

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY,
CONTESTANT,

v.

CIVIL ACTION NO.: 2021CV344953

FULTON COUNTY REGISTRATION
AND ELECTION BOARD et al.,
DEFENDANTS.

**CONTESTANT'S CONSOLIDATED RESPONSE TO ALL PENDING MOTIONS FOR
ADMISSION PRO HAC VICE**

COMES NOW, THE CONTESTANT, by and through his undersigned attorney, and moves the Court pursuant to U.S.C.R. 4.4 to provide a consolidated response to all pending motions for admission *pro hac vice*, as follows:

INTRODUCTION

Three (3) attorneys from the Washington DC law firm of Perkins Coie, LLP's ("PC") "Political Law" group are seeking leave of this Court under U.S.C.R. 4.4(D)(2) to appear *pro hac vice* in this case. The Plaintiff objects to these applications on the following grounds:

1. Attorneys in the PC firm are likely to be called as witnesses and asked to produce evidence in their possession concerning the reliability of Dominion elections systems, thus creating an unavoidable conflict of interest under Ga. Rules of Prof. Conduct 3.7(a). PC has alleged in court filings submitted by the firm in a New York election case that "there is reason to believe that voting tabulation machines misread *hundreds* if not *thousands* of valid votes as undervotes, (*supra* at 4), and that these tabulation machine errors disproportionately affected" their client¹. [emphasis in the original].
2. PC has threatened independent, third party service providers with criminal prosecution for participating in an ongoing civil investigation conducted by the Arizona State Senate pursuant to its constitutional authority to investigate the conduct of the November 2020 election in Maricopa County, Arizona. Such threats are flatly prohibited by Ga. Rules of Prof. Conduct, 3.4(h) ("A lawyer shall not present,

¹ Tenney v. Oswego County Board of Elections, et al, EFC-2020-1376, Supreme Court of New York for Oswego County, 2020.

participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.”)

3. The Fifth Circuit recently sanctioned PC under 28 U.S.C. § 1927 for burdening the court and opposing counsel in another election case with a “redundant and misleading submission” that was evasive, misleading and duplicative. See Ga. Rules of Prof. Conduct 3.3. This is not the first time that PC has been accused of misleading a court, an argument more fully developed below.

And there is more. PC’s lead “Political Law” lawyer seeing admission in this case – Amanda Callais – has previously entered a *pro hac vice* appearance in an astonishing fifteen (15) times over the last two (2) years in the State of Georgia alone. These *pro hac* appearances are more than some full time Georgia lawyers have appeared in court during their entire careers. Given PC’s demonstrated proclivities and misuse of the courtesy extended under U.S.C.R. 4.4, this firm and its “Political Law” attorneys should not be admitted.

The Plaintiff has filed this election contest in good faith and expects that lawyers for opposing parties will deal with his counsel in accordance with fairness and through adherence to the rules of professional and ethical behavior mandated in Ga. Rules of Prof. Conduct 3.4. Given its history of a) lack of candor with the court and opposing parties, b) disregard for conflict of interest situations, c) questionable efforts to impede the progress of other currently-pending election cases, d) PC’s witness status based on its admitted access to information concerning the operation of Dominion elections systems, combined with e) the demonstrated misuse of the *pro hac* courtesy, it is clear that PC’s activities in this case will not only be detrimental to the prompt, fair and efficient administration of justice but the admission of PC, *pro hac vice*, will be detrimental to legitimate interests of the Plaintiff, including his Constitutional right to have this proceeding conducted with due process, according to applicable rules and procedure, without disruption.

BACKGROUND

The facts of this case arise from Georgia’s election on January 5, 2021, specifically the compliance with procedural requirements of Georgia law’s voting laws and the statutory standards for the voting machines utilized to handle that election. All Defendants are residents of Georgia and as known at the present time, all alleged acts or failures to act took place in Georgia under Georgia law.

This Court is being asked to exercise its discretion to admit these attorneys. The courtesy of *pro hac vice* admission is not one by right. It is an exception whose application is not mandatory. The courtesy is not intended to be a superhighway to avoid Georgia Bar membership, which admission in this case would signify, nor was it intended to be blind to a pattern of unacceptable past behavior.

The Plaintiff acknowledges, indeed embraces, the right of any litigant to be represented by counsel of its choosing in accordance with all applicable rules. While the Defendant may have a right to choose counsel, that right is not unlimited or axiomatic. After this Court takes into consideration all factual aspects involved with the PC request, the Plaintiff submits it will be clear that these PC lawyers do not meet the standards, the Plaintiff's rights must be protected and admission in this case is not deserved or warranted.

LEGAL STANDARD

Under U.S.C.R. 4.4 (B) a court may, in its discretion, admit a lawyer *pro hac vice* who was retained to appear in a particular proceeding pending before the court. U.S.C.R. 4.4 (D)(3) allows the court the discretion to deny, on objection, an application if the court finds that the admission may be detrimental to the prompt, fair and efficient administration of justice; may be detrimental to legitimate interests of other parties to the proceedings; or the applicant has engaged in such frequent appearances as to constitute regular practice in Georgia.

FACTS REFLECTING THE PERKINS COIE MODUS OPERANDI FOR "POLITICAL LAW" REPRESENTATION

The PC "Political Law" group is headed by Marc Elias, Esq. A fair estimate is that the Political Law group has entered its appearance in over 100 cases scattered throughout the country in the last two (2) years. The *pro hac* applicant here is Amanda R. Callais, a 7+ year PC attorney who is the junior partner among the seven (7) partners listed as PC's "Political Law group." Since 2019, in a mere two (2) years, Ms. Callais was admitted *pro hac vice* fifteen (15) times in Georgia courts, four (4) of which have been before the Superior Court of Fulton County. Now she is seeking her 16th *pro hac vice* appearance.²

² Mr. Geise has been admitted three (3) times in the last six (6) months in Georgia. Mr. Geise is also part of the PC group admitted *pro hac* in Texas where a group of five (5) cases is consolidated for argument and where different

In exercising this Court's discretion to allow Ms. Callais the courtesy of a sixteenth appearance and two of her fellow "Political Law" attorneys, U.S.C.R. 4.4 requires the Court to consider, and take into account, the following facts:

1. **Sanctions from the US Court of Appeals For the Fifth Circuit.** The "Political Law" group has recently engaged in intentional behavior for which the United States Court of Appeals for the Fifth Circuit imposed monetary sanctions, describing Mr. Elias and his team's failure to disclose vital information to the Court as an "inexplicable failure."³ See Order, *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643 (5th Cir. Mar. 11, 2021) (per curiam) attached as Exhibit "A". This "inexplicable failure" propelled PC to file a pleading that the Court found had "no legal basis" and was further found to have been purposefully filed out of time without any request for permission to file out of time. This incident reflects a total failure of candor with the Fifth Circuit. It is also instructive to note that, in addition to sanctions, the Fifth Circuit "encouraged" Mr. Elias and his "Political Law" group of attorneys to get some sense of legal ethics and professionalism, suggesting that the attorneys:

"...review Rule 3.3 of the Model Rules of Professional Conduct (Candor Toward the Tribunal) and complete one hour of Continuing Legal Education in the area of Ethics and Professionalism."

2. **Continued Sanctionable Behavior before the US Court of Appeals For the Fifth Circuit.**

Even after being publicly called to account by the Fifth Circuit, Mr. Elias' "Political Law" group promptly proceeded, in a companion consolidated case before the Fifth Circuit, to engage the *very identical behavior as was just sanctioned, i.e. lack of candor with the court and a failure to display a sense of ethics and legal professionalism.* Exhibit "B". The Plaintiff does not know if Mr. Elias and the attorneys in his "Political Law" group actually heeded the Fifth Circuit's first admonition to review Rule 3.3 of the Model Rules of Professional Conduct and complete the Continuing Legal Education training in Ethics and

PC lawyers were sanctioned in a different case which is part of the consolidated. Mr. Newkirk has previously been admitted twice in the US District Court for the Northern District of Georgia.

³ While none of the three "Political Law" group applicants in this case names were on the specific sanctioned pleading in the Fifth Circuit case, all applicants here are under the direct supervision and leadership of Mr. Elias, who was sanctioned by the Fifth Circuit along with other members of his group. However, one (1) PC applicant before this Court, Mr. Geise, was and is directly associated with the "Political Law" group team on one (1) of the five (5) cases that are associated with, and consolidated with, the sanctioned case before the Fifth Circuit.

Professionalism before purposefully re-engaging in behavior *identical* to the freshly sanctioned behavior. It would appear that since the “Political Law” group is said to have repeated the exact same behavior, the Fifth Circuit’s referral to the Ethics and Professionalism was ignored. See, District of Columbia Bar Rules of Professional Conduct Rule 3.3 Candor, Rule 8.4.

