tabulators is the marshal. So it would be the marshal and
21 then the inspector, but the ballots are visible to anybody
22 in proximity.
23 Q. And did you --
24 MR. KOLODIN: Alfredo, put the instructions
25 back up, please. Those would be on Page 38. Let's blow

1 those up.
2 Q. (BY MR. KOLODIN) Mr. Banko, during the course of
3 your training, did you ever come across these
4 instructions? Are you familiar with what these are?
5 A. Yes. These the voting instructions that are to
6 be placed in every voting booth and in the polling
7 location. And it's also contained in multiple locations
8 in the voters -- the poll worker's manual.
9 Q. Okay. And fair to say as a poll worker, you're
10 fairly familiar with these instructions, right?
11 A. Yes, I am.
12 Q. Okay. Of the -- I think you testified 25 or so
13 ballots that you got a look at that experienced this
14 issue, did you observe a failure to follow these
15 instructions on any of them?
16 A. Yes. I saw one instance where a gentleman put Xs
17 in the bubbles instead of filling them in completely.
18 Q. Okay. Other than that one instance, did you
19 observe any failures to follow these instructions?
20 A. No, I did not.
21 Q. What about stray marks on the ballots?
22 A. I did not see those either.
23 Q. What about rips, tears, folds on the ballots?
24 A. No. The ballots were in pristine condition.
25 Q. Okay. Now, when you -- now, the ballots that

1 experienced these issues, did those ballots end up in Tray
2 3?
3 If I talk about Drawer 3 or Tray 3, is it
4 familiar to you what I'm talking about?
5 A. Yes. That's considered the misread bin.
6 Q. That's not the slot on the top of the tabulator,
7 but the slot in the middle of the tabulator, right?
8 A. In the front in the lower metal section below the
9 marking of three is the misread bin.
10 Q. So we're displaying the picture of the tabulator
11 from the manual back up on the screen. Of course, that
12 will be page 64. Would the misread slot be the slot below
13 the Number 3 on that tabulator?
14 A. That is correct.
15 Q. Now, at the end of the day, what's supposed to --
16 sorry. Strike the question. In your training, did you
17 ever come to learn what is supposed to happen to the
18 ballots in Tray 3 at the end of the day?
19 A. Yes. In the closing of the polls after the polls
20 were closed and the process of tearing down the site,
21 these ballots that are in the misread bin are supposed to
22 be run through the tabulation machine again to see if any
23 are accepted.
24 Q. Okay. And to your knowledge, did that happen at
25 your polling location?

1 A. I did not see that take place. However, I did
2 see a large -- essentially, the size of a ream of paper of
3 misread ballots being put into the clear misread envelope
4 that would be sent to the elections department and
5 tabulated off site.
6 Q. Could you approximate how many ballots that would
7 have been?
8 A. It's hard to say. I mean, I don't know the exact
9 thickness, but a ream of paper is probably close to 100 or
10 more. So it would be probably greater than 50.
11 Q. Okay. In your training, did you -- were you ever
12 -- were you ever trained -- well strike the question. You
13 see the screen on the tabulator, on the top of the
14 tabulator?
15 A. Yes.
16 Q. Were you ever trained on the various ways or in
17 the various messages this screen might display?
18 A. Yes. It tells us in the poll worker's manual
19 what happens when a ballot is read effectively and then
20 what happens if the ballot is not read effectively.
21 Q. Okay. And isn't it true as -- isn't it true that
22 the way that a voter knows whether their ballot was
23 properly read is that this screen displays a check mark
24 and makes a sound?
25 A. Yes. It illuminates the green button. A green

1 check mark is displayed and the sound is -- an audible
2 sound is emitted.
3 Q. And that's the sign of a successfully cast
4 ballot, right?
5 A. As far as I know, it is, yes.
6 Q. Okay.
7 MR. KOLODIN: One moment. I need to review
8 my notes.
9 Q. (BY MR. KOLODIN) Let's go to Page 112 of the
10 manual. This on this page, it says -- strike the
11 question. I'm sorry. Page 120 of the manual. That's
12 what I'm looking for.
13 All right. On this page, it says if a
14 ballot -- if a ballot has not been cast successfully, the
15 ballot is likely blank or over voted; is that right?
16 A. That's correct.
17 Q. Of the ballots that you saw experience this issue
18 on election day, did you observe any blank ballots?
19 A. No, I did not.
20 Q. The instructions to try to place the ballots in
21 Drawer 3 through the tabulator again, that's on Page 127,
22 correct?
23 A. I don't know the exact location, but it's part of
24 closing down the polls. It's in that section of the
25 manual.

1 MR. KOLODIN: Alfredo, can you go to Page
2 127, please.
3 A. Yes. The upper left-hand corner in the box where
4 it says to try them again into the tabulator. If misread
5 again, then place them in the misread ballot and then
6 affix it with all the details so they're protected. And
7 then --
8 MR. KOLODIN: Sorry. No further questions
9 for right now.
10 THE COURT: All right. Cross-examination.
11 MS. CRAIGER: Thank you, Your Honor.
12 CROSS-EXAMINATION
13 BY MS. CRAIGER:
14 Q. Thank you, Mr. Banko. I just have a few
15 questions for you. Were the tabulators ultimately zeroed
16 out so the voters could begin using them on election day?
17 A. I believe so.
18 Q. Well, were there ballots run through the
19 tabulators during election day while you were there?
20 A. They were, yes, but --
21 Q. Did any voters show you their ballot?
22 A. Some voters did show me their ballots, yes.
23 Q. I want to -- can you tell me again where you were
24 stationed during election day.
25 A. I was stationed all throughout the location of

1 the site. So I worked in -- I started out working
2 adjacent to the tabulators at the drop off bin, as well as
3 roaming throughout the site being a registration clerk and
4 then also back at the On Demand ballot printers.
5 Q. Were you -- you were never stationed at the site
6 book, right, checking people in at the site book; is that
7 right?
8 A. Yes. That's what a registration clerk does. I
9 was at multiple site books, registered voters.
10 Q. You were checking voters in at the site books?
11 A. Yes, I was.
12 Q. Okay. Did you check in every voter at the site
13 book?
14 A. No. That would be impossible to do.
15 Q. So you understand that these were vote centers,
16 correct, where people were voting on election day?
17 A. Yes, I do.
18 Q. And because they're vote centers, that means that
19 anyone, as long as they live in Maricopa County and are a
20 registered voter can vote there that day; is that right?
21 A. That's correct.
22 Q. So you didn't know the address of every voter
23 that voted there election day, right?
24 A. No, I do not.
25 Q. So it's not possible for you know that the ballot

1 that they were voting necessarily that you were looking at
2 was the ballot, the same ballot that you voted, correct?
3 A. I can't with certainly, no, but there are
4 addresses that are local to the polling location that
5 would fall within the same precinct that I live in.
6 Q. And you were never stationed at the tabulator,
7 correct?
8 A. No. Only the marshal was operating it. I was
9 adjacent to it.
10 Q. And it's the marshal's responsibility to assist
11 people with putting their ballots into the tabulators;
12 that's how you were trained, right?
13 A. Yes, or the inspector, or a troubleshooter if
14 there's a problem.
15 MS. CRAIGER: I have no further questions,
16 Your Honor.
17 THE COURT: Ms. Gonski, any questions?
18 MS. GONSKI: No questions from us, Your
19 Honor.
20 THE COURT: All right. Any redirect,
21 Mr. Kolodin?
22 REDIRECT EXAMINATION
23 BY MR. KOLODIN:
24 Q. Mr. Banko, besides what was on your own ballot,
25 did you gain a familiarity with what was on the ballots in

1 the local area?
2 A. Yes, I was.
3 Q. How did you gain that familiarity?
4 A. Just by understanding in certain locales they
5 have different propositions that are on it or different
6 things that are related to the local areas.
7 Q. And you'd see the ballots from voters who lived
8 in the area over and over again throughout the day,
9 correct?
10 A. Yes. So the majority of the ballot is consistent
11 across localities.
12 Q. Okay. Have you ever worked -- have you ever
13 worked at the polls before?
14 A. I have not. Besides the day before, where I
15 worked on the 2nd at the same location.
16 MR. KOLODIN: No further questions, Your
17 Honor.
18 THE COURT: May this witness be released?
19 MR. KOLODIN: Yes, Your Honor.
20 MS. CRAIGER: No objection, Your Honor.
21 THE COURT: All right. Mr. Banko, you are
22 free to go, sir. Thank you. Have a good day.
23 A. Thank you.
24 MR. KOLODIN: Your Honor, we'll now call our
25 expert witness who will be examined by co-counsel, Sue

1 Becker, who's now been admitted pro hac vice.
2 THE COURT: Give us that person's name
3 you're calling, please.
4 MR. KOLODIN: Sue. You're muted.
5 MS. BECKER: Plaintiff would call Dr.
6 Sneeringer. And I believe, Your Honor, I need to get him
7 to log in, as he was one of the witnesses we had first
8 thing this morning.
9 THE COURT: All right.
10 MS. BECKER: So I will contact him quickly.
11 THE COURT: Yes.
12 MS. BECKER: I will not be starting with the
13 exhibit that's currently on display.
14 MS. CRAIGER: Your Honor, this individual is
15 being referred to as an expert, but he has not been
16 qualified as an expert yet, and we'd like the record to
17 reflect that until that occurs, he shouldn't be designated
18 as an expert.
19 THE COURT: Well, what I'm going to do is
20 simply hear from the witness. We, in Arizona, don't
21 declare people to be experts. Basically, testify, give
22 their credentials. It's either the Court or the fact
23 finder gives it all the weight they determine the
24 witness's testimony merits.
25 So unlike states where someone is designated

1 an expert, since we don't do that, I won't be concerned
2 about that. Of course, Ms. Becker will have to establish
3 his qualifications to give the opinions that he's
4 offering.
5 MS. CRAIGER: Thank you, very much, Your
6 Honor.
7 MS. BECKER: Okay. Your Honor, it looks as
8 if Dr. Sneeringer has been able to get into the hearing.
9 THE COURT: Okay. Dr. Sneeringer, if you
10 would please pay attention to my clerk, she will swear you
11 in.
12 WILLIAM JAMES SNEERINGER,
13 called as a witness, having been duly sworn,
14 testified as follows:
15 THE COURT: You can proceed, Ms. Becker.
16 MS. BECKER: Thank you, Your Honor.
17 DIRECT EXAMINATION
18 BY MS. BECKER:
19 Q. Good afternoon, Dr. Sneeringer.
20 A. Good afternoon.
21 Q. Could you please tell the Court and counsel what
22 is your profession.
23 A. I'm a retired software engineer.
24 Q. Okay. And you provided a CV to me upon my
25 request; is that correct?

1 A. That's correct.
2 Q. Okay.
3 MS. BECKER: Your Honor, I would intend to
4 offer plaintiff's Exhibit 32, which is Dr. Sneeringer's
5 CV, provided -- already previously provided to all
6 counsel.
7 THE COURT: Any objection to the Court
8 receiving Exhibit 32?
9 MS. CRAIGER: No objection, Your Honor.
10 MR. ARELLANO: No, Your Honor.
11 THE COURT: Thirty-two is received.
12 Q. (BY MS. BECKER) Dr. Sneeringer, could you please
13 tell us a little bit about your background and
14 qualifications with regard to your work as a --
15 specifically as a voting systems examiner.
16 A. Okay. I have been a voting system examiner for
17 the state of Texas for 20 years, examining probably two,
18 three systems a year.
19 Q. Okay. And have you ever examined Dominion
20 systems in your work as an examiner?
21 A. Yes, I have.
22 Q. And who hired you to do that?
23 A. I work for the Attorney General of Texas.
24 Q. What did he hire you to do exactly? I know
25 you're an examiner, but perhaps you could tell us a little

1 bit of what an examiner does and what an examination
2 entails.
3 A. Okay. An examination involves inviting the
4 vendor to come in, show us the equipment, show how the
5 software is loaded and configured, and things like that.
6 Ask questions, both from software people and from
7 attorneys -- I'm sorry -- answer questions from those
8 people. And then run the test stack and see how it votes
9 and make an evaluation, a written evaluation from each
10 examiner, which are then reviewed by the Secretary of
11 State to make a final determination.
12 Q. Okay. And so that's what you've done for the
13 past 20 years; is that correct?
14 A. That's correct.
15 Q. When did you most recently examine any type of
16 voting machine?
17 A. I'm thinking about that. I think it was in the
18 Spring of this year.
19 Q. Okay.
20 A. Close enough. I know it was this --
21 Q. That's fine. Who did you review that for?
22 A. You mean which voting system?
23 Q. No. I mean who hired you. Was it also for the
24 state of Texas, or do you have other --
25 A. Also for the state of Texas. Only the state of

1 Texas.
2 Q. Okay. How long does an examination of voting
3 equipment system take on average?
4 A. Usually takes two days.
5 Q. Okay. And then are there guidelines that have to
6 be followed? And if so, who makes up those guidelines?
7 A. Well, the statute determines what the
8 requirements are for the voting systems. The examiner,
9 some of them will be attorneys and some will be engineers
10 of one type or another.
11 And obviously, the attorneys tend to focus
12 on whether the information is exactly the way the state of
13 Texas wants it, and the hardware people try to evaluate
14 usability and whether the system actually works.
15 Q. Okay. And do you recall examining a Dominion 5-5
16 system for the state of Texas last year?
17 A. Yes, I do.
18 MS. BECKER: Your Honor, plaintiff would
19 like to offer and discuss the report that Dr. Sneeringer
20 helped prepare. It's Exhibit 30.
21 THE COURT: This is a report of what, Ms.
22 Becker?
23 MS. BECKER: It's a report that Dr.
24 Sneeringer prepared for the state of Texas on the 5.5
25 Dominion system equipment.