3. Ethical Violations of Intimidating Participants in A Legislative Proceeding With

Threats of Criminal Prosecution. Given substantial and well publicized issues with the veracity, reliability and fairness of the 2020 election procedures in the State of Arizona, the Arizona State Senate engaged a group of third-party cyber professionals to conduct a full and comprehensive audit of the Maricopa County election results. Arizona utilized the Dominion Voting System as did Georgia. The ability of the state senate to subpoena such materials was examined and on February 25, 2021 the Arizona court found that the subpoenas were valid and issued pursuant to a valid legislative purpose. Exhibit “C”. Not content with that, however, on April 6, 2021, PC, along with a group of two (2) Arizona law firms and a partisan political activist group, publicly sent a letter to the Arizona Senate’s professional service providers, threatening potential criminal prosecution in executing the state senate’s investigation. Exhibit “D”. PC requested a “litigation hold” for some unspecified litigation, stating:

As explained below, these tactics—no matter their intent—constitute illegal voter intimidation and might expose your companies to both civil and criminal penalties.

PC’s letter stated that the legally sanctioned audit “could” involve “criminal behavior” and was sent *after* the court had agreed with the audit’s legislative intent and affirmed the authority to conduct the audit, taking into account issues of voter confidentiality. *See*, Maricopa County, et al. v. Karen Fann, et al., CV 2020-016840, 2021, Superior Court of Arizona, Maricopa County. Exhibit “C”. The PC “Political Law” group’s letter continuously repeated threats alleging criminal activity and concluded by requesting a “litigation hold.” Exhibit “D”. Threatening criminal prosecution to gain an advantage in a civil manner is contrary to the rules applicable to such situations. Ga. Rules of Prof. Conduct, 3.4(h)(“A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.”) See also, District of Columbia Bar

Rules of Professional Conduct 8.4(g); D.C. Bar Legal Ethics Comm. Op. 339 (2007)
governing threats of criminal prosecution for a civil matter.

4. **PC Disregard for Conflicts of Interest.** The certified result of the 2020 elections for Iowa's second Congressional district gave Rep. Miller-Meeke a win by a slim margin. The loser, Democrat Rita Hart, then sought resolution of the contest in the US House of Representatives' House Administration Committee to not seat the winner. In furtherance of that, Mr. Elias and his Political Law group filed, on behalf of the Democrat candidate, a Notice of Contest before that committee. There is nothing inherently illegal or unethical in properly pursuing an issue in the House. However, Mr. Elias and his Political Law group were in an irreconcilable conflict of interest position, which they ignored. Elias and PC were not only working on behalf of Democrat Hart, but they simultaneously represented the Chair of the House Administration Committee and two (2) Democrat committee members, i.e. the very Democrats who would be voting on the matter. The conflict from this -- and a similar race in Illinois -- was brought to the attention of the Committee in a letter (Exhibit "E") which stated:

In the election contests currently before us, Mr. Elias simultaneously represents Members of the Committee, the triers of fact and law, and parties to these contests, an arrangement clearly prohibited by attorney ethics rules and obligations...

Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct clearly prohibit an attorney from engaging in representation that involves "a concurrent conflict of interest." Such a conflict exists here: You, Mr. Aguilar, and Ms. Scanlon serve as triers of fact and law on the tribunal charged with deciding election contests, and Mr. Elias represents you; Ms. Hart and Ms. Underwood are parties to election contests before the Committee, and Mr. Elias represents them. Your interests are quite clearly "directly adverse" to one another, and Mr. Elias' ability to offer advice to both sides certainly "will be materially limited by [his] responsibilities to another client," namely you, Mr. Aguilar, Ms. Scanlon, and the parties to the election contests before the Committee. Rule 1.7(a).

After the objections to this evident conflict, the matter was dropped. See, District of Columbia Bar Rules of Professional Conduct Rule 1.7 Conflicts of Interest governing prohibitions of this type of activity.

5. Political Law Group's Arranging For The Infamous Steele Report. Ms. Callais' Political Law group arranged, through Marc Elias, for the payment and production of the infamous Steele Dossier, a report discredited by Congress that was specifically created for submission, and was intentionally submitted numerous times, to the FISA Court to obtain a surveillance warrant based on the lies contained in the report.

The clear purpose of arranging payments for this dossier was for it to be "washed" through the Political Law group to further the unethical methods of the Political Law group's clients for use against their political opponent. PC's arranging and paying for a "political hit piece" by indirect payments to hide its activities and its clients' activities is not the issue. What is relevant is that the Political Law group, who are officers of the court, in reality arranged for a lie to be repeatedly submitted to the FISA court over and over to justify a surveillance warrant. The intentional facilitation of a lie for repeated submission to a court would be sanctionable, and perhaps here potentially criminal. What makes PC's activities worse is that since the FISA court issued *numerous* surveillance warrants based on the lie facilitated by PC's Political Law group, the result was that the FISA court was seriously embarrassed when the genesis of the report from the PC's Political Law group, and the true contents of the report, became public. PC never issued even an apology.

An additional example of PC's reported flouting of ethical responsibilities is that Elias accompanied former Clinton campaign chairman John Podesta, to a closed-door interview with the U.S. Senate Intelligence Committee, during which interview Podesta said he had no knowledge of payments to Fusion GPS. Any such statement would have been known to Elias to be false. The circumstance of such a denial, accompanied by Elias' reported complicit silence, would raise serious ethical issues. Despite the numerous false denials, PC paid the money out as a legal expense through Elias and PC as counsel for the Clinton campaign. Any inquiry would raise further issues of the Political Law group's integrity and willingness to conform to applicable ethical rules and rules of professional conduct which under similar circumstances require more than simple, continued silence in the face of any

false representation. See, District of Columbia Bar Rules of Professional Conduct Rule 4.1, 8.4; and ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-376 at 5 (1993) with the then version of ABA Model Rule 3.3(a)(2). See also, ABA Model Rule 8.4c; ABA Model Rule 4.1 (a), (b), and Restatement Third, The Law Governing Lawyers § 120 cmt. h (2000).

6. Disqualification of PC As A Witness In This Case and PC's Irreconcilable Conflict of

Interest. Mr. Elias and four (4) attorneys in his Political Law group sought and were admitted *pro hac vice* admission before the Supreme Court of New York for Oswego County to contest the 2020 Congressional election for the 22nd Congressional District of New York. See, Tenney v. Oswego County Board of Elections, et al, EFC-2020-1376, Supreme Court of New York for Oswego County, 2020. Dominion Voting System voting machines were used in New York, like in Georgia, for the relevant vote.

Surprisingly Mr. Elias' pleadings there admitted to problems with the Dominion voting machines:

“Since [the General Election] substantial errors and irregularities in the conduct of the election have come to light. As these proceedings have continued, that evidence has only mounted. In addition to failures to follow New York's election law, there has also been mounting evidence of significant irregularities in the tabulation of ballots.”⁴ See, Exhibit “F”.

That filing went on to state:

In this case, there is reason to believe that voting tabulation machines misread *hundreds* if not *thousands* of valid votes as undervotes, (*supra* at 4), and that these tabulation machine errors disproportionately affected Brindisi, (*id.*). In addition, Oswego County admitted in a sworn statement to this Court that its tabulation machines were not tested and calibrated in the days leading up to the November 3, 2020 General Election as required by state law and necessary to ensure that the counts generated by tabulation machines are accurate. *Id* at 9.

⁴ Exhibit “E”, p.1; Memorandum in Support of Proposed Order to Show Cause of Respondent Anthony Brindisi, filed by PC as attorneys for Mr. Brindisi on 2/01/21.

This representation by five (5) PC lawyers to the New York court reflects a cognizance that the “voting tabulation machines” were capable of, could and did “misread *hundreds* if not *thousands* of valid votes as undervotes . . . and that these tabulation machine errors disproportionately affected [a particular candidate].” *Supra*. That admission had a factual basis and that factual basis, in addition to the Dominion voting machines’ inherent tabulation error capacity, is now a legitimate subject of discovery, deposition and oral testimony at trial. The knowledge on which PC’s admission is based is discoverable, and these lawyers are subject to testimony on the subject. However, as PC should know, a lawyer is not allowed as a witness in his own case under District of Columbia rules. See, District of Columbia Bar Rules of Professional Conduct Rule 3.7 Lawyer as a Witness.

PC, and each and every member of the Political Law group that signed the pleading representing those facts to the New York court, are now witnesses in this case. Moreover, the position of the PC Political Law group in giving such discovery and testimony means that there is an irreconcilable conflict of interest with the defendant in this case whom they are seeking to represent because the accuracy, vulnerability to error and ability to be manipulated of the Dominion voting machines used in both New York and Georgia are salient issues in this case.

ARGUMENT

The mere fact of a past sanction in and of itself is not cause to automatically deny a motion for *pro hac vice* admission. No one is above making a mistake. If most trial attorneys have not actually been sanctioned, most would agree to past transgressions that should have been sanctioned. Most attorneys also acknowledge their mistakes, unlike PC and its sanction. Nor do Plaintiff’s objections here simply arise from PC’s boast of having engaged in over 100 election/voting litigation cases around the US in the recent past. The client(s) with which PC is so closely identified certainly have a right to their choice of counsel and PC certainly has a right to provide legal representation to the clients of its choice. But that is neither the point nor the issue. The point is that PC inherently does not just practice law when litigating, it practices “political law” which is their brand of mixing politics and law to the detriment and disregard of the rules of ethics, respect for the court, professional behavior and the uninterrupted administration of justice, not to speak of placing themselves in the position of being a witness in the case in which they wish to enter their appearance.