1 THE COURT: Any objection?
2 MS. CRAIGER: Your Honor, I object on the
3 grounds of relevance. This is not our system that's used
4 here. And this was done for the state of Texas and not
5 the state of Arizona.
6 THE COURT: We are getting a lot of noise
7 here. Mr. Arellano, can you mute for a moment. Let's see
8 if we can narrow this down.
9 Ms. Craiger, try that again. I could not
10 hear you.
11 MS. CRAIGER: We object on the grounds of
12 relevance. This isn't the system that we use here in
13 Maricopa County. And this report was done for the state
14 of Texas, not the State of Arizona. It's different
15 equipment.
16 THE COURT: Ms. Craiger, when you say it's
17 not the system used here in Arizona, tell me what the
18 difference is.
19 MS. CRAIGER: 5.5 system, not the 5.5-B
20 system, Your Honor.
21 THE COURT: How is that different? Isn't
22 that, in fact, different, Ms. Craiger? Is that what
23 you're saying?
24 MS. CRAIGER: Yes. They are two different
25 systems.

1 THE COURT: Okay. Ms. Becker, I heard
2 someone else chiming in. I'm not sure who it was.
3 Ms. Becker, what's your response to that? If it's a
4 different system, why is this relevant?
5 MS. BECKER: Well, Your Honor, Dr.
6 Sneeringer is indeed an expert in this field. And he will
7 tell you that the 5.5 is the main version of the Democracy
8 Suite. He's prepared to discuss of the slight
9 modification. In fact, if you look at Dominion, its own
10 literature calls the 5.5-B a modification. There's also a
11 5.5-A, which is a modification specific for Pennsylvania,
12 for example.
13 So this is the same system. And, in fact,
14 you know, looking through it, the county's own literature
15 in an exhibit that they've got admitted, you can tell that
16 the equipment is the same because there's various
17 similarities, but I'd let Dr. Sneeringer be examined on
18 that.
19 THE COURT: Well, I'm going to determine
20 something about admissibility here in the first instance.
21 So it's your burden. He's your witness you're offering.
22 MS. BECKER: Well, Your Honor, first of all,
23 besides the fact that the 5.5-B is just merely stating
24 that there is an addition to the system, it's the same
25 system. And Dr. Sneeringer is willing to -- he'll talk

1 about that. So you can -- he has already explained that
2 it's substantially similar, if not the same, but more to
3 the --
4 THE COURT: Okay. Go ahead.
5 MS. BECKER: It does go to the weight of the
6 evidence in that plaintiffs have identified an actual
7 expert, someone who has examined this same system built --
8 not the modification, but he's examined Dominion systems
9 for 20 years.
10 And at this time, the county brought their
11 election supervisor, Mr. Jarrett, and yet he was allowed
12 to give sort of a quasi-expert testimony about the
13 technicality of the percentage of marks on the ballot and,
14 you know, I don't think he graduated college. So we're
15 bringing -- as far as the evidence that the Court is
16 considering, I would like to -- Dr. Sneeringer has
17 reviewed these systems for 20 years, and he can tell you
18 -- we're not going to get into the weeds, but it's
19 relevant enough, and it goes to the weight of the evidence
20 that we'd like to present.
21 THE COURT: Okay. Here's what I'm going to
22 do.
23 Ms. Craiger, you can voir dire the witness
24 to establish that, in fact, this is a different system,
25 and let me determine whether it's not going to be relevant

1 because it's a different system.
2 If that's your objection to his testimony --
3 Ms. Becker is saying it's -- she's making it sound like
4 it's a slight modification. I'm putting that gloss on
5 what she said, but that was the gist of what I was
6 understanding her comments to be.
7 So if you want to ask the potential expert
8 on those questions to illustrate that it's too different
9 for it to be relevant, then go ahead and do that, Ms.
10 Craiger.
11 MS. CRAIGER: Certainly, Your Honor. First,
12 I would like to just clear the record here. Mr. Jarrett
13 went to college, and he testified to that in his
14 testimony. As well as all the other additional
15 certifications that he's received, and he was presented as
16 a fact witness as the Director of Election Day and Early
17 Voting, that he's worked for at the county developing that
18 expertise and that knowledge of this system through his
19 work here. So I just want the record to be clear on that.
20 THE COURT: Ms. Craiger, let me clarify
21 something there. Are you saying that Mr. Jarrett, because
22 it's what Ms. Becker put a fine point on, he did, in fact,
23 graduate from college.
24 MS. CRAIGER: Yes. He testified to that
25 today.

1 THE COURT: All right. And I certainly
2 would agree with you that the capacity which he testified
3 was as a fact witness knowledgeable from his experience
4 and interactions with all of this equipment specifically.
5 So that's not of a concern to the Court.
6 Go ahead and do your voir dire of the
7 witness, please.
8 MS. CRAIGER: Thank you, Your Honor.
9 VOIR DIRE EXAMINATION
10 BY MS. CRAIGER:
11 Q. So Mr. Sneeringer, I understand that you -- this
12 report that's being offered into evidence here relates to
13 the 5.5 system; is that correct?
14 A. That's -- what's the date on that report?
15 MS. BECKER: I believe you misspoke. It
16 says the 5.5, not 5.5-B.
17 MS. CRAIGER: That's what I said, 5.5.
18 Q. (BY MS. CRAIGER) This report relates to the 5.5
19 system; is that correct?
20 A. Okay. Well, my report, the January, for the
21 January exam, is for the version 5.5.3 or mostly, at
22 least. And then for the precinct counter, it's 5.5.3.002.
23 We examined it again in October of the same year. And
24 that year there was no change to the image cast precinct.
25 At least it has the same version number.

1 Q. You have never examined the 5.5-B; is that
2 correct? And the reports have nothing related to 5.5-B
3 system; is that correct?
4 MS. BECKER: Objection. Asked and answered.
5 You just gave her the exact same equipment.
6 THE COURT: Overruled. I'm not clear what
7 the witness is telling me on this point. Because the
8 exhibit you directed us to, his report, Exhibit 30, he's
9 talking about the 5.5.3, but the report, as I'm looking at
10 the first page, doesn't say three anywhere. It just says
11 5.5. So I don't know what I'm dealing with here.
12 MS. BECKER: Your Honor, he was trying to
13 point counsel to the equipment that is the same, as
14 opposed to the title of the report.
15 THE COURT: As opposed to what, Ms. Becker?
16 MS. BECKER: As opposed to the title of the
17 report.
18 THE COURT: Okay. I'm not talking about the
19 title. I'm talking about the content in the first
20 paragraph, but where is -- Dr. Sneeringer, where in your
21 report do you talk about the 5.5.3 system? Again, I don't
22 even know the difference between that and a 5.5 or
23 anything else yet, but that's what you just told us is
24 what you examined. I don't see any reference to 5.5.3 in
25 this report on just a quick skim of the first couple of

1 pages; is it there?
2 A. Yes. I'm sorry to be confusing. What's
3 typically done is you add more decimal points as you make
4 new versions of things, and the components of the system
5 are listed in the report about halfway down the page, each
6 with its own version number.
7 THE COURT: Which page, sir? Second page?
8 A. Page 1.
9 MR. ARELLANO: Your Honor, may I note a
10 quick clarifying point that I think may be helpful.
11 THE COURT: Yes.
12 MR. ARELLANO: What plaintiffs has labeled
13 as Exhibit 30 actually appears to be numerous reports
14 compiled together. I don't think it's just one. For
15 example, the first three pages is a preliminary statement
16 by the Secretary of State of the State of Texas that is
17 signed by a Deputy Secretary of state of Texas, not Dr.
18 Sneeringer. Dr. Sneeringer report --
19 THE COURT: You're right, Mr. Arellano.
20 Thanks for pointing that out. So where are we in
21 Exhibit 30, Mr. Arellano? Hold on, Ms. Becker.
22 MS. BECKER: It's --
23 THE COURT: I'm just trying to let
24 Mr. Arellano finish.
25 MR. ARELLANO: I'll just note, Your Honor, I

1 don't know what plaintiffs are trying to get admitted
2 precisely within the report. I'll just note that as best
3 I can tell, Dr. Sneeringer's report are the last few pages
4 -- and I have a paper copy I'm looking at. I apologize.
5 I don't have the PDF number page, but it is the last five
6 pages of the document. The first one of which says,
7 voting system examination, Dominion voting systems,
8 Democracy Suite 5.5-A. It says prepared for as the
9 Secretary of State of Texas by James Sneeringer, Ph.D.
10 THE COURT: I see that now. Thanks for
11 pointing that out. That was not made clear.
12 Ms. Becker, are you trying to say something
13 further as to that right now before Ms. Craiger finishes.
14 MS. BECKER: No, Your Honor. I was just
15 trying to point you to where his individual thing started,
16 which we would do should the exhibit be admitted.
17 THE COURT: Ms. Craiger, hopefully, you are
18 on the same portion I am now within Exhibit 30 as Mr.
19 Arellano pointed out. It's at the very end. Go ahead
20 with your voir dire.
21 MS. CRAIGER: Thank you, Your Honor.
22 Q. (BY MS. CRAIGER) Mr. Sneeringer, I'm looking at
23 this now, and the title is Democracy Suite 5.5-A; is that
24 correct?
25 A. Correct.

1 Q. So this was not on the 5.5-B system; is that
2 correct?
3 A. Correct.
4 MS. CRAIGER: So Your Honor, this is a
5 different system. There are modifications which is a fact
6 that I think all parties can agree to. This report that's
7 been provided is not probative to the equipment that was
8 used at Maricopa County.
9 So while Mr. Sneeringer can testify, this
10 report should not be entered into evidence because it's
11 not relevant.
12 THE COURT: You're saying his testimony is
13 not objectionable as relevant, but the report would be
14 objectionable as relevant?
15 MS. CRAIGER: We could listen to
16 Mr. Sneeringer's testimony. I'm not sure what it entails
17 or what his knowledge is about 5.5-B, but this report is
18 about a different system. So it is not relevant and
19 should not be included into evidence.
20 THE COURT: I understand what you're saying.
21 Ms. Becker, I'm not going to receive
22 Exhibit 30 at this time. You can examine the witness.
23 Proceed with his oral testimony if you wish.
24 MS. BECKER: Certainly. May I -- would you
25 like me to lay the foundation as to the similarities

1 between the two?
2 THE COURT: I'd like the witness to tell us
3 all that.
4 MS. BECKER: Perfect.
5 CONTINUED DIRECT EXAMINATION
6 BY MS. BECKER:
7 Q. Dr. Sneeringer, with regard to the counsel's
8 objection about the 5.5 and the 5.5-A and B, could you
9 please give us your opinion as to whether they are
10 substantially similar enough for you to be able to discuss
11 them, given your education and experience.
12 And if there are specific details and
13 changes between the two that you're aware, you could
14 identify those, but if you could just answer the question
15 for the Court as to whether they are similar enough,
16 please.
17 MR. ARELLANO: Your Honor, I'm going to
18 object on the basis of both foundation and speculation.
19 The witness has not testified that he has ever examined
20 Arizona or Maricopa County's voting system or more
21 specifically the 5.5-B system such that he could make a
22 comparison between the two.
23 MS. BECKER: Your Honor, I'm attempting to
24 lay the foundation since they've objected for the first
25 time now that a 20 year experienced expert cannot talk

1 about the voting system. He's willing to tell the Court
2 that the two systems -- you've got 5.5 is the main system.
3 You've got little versions that are modified. And that's
4 what the Court -- or that's what I'd like the expert to
5 explain if the Court will allow.
6 THE COURT: Ms. Becker, you need to elicit
7 that from the witness, rather than you giving me that
8 argument. Go ahead and get him to tell you what it is
9 that you're telling me he would say in that regard.
10 He's talking about doing an examination in a
11 wholly different state with a system that has a different,
12 at least, number assigned to it. What I'm not hearing yet
13 is substantively how those two systems compare. So I'm
14 not being provided the information that would enable me to
15 resolve that.
16 Go ahead, Ms. Becker.
17 MS. BECKER: All right. I apologize, Your
18 Honor.
19 Q. (BY MS. BECKER) Dr. Sneeringer, could you please
20 tell the Court what the substantive similarities are
21 between the 5.5-B and the 5.5-A that you examined in
22 Texas.
23 MR. ARELLANO: Your Honor, again, I'm going
24 to object on the basis of foundation. I think we first
25 need to hear whether this witness has ever examined the

1 5.5-B system to determine whether he has basis to compare
2 the two.
3 THE COURT: Dr. Sneeringer, have you ever
4 examined a 5.5-B system, Dominion voting system?
5 A. No.
6 THE COURT: Sir, have you ever examined the
7 Dominion voting system used in Maricopa County, Arizona.
8 A. No.
9 THE COURT: Ms. Becker, you've got a problem
10 here. This entire case is built around what's happened
11 with the procedures in Arizona and Maricopa County's
12 voting system. We are getting into the nitty gritty of
13 how much of a bubble is filled in and which drawer it goes
14 into, et cetera, et cetera, but your expert is saying he's
15 never examined the same system as your -- as the
16 plaintiffs are criticizing in their lawsuits. That, to
17 me, is not helpful. I don't see the relevance there.
18 MS. BECKER: Well, Your Honor, first of all,
19 we asked the county to allow our expert to review the
20 exact system, and they did not allow it. They denied it.
21 So we asked on Wednesday morning, because Dr. Sneeringer
22 said, you know, it would be helpful to see the system.
23 And that was denied, but, Your Honor, to the bigger
24 question, we don't -- we're not alleging that --
25 plaintiffs are not alleging that the Dominion system was a

1 problem. It really could be any voting system, because
2 what we alleged is that the voting system that was used
3 failed.
4 And what Dr. Sneeringer is an expert at as
5 failures of all kinds of voting systems. He is --
6 THE COURT: Ms. Becker, we lost you there.
7 We can't hear you, Ms. Ms. Becker. Ms. Becker. Can
8 anyone else hear Ms. Becker?
9 MR. KOLODIN: We can't.
10 THE COURT: Ms. Becker, we've lost you here.
11 Everyone has lost you.
12 MR. KOLODIN: Your Honor, while we're trying
13 to get Sue back, perhaps we can have Dr. Sneeringer
14 testify whether he's aware of what the differences are
15 between the two systems, and that would establish the
16 needed foundation.
17 THE COURT: What would be his foundation to
18 testify as to the differences if he doesn't know anything
19 about -- if he's never examined B?
20 MR. KOLODIN: That would be a good question
21 for Dr. Sneeringer.
22 THE COURT: No. You've got to give me more
23 than this, folks. You're offering an expert to testify
24 about the system that is criticized in the plaintiff's
25 complaint, and what I'm hearing the witness say is he has