U.S.C.R 4.4 is based on a courtesy to attorneys from other jurisdictions. Rather than be respectful of courtesy, the PC group has acted as if it is acceptable to abuse that courtesy. U.S.C.R. 4.4 does not allow for such abuse. Sixteen (16) admissions in two (2) years is tantamount to the regular practice of law.

Further, the factual record surrounding PC's lawyers reflects something much darker than an occasional misstep. Each of the examples above reflects a serious and repeated disregard for ethical rules, rules of professional conduct and an intentional disrespect for the law and the courts which administer the law. One of those missteps involves PC's creating a situation where PC and its attorneys will be a witness in this case and therefore they must be disqualified.

The Plaintiff submits that each of the above enumerated examples of unacceptable behavior reflects an inherent, intentional philosophy that the gutter morals of the political marketplace play a proven role in PC's litigation tactics, despite the higher standards that the Constitution and Georgia law require in hearings such as this. The Plaintiff submits it is no mistake or oversight that the PC lawyers who currently seek admission to practice before this Court are proudly part of a group that portrays itself as engaging in "Political Law." Politics is not the law and the law is not politics. Each of the examples cited above reflects public or official information supporting PC's rejection of these principles and concurrent acts, proudly and without remorse, that have no place in the law and certainly not before this Court. That type of practice should not be allowed to cause such disruption that the Plaintiff's Constitutional right to due process is derailed or eroded.

Further, the PC "Political Law" group has abused the normal, occasional extension of the courtesy exception to the requirement of being a member of the bar where they practice. This group apparently feels it is acceptable to parachute into Georgia, at will, for hire and countless times, to interject its brand of political law in Georgia. While *pro hac vice* admissions should always be treated with courtesy and respect, these serial admissions do not reflect the same sentiment.

CONCLUSION

There is overwhelming factual evidence reflecting outrageous tactics, the blending of the worst of politics with the practice of law and unrepentant disregard for the rules of ethics and professional behavior. The Plaintiff requests the Court to find that these admissions will be

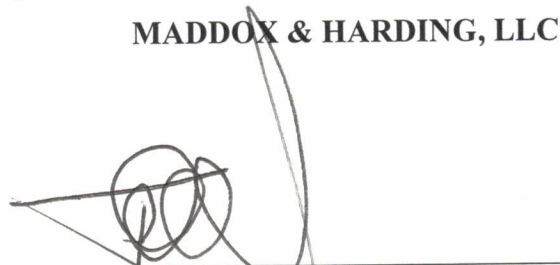
detrimental to the prompt, fair and efficient administration of justice; will be detrimental to legitimate interests of the Plaintiff in these proceedings; and that the applicants, either individually or through the standard practice of this “Political Law” group, have engaged in such frequent appearances as to constitute regular practice in Georgia. These requests for admission should be **DENIED**.

WHEREFORE, THE CONTESTANT prays:

- a). that the Court **DENIES** the pending motions for admission pro hac vice; **AND**
- b). for any other relief the Court **DEEMS** just and proper.

Respectfully submitted this the 5th day of May, 2021.

MADDOX & HARDING, LLC



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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. DAUGHERTY,
CONTESTANT,

v.

CIVIL ACTION NO.: 2021CV344953

FULTON COUNTY REGISTRATION
AND ELECTION BOARD, et al.,
DEFENDANTS.

CERTIFICATE OF SERVICE

COMES NOW, THE CONTESTANT, by and through his attorney of record, and certifies that a true and accurate copy of the **CONTESTANT'S CONSOLIDATED RESPONSE TO ALL PENDING MOTIONS FOR ADMISSION PRO HAC VICE** has been served by the Odyssey automated system upon all Parties of record.

Respectfully submitted this the 5th day of May, 2021.

MADDOX & HARDING, LLC



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EXHIBIT "A"

United States Court of Appeals
for the Fifth Circuit

No. 20-40643

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI;
DSCC; DCCC,

Plaintiffs—Appellees,

versus

RUTH HUGHS, *in her official capacity as the Texas Secretary of State,*

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:20-CV-128

Before CLEMENT, ELROD, and HAYNES, *Circuit Judges.*

PER CURIAM:*

IT IS ORDERED that Appellees' opposed motion to supplement the record with attached declarations is DENIED.

IT IS FURTHER ORDERED that Appellant's opposed motion to strike portions of Appellees' brief that improperly reference non-record material is GRANTED.

* Judge Haynes concurs in the first two orders but would deny the motion for sanctions.

No. 20-40643

IT IS FURTHER ORDERED that Appellant's opposed motion to sanction Appellees' counsel is GRANTED. Appellees did not notify the court that their latest motion to supplement the record filed on February 10, 2021 was nearly identical to the motion to supplement the record filed several months ago by the same attorneys, on September 29, 2020. Critically, Appellees likewise failed to notify the court that their previous and nearly identical motion was denied. This inexplicable failure to disclose the earlier denial of their motion violated their duty of candor to the court. Moreover, to the extent that their motion, without directly saying so, sought reconsideration of their already denied motion, the motion was filed beyond the fourteen-day window for filing motions for reconsideration set forth in Federal Rule of Appellate Procedure 40(a)(1) and Fifth Circuit Rules 27.2 and 40, and they did not seek permission to file out of time.

Appellees' only explanation for their redundant and misleading submission is that they construed the original denial of their motion to supplement the record as an order that applied only to the emergency stay proceedings. However, Appellees' original motion to supplement the record on appeal was not limited to the stay proceeding, nor was the order denying it so limited. There is no legal basis to support Appellees' *post hoc* contention that motions to supplement the record apply only to one stage of an appeal.¹

If Appellees had any confusion about the application of the order, they could have and should have disclosed the previously denied motion in their new motion. Moreover, after Appellant notified Appellees that they

¹ When the panel granted a stay in this case in September 2020, it deferred a merits determination as to Appellees' standing. *See Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567-68 (5th Cir. 2020). But it had not deferred the entirely distinct question of whether Appellees could supplement the record on appeal. By the time the opinion was published, Appellees' motion to supplement the record had already been denied without caveat.

No. 20-40643

intended to file a motion for sanctions based on this lack of candor and violation of local rules, Appellees could have withdrawn their motion. But they did not. Instead, they stood by a motion that multiplied the proceedings unreasonably and vexatiously.

Sanctions are warranted in this case to deter future violations. The attorneys listed on the February 10, 2021 motion to supplement the record shall pay: (i) the reasonable attorney's fees and court costs incurred by Appellant with respect to Appellees' duplicative February 10, 2021 motion, to be determined by this court following the filing of an affidavit by Appellant and any response by Appellees, and (ii) double costs. *See* 28 U.S.C. § 1927; *Automation Support, Inc. v. Humble Design, L.L.C.*, 982 F.3d 392, 395 (5th Cir. 2020); *Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992); *Renobato v. Merrill Lynch & Co.*, 153 F. App'x 925, 928 (5th Cir. 2005).

The attorneys listed on the motion are also encouraged albeit not required to review Rule 3.3 of the Model Rules of Professional Conduct (Candor Toward the Tribunal) and complete one hour of Continuing Legal Education in the area of Ethics and Professionalism, specifically candor with the court. Further violations of this court's rules may subject the attorneys to further sanctions under this court's inherent powers.

EXHIBIT “B”



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Matthew H. Frederick
Deputy Solicitor General

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(512) 936-6407

April 13, 2021

Via CM/ECF

Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit

Re: No. 20-50667, *Texas Democratic Party; Democratic Senatorial Campaign Committee; Democratic Congressional Campaign Committee v. Ruth R. Hughs*

Dear Mr. Cayce:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellant Secretary Hughs writes regarding an order recently issued by this Court in a related appeal. *See* Order, *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643 (5th Cir. Mar. 11, 2021) (per curiam) (“*TARA*”) (Exh. 1). The order supports the Secretary’s motion to strike, which a motions panel carried with the case.

In *TARA*, as here, plaintiffs (including DSCC and DCCC, two of the plaintiffs in this case) attempted on appeal to introduce non-record evidence relating to the *Ex parte Young* exception to sovereign immunity. *See* Br. of Appellees, *TARA*, *supra*, 2021 WL 537633, at *51-52 & n.9 (5th Cir. Feb. 10, 2021). Relying on this evidence, plaintiffs argued (as they do here) that certain post-complaint conduct demonstrated the Secretary’s willingness to enforce the voting laws challenged in that case. *See id.* at *51-52. Plaintiffs also submitted an appendix containing additional non-record material in support of their contention that the district court had subject-matter jurisdiction. *See id.* at *32.

There, as here, plaintiffs asked the Court to expand the record to include—or to take judicial notice of—the non-record material. *See* Reply in Support of Mot. to Strike & to Sanction Appellees’ Counsel 6-7, *TARA*, *supra*, Doc. No. 00515761093 (5th Cir. Mar. 1, 2021). The Court denied these requests. Order at 1, *TARA*, *supra*.

Letter to Mr. Cayce, Clerk
April 13, 2021
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The Court also struck from the appellees' brief the references to the addendum and to the post-complaint conduct for which plaintiffs had sought judicial notice. *Id.*

Given that the plaintiffs advance essentially the same arguments and ask for essentially the same relief here, *see* Red Br. 25 & n.5, the Court should again strike plaintiffs' improperly introduced non-record material. *See* Reply in Support of Mot. to Strike Addendum1-6, Doc. No. 00515702631 (Jan. 11, 2021).

Respectfully submitted.

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK
Deputy Solicitor General

cc: All counsel of record (via CM/ECF)

CERTIFICATE OF SERVICE

On April 13, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 28(j) because it contains 303 words, excluding the parts exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK

EXHIBIT “C”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-016840

02/25/2021

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

MARICOPA COUNTY, et al.

STEPHEN W TULLY

v.

KAREN FANN, et al.

THOMAS J. BASILE

JAMES E BARTON II
JOHN A DORAN
THOMAS PURCELL LIDDY
JOSEPH EUGENE LA RUE
JOSEPH J BRANCO
EMILY M CRAIGER
KORY A LANGHOFER
JACQUELINE MENDEZ SOTO
GREGREY G JERNIGAN
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE THOMASON

MINUTE ENTRY

East Court Building - Courtroom 713

9:03 a.m. This is the time set for Oral Argument on Plaintiffs' Motion for Summary Judgment, filed February 22, 2021, President Fann and Senate Judiciary Committee Chairman Petersen's Motion for Judgment on the Pleadings, filed February 22, 2021, and Democratic Senators' Motion for Summary Judgment, filed February 22, 2021 via Court Connect. All appearances are virtual and are as follows:

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- Counsel, Stephen W. Tully, John A. Doran, Thomas P. Liddy, Joseph J. Branco, Joseph E. LaRue, and Emily Craiger are present on behalf of Plaintiffs/Defendants-in-Counterclaim Maricopa County; Clint Hickman, in his official capacity as Chairman of the Maricopa County Board of Supervisors; and Jack Sellers, Steve Chucuri, Bill Gates, and Steve Gallardo, in their official capacities as Members of the Maricopa County Board of Supervisors, who are not present.
- Counsel, Thomas Basile and Kory Langhofer are present on behalf of Defendants/Plaintiffs-in-Counterclaim Arizona Senate President Karen Fann, who is present, and Senate Judiciary Committee Chairman Eddie Farnsworth, who is not present General counsel for Arizona State Senate, Gregroy G. Jernigan, is also present.
- Counsel, James Barton, II, and Jacqueline Mendez Soto are present on behalf of Defendants Lupe Contreras, Andrea Dalessandro and Martin Quezada, in their official capacities as Members of the Arizona Senate Judiciary Committee, who are not present.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court outlines the pleadings reviewed in preparation for this hearing.

Oral argument is presented.

For the reasons stated on the record,

IT IS ORDERED taking this matter under advisement.

9:28 a.m. Matter concludes.

The Arizona Constitution requires the Arizona Commission on Judicial Performance Review to conduct performance evaluations of superior court judges. The Commission is asking for your help to evaluate Maricopa County Superior Court judges currently undergoing performance review. After your hearing, if the judge you are in front of is undergoing review, a survey will be emailed to you and you can take the survey online. The survey is conducted by the Docking Institute of Public Affairs at Fort Hays State University and is anonymous and confidential. Your participation in the review process is important! More information on Judicial Performance Review can be found at www.azjudges.info.

La Constitución de Arizona exige que la Comisión de la Evaluación del Desempeño Judicial realice evaluaciones de desempeño de los jueces de los tribunales superiores. La comisión pide su ayuda para evaluar a los jueces del Tribunal Superior del Condado de Maricopa a quienes

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actualmente se les esta evaluando su desempeño. Despues de su audiencia, si el juez ante el cual comparece esta sometido a una evaluaci3n se le enviara por correo electr3nico una encuesta que usted podra tomar por Internet. La encuesta es realizada por el Docking Institute of Public Affairs de la Fort Hays State University y se mantiene an3nima y confidencial. jSu participaci3n en el proceso de la evaluaci3n es importante! Para obtener mas informaci3n sobre la evaluaci3n del desempeño judicial, dirijase a www.az.judges.info.

BACKGROUND

Maricopa County and the Maricopa County Board of Supervisors, in their official capacities (at times referred to collectively as the "County"), filed suit in CV2020-016840 asking the Court to declare that two legislative subpoenas issued to the Maricopa County Board of Supervisors (the "2020 subpoenas") were illegal and unenforceable. The 2020 subpoenas required production of numerous documents and electronic materials dealing with the November 2020 election.

Karen Fann ("Fann"), as President of the Arizona Senate, and Eddie Farnsworth ("Farnsworth"), as Chairman of the Arizona Senate Judiciary Committee, filed a Counterclaim seeking enforcement of the 2020 subpoenas. Fann and Farnsworth filed a Motion for Preliminary Injunction, asking the Court to enforce the 2020 subpoenas. After the Motion was filed, a notice of substitution was filed under Arizona Rule of Civil Procedure 25(d), stating that Warren Petersen ("Petersen"), the incoming Chairman of the Senate Judiciary Committee, was substituting for Farnsworth, who no longer held that position. (Fann and Petersen are, at times, referred to as the "Senators").

The Court considered the Motion for Injunctive Relief, the Response and the Reply, along with the arguments of counsel. The Court also considered the Amicus brief from the Attorney General of the State of Arizona and the Amicus brief filed by certain Republican Chairmen and House members. At a hearing held on January 13, 2021, the Court found that the dispute before the Court was moot, in light of the fact that the 2020 subpoenas were no longer enforceable.

The day before the January 13 hearing, Fann and Peterson issued two new subpoenas to the Board of Supervisors. Subpoenas were also issued to the Maricopa County Recorder and the Maricopa County Treasurer. (The subpoenas issued on January 12 are collectively referred to as the "Subpoenas.") The County filed CV2021-002092, asking the Court to declare that the Subpoenas were illegal and unenforceable.¹ Nonetheless, in response to the Subpoenas, the County

¹ CV2020-016840 and CV2021-002092 have been consolidated.

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"quickly produced some 11.32 gigabytes of data" and commissioned two separate examinations of its tabulation machines, to ensure that they functioned properly during the November 2020 election.

The Subpoenas were served on the afternoon of January 12. The Subpoenas commanded appearances the next day, January 13, 2021, at 9:00 a.m. The Chairman of the Board of Supervisors, Jack Sellers, Maricopa County Recorder Stephen Richer, and Maricopa County Treasurer John Allen appeared at the Senate at 9 a.m. They were ostensibly prepared to testify and to notify the Senators that they could not possibly produce all of the subpoenaed material in the time frame provided. The Subpoenas commanded production of some 2.1 million voted paper ballots, nine large Central Count Tabulators, 350 smaller Precinct Based Tabulators and other hardware and electronically stored information ("ESI"). There was no Senate hearing on January 13 and no testimony was taken. Despite the production of 11.32 gigabytes of data, the County has not provided all of the materials that were subpoenaed. Among other things, the County has not provided the Senators the ballots from the election.

The County later filed a request for injunctive relief. The County was concerned that the Arizona State Senate was going to hold County officials in contempt and possibly have them arrested. The Senate vote to hold the County officials in contempt failed by one vote, and the request for injunctive relief was withdrawn.

The Court has now been asked to issue an expedited ruling on the merits of the dispute. The County wants the Court to declare that the Subpoenas are illegal and unenforceable. The Senators ask the Court to rule that the Subpoenas are legal and enforceable. Specifically, the County has filed a Motion for Summary Judgment, and the Senators have filed a Motion for Judgment on the Pleadings. The Democratic Members of the Senate Judiciary Committee have also filed a Motion for Summary Judgment.² (The Democrat Members of the Senate Judiciary Committee are referred to as "Democrat Senators.") The parties agreed that there would be no responses. The Court has considered these various Motions and the arguments of counsel.

² The Court questions the standing of the Democrat Senators. It is not clear why they were named as defendants. As minority members, the Democrat Senators have no authority to issue subpoenas under A.R.S. § 41-1151, which provides that subpoenas can be issued by "the presiding officer of either house or the chairman of any committee." The Democrat Senators are not the target of the Subpoenas, so their standing to object is suspect. Nonetheless, the Court has considered the Motion filed by the Democrat Senators.

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SCOPE OF THE RULING

The courts should generally be hesitant to enter the fray of political disputes between two other branches of government. The controversy between the Senators and the County is a highly charged political dispute.³ Serious accusations have been made and emotions are raw.