1 never examined that system.
2 I'm ready to sustain an objection to
3 relevance. He doesn't seem to have the foundation. It's
4 not relevant to me what the systems in Texas. This
5 lawsuit is not about the systems in Texas, 5.5-A or
6 whatever it is that's used there. It's about the one here
7 in Maricopa County. That's what the plaintiffs have
8 included in their complaint.
9 So hold on. Here's what we're going to do.
10 We've got a take a break. We've lost track for the poor
11 court reporter. We've gone for more than an hour and a
12 half. We're going to stand in recess for 15 minutes, and
13 we will begin again in 15 minutes.
14 (Off the record.)
15 THE COURT: Okay, folks. I was doing a time
16 count back there. Here's the sobering news. Plaintiffs
17 have used two hours and 26 minutes. Defendants have used
18 one hour and 32 minutes. So the time allotment for the
19 period we had allotted today was two-and-a-half hours a
20 piece. Obviously, we haven't even reached closing
21 arguments/oral arguments on the motions to dismiss.
22 And Mr. Kolodin, I have no idea how many
23 more witnesses you would intend to put on or defendants.
24 I know we took Mr. Jarrett out of turn, and he was done
25 early, but then because of the usage of time that was

1 addressed previously. When we summarized that, basically,
2 defendants skipped cross-examining some of the witness,
3 and the time balance shifted significantly then, but it's
4 already 3:35.
5 Is anybody paying attention to the time in
6 the sense -- I'm not challenging you but in the sense of
7 have you given any thought to how we're going to finish
8 this?
9 MR. KOLODIN: Your Honor, a question and
10 perhaps a thought. The question being, was Ms. Gonski's
11 time for voir dire our witness attributed to us or to the
12 defendants?
13 THE COURT: Well, Ms. Gonski?
14 MR. KOLODIN: Was it Ms. Gonski or
15 Ms. Craiger who was voir diring our witness?
16 MS. CRAIGER: I did that, Your Honor.
17 MS. GONSKI: That was Ms. Craiger.
18 MR. KOLODIN: My apologies.
19 THE COURT: That was Ms. Craiger. And
20 frankly, she took up much less time with the witness than
21 Ms. Becker did. Most of the time with the witness was Ms.
22 Becker. So, you know, it might make the difference of
23 five or six minutes. There really wasn't that much from
24 her as opposed to Ms. Becker dealing with the issues.
25 MR. KOLODIN: If we're so tight on time, the

1 five or six minutes might make a difference for closing.
2 We wouldn't necessarily intend to call any other witnesses
3 simply because of the time issue. I mean, otherwise, we
4 would.
5 And I also want to put in an objection on
6 the record when the Court is ready as to this witness.
7 THE COURT: You want to put an objection to
8 your own witness?
9 MR. KOLODIN: No, Your Honor. An objection
10 to the fact that counsel seems to have disqualified this
11 witness by testifying in a technical capacity. So
12 opposing counsel is testifying as to whether differences
13 between systems are meaningful and whether an expert who
14 could speak to one is qualified to speak to another.
15 They're not presenting any contravening testimony.
16 They're not drawing that out. Counsel is literally
17 testifying as to these technical issues, and we object to
18 that.
19 THE COURT: So I was hopeful that that's
20 what Ms. Becker would provide me by way of the witness's
21 testimony just to try to do that comparison to connect the
22 dots, but I didn't get that, frankly, from what was
23 covered with the witness. And I don't mean specifically
24 on the voir dire that Ms. Craiger did, but from what Ms.
25 Becker was offering about the witness.

1 It sounds like, at this moment in time, it
2 sounds like we're not talking about the same systems. And
3 it's the plaintiff's witness. It's their burden to offer
4 him in a manner that makes that clear when we've got these
5 issues right from the get-go, which is he hasn't even
6 examined the Maricopa County system.
7 Maybe, ultimately, he would tell us that,
8 but we're at a point right now where you have four minutes
9 left for your entire presentation, Mr. Kolodin. So we
10 need to figure out --
11 MR. KOLODIN: Written closings, Your Honor.
12 That's what we suggest.
13 THE COURT: I'm sorry.
14 MR. KOLODIN: Written closings.
15 MS. CRAIGER: Your Honor, this is an
16 expedited election matter that was brought by the
17 plaintiffs. This was scheduled for today. We were
18 provided the allotment of time. Defendants have saved
19 time as necessary, and we're ready to move forward to
20 close our case so that the Court can issue its decision
21 here.
22 MS. BECKER: Your Honor, we were
23 interrupted. I had asked Dr. Sneeringer three times to
24 explain how he knew the comparisons were the same, and
25 each time there was an objection and argument when all I

1 wanted to do was ask him, are these the same systems. I'm
2 still willing to do that.
3 I now realize we have a time issue, but it's
4 not because of plaintiff's fault. We have been tracking
5 our time diligently as well, and we keep getting side laid
6 on these arguments made and objections that should have
7 been made when they first saw the exhibit days ago.
8 THE COURT: First saw what exhibit? That he
9 was going to be a witness, or that the report --
10 MS. BECKER: His report was listed and
11 exchanged and that this whole thing started because I had
12 offered his report on the Dominion system. He's a voting
13 systems examiner. That's what he does. And so that's how
14 this whole thing started when we would have been done with
15 his testimony by now.
16 THE COURT: That's a little bit glib because
17 if it's irrelevant, we don't deal with the testimony. The
18 relevance is an initial hurdle that you have to get over,
19 and that was the objection that was raised, is that you
20 have -- you're offering someone who is testifying about a
21 system that's different than what the plaintiffs have put
22 at issue in their complaint.
23 MS. BECKER: And that was what -- the
24 opinion of counsel. That's not the opinion of the expert.
25 He's ready to tell you that they're the same system. It

1 was counsel's objection that was trying to state that
2 after I had offered his report, that it was different.
3 And that was an objection to the report that was something
4 that easily come out in testimony if I had been allowed to
5 ask the question, are these the same. Instead, I was hit
6 with multiple objections.
7 THE COURT: Okay. Ms. Becker, you asked the
8 question that you believe you were attempting to get from
9 the witness previously. You go ahead and ask that
10 question. His testimony about the system in Maricopa
11 County versus what's in his report are two different
12 analyses that the Court would go through. Why are you
13 shaking your head?
14 MS. BECKER: Well, I'm sorry, Your Honor.
15 I'm just -- I want to ask him. I believe that's because
16 counsel has told you that.
17 THE COURT: No. You're not hearing what I'm
18 saying. I'm saying, Ms. Becker, for the witness to
19 testify is not exactly the same as whether the exhibit
20 comes in. It could be that the exhibit is not coming in,
21 but he's allowed to testify. This report -- do you
22 understand what I'm saying?
23 MS. BECKER: Yes, Your Honor.
24 THE COURT: Okay. So you ask the witness
25 now what it is that you want him to advise the Court that

1 you are saying, hey, if it comes from an expert, you'll
2 understand it, as opposed to counsel arguing. Go ahead.
3 MS. BECKER: Thank you, Your Honor.
4 Q. (BY MS. BECKER) Dr. Sneeringer, is the Democracy
5 5.5 and the 5.5-B the same system?
6 A. Yes. It's like two editions of a book. Same
7 words. Maybe it's paperback. Maybe you have a new
8 introduction and, you know, edits and make some
9 corrections, things like that.
10 Q. Thank you.
11 THE COURT: So Ms. Craiger, on that basis,
12 do you have any expertise -- I'm sorry. Do you have any
13 witness that would say that despite the fact that it's got
14 a different number affixed to the end that it's not
15 exactly as the witness just testified?
16 MS. CRAIGER: Well, I believe based on
17 Mr. Sneeringer's or Dr. Sneeringer's testimony right now,
18 there are -- the different numbering indicates there have
19 been modifications and changes to this system. And in the
20 report, there are several listed with different versions
21 and presumably those changes and modifications are done
22 for a reason and are significant. So --
23 THE COURT: Ms. Craiger, the issue is
24 presumably. I'm not going to presume anything because I
25 don't have any expert. Maybe you do, but I certainly

1 don't. I'm not being facetious. Maybe you've learned
2 that over time in your job, but I have no way of knowing
3 whether a 5.5-A and a 5.5-B are similar, different, only
4 different in minor respects. There's no way I would know
5 that without witnesses telling me that. And those would
6 need to be witnesses with knowledge as opposed to lawyers
7 arguing.
8 So Mr. Arellano, what are you trying to say?
9 MR. ARELLANO: Your Honor, respectfully,
10 that's precisely the point we're making with respect to
11 the witness. If the witness has no basis to know whether
12 the two are the same, because as he's already acknowledged
13 in his testimony -- not my colloquy, but his own testimony
14 was that he has not tested the 5.5-B system. He has not
15 examined the 5.5-B system. He has never examined any
16 system outside -- in a jurisdiction outside of Texas. And
17 he certainly has not examined any system in Maricopa
18 County.
19 And to ask the witness are the two the same
20 is circular. The question presumes that he has a basis to
21 know what the differences between the two are when he's
22 never compared one to the other. It's comparing apples
23 and oranges for a person who has never seen an orange
24 before.
25 THE COURT: Mr. Arellano, that struck me as

1 well earlier on. That's how I was thinking about it, but
2 Mr. Sneeringer or Dr. Sneeringer -- we didn't even get
3 that far -- how is it that you have any basis, any
4 factual, knowledgeable technical foundation to tell me
5 what you -- what Ms. Becker elicited from you in the
6 beginning if you've never done an examination of a 5.5-B,
7 how do you know what you've already told me?
8 A. Well, Your Honor, I'm familiar with how the
9 industry works. And also I know how much time has elapsed
10 since that system. You don't rewrite a system overnight.
11 You go in and you make edits. If you go back to the book
12 analogy. So it's substantially the same system.
13 THE COURT: But, sir, do you know what edits
14 have been made between the version you are familiar with
15 and the version that was used in Maricopa County that the
16 plaintiffs have their grievances related to?
17 A. No.
18 THE COURT: You do not know what the
19 differences are, sir?
20 A. I do not.
21 THE COURT: Okay. Ms. Becker, I'm not going
22 allow the witness. This case, based on what he's just
23 told me -- he may have expertise all over the area, but
24 we're focused on one system here, and he's just made it
25 clear that he, himself, does not know what the differences

1 are.
2 There's no way -- there's no way I would
3 really reasonable rationally give any weight to that
4 because he doesn't know what you need to know to address
5 this system.
6 MS. BECKER: Well, and Your Honor, thank you
7 for your ruling, I suppose, but we would like to make a
8 record on that because I'm not even sure that -- I think
9 it's only Dr. Sneeringer that knows what he would need to
10 know to know the differences as far as that's what we
11 intended to elicit. So may we make a proffer of his
12 testimony, Your Honor, or a written --
13 THE COURT: Ms. Becker, I think he just
14 answered my question very clearly, that he does not know
15 what the edits are. He doesn't know what the
16 modifications are. He doesn't know what the differences
17 are. So how could he address anything of relevance to us?
18 In other words, given what he just told me
19 -- and I appreciate the witness's candor. The only way
20 would be valuable and relevant to me would be I'd have to
21 go on faith that, in fact, 5.5-A -- and this would be a
22 leap that we don't have any facts or evidence or testimony
23 to fill in -- that 5.5-A and the differences between 5.5-A
24 and 5.5-B are insignificant. We don't need to worry about
25 them, but I would have no witness on the record being

1 presented to me, the witnesses being presented, who could
2 tell me as a factual expert or technical matter. That's
3 the problem.
4 MS. BECKER: Well, and Your Honor, he was
5 not designated to discuss in detail -- did you lose me?
6 THE COURT: No. I can still hear you.
7 MS. BECKER: He was not designated to
8 discuss the Dominion system specifically. He was
9 designated to say that voting systems, in general, based
10 on his 20 years of knowledge are to act a certain way.
11 The fact that he happened to have been --
12 examined the system that was the previous -- it's the main
13 force. It's the main brain of the same system, but that
14 part, Your Honor, we wanted to elicit the testimony to
15 explain that if so many ballots are being rejected, that
16 there is a problem. He wasn't going to say what problem,
17 which -- how he knew.
18 I would like the record to reflect though we
19 did ask for him to be allowed to physically examine this
20 specific equipment, and it was denied.
21 THE COURT: Okay. Ms. Becker, I'm hearing
22 something a little different than I was hearing earlier
23 because this report is what was put out there, and the
24 report is not as general as what you are now saying he was
25 being offer for. To just say if there were that many

1 ballots that had problems, that's unusual or that's
2 concerning or whatever that opinion is going to be.
3 Ms. Craiger, address for me if you would the
4 point that Ms. Becker has made a couple of times about
5 plaintiffs asking to examine the system and being denied
6 that request.
7 MS. CRAIGER: Thank you, Your Honor. They
8 made that request of us on Wednesday of this week, I
9 believe. At the time when that request was made, we were
10 in the process of the logic and accuracy testing
11 occurring, but also under 16-566 (b), the tabulators have
12 to be sealed post election at least until the canvas and
13 likely longer than that.
14 So having anyone in working on the
15 tabulators that are used for the election prior to the
16 canvas being completed would be improper. We don't have
17 spare tabulators sitting around that he could have
18 examined. All of the tabulators were used as part of this
19 election site.
20 THE COURT: Ms. Craiger, what was the
21 16-566?
22 MS. CRAIGER: 16-566(b) that requires the
23 tabulators be sealed after the election.
24 THE COURT: And you're saying they need to
25 be sealed from the time the election -- from the time the

1 polls close on election day to when?
2 MS. CRAIGER: Except for the L&A, just to be
3 clear, there is one that -- there are tabulators used to
4 perform the logic and accuracy function. They're zeroed
5 out at the time in front of the observer so they can do
6 that testing, but until the canvas is completed, which
7 means that the Board of Supervisors has accepted the final
8 count, those tabulators cannot be touched because they
9 contain the information, the necessary information
10 relating to the number of votes cast in the election.
11 THE COURT: Did you explain that to Ms.
12 Becker when plaintiffs asked to have the witness examine
13 them?
14 MS. CRAIGER: I'll have Mr. LaRue answer
15 that. He had that communication.
16 MR. LARUE: Your Honor, we did not explain
17 the full process. We were in the middle of briefing.
18 Plaintiffs did ask if they could examine, and I responded,
19 I believe, in an email, but it could have been a phone
20 call. I don't remember. I just responded, no, that is
21 not a possibility. I didn't go into full detail and a
22 full explanation. They're just simply -- everything is
23 rushing and racing and I didn't take the time.
24 THE COURT: Okay. Ms. Becker, maybe that
25 gives you a little more information about the response