The Senators believe that the County has snubbed the clear authority of the Senators to issue the Subpoenas. The County believes, on the other hand, that the Subpoenas are the result of continuing claims by supporters of former President Trump that the election was "stolen" and that this entire matter is a waste of time. The County firmly maintains that the Senators are abusing their powers and refusing to show proper deference to another branch of government.

This Court has no interest in the political dispute between these parties. This is a Court of law, not a Court of politics.

It is, however, an appropriate function for the Court to issue declaratory rulings on limited legal issues. As such, the Court will issue declaratory rulings on whether the Subpoenas are valid and have a proper legislative purpose, whether the Subpoenas violate separation of powers and whether the Subpoenas improperly seek production of materials protected by confidentiality statutes. Issuing such rulings is a proper and necessary exercise of the jurisdiction given to the Court in the Uniform Declaratory Judgment Act, A.R.S. § 12-1831 *et seq.*

It is, of course, not the Court's place to address the wisdom of the Subpoenas. The statutes of this State give the Senators the right to issue subpoenas and to enforce those subpoenas. This Court must follow the law.

It is regrettable that this matter has resulted in a highly bitter dispute between two branches of our government. The members of the County Board of Supervisors and the Senators are all dedicated public servants. This Court has urged these public servants to devote their time and energies to finding a mutually agreeable solution to this problem. They apparently have not done so. Our governmental officials should not be spending valuable resources on lawyers, "fighting" with another branch of government over what materials can be provided to another branch of government under a subpoena. Rather, the citizens expect their governmental officials to work cooperatively for the common good. It is highly unfortunate that that has not happened here. When government officials resort to "name calling" and threats, something has gone terribly wrong.

³ The political dispute initially arose out of the allegations by former President Trump and his allies that there was widespread fraud in the 2020 presidential election. The County accused the Senators of taking part in the purported effort of President Trump and his allies to "overturn" the 2020 election. President Biden is now in office and there clearly will be no "overturning" of the 2020 election.

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This ruling decides only very narrow legal issues. This Court is not enforcing the Subpoenas. This Court has serious concerns about whether it has jurisdiction to enforce the Subpoenas and the Senators have not asked the Court to issue an order enforcing the Subpoenas. As such, this Court's ruling is a narrowly focused declaratory ruling.

VALIDITY OF THE SUBPOENAS

A.R.S. § 41-1151 authorizes "the presiding officer of either house or the chairman of any committee" to issue a subpoena. A.R.S. § 41-1151 *et seq.* provides a mechanism for the legislature to enforce the subpoenas and provides that a person who does not comply is guilty of a misdemeanor. A.R.S. §§ 41-1153, -1154. The statutes also authorize the Senate to find that a person who does not comply with a subpoena to be held in contempt. Moreover, a person who does not comply can be arrested by the sergeant-at-arms. A.R.S. § 41-1153.

Statutory Requirements

The Court first briefly addresses the County's argument that the Subpoenas do not comply with statutory requirements. The County argues that the Subpoenas are invalid because there was no actual hearing conducted on January 13.

The County claims that legislative subpoenas "must be tethered to a hearing." There is nothing in A.R.S. § 41-1151, however, that requires a hearing. Rather, the statute refers only to requiring "the attendance of the witness at a certain time and place." The Subpoenas did command that witnesses appear at a specific time and place. The fact that no actual hearing occurred did not invalidate the Subpoenas.⁴ The fact that the Senators did not force the witnesses who appeared to testify did not render the Subpoenas a nullity. The County's argument that the Subpoenas are invalid because there was no hearing is inconsistent with the statute that authorized the issuance of the Subpoenas.

A.R.S. § 41-1154 requires that a witness produce material "upon reasonable notice." The Subpoenas were served less than 24 hours before the due date. The County, however, knew about the 2020 subpoenas and, therefore, knew for several weeks what materials the Senate was seeking. Moreover, the County has now had weeks to comply, and has, in fact, produced many of the requested materials. As such, while a "reasonable notice" objection might have been valid at the time, it is hardly valid now. Moreover, it appears as if the County is refusing to produce certain information, irrespective of whether it had reasonable notice. A party cannot use the lack of

⁴The Democrat Senators acknowledge that the legislature is authorized to issue subpoenas for documents, without requiring attendance of witnesses at a hearing. Democrat Senators' Motion at 4. As they point out in their Motion, A.R.S. § 41-1152 refers to "[t]estimony or evidence produced pursuant to this article," supporting the notion that evidence other than witness testimony can be the target of a legislative subpoena.

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reasonable notice as a defense if it intends to not comply, irrespective of the notice provided. *See United States v. Bryan*, 339 U.S. 323, 333-34 (1950).

The County's argument that the Senate cannot subpoena electronically stored information ("ESI") or tangible objects, such as voting "machines", is also meritless. A.R.S. § 41-1154 addresses enforcement of legislative subpoenas. The County cites the portion of the statute that refers to production of "relevant books, papers or documents," and argues that ESI and machines are not books, papers or documents. The County ignores, however, the same portion of the statute, which refers to production of "any material." Clearly, ESI and machines constitute "material."

A.R.S. § 41-1154 clearly reflects the legislative intent that legislative subpoenas can demand production of "any material," in addition to "books, papers or documents." Moreover, the statute does not somehow immunize information from being subpoenaed simply because the information is electronically stored. In modern parlance, "documents" include electronically stored information. Indeed, when parties in litigation are producing "documents," they understand that documents include ESI. It is absurd to think that information that happens to be electronically stored and not kept on a piece of paper is not a "document" that can be subpoenaed.

Necessity of a Resolution

The County argues that the issuance of a legislative subpoena is dependent on an active investigation established by resolution. No Arizona authority so holds. Indeed, such a conclusion is contrary to the operative statute.

The Arizona legislature granted the authority to the presiding officer and committee chairmen in each chamber of the legislature to issue subpoenas. A.R.S. § 41-1151. This grant of authority to these officials is diametrically opposed to the County's position that there must be some resolution passed before a subpoena can be properly issued.⁵ There is nothing in the statute

⁵ The Arizona statute has no similar counterpart in federal law. It is true that Congress' constitutional subpoena power is vested in the body as a whole and delegation of that power to a committee must entail an authorizing resolution. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *Comm. on the Judiciary, US House of Representatives v. Miers*, 558 F. Supp. 2d 53, 70-71 (D.D.C. 2008). Arizona legislative subpoenas, however, are not governed by the federal standards and rules for issuing congressional subpoenas. Arizona legislative subpoenas are not issued by the body as a whole and, therefore, require no "resolution." Indeed, the presiding officer of the Senate, the president, does not chair any committee. Yet, the statute gives that official the authority to issue a subpoena. This clearly indicates that no committee resolution is necessary.

Although *Buell v. Superior Court* involved a legislative investigation pursuant to a resolution, the Arizona Supreme Court did not hold that a resolution was required before a legislative subpoena could be issued. *Buell v. Superior Court*, 96 Ariz. 62 (1964). *Buell* concerned the power of the legislature to hold a lawyer in contempt for failing to comply with a legislative subpoena. It did not specifically address the requirements for issuance of such a subpoena. It certainly did not hold that a resolution was required before a subpoena could issue.

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that requires an open formal investigation or a resolution, as a necessary precursor to the issuance of a subpoena.

The County further argues that the power to issue subpoenas is only held by the Senate as a corporate body, not by individual Senators. The argument again ignores the plain language of the statute, which expressly authorizes "the presiding officer of either house or the chairman of any committee" to issue subpoenas. A.R.S. § 41-1151.⁶

Accordingly, the Senators themselves, in their capacities as Senate president and committee chair, had the statutory power to issue subpoenas.⁷ As long as the Subpoenas were issued for a proper legislative purpose and do not violate Constitutional protections, the Subpoenas are valid and enforceable.

It is not the Court's function to ascertain the wisdom of the Senators' decision to issue the Subpoenas or to determine if any attendant investigation is "justified." *See Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20-21 (D.D.C. 1994) ("[T]his Court may only inquire as to whether the documents sought by the subpoena are 'not plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties.'" (citations omitted). Similarly, the Court is not in a position to determine whether some or all of the information being subpoenaed is "immaterial" to the inquiry being undertaken by the Senators. Indeed, materiality is arguably framed by the scope of the Subpoenas themselves.

Proper Legislative Purpose

The Arizona Supreme Court has held that "[i]t is within the powers of legislative committees to conduct investigations... and to issue subpoenas and to summon witnesses generally and punish them for contempt if they refuse to answer relevant questions or produce records." *Buell*, 96 Ariz. at 66.⁸ A legislative subpoena is issued for a proper legislative purpose if "the

The cases cited by the County from California and other states are not persuasive because they do not address the specific requirements of Arizona's legislative subpoena statutes. For example, in *Connecticut Indent. Co. V. Superior Court*, 3 P.3d 868, 810 (Cal. 2000), cited by the County, the statute in question, Cal. Gov. Code § 37104, states that subpoenas can be issued by "[t]he legislative body." A.R.S. § 41-1151 does not authorize the "legislative body" to issue subpoenas; only the presiding officers and committee chairs may do so. As such, California law is completely irrelevant.