1 that you got.
2 So before we even get back to
3 Dr. Sneeringer, we are at 3:51 now. What --
4 Ms. Craiger, what's the State -- or I'm
5 sorry. What are the defendant's position on how we
6 proceed?
7 MS. CRAIGER: Your Honor, we have no
8 additional witnesses to call, and we are ready to move
9 forward with our oral argument on the motion to dismiss
10 and our closings.
11 THE COURT: Okay. Mr. Kolodin.
12 MR. KOLODIN: Your Honor, in the interest of
13 time, we would move forward. Our clock has us at two
14 hours and 10 minutes with the way Chris Viskovic was
15 keeping our time. So we don't want to burn any more of it
16 and have time to respond to the closing.
17 THE COURT: Okay. So Mr. Kolodin, my count
18 for you when I think back to the amount of time that went
19 on with your witness, with your expert, I would be willing
20 to take some of the time off of that. That was a back and
21 forth with the other side. So I will go with your two
22 hours and 10 minutes.
23 MR. KOLODIN: Thank you, Your Honor.
24 THE COURT: What that means at this point,
25 are we done with all the witnesses, and I'm going to hear

1 just argument?
2 MS. BECKER: Your Honor, may I ask
3 clarification, because I understand your ruling was that
4 the report could not come in, that Dr. Sneeringer was
5 going to discuss when he examined equipment, but can he
6 still offer his opinion as to the general problem of the
7 rejected ballots that has nothing to do with the name
8 brand or the equipment or the reports? Because he is a
9 voting systems examiner. We can do that briefly.
10 THE COURT: I hear what you're saying.
11 Ms. Craiger, do you have an objection?
12 And Mr. Arellano, do you have an objection
13 to that testimony?
14 MS. CRAIGER: Well, Your Honor, again, I
15 think we have to have foundation for what he's basing that
16 opinion on. So without --
17 THE COURT: Let's assume that Ms. Becker can
18 provide that foundation through the witness. He's got the
19 background, et cetera, that I'm gathering he does. And
20 that's what he's been doing for 20 years or however long
21 the testimony was earlier, do you have any objection to
22 that?
23 MS. CRAIGER: As long as we still have an
24 opportunity to closing, no objection.
25 THE COURT: Mr. Arellano?

1 MR. ARELLANO: Candidly, Your Honor, it's
2 hard for me to answer that question because the rationale
3 for offering this expert has shifted. Ms. Becker said
4 that he is not being called to testify about Dominion
5 voting systems generally. Yet, the plaintiff's exhibit
6 and witness list specifically said that Dr. Sneeringer was
7 being called to testify that this particular voting system
8 has previously been found to reject correctly marked
9 ballots. I'm on Page 6 of the joint statement.
10 And also that he would testify that the
11 rejection of properly marked ballots appears to have
12 occurred in Maricopa County on election day. And so
13 that's what we were prepared to cross, and that's what I
14 understood this witness was being offered for.
15 If the point that they want to elicit from
16 him is simply that voting are imperfect, I mean, I would
17 think that cuts across a central tenet of plaintiff's
18 case, and that the premise of their relief sought is that
19 machines are perfect, and they're entitled to perfect
20 systems; but, again, unless I hear what the witness has to
21 say, it's hard for me to say at the outset whether or not
22 I would object to his opinion testimony generally without
23 knowing to what precisely it would go because, again, that
24 issue has shifted.
25 THE COURT: Ms. Becker, has that shifted?

1 Is that different than what was in the disclosure?
2 MS. BECKER: No, Your Honor. It was the
3 same. What I stated was that we're not here to beat up on
4 Dominion. We're basically --
5 THE COURT: No, no. I mean, what
6 (simultaneously speaking) Mr. Arellano read.
7 MS. BECKER: Oh, sure. Yeah, that's what we
8 said. And that goes towards his position and his
9 experience that a voting system, regardless of what it is,
10 should not have acted this way. And that's what our
11 statement says, that this particular means the one that
12 was used. It doesn't mean Dominion. It just means
13 whatever brand was used that day.
14 This particular one used on November 3rd
15 failed to read the ballots, and it rejected upwards of 80
16 percent. It doesn't say the word Dominion in there. The
17 only entrance of Dominion came just as the foundation for
18 Dr. Sneeringer's vast experience. Dominion just happen to
19 be the most recent reports he's created. He is a retired
20 gentleman, and so we thought that would be helpful.
21 THE COURT: Ms. Becker, how long will you
22 take with this witness to elicit the opinions you want?
23 MS. BECKER: Your Honor, I could do five
24 minutes because I really -- Mr. Kolodin needs the rest of
25 the time. So we could just --

1 THE COURT: Okay, Ms. Craiger and
2 Mr. Arellano, I'm going to allow it. I understand your --
3 and for these more general opinions based on his expertise
4 assuming that's what Ms. Becker gives me.
5 I understand you're at a little bit of
6 disadvantage here because of the tight time frame and
7 what's been identified as the basis of his testimony, but
8 I think that's what's appropriate here. I will give it
9 the weight that I think it is due based on what I hear
10 from the witness.
11 And Ms. Becker, proceed right now, please.
12 MS. BECKER: Thank you, Your Honor.
13 Q. (BY MS. BECKER) Dr. Sneeringer, in your 20 years
14 of experience of examining voting machines, do you feel
15 qualified enough to be able to determine when a system
16 indicates a failure in it?
17 A. Yes.
18 Q. And based on your 20 years of examining voting
19 machines, your experience and knowledge, in a situation
20 where any voting machines, regardless of the brand, is
21 reported to have rejected properly marked ballots in a
22 precinct tabulator, if it is upwards of 80 percent -- the
23 highest we've heard, 80 percent -- what does that indicate
24 to you?
25 A. Well, rejecting a large number of ballots

1 indicates that it's not fulfilling its purpose. It's not
2 counting the ballots properly. And so I would say that
3 was a failure in the equipment.
4 Q. Okay. And would that failure -- if we were to
5 try to lay blame on either the voter or the equipment, if
6 you assume that as the witnesses have stated, that these
7 were properly marked ballots; meaning, no (audio
8 distortion)-rent marks, no notes, no messages to the
9 election board, who's fault would that be in your opinion?
10 A. Again, I would say the equipment. Especially,
11 when you have large numbers like that.
12 Q. All right. Thank you. And Dr. Sneeringer, there
13 was an Exhibit Number 43 which has already been admitted
14 into evidence, which you and I have looked at before, and
15 it is the tabulator sheet. Do you have that in front of
16 you?
17 A. I do.
18 MS. BECKER: And Alfredo, would you be able
19 to broadcast Number 43. It is the county's two page --
20 Q. (BY MS. BECKER) Well, actually, do you recognize
21 it, Dr. Sneeringer?
22 A. Yes. Maricopa County Elections Department
23 election day only.
24 Q. Yes. And on Page 2, can you tell me just whether
25 the option of just having a blank screen and no response

1 was presented in this as an option for how this particular
2 voting machine was supposed to work?
3 A. That's not how it's supposed to work. It
4 explicitly says that it's going to give a message that the
5 ballot has been accepted if it has been.
6 Q. Okay. So if someone were to say that none of
7 these error messages appeared and my ballot disappeared
8 into that without any kind of green check mark, would you
9 consider that a failure of the voting system?
10 A. Yes, I would. It explicitly says it's going to
11 show the green check mark, so how does the voter know if
12 it doesn't say so?
13 Q. And in your education and experience is this a
14 common part of a voting system as far as a human
15 interface, and it is important?
16 A. I'm not sure I understood that.
17 Q. I'm sorry. It is common to have a message being
18 displayed when a voter inserts a ballot into a tabulator?
19 A. Yes. Either a confirmation message or something
20 saying what went wrong.
21 Q. So in the case of Ms. Aguilera, what is your
22 opinion of whether the equipment worked or not when she
23 did not get a message at all?
24 A. Well, the equipment didn't work right. I can say
25 that, assuming that's what happened. I'm relying on her

1 testimony. I can't say whether the ballot was counted or
2 not.
3 Q. But you can say at the time -- is it your opinion
4 though at the time that she put the ballot in, something
5 went wrong?
6 A. Yes.
7 Q. Thank you.
8 MS. BECKER: No further questions, Your
9 Honor.
10 THE COURT: Cross-examination?
11 MS. CRAIGER: We have no questions, Your
12 Honor.
13 THE COURT: You said no questions?
14 MS. CRAIGER: That's correct. No questions.
15 THE COURT: Okay. Mr. Arellano?
16 MR. ARELLANO: I have a few, Your Honor.
17 CROSS-EXAMINATION
18 BY MR. ARELLANO:
19 Q. Dr. Sneeringer, you just stated an opinion based
20 on the testimony of Ms. Aguilera; is that right?
21 A. Yes.
22 Q. Did you have an opportunity to listen to Ms.
23 Aguilera's testimony?
24 A. No. I was denied that.
25 Q. Okay. So how would you form an opinion based on

1 her testimony if you haven't heard it?
2 A. Well, my understanding is that she testified that
3 there was no message.
4 Q. Your understanding --
5 A. What I'm testifying is that it's wrong to have no
6 message.
7 Q. Sure. I'm just trying to understand the basis on
8 which you draw that conclusion. You said your
9 understanding of what her testimony was. On what basis do
10 you draw that understanding?
11 A. Well, what I understand is that she said there
12 was no message. Ballot went in, and the machine did not
13 give a message.
14 Q. Right. And let me be more precise in my
15 question. From what source do you draw that understanding
16 of what her testimony was?
17 A. From what I've heard just now.
18 Q. Based on what counsel told you?
19 MS. BECKER: Your Honor, I object. He's
20 answered the question. And had there been more time, we
21 would have gone through all of the materials he had
22 reviewed as an expert.
23 THE COURT: Ms. Becker, no speaking
24 objection, please. Just tell me what your objection is.
25 I think what I'm hearing is the witness is saying, my

1 knowledge is based on the way the question was phrased.
2 So Mr. Arellano, I think that answers the
3 question about the source of the information. He's saying
4 it came from the questioner.
5 MR. ARELLANO: And that's what I wanted to
6 clarify, Your Honor. Thank you.
7 Q. (BY MR. ARELLANO) Dr. Sneeringer, I want to go
8 back to what I think has been marked as Exhibit 43. Did
9 you testify that it explicitly says -- let me clarify.
10 Did you testify that based on Exhibit 43, the tabulator
11 will display a green check mark when a vote is
12 successfully cast?
13 A. Yes.
14 Q. Okay, but, again, you have never examined this
15 particular voting system; is that right?
16 A. That's right. I'm basing that on what this
17 document says in 2A.
18 Q. I just wanted to clarify that the opinion is
19 based solely on what appears in the document rather than
20 any other opinion or training on your behalf?
21 A. I've seen similar systems obviously, but I'll
22 grant you that.
23 Q. Just a couple more quick questions. Dr.
24 Sneeringer, how many voting systems have you examined in
25 your career, would you estimate?

1 A. I'd say perhaps 60 to 70 examinations of 10
2 different systems maybe. Different --
3 Q. And in the course of those 60 to 70 examinations,
4 have you ever come across a perfect voting system?
5 A. No.
6 Q. To your knowledge, does a perfect voting system
7 exist?
8 A. There's nothing perfect in this world, including
9 voting systems.
10 Q. Thank you.
11 MR. ARELLANO: That's all I have.
12 THE COURT: Any redirect?
13 MS. BECKER: Yes, just very briefly.
14 REDIRECT EXAMINATION
15 BY MS. BECKER:
16 Q. Dr. Sneeringer, I just want to confirm that you
17 did receive materials in the form of exhibits for this
18 case from counsel; is that correct?
19 A. That's correct.
20 Q. And so in addition to the case materials provided
21 you, your testimony, however, and the reason we reached
22 out to you -- or you don't know that, but it is based on
23 your 20 years of experience and education as a data
24 expert, as well as a voting system expert; is that
25 correct?

1 A. Are you asking me why you did something? I'm
2 sorry. I think I lost the --
3 Q. I was just asking you to confirm that rather than
4 forming your opinions solely on the basis of documents
5 that counsel provided to you, that your actual opinion is
6 based on your experience and education as a voting systems
7 and data expert; is that correct?
8 A. Yes, that's correct.
9 MS. BECKER: No further questions.
10 THE COURT: All right. May this witness be
11 released -- or Ms. Craiger, you said -- yes. I'm sorry.
12 We're already past that. May this witness be released.
13 MS. CRAIGER: Yes, Your Honor. We have no
14 objection.
15 THE COURT: Mr. Arellano?
16 MR. ARELLANO: No objection.
17 THE COURT: All right. Dr. Sneeringer,
18 thank you, sir. You are free to go.
19 A. Thank you, Your Honor.
20 THE COURT: You're welcome. Did we -- was
21 he trying to speak to us when he left there? I missed
22 that. Did he exit okay? Is he gone, or do we have still
23 have him? It sounded like he was still speaking as he
24 left.
25 MS. BECKER: I think he's gone, Your Honor.

1 I believe he was just thanking you.
2 THE COURT: Oh, sorry, Dr. Sneeringer. I
3 didn't hear that. So at this point, folks, has -- let's
4 see. That was the plaintiffs. Are plaintiffs resting at
5 this point?
6 MR. KOLODIN: Except for argument, Your
7 Honor.
8 THE COURT: Resting in terms of any
9 presentation of evidence?
10 MR. KOLODIN: Yes, Your Honor.
11 THE COURT: Okay. Are there any further
12 witnesses from defendants or intervenor?
13 MS. CRAIGER: We have no further witnesses,
14 Your Honor.
15 MR. ARELLANO: Neither do we.
16 THE COURT: All right. So folks, what we
17 have left at this point is -- I know that counsel
18 indicated to the Court up front that what they would like
19 to do is just sort of combine argument on the two motions
20 to dismiss that the intervenor and the county defendants
21 have filed with closing argument based on the evidence
22 that we've now heard here today.
23 So how are we on the court reporter? Hope,
24 could we stop for a minute and let me check on your
25 survivability out there.