⁶ There is nothing in the record suggesting the Senators were acting outside their official capacities.

⁷ Judge Warner did not rule that the Senators are not authorized, individually, to issue legislative subpoenas, as the County claims. The issue decided by Judge Warner was whether mandamus was a proper means of enforcing a legislative subpoena. *Fann v. Maricopa County*, No. CV2020-016904, Decision Order (Dec. 23, 2020). In fact, Judge Warner expressly stated that "A.R.S. § 41-1151 authorizes the presiding officer or a committee chair of either house of the Arizona Legislature to issue subpoenas." *Id.* at 1.

⁸ During oral argument, the County admitted that the legislature has "broad powers of inquiry."

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subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). If there is a conceivable legislative purpose, the court will presume that the purpose of the subpoena is proper. *Id.* at 178. So long as the subpoena can be construed to relate to a subject upon which legislation might be had, the subpoena is valid. *Id.* at 180.

The Subpoenas seek numerous pieces of data and information dealing with the November 2020 election. For purposes of this ruling, the Court finds that the Subpoenas were issued for a valid legislative purpose.

The Arizona Constitution entrusts the legislature with the power to enact "laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. The United States Constitution empowers the legislatures of the states to set the time, place and manner of elections. U. S. Const. art. 1, § 4, cl. 1. The states also determine the manner in which electors are chosen. U.S. Const. art. II, § 1, cl. 2.

The Senators state that they intend to use the data gathered under the Subpoenas to evaluate the accuracy and efficacy of existing vote tabulation systems and competence of county officials in performing their election duties, with an eye to introducing possible reform proposals. This is a valid legislative purpose. Granted, there was no specific legislation pending before, or even being examined by, the Senate at the time the Subpoenas were issued. There does not, however, have to be actual legislation pending in order for a legislative subpoena to be issued for a proper purpose. A.R.S. § 41-1151 does not require pending legislation, or even a formal "investigation," before a presiding officer or committee chair can issue a subpoena.

Wilkinson v. United States, 365 U.S. 399 (1961), cited by the County, stated only that the existence of pending legislation was a factor to be considered in determining whether the subpoena was issued for a proper purpose. Further, in the absence of pending legislation, legislative investigations can appropriately determine whether other governmental agencies are properly performing their functions. *See McGrain*, 273 U.S. at 177-78 (Congressional investigation into whether the Attorney General and his assistants were performing or neglecting their duties).

The County contends that the Subpoenas were not issued for a proper legislative purpose because the Senators are allegedly seeking to re-adjudicate the presidential election. Indeed, the County argues that "Fann is attempting to perform a private recount⁹ of the election" and that the Senators have no authority to "audit" elections. The County asks the Court to examine statements

⁹ The Court does not know what the County means when it refers to a "private recount." A "private recount," whatever that is, would have no legal significance. The fact that the Senators might conduct a "private recount" does not negate the notion that there was a proper legislative purpose-investigating the need for election reform and examining possible legislation attendant thereto.

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made by Senator Fann in order to ascertain the "true" purpose of the Subpoenas. Granted, Senator Fann has made public comments about concerns of "many voters" regarding the accuracy of the presidential election and the need to "audit" the election.¹⁰ These comments, however, do not mean that the Subpoenas were not issued for a proper legislative purpose.¹¹

If there is a conceivable proper purpose, the Court must construe the Subpoenas as valid. *Id.* at 180. There clearly is a proper legislative purpose here. Assessing electoral integrity is a proper legislative purpose. Examining potential legislative reforms to the electoral process is certainly a proper function of the State legislature.

This Court is not in a position to determine if the "real" purpose of the Subpoenas is to try to "overturn" the result of the election.¹² Even if one of the original purposes of the 2020 subpoenas was to see if the election could somehow be challenged, there still is a perfectly valid legislative purpose for the Subpoenas.¹³ Accordingly, the Court finds that there was a proper legislative purpose.

SEPARATION OF POWERS

The County suggests that the Subpoenas could "usurp" the administration of elections and duties of County officials and the Secretary of State. Therefore, according to the County, the Subpoenas present separation of powers problems. The entire electoral infrastructure, however, is a legislative creation. The functions of County officials and the Secretary of State were the result of delegations by the legislature.¹⁴

Powers held by the counties are those delegated to the counties by the legislature. *Ariz. Const. art XII, § 4; see Assoc. Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395-96 (1949) ("The boards

¹⁰ The County's contention that the Senators are acting improperly in looking at the integrity of the 2020 election is somewhat ironic in light of the fact that the County itself just completed a "forensic audit" of the election.

¹¹ The Democrat Senators acknowledge that it is a proper purpose to use a legislative subpoena to "investigate election administration in general." The Democrat Senators insist, however, that it is not proper for the legislature to issue subpoenas to investigate the November 2020 election. An investigation of the 2020 election, however, clearly could be of assistance in investigating election administration and possible reforms.

¹² In light of the fact that the Electoral College has voted, Congress has confirmed the election, and President Eiden has been sworn in, any purported attempt to "overturn" the result of the election now would clearly be futile.

¹³ Indeed, the Senators acknowledge that one purpose of the 2020 subpoenas was to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome. Even though that might have been one purpose of the 2020 subpoenas, the goal of studying the result and trying to determine if legislation should be passed to improve the election process is still a valid purpose, sufficient to uphold the Subpoenas.¹⁴ The Arizona Constitution gives the legislature authority to define the powers and duties of the Secretary of State. *Ariz. Const. art. V, § 9*. The duties of the Secretary of State are set out by in A.R.S. § 41-121, which duties include certifying election results. A.R.S. § 41-121(A)(6).

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of supervisors of the variou counties of the state have only such powers as have been expressly or by necessary implication, delegated to them by the state legislature."); *State v. Payne*, 223 Ariz. 555, 561, 15 (App. 2009).¹⁵ Since the legislature delegated powers to the counties, it can certainly investigate modifying or improving those delegated powers.¹⁶ It also has the power to investigate whether the County is properly discharging its delegated functions. *See McGrain*, 273 U.S. at 177- 78.

The County's characterization of the Senators' argument as "bizarre" is premised on the notion that the real purpose of the Subpoenas is to "overturn" or "challenge" the election. A subpoena, however, cannot "overturn" an election. A subpoena simply demands production of information. Responding to the Subpoenas could hardly result in the "overturning" of the presidential election in Arizona.

If one assumes, as the Court must, that the Subpoenas were issued to examine potential election reforms, then it is evident the Subpoenas were not an attempt to "usurp" powers of the County and the Secretary of State. Subpoenaing materials from the County is not a usurpation of the County's powers. Rather, it is simply gathering of information.

Accordingly, the Subpoenas do not violate the separation of powers. As noted above, the counties have only such powers as delegated to them by the legislature. It is axiomatic that the legislature can take action, so long as it is acting within the scope of its legislative authority. Separation of powers issues are raised when one branch of government tries to usurp a power it has delegated to another branch. No such attempt has been made here.

CONFIDENTIALITY

The County also contends that the Subpoenas might threaten the "right to a secret ballot" and violate certain state statutes on confidentiality. The statute governing confidential voter information, however, permits access by any "authorized government official in the scope of the official's duties." A.R.S. § 16-168(F).

¹⁵ The statutes governing counties are set out in Title 11 of Arizona Revised Statutes. Chapter 2, Article 4 of Title 11 describes the powers and duties of the county boards of supervisors, which include the power to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. § 11-251(3).

¹⁶ The County argues that "the Legislature gave the Executive Branch" authority to canvass and proclaim the results of the election. That is true. That does not prevent, however, the legislature from considering or passing legislation addressing the voting process or potentially revoking some of the authority delegated to the County or the Secretary of State. Indeed, the Arizona Constitution charges the legislature with the responsibility of ensuring the "purity" of elections and guarding against abuse. *See* Ariz. Const. art. VII, § 12.

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Confidentiality statutes do not prevent ballots and associated materials from being provided to government officials. Rather, these statutes are intended to prevent disclosure of information to the public. All government officials are obligated to follow the law and comply with confidentiality statutes. This, of course, includes the Senators.

The County cites the Arizona Constitutional right to a "secret" ballot. Ariz. Const. art. VII, § 1. Absent unusual circumstances, however, it is impossible to tie any given ballot to the voter who completed the ballot. Moreover, producing information to government officials clearly does not deprive a voter of his or her right to a secret ballot. All government officials, including the Senators, clearly have a corresponding duty to maintain the secrecy of ballots that are provided to them.