1 (Off-the-record response by court reporter.)
2 THE COURT: I never intended to be the time
3 keeper. I know I sort of turned into that, unfortunately,
4 but we have -- let me ask it this way. County defendants,
5 including Mr. Arellano, as opposed to plaintiffs, how much
6 time does each side believe they have remaining to use for
7 their argument now?
8 MS. CRAIGER: I believe we have 30 minutes
9 left. Is that correct?
10 MR. LARUE: Yes. We should have --
11 according to my calculations, we have at least 25 minutes.
12 THE COURT: Okay. Mr. Arellano, does that
13 include -- that's included with the county defendants,
14 correct?
15 MR. ARELLANO: It's consistent with, I
16 think, what we have. I know before I crossed
17 Dr. Sneeringer, I think I had us at 30 minutes. And I'm
18 assuming my cross took a few minutes. So I would think we
19 have about 25 as well.
20 THE COURT: And will I hear argument from
21 both Mr. Arellano and county defendants?
22 MS. CRAIGER: Yes, Your Honor.
23 MR. ARELLANO: You'll here from Ms. Gonski,
24 actually, but, yes, you will hear arguments from
25 intervenors.

1 THE COURT: Oh, there's Ms. Gonski. She's
2 looking right at me. So you folks are going to decide how
3 to divide up that time, correct?
4 MS. CRAIGER: That's correct, Your Honor.
5 THE COURT: All right. Mr. Kolodin, how
6 much time do you have left, sir?
7 MR. KOLODIN: Thirteen-and-a-half minutes,
8 Your Honor.
9 THE COURT: All right. Mr. Kolodin, you can
10 have 15 minutes, sir, total.
11 MR. KOLODIN: Thank you, Your Honor.
12 THE COURT: All right. You can begin,
13 Mr. Kolodin.
14 MR. KOLODIN: Well, Your Honor, a lot of the
15 issues today are issues that are relatively obscure of the
16 law. I want to start at the end, and then we'll work our
17 way towards our beginning.
18 Our sixth cause of action was failure to
19 comply with the election procedures manual because the
20 public was not provided with access to the counting -- or
21 sorry -- to observe the electronic adjudication process,
22 which as you've heard, both plaintiffs testified that they
23 would like to have. And Mr. Jarrett testified that the
24 public is not provided.
25 Now, the election procedures manual, which

1 has the force of law -- and we've cited the statute for
2 that in various briefing, but in prior litigation, the
3 county has not contested it has force of law.
4 States that the electronic adjudication of
5 votes must be performed in a secure location. Preferably
6 in the same location as the EMS system but open to public
7 viewing. The juxtaposition of the secure location with
8 but open to public viewing makes it very, very clear
9 that's what contemplated by this -- and I'll call it a
10 statute because it has the force a law, but this rule is
11 that the public be permitted to be physically present to
12 review the electronic adjudication process. Otherwise,
13 there would be no reason for the drafters to juxtapose
14 secure location with but open to public viewing if a mere
15 camera could satisfy the observation requirement.
16 THE COURT: Mr. Kolodin, give me the precise
17 statute you are contrasting with the precise portion of
18 the elections procedure manual. Maybe you said that, but
19 it went by me.
20 MR. KOLODIN: Certainly. So A.R.S.
21 16-621(A) states that proceedings at the counting center
22 have to be conducted in accordance with the election
23 procedures manual. There's another statute that says it
24 has the force of law I don't have off the top of my head,
25 but it's in our briefing. And then with respect to the

1 particular rule, this could be found on Page 3 of the
2 electronic adjudication addendum, or if the Court would
3 rather, Addendum D-1 at 3.
4 THE COURT: Which exhibit is that, sir?
5 MR. KOLODIN: Exhibit is I think something
6 that came in on stip.
7 Alfredo, what's the exhibit?
8 MS. BECKER: It's 24.
9 MR. KOLODIN: Twenty-four.
10 THE COURT: Thank you. Okay.
11 MR. KOLODIN: So -- but even if a camera
12 could satisfy the requirement, which, again, it can't, but
13 even if it could, the cameras the county defendant has set
14 up don't satisfy the requirement because, as Mr. Jarrett
15 testified, the key components of the electronic
16 adjudication process come when a county employee applies
17 their training to what's on the screen. To the image on
18 the screen. That is the electronic adjudication process.
19 A process that the county employee applying
20 their training to the image on the screen, but Mr. Jarrett
21 testified that the way that camera are set up, the screens
22 are not visible. So the public, even via camera, cannot
23 observe the process. Therefore, the public -- or
24 therefore, the county defendants have failed to comply
25 with their legal obligation to allow public access --

1 sorry -- to allow public viewing of the electronic
2 adjudication process.
3 Now, county defendants, in their briefing
4 have cited certain cases that mostly go to the issue of
5 standing. They cited those -- and their argument in
6 general, along with intervenor, seems to be plaintiffs, as
7 member of the public, don't have standing to ring a claim
8 like that. The problem is, they cited almost those exact
9 same cases in a recently decided Supreme Court case that
10 was literally decided within the past month.
11 And there the Supreme Court concluded, no,
12 actually, individual voters always have standing to bring
13 suit against violations of Arizona election law. And I
14 think it was in one of the intervenor's briefs where the
15 intervenor says, you know, other than these two cases, you
16 know, plaintiffs don't have a leg to stand on with respect
17 to standing, which when you're dealing with a recent
18 Supreme Court case directly on point, it's kind of like
19 saying, other than that, Ms. Lincoln, how was the play.
20 So there is a standing and purely as a
21 matter of law based on their own witness's testimony, that
22 legal requirement simply hasn't been met. And, of course,
23 the recent Supreme Court case, notably here, did deal with
24 violations of the election procedures manual. So we're
25 even talking about something dramatically similar. And it

1 sought both declaratory and injunctive relief. So it was
2 similar in terms of the relief sought as well.
3 THE COURT: Mr. Kolodin, you have not yet
4 cited the name of the case you keep arguing about.
5 MR. KOLODIN: Sure. That would be Arizona
6 Public Integrity Alliance v. Fontes, which is known, of
7 course, to Mr. LaRue because him and I were opposing
8 counsel on that case. So that would be with respect to
9 our sixth cause of action.
10 All right. Let's take it at the beginning,
11 as Mr. Arellano very, very intelligently pointed out, our
12 first cause of action is predicated on a simple question,
13 right? Which is, did the county's electronic voting
14 system read and tabulate ballots with perfect accuracy
15 this election cycle?
16 So I'll go again first to the testimony of
17 county's witness, Mr. Jarrett. Mr. Jarrett testified that
18 at least some ballots this cycle were printed in a skewed
19 fashion where they could not be read by the tabulator.
20 Thus, as a matter of law based on county defendant's own
21 testimony, their system has failed to read and tabulate --
22 has failed to automatically read and tabulate every ballot
23 cast with perfect accuracy.
24 Now, those ballots may well have been
25 properly tabulated at the end of the day through humans

1 looking at the ballots, figuring out voter intent and then
2 duplicating the ballot, but that is a fundamentally
3 different thing than the voter receiving automatic
4 tabulation with perfect accuracy. It injects humans into
5 the process. And as you've heard both plaintiffs testify,
6 they view that as an inferior process to a fully
7 electronic process, because every time you introduce
8 humans you have the possibility of the error and bias.
9 With respect to plaintiffs themselves, both
10 of them also experience this problem. Although, again,
11 based on Arizona Public Integrity Alliance, we fought this
12 in the other case we've cited in the brief, it would be
13 enough for them to point to this error happening to anyone
14 to give them standing to bring suit, but in addition to
15 the testimony from Mr. Jarrett that it happened to at
16 least some voters, they have direct testimony that it
17 happened to them.
18 As Mr. Jarrett testified, when a ballot is
19 properly accepted by the tabulator, there will be a green
20 check mark that lights up on the screen, and there will be
21 -- there will be a sound that is played.
22 With respect to Ms. Aguilera, she testified
23 that she didn't see the green check mark, even though she
24 was looking, and she didn't hear a sound. And it was a
25 significant enough deviation for the poll worker to

1 explain that this was indicative of a problem and to
2 cancel out her check in, as a ballot that has not been
3 cast.
4 We've heard, of course, from our own expert
5 that the only way that you would know that a ballot has
6 been successfully cast is this green check mark and sound.
7 And we've also heard from a former employee, Mr. Banko, of
8 the county that received the county's training --
9 THE COURT: Mr. Kolodin, I don't know if you
10 can hear us --
11 MR. KOLODIN: -- but also testified that the
12 only way that you would know that a ballot has been
13 successfully cast is this -- where did I get lost? Am I
14 gone?
15 THE COURT: Mr. Kolodin, you keep freezing.
16 MR. KOLODIN: Am I good now?
17 THE COURT: Mr. Kolodin, when I noticed at
18 an earlier proceeding is when you lean close to the
19 camera, we have problems. Try sitting back. I know
20 you're getting animated, so it's hard to relax back there,
21 but I think you're better off if you sit back.
22 MR. KOLODIN: Where did the Court lose me,
23 Your Honor?
24 THE COURT: I wish I could tell you. I
25 don't know. All of a sudden you were frozen and I kept --

1 MR. KOLODIN: Alfredo, what was the last
2 thing you heard me say?
3 MR. ALFREDO: I might be bad person to go
4 off because I'm in the office right next to him so I can
5 hear him.
6 MR. KOLODIN: How about you, Sue?
7 THE COURT: I honestly don't know. I've
8 been too distracted by trying to see you coming and going.
9 Anybody else?
10 MS. BECKER: I think you were just talking
11 about the testimony from the county's own employee.
12 THE COURT: Mr. Jarrett.
13 MR. KOLODIN: Mr. Banko, right?
14 THE COURT: Mr. Banko.
15 MR. KOLODIN: Yeah. So we've not only heard
16 from Mr. Jarrett, who is the election day director that
17 the only way to know that a ballot's been cast
18 successfully is the green check mark and sound. We've
19 also heard from Mr. Banko who received the county's
20 training that the way that a voter knows that their vote
21 has been successfully cast and tabulated is to receive the
22 green check mark and the sound.
23 So on the undisputed testimony, the green
24 check mark and the sound did not play for Ms. Aguilera,
25 her vote was not counted.

1 Now, with respect to Mr. Drobina, we have a
2 slightly different issue with respect to the failure to
3 maintain a statutory compliant electronic voting system.
4 Frankly, we don't know and it's entirely possible that
5 Mr. Drobina's vote at the end of the day actually were
6 totally correctly added to the tally, okay, but that
7 notwithstanding, there's a process problem with respect to
8 Mr. Drobina, as we've talked about.
9 It is a fundamentally inferior method of
10 counting ballots to have human beings attempt to determine
11 intent. And Mr. Drobina was denied his right under
12 Arizona statute to have his ballot counted by perfectly
13 accurate machines. Because as he testified, he followed
14 the instructions -- actually, both plaintiffs testified,
15 and we went through the instructions together -- that they
16 followed all of those instructions, and yet, they still
17 experienced the read errors.
18 As Mr. Jarrett testified, a ballot that is
19 undamaged and cast according to the instructions should
20 never, ever end up in Tray 3, right? Because at that
21 point, the machine has failed to read and tabulate it and
22 tabulate it automatically and with perfect accuracy.
23 There's been a failure where there shouldn't have been and
24 even Mr. Jarrett acknowledged.
25 This is what happened to Mr. Drobina. He

1 followed all the instructions. He put his ballot in the
2 tabulator, and yet, it was improperly subject, taken
3 downtown and subject to humans reviewing it in the first
4 instance, to figure out if they should run it though
5 another tabulator. And, of course, if the decision they
6 made is to run it through another tabulator then to
7 determine his intent. That's not the process he's
8 entitled to under Title 16. Specifically, 16-444 and
9 16-446. And therefore, it's contrary to law.
10 THE COURT: Mr. Kolodin, you made a
11 reference a moment ago to statutes requiring perfect
12 accuracy.
13 MR. KOLODIN: Yes.
14 THE COURT: And throughout your complaint,
15 repeatedly you've used the term perfectly accurate,
16 perfectly this, perfectly read. What statute, what rule,
17 what elections procedure manual, what case law says
18 perfectly accurate?
19 MR. KOLODIN: So Your Honor, that would be
20 A.R.S. 16-446(B)(6). By statute, the county's electronic
21 voting system must, quote, when properly operated --
22 right, which is why we've talked about the instructions
23 and them being followed. So when properly operated,
24 record correctly and count accurately every vote cast.
25 And we agree. This is high standard.

1 Perhaps a very difficult standard to meet. Nonetheless,
2 is the standard that the legislature chose, and,
3 therefore, it is the standard that this Court must
4 enforce. And if county defendants have a problem with
5 this statute, then their recourse is to lobby the
6 legislature and explain that they can't comply with it,
7 but until such time as that comes, they must follow it,
8 and they have failed to follow it.
9 THE COURT: Mr. Kolodin, do you see the word
10 perfectly in what you just read to me? Because I do not.
11 MR. KOLODIN: Your Honor, I believe the word
12 every vote would be synonymous with perfectly. So there
13 can't be one failure, right? If every vote is going to be
14 correctly read, there can't be a single failure.
15 THE COURT: So you're finding -- you're
16 using the term perfectly accurate as synonymous for what,
17 sir?
18 MR. KOLODIN: But -- with record correctly
19 and count accurately every vote cast. And we tie that
20 with the requirement that this happened automatically when
21 we look at A.R.S. 16-444 (A)(7) because vote tabulating
22 equipment that must do this is the automatic tabulation
23 equipment. So not the manual duplication process.
24 THE COURT: But, Mr. Kolodin, doesn't the
25 elections procedure manual, which has the force of law as

1 you've already pointed out as the opposing parties don't
2 dispute, I'm sure, doesn't it also provide for the
3 procedures that, in fact, were followed with respect to
4 Ms. Aguilera? If so, how are you picking this and saying
5 it means no human can touch it, when the elections
6 procedure manual says under a certain circumstance, a
7 human will touch it?
8 MR. KOLODIN: Oh, certainly. So Your Honor,
9 that is a very good question. We're not saying no human
10 should touch it. First of all, I would say statute
11 controls over the election procedures manual, of course,
12 but more than that, there's absolutely a role for the
13 human adjudication process as a back stop when a voter has
14 made a mistake. As Mr. Jarrett testified, it should never
15 be used when a voter hasn't made a mistake.
16 What is it there for? To try to ascertain
17 the intent of voters who have made a mistake, who haven't
18 perfectly followed the instructions, who put Xs instead of
19 bubbles on their ballot. Who accidently made a stray
20 mark. It is there for those voters as a back stop. It
21 should never be used in first instance.
22 THE COURT: Mr. Kolodin, you are at
23 15 minutes now, sir.
24 MR. KOLODIN: Okay. Then just to wrap up
25 and conclude. Our second cause of action is much the same

1 except that --
2 THE COURT: Sir, you can't go through every
3 cause of action because you're at the end of 15 minutes.
4 MR. KOLODIN: Your Honor, very well. Then
5 we have it all explained in our complaint and with
6 citations to the law and, of course, in our brief. So
7 I'll stop there.
8 THE COURT: Thank you, sir. Okay, who's
9 next, Ms. Gonski or Ms. Craiger?
10 MS. CRAIGER: Ms. Craiger, thank you.
11 THE COURT: Go ahead.
12 MS. CRAIGER: So I'd like to start out by
13 saying that the Court should dismiss this case at this
14 point because it's, essentially, nonjusticiable because
15 plaintiffs cannot obtain the relief that they seek.
16 THE COURT: Ms. Craiger, I'm sorry to
17 interrupt. Maybe it's a bad connection. I thought I just
18 heard you say the Court should not dismiss this case.
19 MS. CRAIGER: No. I said the Court should
20 dismiss this case at this point because it is
21 nonjusticiable.
22 THE COURT: I'm having a little trouble
23 hearing you so...
24 MS. CRAIGER: Is that better?
25 THE COURT: Yes, it is actually.

1 MS. CRAIGER: So what I was saying, Your
2 Honor, is that the Court should dismiss this case at this
3 point because it is nonjusticiable because the relief that
4 plaintiffs (audio distortion) is not possible.
5 Ms. Aguilera wants to cast another ballot.
6 Mr. Drobina doesn't actually ask for any relief for
7 himself. He just seeks a declaration from the Court that
8 Maricopa County violated the law, which it did not; but
9 let's talk about Ms. Aguilera's relief first.
10 She wants to be allowed to cast another
11 ballot, but the election is being canvassed as I am
12 speaking right now, or it may be already canvassed. That
13 was publicly noticed to take place this afternoon, and
14 that is why Scott Jarrett had to testify this morning.
15 To be clear, canvassing the vote is the
16 public proclamation by the Board of Supervisors that the
17 election is final, and that the totals have been
18 tabulated. Letting Ms. Aguilera cast another ballot,
19 therefore, would be of no effect. And it would be a
20 nullity, and for that reason, this Court should not give
21 her that relief, but there is another reason. It would be
22 illegal to cast another ballot for two reasons.
23 First, Ms. Aguilera, as we learned today,
24 cast her ballot. So this would be double voting, which is
25 illegal, but second, the law commands that no ballots

1 whatsoever can be cast after 7:00 p.m. on election day
2 unless the voter was standing in line to vote at that
3 time. That is the rule. A.R.S. 16-565(A) says that the
4 voting locations must be closed at 7:00 p.m. 15-565(D)
5 says anyone who is in line at 7:00 p.m. gets to vote. And
6 16-566(B) says that as soon as the last qualified voter
7 votes on election day, the tabulators have to be sealed
8 against any further voting.
9 So Ms. Aguilera cannot now vote. It would
10 be double voting and unlawful.
11 As to the points raised in our motion to
12 dismiss, first, this case is barred by laches. Plaintiff
13 waited 10 days until after the election to file this third
14 lawsuit after voluntarily dismissing their first and then
15 having their second dismissed.
16 Inexplicably, they assert that they
17 dismissed their first lawsuit because large firms had
18 intervened. And then they attempted to intervene in the
19 Trump v. Hobbs lawsuit involving the very same firms. And
20 after their second dismissal, they waited another four
21 days to refile for seemly no reason.
22 While 10 days in the normal litigation
23 context may not seem important, in the election context,
24 it's an eternity. And the case law on this is clear. At
25 this point, all votes have been tabulated. The hand count

1 audit has been completed, and, as I said, the canvas is
2 taking place in front of the Board of Supervisors right
3 now.
4 Secondly, the plaintiffs lack standing to
5 bring their generalized grievances in this suit. For
6 instance, there is no harm alleged related to their claim
7 that the county's decision to make electronic adjudication
8 available for public viewing via the internet or even that
9 there was a violation of the elections procedure manual,
10 which is not.
11 Also, plaintiffs' statutory claims based on
12 Title 16 fail because they did not bring a mandamus action
13 here. The plaintiffs reliance on public integrity is
14 misplaced.
15 In that case, that case was brought as a
16 mandamus action, and the Court very clearly made -- or
17 made it very clear that when cases are brought as a
18 mandamus, there is a broader standing allowed to the
19 plaintiffs. And that was reflected in the mandamus
20 statute found at 12-2021. That gives broad standing to
21 the members of the public, but that doesn't give the
22 plaintiffs here a private right of action.
23 Plaintiffs constitutional claims, likewise,
24 fail. Plaintiffs do not allege any state law or even
25 practice by the county. Rather, this case is about -- and

1 I quote from the complaint at Paragraph 1.12 -- two
2 individuals who experienced difficulties voting on
3 election day. These two isolated events, even if true, do
4 not rise to the level of a depravation of constitutional
5 rights. And there is ample case law addressing this
6 issue, but now I'd like to turn, Your Honor, to what
7 happened here today.
8 When plaintiffs filed this third lawsuit
9 here, and they filed their non-opposition to return this
10 case to you, Your Honor, at Docket 11 they stated that the
11 evidentiary hearing in this case is simple. Plaintiffs
12 will need to prove two things; that plaintiff Aguilera's
13 ballot was not counted at all, and that defendant's
14 tabulator machines failed to automatically read and report
15 at least one vote such as either plaintiff Aguilera or
16 plaintiff Drobina's votes with perfect accuracy.
17 Plaintiffs counsel went on to say that
18 proving that had happened can be expected to be a much
19 simpler fact-finding process than proving how it happened.
20 That's at the non opposition at Page 3, Lines 19 through
21 23.
22 Of note however, Your Honor, in their
23 complaint at Paragraph 3.14, plaintiffs admit -- and I
24 quote -- it would be impossible after election day to
25 ascertain with any certainty whether a particular election

1 day voter's ballot was counted, much less whether all
2 votes contained on any given ballot were tabulated.
3 So that begs the question, what have we been
4 doing here all day? Plaintiffs admit there is no way to
5 ascertain whether a ballot has been counted, and so
6 there's also no way to ascertain whether a ballot has not
7 been counted. And for them to prevail, they have to be
8 able to prove the ballots and votes were not counted.
9 They cannot do that, and they did not do that.
10 By the way, Your Honor, there is a reason
11 why we can't link a particular voter to a ballot. It's
12 constitutionally prohibited. Article 7, Section 1 of the
13 Arizona Constitution protects the right to a secret
14 ballot.
15 Now setting aside that the relief requested
16 is impossible and the claims can't be proven, let's talk
17 the facts and the lack of facts that you heard here today.
18 Certainly, you heard a lot of rhetoric and
19 speculation, but what you did not hear is a single piece
20 of evidence to support plaintiffs' claims that their votes
21 weren't counted or properly counted.
22 From Mr. Jarrett, you learned how the
23 tabulation equipment works. The layers of testing,
24 certification and safeguards put in place to ensure votes
25 are accurately counted. All of the efforts that went into

1 training the hundreds of poll workers that work prior to
2 and on election day.
3 You also learned all the steps that were
4 taken because of Covid-19 to ensure the health and safety
5 of the poll workers and the public. You learned that
6 public viewing of the tabulation was available on the
7 internet to ensure the county met its requirements under
8 statute, but also kept its workers and the members of the
9 political parties safe.
10 Plaintiffs' assertion that the statute
11 requires that the tabulation room will be open to the
12 public has no basis. The statute just says it must be
13 available for public viewing, and the cameras meet that
14 retirement.
15 You also heard that the pre- and
16 post-election logic and accuracy testing and hand count
17 audit was observed by bipartisan observers and the hand
18 count audit was 100 percent accurate, and the equipment
19 was certified; but, again, what you did not hear was a
20 single fact to support plaintiffs' assertion that their
21 votes weren't counted.
22 From Mr. Drobina you learned that the system
23 and training worked. When his ballot could not be read by
24 the tabulator, it was placed in the third drawer so that
25 it could ultimately be counted, either at the site later

1 in the evening or at central counting. And there's
2 absolutely no evidence to the contrary.
3 For Ms. Aguilera, you learned that her
4 ballot was inserted into the tabulator and was not
5 returned. And you heard from Mr. Jarrett tell us that
6 that means her vote was counted.
7 Now, you did hear Ms. Aguilera testify that
8 she did not see or hear the ding, or the see the check
9 mark -- I'm sorry -- or hear the ding, but you also heard
10 her testify that she was there very early in the morning.
11 There were numerous voters, and there were two tabulators
12 running at the same time.
13 While we take Ms. Aguilera's assertions at
14 face value, it's very possible she was mistaken, but also
15 perhaps taking her claims at that face value, a poll
16 worker made a mistake when they spoiled her ballot on the
17 site book when her ballot had already been tabulated by
18 the tabulator. And maybe when the other poll worker
19 realized what had occurred and informed them that she
20 could not be provide a second ballot that would enable her
21 to vote twice, that spoiled ballot on the site book should
22 have been changed. Perhaps that's what happened.
23 And in that case, the recorder's website
24 would have reflected she had voted. We can acknowledge
25 that perhaps a mistake was made, but the mistake that was

1 not made was letting Ms. Aguilera vote twice.
2 Again, taking all of the plaintiffs'
3 testimony at face value, what we learned is that the
4 training and processes worked. Ms. Aguilera was not
5 allowed to vote twice, and Mr. Drobina was able to place
6 his ballot into Drawer 3 so it could be counted, even
7 though the tabulator at the voting location was able to
8 accept it at the time.
9 Elections are not perfect, Your Honor. From
10 time to time, mistakes are made. As plaintiffs' own
11 witness, Dr. Sneeringer admitted, no system is perfect.
12 And I'd like to point out also that we heard from three
13 voters today. Two had ballots accepted by the tabulator.
14 I'm sorry. We heard from three witnesses -- three voters.
15 Two had both ballots accepted by the tabulator, and one
16 was not and went into the third drawer.
17 You also heard a poll worker state that as
18 he was busy helping voters, checking people in, helping
19 them put their early ballots into the ballot box, that in
20 his opinion, what he observed was maybe 80 percent of
21 voters having trouble at that location that day.
22 There is no evidence to support the
23 assertion that 80 percent of ballots were rejected on
24 election day, which was the question that was posed by
25 plaintiffs' counsel to their expert. And -- I'm sorry --

1 to Dr. Sneeringer, who then provided his opinion that that
2 meant that there was a significant problem. That 80
3 percent figure is not based on any of the evidence that
4 was presented today.
5 As a final point, all ballots in Maricopa
6 County are counted by machines, and adjudication and
7 duplication takes place as is required by law. 16-621(A)
8 provides for duplication and 1621[verbatim](B) provide for
9 electronic adjudication.
10 So if the plaintiffs have an issue with
11 electronic adjudication and duplication taking place, then
12 their beef is with the legislature, not with Maricopa
13 County. At the end of the day, Your Honor, plaintiffs'
14 allegations that they were disenfranchised is absolutely
15 meritless, and this Court should not grant any of the
16 relief that they have requested.
17 THE COURT: Thank you, Ms. Craiger. Ms
18 Gonski.
19 MS. GONSKI: Thank you, Your Honor. I won't
20 repeat points that have already been made by the county,
21 but a few points, I think, are worth highlighting here.
22 Just at a high level, I think a cursory
23 check of the statutes and the citations in the complaint
24 establishes that there is no legal basis to these claims.
25 The citation that they are citing do not actually say what

1 they need them to say in order to get the relief that
2 they're seeking here.
3 The disjointed presentation of evidence that
4 we've seen today also underscores the many independent
5 reasons this case lacks any sort of factual foundation,
6 and should be dismissed for this reason as well.
7 Just as one example, plaintiffs starting the
8 day claiming a right to have their ballots adjudicated by
9 perfect machines and only tabulated by those machines, but
10 they ended the day with a witness who testified that all
11 voting machines are imperfect and infallible.
12 Even under the case that we've heard today,
13 it is unclear how any voting system would meet their
14 standards for being perfect and infallible. And that's
15 out of the mouth of their own witness, but I want to get
16 back to the claims in the actual complaint.
17 Despite all that we've heard today, the
18 complaint has to do with the voting experiences of two
19 people. And that is Laurie Aguilera and Donovan Drobina.
20 And at the end of the day what matters is these two
21 plaintiffs and their alleged injuries and their ability to
22 seek legal redress here in this lawsuit that would make
23 their injuries better.
24 And in the complaint, both Ms. Aguilera and
25 Mr. Drobina make clear that they want this Court to order

1 two specific things to happen. Aside from the declaratory
2 relief, which we've already spoken about, there are two
3 requests for injunctive relief in this claim.
4 First, is that plaintiff, Laurie Aguilera,
5 wants to cast a new ballot. She wants another bite at the
6 apple. Second, both she and Drobina want to be physically
7 present when ballots are being tabulated. They want to be
8 able to be in that room. And so that's it. At the end of
9 the day, the plaintiffs can talk all they want about
10 fraud, and Sharpies, and tabulation machine errors being
11 imperfect, or frustrations with poll workers or training,
12 but I want to look at this case through the prism of the
13 things that they are actually asking for the Court to do
14 on the strength of this evidence and these legal theories.
15 So first, I just want to take the new ballot
16 remedy. So they want this Court to order Maricopa County
17 to let Ms. Aguilera cast a different ballot. There are a
18 few problems with that. I won't rehash over what the
19 county just said, but there are, of course, multiple legal
20 problems with allowing a voter post hoc to cast a new
21 ballot.
22 Moreover, even if they're right that all
23 voters in Arizona must have ballots tabulated by machines
24 -- and I noticed that plaintiffs don't actually cite
25 anything. They don't offer any authority that supports