The County even cites A.R.S. § 16-1018(4), which makes it unlawful to "[s]how[] another voter's ballot to any person after it is prepared for voting in such a manner as to reveal the contents[.]" This provision, however, obviously does not prohibit the showing of the ballot to government officials. Indeed, if that were the case, it would be illegal for any County official to "see" any ballot after it was prepared for voting. It is apparent that the word "person," as used in this statute, does not refer to government officials.¹⁷

When interpreting confidentiality statutes, the Court must "'apply constructions that make practical sense' rather than those that 'frustrate legislative intent'" *State v. Zeitner (Zeitner I)*, 244 Ariz. 217, 224, ¶ 27 (App. 2018), *aff'd* 246 Ariz. 161 (2018) (*Zeitner II*). The clear intent of the legislature in enacting these confidentiality statutes was to protect voters' rights to cast secret ballots. The legislature did not intend for these statutes to prevent it from having access to the materials it deemed necessary to fulfill its duty to oversee the election process.

¹⁷ The County cites a number of other statutes that clearly have no application to the question of production of balloting materials to the legislature. For example, the County argues that A.R.S. § 16-1005(H) makes it "illegal to possess voted ballots even when it is unknown who cast them," Section 16-1005(H) prohibits the practice of "ballot harvesting." That statute was held unconstitutional by the Ninth Circuit in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 222 (Mem) (Oct. 2, 2020). In any event, the ballot harvesting prohibition was not intended to prevent the legislature or other governmental bodies and officials from examining ballots and related materials. If that were the case, the County and its officials would not be permitted to possess and examine ballots.

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Statutes such as §§ 16-624 and 625, operate as restrictions on access by the general public.¹⁸ The statutes do not prohibit disclosure of voting information to another part of the government.¹⁹

During oral argument, counsel for the County focused on A.R.S. § 16-624 and argued that compliance with the Subpoenas would require the County to violate the law. The Court disagrees.²⁰

Section 16-624(A) requires the "officer in charge of elections" to deposit the package containing ballots in a secure facility, managed by the County Treasurer, to be kept "unopened and unaltered" for a period of twenty-four months for federal elections. This statute, which imposes obligations on the "officer in charge of elections" and the County Treasurer, does not immunize the ballots from being subpoenaed, let alone from being subpoenaed by the legislature, acting in

¹⁸ The County argued that, under A.R.S. § 16-624, once paper ballots are sealed after a canvass, ballots can only be unsealed by court order for purposes of a court-ordered "recount." (County's Motion at pp. 3, 13.) The County seems to suggest that this is the only situation where the ballots can be unsealed. This is clearly not the case. Subsection A of the statute states that, after a canvass is completed, the County Treasurer must keep the ballots for 24 months for federal elections. Subsection B provides that "irregular ballots" must be preserved for six months and "may be opened and the contents examined only upon order of the court." Subsection D states that, in the case of a recount within six months, "the county treasurer may be ordered by the court" to deliver the ballots to the court. The County's argument suggesting that ballots can be opened only under situations specifically addressed in the statute is clearly wrong. The statute only specifically refers to a court order providing for opening the ballots in the narrow circumstances dealing with "irregular ballots" (subsection B). While the power of the Court to open ballots in recount situations under subsection D may be implied, the statute does not directly provide such authorization. In any event, it is clear that the Court has the inherent authority to order the opening of ballots in other situations. See discussion below in fn. 21. Similarly, the Senate, as a co-equal branch of government with broad subpoena powers, can subpoena ballots in situations not provided for in the statute itself.

¹⁹ *Garner v. Cherberg*, 765 P.2d 1284 (Wash. 1988), is not controlling, nor is it persuasive. In *Garner*, the Washington Supreme Court quashed a legislative subpoena, which sought confidential records from the commission on judicial conduct pertaining to a particular judge. The court did not hold that the confidentiality rules precluded all legislative oversight, as indicated at the end of the decision where the court "invite[d] the Majority Leader of the Senate and the Speaker of the House of Representatives to join the Chief Justice of the Supreme Court to conduct such an in camera inspection of the Commission's investigation files on Judge Little to satisfy themselves of the objectivity of the report." *Id.* at 1290. In addition, that case did not involve the oversight of elections, which the Arizona legislature is Constitutionally empowered to oversee.

²⁰ The Court understands that, in addition to ballots, the County has also not produced various voting machinery and hardware. The confidentiality statutes cited by the County clearly provide no justification for withholding those materials.

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its Constitutional role to ensure the "purity" of elections.²¹ This statute simply does not create a privilege, justifying non-disclosure.²²

In fact, the statutory requirement that ballots be maintained for twenty-four months itself suggests these materials may be responsive to, and subject to, compulsory process long after an election has been certified and any contest period has lapsed. The County certainly provides no other explanation as to why ballots are required to be maintained for such a long period of time. Common sense suggests that they are maintained because they may be relevant to a legislative investigation, or perhaps a lawsuit, and that they might be subpoenaed. *See Zeitner I*, 244 Ariz. at 224, **127**. There is simply no suggestion from the statute itself, or from common sense, that the statute means that no one is entitled to see the ballots, let alone Senators who are considering ways to improve the electoral process.²³

The County's argument could lead to absurd results. According to the County, any statute that imposes obligations on a person to do specific things with documents or information immunizes those documents or information from being subpoenaed. For example, a state statute could require state chartered financial institutions to keep certain information confidential and "under lock and key." By further way of example, a state statute could require companies who do business with the State to keep certain information safely stored and confidential. Such statutes cannot, and do not, prevent the "confidential" material from being subject to subpoena.

If the County's argument is correct, that providing ballot materials would violate the law, then the County is itself violating the law presently. The County admits that it has not stored the ballots as provided for in § 16-624 because the ballots are still "under the custody and control of the Board of Supervisors." (County's Statement of Fact 88.) The County claims it has not stored the ballots with the County Treasurer as required "because of ongoing litigation." The County states that it will deposit the ballots in the Treasurer's vault, "as the law requires," only after litigation concludes. It is unclear why the County feels justified in violating the law simply because

²¹ *See Democratic Party of Pima County v. Ford*, 228 Ariz. 545 (App. 2012) (noting that trial court had entered an order granting political party's public records request to gain access to ballot records required to be kept confidential under A.R.S. § 16-624). The public record request in *Ford*, which was approved by the court, certainly demonstrates that ballots may be subject to disclosure in circumstances other than those specifically identified in § 16-624(B) and (D), contrary to the County's assertion otherwise.

²² Indeed, during oral argument, the County admitted that the relevant statutes do not render the material in question the confidential or privileged material of the County.

²³ The County's argument that the Senate's attempt to pass legislation specifically providing that ballot materials can be subpoenaed constitutes an admission that the current law does not provide for subpoenaing such materials is unconvincing. The Senators have firmly maintained that they have the power to subpoena these materials. A legislative attempt to clarify what could be seen as an ambiguity in the current law is hardly an admission by the Senators.

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litigation is pending, but claims that it cannot violate the law by complying with the Subpoenas.²⁴ Complying with the Subpoenas would not violate the law.

The Senators had the power to issue the Subpoenas and have the statutory power to enforce those Subpoenas in the manner set forth in the statutes. The Subpoenas are, in essence, the equivalent of a Court order, requiring production of certain information. The County cannot avoid a subpoena based on statutes that require that the material being subpoenaed be kept confidential.

While a claim of privilege might, under certain circumstances, constitute a defense to a legislative subpoena, a claim of confidentiality does not.²⁵ The Senators, of course, are obligated to maintain confidentiality of the materials turned over to them. Confidentiality, however, is not a basis for quashing the Subpoenas.²⁶

CONCLUSION

The Court finds that that Subpoenas are legal and enforceable. There is no question that the Senators have the power to issue legislative subpoenas. The Subpoenas comply with the Statutory requirements for legislative subpoenas. The Senate also has broad constitutional power to oversee elections. The Arizona legislature clearly has the power to investigate and examine election reform matters. Accordingly, the Senators have the power to subpoena material as part of an inquiry into election reform measures. As such, the Subpoenas have a proper legislative purpose.²⁷ The Subpoenas also do not violate separation of powers principles. Production of the subpoenaed materials would not violate confidentiality laws.

²⁴ The ballot material could have been stored by the County Treasurer and retrieved, if it were determined that the materials were properly subject to subpoena.

²⁵ See *Zeitner II*, 246 Ariz. at 168, ¶ 28 (Arizona Supreme Court stated that the statutory physician-patient privilege "must yield to the State's interest in combatting fraud."); *Buell*, 96 Ariz. at 68-69 (finding claim of attorney-client privilege was defeated by legislature's need for subpoenaed materials in investigation of the Arizona Corporation Commission).

²⁶ This is not to say that the Court does not have concern about the confidentiality of the subpoenaed ballot information. The Elections Procedures Manual has carefully delineated provisions providing for the security of ballots. The Manual, however, simply cannot be reasonably read to prevent production of subpoenaed material to government officials, particularly State legislators who are constitutionally charged with ensuring election integrity. For example, Congress often investigates topics that involve highly confidential and sensitive information and subpoenas confidential and sensitive information. Congress, of course, is obligated to maintain the confidentiality of such materials. Similarly, the Senators certainly are obligated to maintain confidentiality of the subpoenaed materials here.