1 their idea that the remedy for that would be that a voter
2 gets to take a new crack at it if they felt like their
3 ballot wasn't actually adjudicated by that machine. So I
4 went and I looked too, but I couldn't find any case or any
5 statute or any constitutional provision anywhere that says
6 that a voter that has trouble voting on election day can
7 just cast a new ballot after the election.
8 So even putting aside all the things we
9 heard from the county and the things in our briefs about
10 how there's no private right of action here, or standing,
11 or procedure, putting aside all of that, if we just return
12 to the remedy that they're seeking, nothing that they cite
13 supports the proposition that a voter who struggled on
14 election day gets to cast a new vote, and that the whole
15 state needs to hold up certification of election results
16 until that new vote is counted. I found nothing.
17 Second, there's a really big threshold
18 problem here on the facts. And that's that all of the
19 available facts that we heard today point to the idea that
20 on election day, Ms. Aguilera's ballot was both cast and
21 counted. I won't rewalk through the evidence, but I think
22 Mr. Jarrett's testimony established that -- I think,
23 Exhibit 44, which was the video of the way the tabulation
24 machine works helped us understood that.
25 I also think Ms. Aguilera, herself, when

1 asked if she voted on election day said, quote, yes. You
2 heard her state that her ballot had issues the first time
3 going through the tabulator, but that it actually went
4 through on a subsequent try. And you heard her say that a
5 poll worker told her, quote, your ballot will be counted
6 tonight.
7 The only evidence that they offer to counter
8 that is a screen shot from the plaintiff's phone that was
9 taken over a week ago that shows a blank on a website for
10 her ballot status. I don't know what the explanation is
11 for that, but plaintiff hasn't offered any answers either,
12 and that alone, can't rebalance the weight on the other
13 side of the equation that we see -- with all of the things
14 that we've seen today leading to the conclusion that her
15 ballot was cast and counted on election day. It is
16 plaintiffs' burden to show that Ms. Aguilera was actually
17 injured and is entitled to relief and the weight of the
18 evidence, including her own testimony, point strongly
19 toward that conclusion that she has no injury because she
20 was actually able to cast her ballot on election day.
21 I want to look, secondly, at that second
22 claim for injunctive relief, which is the observations
23 right. So the complaint says that the legal basis for
24 this claim is that the election procedures manual says
25 that -- at Addendum D-1 at Page 3, says that the

1 electronic adjudication of vote, quote, must be performed
2 in a secure location, preferably in the same location as
3 the EMS system but open to public viewing; but the
4 election procedures manual also says on Page 196 that
5 that's accomplished through live video recording. And it
6 lays out a whole process for that.
7 And even it mentions where specifically the
8 hyperlinks are posted. A.R.S. 16-621(C) has more
9 information about the posting and availability of those
10 camera links. And plaintiffs haven't offered any
11 authority to support their contention that, quote, open to
12 public viewing means that these plaintiffs or members of
13 the public broadly have a right to be physically present
14 in that tabulation room.
15 So even assuming that the facts in the
16 complaint are true, they haven't stated a claim for
17 relief, and the complaint should be dismissed on that, but
18 even coming back and looking at the facts that we've seen
19 today on this particular claim, it's zip. We've heard
20 zero facts that would establish that the plaintiffs have
21 ever actually tried to watch ballot tabulation, that the
22 live stream of videos is not sufficient and has not
23 sufficiently met their desire or their need or what they
24 claim to be their right to have public viewing.
25 We haven't heard them say that they'd be

1 injured at all if they weren't allowed to be in the rooms
2 in person. And all of those things are plaintiffs' burden
3 to show, and they haven't done that here.
4 Now, on the other side of the equation we've
5 heard facts about why we don't have a general right for
6 the public to be physically present in those tabulation
7 rooms. And we heard Mr. Jarrett testify that there are
8 security reasons that are -- you know, make it reasonable
9 for the county to try to limit the number of people who
10 are physically able to be in the room while ballots are
11 being tabulated.
12 There are a limited number of people. Those
13 people have background checks. We heard that from Mr.
14 Jarrett. They are designated by the political parties
15 frequently or employees of the county. They are physical
16 distanced this year because of the risk of Covid-19. So
17 we've heard a lot of facts about why it actually doesn't
18 makes sense and is not a reasonable or a plausible remedy
19 to just have a general public right to be in the room when
20 ballots are being tabulated.
21 So there's no question here that even if
22 plaintiffs had established a legal entitlement to that
23 relief. And even if they had established facts showing
24 that they, themselves, were entitled that relief, they
25 still haven't shown that it's plausible or practical or

1 that it would remotely address any injury if they were
2 able to be physically present in person during ballot
3 tabulation.
4 And lastly, I just want to very briefly
5 touch upon standing. Now, as they -- as Mr. Kolodin spoke
6 about before, he pointed to the case, Arizona Public
7 Integrity Alliance v. Fontes. And as Ms. Craiger
8 accurately pointed out, that case is a mandamus case. And
9 mandamus is a very specific procedural vehicle that has
10 specific statutory structure, which are not actually at
11 issue here; but even setting that aside, even assuming
12 that we could construe or construct a mandamus case out of
13 what's been brought here, all this has to do with the
14 injury prong of standing and not redressability.
15 And here, I think, what we've seen is that
16 we have a pretty major redressability problem. For all
17 the reasons that have been covered by the county and in
18 the briefing, neither plaintiff actually has a legally
19 cause manageable injury here.
20 Mr. Drobina was able to vote, period. Ms.
21 Aguilera was able to cast a ballot that all of the
22 evidence that we have, except for the Secretary of State's
23 blank ballot status notification, all of the other weight
24 of the evidence goes to show that her ballot was actually
25 counted on election day.

1 Neither Mr. Drobina nor Ms. Aguilera alleges
2 that they were somehow denied access to the observation of
3 ballots or that their physically presence was wasn't
4 allowed. In fact, you even didn't hear either one of the
5 plaintiffs even say that they've ever even tried to watch
6 the live feeds that are available to them.
7 So it is unclear that whether they could
8 even establish that they were injured, and they can't, it
9 is not clear at all whether the remedy that they're
10 seeking could actually be something that would be given by
11 the Court in this lawsuit if they were to prevail.
12 At the end of the day, even if we put aside
13 everything else in this case, we envision for a moment
14 that plaintiff is right, that Arizona law required
15 Maricopa County to have machines that perfectly and
16 flawlessly read all of the ballots, even if we assume that
17 human adjudication really is more likely to result in
18 rejection of these ballots, something that plaintiffs'
19 counsel has asserted in argument and in briefs, but which
20 we have seen no evidence on today, even if we assume
21 that -- let's assume that there are no other issues in the
22 case like standing, or redressability, or laches, or
23 private right of action issues, or class action by
24 footnote, putting all of those things aside, at the end of
25 the day, we're still left with no real idea how any relief

1 that the Court would actually order here would be
2 plausible, much less that it would help any of plaintiffs'
3 claimed injuries.
4 Neither of the things -- neither of the
5 plaintiffs have any plausible injury here that would even
6 remotely be addressed by being able to physically being in
7 the room to watch ballots being tabulated. And Ms.
8 Aguilera cannot cast a new ballot 17 days after election
9 day.
10 For those reasons alone, not to mention all
11 of the other reasons we've spoken about today and in the
12 papers, this Court should dismiss the complaint with
13 prejudice and deny the relief that's being sought here.
14 Thank you, Your Honor.
15 THE COURT: Thank you. All right. Folks,
16 we are at 4:50. And thank you everyone for your good
17 work.
18 I will tell you that I will be dismissing
19 the complaint with prejudice. I will do that in a
20 written, more detailed ruling, but I have heard what I
21 needed to hear today. And based on the record that's been
22 presented, everything that's been provided to the Court
23 previously, for many, many reasons that have been argued
24 that the Court finds supported by what I've heard here
25 today, I do believe that that is the appropriate

1 resolution, and that's what I will be doing.
2 And I'm telling you that -- frequently, I
3 rule from the bench, and I give explanations. We're out
4 of time, Number 1. And Number 2, I wanted to give you the
5 -- what my ruling will be just because of the time issues
6 that everybody is aware of.
7 So I'm not going to take any more argument.
8 It's always a danger when you rule from the bench that
9 somebody will say, wait, you didn't think about this, or
10 how about that. There's really no doing over or
11 supplementing at this point. I'm just trying to give you
12 the courtesy of making you aware of what is coming, but
13 that is what is coming.
14 So thank you everyone. Stay well, and we
15 are adjourned.
16 (Proceedings concluded.)
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1 STATE OF ARIZONA)
)
2 COUNTY OF MARICOPA)
3
C E R T I F I C A T E
4
5 I, ***HOPE J. YEAGER***, Registered Professional
6 Reporter and Official Certified Reporter, Certificate No.
7 50910, in and for the State of Arizona, do hereby certify
8 that the foregoing pages constitute a true and accurate
9 transcript of the proceedings held via GoToMeeting video
10 conferencing in the foregoing matter, all done to the best
11 of my skill and ability.
12
13 Dated in Phoenix, Arizona, this 24th day of
14 November, 2020.
15
16
17 /s/ Hope J. Yeager
18 **HOPE J. YEAGER, CR, RPR**
Certified Reporter No. 50910
19 **Official Court Reporter**
Maricopa County Superior Court
20 **Phoenix, Arizona 85003**
21
22
23
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25

CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. 14, I certify that the attached brief uses 14-point font in Book Antiqua, is double-spaced, and contains approximately 3,525 words and therefore does not exceed 12,000 words.

RESPECTFULLY SUBMITTED December 31, 2022:

By /s/ Veronica Lucero
Veronica Lucero
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CERTIFICATE OF SERVICE

Pursuant to Ariz. R. Civ. App. P. 15, the undersigned hereby certifies that the attached Brief of Amicus Curiae David Mast was electronically served on the parties via TurboCourt on December 31, 2022.

RESPECTFULLY SUBMITTED December 31, 2022:

By /s/ Veronica Lucero
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IN THE SUPREME COURT FOR THE

STATE OF ARIZONA

KARI LAKE *Petitioner*, v. KATIE HOBBS, *et al.*, *Respondents.*	No. CV-23-0046-PR Court of Appeals Division One No. 1 CA-CV 22-0779 No. 1 CA-SA 22-0237 (CONSOLIDATED) Maricopa Superior Court No. CV2022-095403

AMICUS CURIAE BRIEF OF DAVID MAST IN SUPPORT OF KARI LAKE'S PETITION FOR SPECIAL ACTION

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

David Mast ("Mast" and/or "Mr. Mast") is an Arizona voter residing in Maricopa ("Maricopa"). As a registered "Independent" voter, he has no partisan interest in the outcome of the election at issue here. As an Arizona voter and someone whose political beliefs are seldom represented in his elected leaders, Mast has a strong interest in ensuring that the outcomes of elections are free and fair.

Mr. Mast previously filed an *amicus curiae* brief before the Arizona court of appeals in this action without any objection from Respondents. He believes the facts and issues raised therein remain relevant to this Court's consideration. To that end, a true and correct copy of Mast's brief filed before the court of appeals is attached hereto and incorporated herein by this reference as Exhibit "1."

Respectfully Submitted,

March 20, 2023

/s/ Ryan L. Heath
Ryan L. Heath, Esq.

[1] This *amicus curiae* brief is filed with the consent of Petitioner. Respondents did not consent.

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BRIEF *AMICUS CURIAE* OF DAVID MAST IN SUPPORT OF PETITIONER KARI LAKE

INTRODUCTION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The issues presented in this case are of critical importance to the State of Arizona and to the Nation as they concern the integrity of the electoral process and public's confidence in the fundamental fairness and honesty of our system of government. Maricopa's failure to comply with Arizona's laws in its conduct of the 2022 general election, especially its unlawful counting of mail-in ballots that were not verified in accordance with Arizona law, puts this guarantee at great risk.

Additionally, by requiring that Lake prove by clear and convincing evidence that electoral misconduct actually "affected the result" of the election, the appellate court flew in the face of this Court's precedent and imposed an insurmountable bar, effectively shielding election officials from recourse. This perpetuates and even reinforces the risk of abuse and malfeasance by election officials. It is now incumbent upon this Court to ensure that the electoral process is conducted in accordance with the law and that the will of the voters is upheld. Therefore, it is critical that this Court grants review of this. Mr. Mast, as

a non-partisan voter of the State of Arizona, implores this Court to steadfastly maintain the rule of law and grant Ms. Lake's Petition for Review.

LEGAL ARGUMENT

I. *Sherman*'s Holding that "Procedural Challenges" Must Be Brought Prior to an Election Has Never Been Extended to Matters That Were Not Known and Could Not Have Been Known Prior to the Election.

The court of appeals misconstrued Lake's signature verification claim as "a challenge to Maricopa's existing election procedures," which could only properly be brought before the election. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342, 45 P.3d 336, 339 (2002). However, this rule is implicitly grounded in the rationale that, because election challenges request a radical remedy, post-election requests to alter an election's outcome should not be based on grounds that existed prior to the election. *Id.* The prohibition does not apply in this case because, (A) while the Maricopa Elections Department's 2022 Elections Plan (the "Election Plan") did contain some provisions that violate A.R.S. §16-550(A), Lake's challenge was not procedural as a matter of law, and (B) Lake had no way of knowing about many other violations of that statute that were not specified in the Election Plan.

A. <u>Lake's Complaint makes plain that she is not challenging a procedure in the Election Plan but challenging the inclusion of illegal votes.</u>

Lake's Complaint in Special Action (the "Complaint") is explicit; her objections regarding verification were never objections to Maricopa's existing election procedures

but, rather, objections to the fact that votes were illegally counted. *See* Lake.Appx:017-034 (Compl. ¶¶2-58). The mere fact that facially illegal procedures were *a* cause of the unlawful count is irrelevant to her claim, *because of when the alleged act of misconduct occurred*. Arizona case law clearly delineates between challenges to alleged acts of misconduct that occurred prior to an election, which are subject to *laches*,[2] from acts of alleged misconduct that occurred during the "voting process," which are not. *See Reyes v. Cuming*, 952 P.2d 329 (Ariz. Ct. App. 1997); *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178 (1994).

Because Ms. Lake's signature verification claim challenges the illegal tabulation of unverified votes, which necessarily occurred during the "voting process," it *is not* a procedural challenge as a matter of law. Thus, this claim is not subject to the limitations specified in *Sherman* and can be brought after the election has taken place.

B. <u>While the Election Plan does contain instructions clearly violating A.R.S. §16-550(A), there were many other violations that were impossible for Lake to contest prior to the election.</u>

The violations of A.R.S. §16-550(A) in the Election Plan relate to Maricopa's instruction that employees could verify mail-in ballot signatures against a variety of

[2] *See Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254 (Ariz. Ct. App. July 22, 2019) ("[t]he statutory violation in that case occurred during the voting process, not before[,] . . . by contrast, Williams's argument is based on purported misconduct with how the ballots were printed—something that necessarily occurred before the ballots could have been voted, and certainly well before post-election canvassing"); *see also Sherman*, 202 Ariz. at 342; *Grounds v. Lawe*, 67 Ariz. 176 (1948).

historical documents, rather than against each "voter registration record," as the text of the law plainly requires (discussed in greater detail hereinbelow). However, there were a huge number of other violations of A.R.S. §16-550(A) of which the public, and Lake in particular, had no warning prior to the election. There is already ample briefing from Lake regarding the eyewitness testimony of extremely low rejection rates, split-second verification, discrepancies between reviewers at different stages of review, and defects in the review process to such a gross extent that we hardly need repeat that evidence here. *See, e.g.*, Lake.Appx:017-036 (Compl. ¶¶54-62).

Of particular note, however, is the trial and appellate courts' acceptance that Maricopa utilized Early Voting Ballot Transfer Receipts ("EVBTRs") for mail-in ballot packets on Election Day—as they had every day prior (during the early voting period). Lake.Appx:102-3 (Rul. 4-5); Lake.Appx:012 (Op. ¶22).

It is worth noting that the numerous other violations noted in Ms. Lake's Complaint were similarly absent from Maricopa's Election Plan. The public did not become aware of these issues, especially with respect to their scale, until after Election Day, as alleged in Lake's Complaint. Lake.Appx:013-036 (Compl. ¶¶44-62). Therefore, even if *some* of Maricopa's violations of A.R.S. §16-550(A) were challengeable prior to the election, many others were not, and the lawsuit before this Court concerning those issues that arose on or after Election Day could not have been brought prior to the election. Therefore, the holding in *Sherman* does not apply and review should be granted.

II. If this Court Were to Allow the Ruling of the Lower Court to Stand, it Would Render Electoral Misconduct Effectively Unreviewable

A. The lower court's understanding of "uncertainty" contradicts the precedent of this Court.

Misconduct rising to a level "affect[ing] the result [of an election], or at least render[ing] it uncertain" is sufficient to invalidate the results of an election. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Applied, this standard is met when the "violation of a non-technical statute" occurs in "sufficient numbers to alter the outcome of the election." *Miller*, 179 Ariz. at 180. Put simply, Lake need only show that the number of affected votes exceeds the margin of victory. *See Reyes*, 191 Ariz. at 93 (holding that "even without a showing of actual fraud, the election had to be set aside because (1) absentee ballots were procured in violation of a non-technical statute and (2) those ballots were in sufficient numbers to alter the outcome of the election"); *Fink*, at ¶16 (omissions and irregularities void the result of an election when they rise to such a level that they "*may have*" affected the result of the election) (emphasis added); *see also Moore v. City of Page*, 148 Ariz. 151, 159, 713 P.2d 813, 821 (Ct. App. 1986) ("Moore is obliged to show that the alleged disenfranchisement *may have* affected the result of the election") (emphasis added).

Indeed, the only contrary example to this plain pattern, referenced by the Arizona court of appeals in its ruling, was in the case of *Huggins v. Superior Court,* Ariz. 348, 352-53 (1990). However, the court of appeals ignored the fact that the only reason that the mere margin for victory was insufficient to invalidate the election results in that case was that,

once a pro-rata deduction of illegal votes had been made, the new total *no longer exceeded the margin for victory. Id.* The direct implication of this is that, had the affected votes exceeded the margin of victory, then the challenge would have been sufficient to invalidate the results, as has been recognized, consistently, in every other Arizona case on this subject.

Regardless of the credibility one attributes to Lake's expert witnesses, the undisputed factual record demonstrates that a sum of votes far greater than the margin of victory was affected by electoral misconduct in Maricopa. Lake.Appx:200 (Tr. 43:4-14), 481-2 (Tr. 257:15-258:7), 704-5 (Tr. 34:21-35:18). In fact, even examining each of the major areas of misconduct *individually* (*i.e.*, logic and accuracy testing, Lake.Appx:772; chain-of-custody defects impacting nearly 300,000 mail-in-ballot-packets (based on undisputed witness testimony, Lake.Appx:156 (Cnty. Ans. 26); and signature verification), each of them yields a sum of votes affected that exceeds the margin for victory, providing a mathematical basis for uncertainty. The fact that an analysis of exit polling and demographic data swings the uncertain votes substantially in Lake's favor only further corroborates this, especially when the data demonstrates that tens of thousands of voters were likely disenfranchised. Lake.Appx:484 (Tr. 37:18-19). Because the electoral results are uncertain as a matter of law, this Court should grant review.

B. There is good reason for the "uncertainty" standard and, if a different standard were permitted to go unreviewed, electoral integrity and public trust would be seriously compromised.

When a material number of voters are simply unable to cast their ballots, as occurred here, determining precisely how the election would have gone with the inclusion of such votes is impossible. With the secret ballot, the same difficulty arises even when the votes have been cast but are counted in error, as occurred during the signature verification process. *Montana Republican Party v. Jacobsen*, 230 F.3d 920, 926 (9th Cir. 2000) ("we do not, and cannot, ascertain how [the impacted voters] would have voted if provided with the opportunity").

Requiring Lake to demonstrate that the affected votes would have been cast for a particular candidate imposes an insurmountable burden that, in effect, nullifies the "uncertainty" standard, rendering the vast majority of electoral conduct unreviewable, because it necessitates Lake to establish how every voter would have voted absent the misconduct or irregularity. The "uncertainty" standard has never been held to mandate such proof and imposing such a requirement constitutes a gross deviation from established legal precedent. *Reyes*, 191 Ariz. at 93.

Given the inherent significance of fair elections to our system of government, putting misconduct beyond review would be a grave mistake. This Court should uphold the law as it has been consistently recognized in Arizona and acknowledge that, because a huge number of votes—far exceeding the margin of victory—were tainted by the misconduct of Maricopa elections officials, the results cannot stand.

III. The Lower Court Ignored the Precedent of *Reyes* Which, Based on the Undisputed Evidence Presented at Trial, Requires the Election to be Set Aside as a Matter of Law.

The binding precedent in the *Reyes* case bears directly upon this case. There, the Arizona court of appeals unanimously set aside the results of an election in which Yuma County had failed to comply with the A.R.S. §16-550(A) signature verification requirements, finding explicitly that the statute was "non-technical" and that "impracticability" was no excuse for noncompliance, because such requirements "set[] forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and intimidation." *Reyes*, 191 Ariz. at 331 (quoting Ariz. Const. Art. VII §1). In other words, the requirements of A.R.S. §16-550(A) are precisely the sort that, if ignored (as here), justly undermine public faith in the integrity of the electoral process and run substantial risk of destabilizing civil society.

Maricopa's signature verification process for mail-in ballots unquestionably allowed for the inclusion of illegal votes in the 2022 general election for Arizona Governor. Contrary to A.R.S. §16-550(A), testimony before the superior court showed that Maricopa did not compare ballot signatures against each elector's "registration record" alone. Instead, Maricopa used an ambiguous standard that allowed for the comparison of ballot

affidavit signatures with legally prohibited documents.[3] This resulted in the acceptance of mail-in ballot packets containing statutorily unverified signatures.

Therefore, as a matter of law, the court in *Reyes* ruled that the violation of A.R.S. §16-550(A) is, *per se*, "misconduct" within the meaning of the law and thus, when violations of that statute are found, it necessitates the invalidation of votes affected. 191 Ariz. at 331. "To rule otherwise," explained the court of appeals, would "'affect the result *or at least render it uncertain*.'" *Id.* (*quoting Miller*, 197 Ariz. at 180).

Here, because the number of tabulated votes affected exceeds the margin of victory, setting aside those votes necessarily requires setting aside the results of the 2022 election for Governor. Respondents have rightly observed that "strong public policy favor[s] stability and finality of election results," *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978), and the remedy of setting aside an election is usually a radical one, however, the circumstances here make this remedy no more radical here than in *Reyes*. Firstly, *Reyes* set aside the results of an election over a year after that election had taken place. *Reyes*, 191 Ariz. at 331. Comparatively, this election took place less than six months ago. Secondly, the margin for victory originally returned in *Reyes* was almost identical to the margin in

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[3] The Election Plan allowed "historical reference signature[s] that was previously verified and determined to be a good signature for the voter. These historical documents may include voter registration forms, in-person roster signatures and early voting affidavits from previous elections." See Election Plan §6.3.8. However, Arizona law only allows comparison of the signature on the affidavit accompanying a mail-in ballot to the signature on the elector's "registration record." A.R.S. §16-550(A). The use of historical reference signatures other than the voter's registration record is contrary to the plain language and intent of A.R.S. §16-550(A).

this case – a mere fraction of a percent.[4] The primary difference in the two cases is that the race for Governor is a more powerful and significant position, which only further stresses the importance of an accurate count. Because the unusual remedy of setting aside an election's results was appropriate in *Reyes,* it is also appropriate here. In short, "because A.R.S. section 16-550(A) is a non-technical statute and because absentee ballots counted in violation of that statute have rendered the outcome of this election uncertain," the only appropriate remedy—*as a matter of law*—is for the results from the Maricopa election for Arizona Governor to be "set aside." *Reyes*, 191 Ariz. at 331 (*quoting Miller*, 179 Ariz. at 180).

IV. The Constitutional Standards Mandate that the Results of the Election be Set Aside

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. Generally, the Equal Protection Clause is "a direction that all persons similarly situated should be treated alike." *Green v. City of Tucson*, 340 F. 3d 891, 896 (9th Cir. 2003) (internal quotations omitted). Similarly, the Equal Protection and Privileges or Immunities Clauses of Arizona's Constitution provide similar protections. *See Chavez v. Brewer*, 222 Ariz. 309, 320 (Ct. App. 2009). These fundamental Constitutional rights bear directly upon this election.

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[4] In *Reyes*, the margin for victory was 0.62179% (23 votes); here, the margin for victory is 0.668982% (17,117).

Each United States citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at. 366; *See also Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). Here, because the case at hand involves a state-wide election, electors across Arizona must be treated equally with respect to the way their votes are counted.

The "right to vote" also applies also to "the manner of its exercise." *See Bush v. Gore*, 531 U.S. 98, 104 (2000). This applies in the context of vote dilution. *See Id.* at 105 (*quoting Reynolds*, 377 U.S. at 555) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise") (internal quotations omitted).

Here, for each of the tens of thousands of mail-in ballots illegitimately accepted by Maricopa using its wholly ambiguous "historical record" for signature verification, all qualified electors across the State of Arizona experienced disenfranchisement. Maricopa is by far the most populous county in Arizona and counted approximately 1.6 million ballots in this election—far more than any other county. Lake.Appx:698 (Tr. 251:8). Thus, any error in Maricopa's process resulting in the inclusion of illegitimate votes does more relative harm as compared to an error elsewhere.

Additionally, "it is well-established that once the legislature prescribes a particular voting procedure, *the right to vote in that precise manner is a fundamental right*, and 'one source of its fundamental nature lies in the . . . equal dignity owed to each voter.'" *Id.* at

953 (*quoting Gore*, 531 U.S. at 104) (emphasis added); *see also e.g. San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 36 n. 78 (1973); *Green*, 340 F. 3d at 897.

Here, A.R.S. §16-550(A) is a statute passed by the Arizona legislature that prescribes a particular voting procedure with respect to *how every county across Arizona must verify the signatures on mail-in ballot packets before a purported elector's vote can be counted*. Accordingly, the procedural safeguards conferred by A.R.S. §16-550(A) are fundamental rights—and they must be strictly followed. *Gore*, 531 U.S. at 104; *Charfauros*, 249 F.3d at 953. Because the State of Arizona guarantees to all similarly situated electors, the right to have their mail-in ballot packets scrutinized for tabulation in a particular way, Maricopa's failure to conform with the clear requirements of A.R.S. §16-550(A, (utilizing unenumerated sources for signature verification) must withstand strict scrutiny. *Charfauros*, 249 F.3d at 950–51; *Dunn*, 405 U.S. at 343; *Green*, 340 F. 3d at 899.

State actions that burden fundamental rights "must be drawn with 'precision'… and must be 'tailored' to serve their legitimate objectives." *Dunn*, 405 U.S. at 343 (internal citations omitted). Because Maricopa unquestionably included tens of thousands of unverified mail-in ballots in the state-wide election for Arizona Governor, Maricopa's actions must be measured by a strict equal protection test.

Reyes explicitly addressed A.R.S. §16-550(A) as a "very important," "non-technical" (*i.e.*, substantive) statute that advances the constitutional goal of "secur[ing] the purity of elections and guard[ing] against abuses of the elective franchise" 952 P.2d at 331 (quoting Ariz. Const. Art. VII §1). Although decided before *Gore*, *Reyes* rests upon the

same principle: uniform application of state election laws is necessary to guard against arbitrary and disparate determinations for what constitutes a "legal vote." The "purpose of A.R.S. 16-550(A) is to prevent the inclusion of invalid votes." *Id.* Far from requiring a showing of strict scrutiny from Maricopa, the court of appeals rested on the ordinary presumption that the returns of an election are valid and put the burden on Lake to show that the results would have been different if Maricopa had followed the law. This is not what strict scrutiny requires.

CONCLUSION

Based on the undisputed evidentiary record, Maricopa elections officials engaged in misconduct affecting tens of thousands of votes, a number far greater than the margin of victory. As a consequence of these defects, the election's result is uncertain. Therefore, as a matter of law, the results of the 2022 Arizona election for governor must be set aside.

Respectfully Submitted,

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