²⁷ The County has also argued that the Subpoenas are overly broad and unduly burdensome. The Court's function, however, is to simply determine if the Subpoenas were valid and had a proper legislative purpose. The Senators have broad discretion in determining what information is needed. The Court is in no position to determine if specific requests are unduly burdensome. Disagreements about the breadth and burdensomeness of the Subpoenas should be worked out between the Senators and the County and their counsel.

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The County's Motion for Summary Judgment is denied. The Senators' Motion for Judgment on the Pleadings is granted, to the extent consistent with this Order. The Democrat Senators' Motion for Summary Judgment is granted in part and denied in part, consistent with this Order.

The Court expressly finds that there is no just reason for delay and expressly directs entry of this Order as final partial judgment under Rule 54(b) of the Arizona Rules of Civil Procedure.

/s/ HON. TIMOTHY THOMASON

HONORABLE TIMOTHY THOMASON
JUDICIAL OFFICER OF THE SUPERIOR COURT

EXHIBIT “D”

April 6, 2021

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VIA E-MAIL

Dear Mr. Logan, Mr. Ward, Mr. Weber, and Mr. Witt:

On behalf of the undersigned legal organizations, we have significant concerns that the tactics that your companies intend to utilize in your proposed review of the Maricopa County election results (hereinafter the “Cyber Ninjas ‘Audit’” or “Audit”) likely violate both federal and Arizona law. In particular, we understand that as part of the “Audit,” Cyber Ninjas in partnership with other companies has agreed and plans to, among other things, “knock on doors to confirm if valid voters actually lived at the stated address,” and “validate that individuals that show as having voted in the 2020 General election match those individuals who believe they have cast a vote,” Statement of Work ¶¶ 2.1, 5.1 (explaining that voters may be questioned by phone calls and at-home visits),¹ as well as engage in a comparison of the voter rolls against lists of supposedly “invalid voters,” Statement of Work ¶ 4.1. As explained below, these tactics—no matter their intent—constitute illegal voter intimidation and might expose your companies to both civil and criminal penalties.

Accordingly, we demand that you immediately (1) cease any planned or ongoing violations of federal and state law, including but not limited to any conduct that may intimidate voters, and (2) implement safeguards to ensure that no additional legal violations occur. In addition, because

¹And in fact, Cyber Ninjas admits that it has *already* done door-to-door physical canvassing. Statement of Work ¶ 2.1.

litigation may commence should your companies engage in the conduct outlined in the Statement of Work or any other conduct that intimidates voters, we demand that you (3) immediately take all necessary steps to preserve any and all records related to the Cyber Ninjas “Audit” or other records concerning audits of the 2020 presidential election, including but not limited to (i) records concerning the negotiation, bidding, planning, and implementation of the Cyber Ninjas “Audit”; (ii) any and all communications related to the Cyber Ninjas “Audit” as well as any other efforts to challenge or verify the 2020 election results; (iii) any and all records—including communications—by your companies, officers, or employees related to challenging or verifying the 2020 election results; (iv) any and all communications with legislators and their staff concerning the “Audit”; and (v) any and all records—including but not limited to communications and social media posts—by your companies, their officers, and employees related to the accuracy or validity of the 2020 election results.

Multiple audits—including hand recounts and forensic audits—have already confirmed the accuracy, integrity and outcome of the Maricopa County election—a conclusion with which both Republicans and Democrats agree. Indeed, following an extensive audit, the Republican-led Maricopa County Board of Supervisors unanimously certified the election results, and the Republican Chairman of that Board publicly affirmed that the “election was administered with integrity, transparency, and most importantly in accordance with Arizona state laws.”² The Cyber Ninjas “Audit” is therefore not only unnecessary but also—for the reasons detailed below—substantially likely to result in the violation of both federal and state laws.

Federal law prohibits intimidating voters, regardless of your companies’ intent when doing so.

Numerous federal laws prohibit intimidation of voters. The Civil Rights Act of 1957 makes it illegal to intentionally intimidate voters.³ The Ku Klux Klan Act of 1871 (“Klan Act”) makes it illegal either to engage in a conspiracy to injure or intimidate voters, and also allows for, among other things, the recovery of damages for such conspiracies.⁴ Crucially, under the Voting Rights Act of 1965, intimidating voters is illegal *regardless* of whether someone acts with an intent to intimidate.⁵ In addition to providing these civil remedies, federal law also makes intentional voter intimidation a criminal offense.⁶

Voter intimidation can take many forms and need not include threats of physical violence. Indeed, the anti-voter intimidation provisions of the Voting Rights Act were intended to address a “sometimes more subtle, certainly more damaging” obstacle to voting: “*fear*.”⁷ As a result, falsely

² Jen Fifield, *Maricopa County Board of Supervisors votes unanimously to certify election results*, Arizona Republic (Nov. 20, 2020), <https://www.azcentral.com/story/news/politics/elections/2020/11/20/maricopa-county-supervisors-meet-consider-certifying-election-results/6362991002/>.

³ 52 U.S.C. § 10101(b).

⁴ 42 U.S.C. § 1985(3) clauses 3 & 4.

⁵ 52 U.S.C. § 10307(b).

⁶ See 18 U.S.C. § 594 (making intentional voter intimidation a federal crime punishable by imprisonment); see also 52 U.S.C. § 20511 (imposing criminal penalties for anyone who knowingly and willfully intimidates or coerces prospective voters in registering to vote, or for voting, in any election for federal office).

⁷ Voting Rights: Hearing on S. 1564 Before S. Comm. on the Judiciary, 89th Cong. 7 (1965) (Statement of Nicholas deB. Katzenbach, Att’y Gen. of the United States) (emphasis added); *id.* at 12 (explaining that the Voting Rights Act was specifically drafted to address “intimidation” that “involve[s] subtle forms of pressure”). The Ninth Circuit has also explained that a California statute prohibiting “coercion or intimidation” with respect to voting “is not limited to

accusing individuals of being unlawful voters can violate both the Voting Rights Act and the Klan Act.⁸ As does making calls to voters suggesting that they may suffer negative consequences from electoral participation.⁹ Importantly, your companies cannot escape liability for voter intimidation by cloaking your activities under the guise of a so-called “audit.” As the Department of Justice has previously explained, one can violate federal voting rights law even when it is purportedly part of an effort to investigate election crimes and fraud.¹⁰

Many of the tactics envisioned by the Statement of Work for the “Audit”—such as interrogating voters and generating reports on supposedly “unlawful” voters—are just the sort of conduct that have created federal voting rights liabilities for entities and individuals in the past.¹¹ Therefore, should you proceed with your current proposed Statement of Work or engage in any other conduct that intimidates Arizona voters, your companies may be named as defendants in federal civil rights lawsuits, thereby exposing you to money damages,¹² the payment of attorneys’ fees,¹³ and court injunctions. The same conduct also may expose your companies, officers, and employees to criminal penalties.¹⁴ And, in any event, contacting and interrogating voters about their registration and voting history months after an election bears no relation to an “audit” of ballots.

Further, under federal civil rights law, you not only have the obligation to not violate federal voter intimidation laws, but you *also* have an affirmative obligation under Section 6 of the Klan Act to take steps to prevent conspiracies to intimidate or injure voters in federal elections¹⁵

displays or applications of force” but also covers intimidation “achieved through manipulation and suggestion.” *United States v. Nguyen*, 673 F.3d 1259, 1265 (9th Cir. 2012).

⁸ See *LULAC-Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 18-423, 2018 WL 3848404, at *4-6 (E.D. Va. 2018) (holding that no showing of specific intent or racial animus is required under § 11(b) [i.e. 52 U.S.C. § 10307(b)]).

⁹ *National Coalition for Black Civil Participation v. Wohl*, 2020 WL 6305325 (S.D.N.Y., Oct. 28, 2020).

¹⁰ See U.S. Att’y for N.D. Ala., *District Elections Officers Available Nov. 8 to Receive Complaints of Election Fraud or Voting Rights Abuses* (Oct. 21, 2016), available at <https://www.justice.gov/usao-ndal/pr/district-elections-officers-available-nov-8-receive-complaints-election-fraud-or-voting> (observing that even “actions to uncover illegal voting . . . may violate federal voting rights law”).

¹¹ For example, the State of Texas recently was forced to settle multiple federal lawsuits after an erroneous audit wrongly flagged citizens as potentially unlawful voters. See Alexa Ura, *Texas will end its botched voter citizenship review and rescind its list of flagged voters*, Texas Tribune (Apr. 26, 2019), available at <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>. Similarly, the Pence-Kobach Commission’s prior attempt to pursue baseless allegations of unlawful voting disbanded after facing a barrage of lawsuits and without discovering any widespread voter fraud. See, e.g., John Wagner, *Trump abolishes controversial commission studying alleged voter fraud*, Wash. Post (Jan. 4, 2018), available at https://www.washingtonpost.com/politics/trump-abolishes-controversial-commission-studying-voter-fraud/2018/01/03/665b1878-f0e2-11e7-b3bf-ab90a706e175_story.html; Andrew Gumbel, *Documents disprove White House voter fraud claims, says ex-member of Trump Commission*, The Guardian (Aug. 3, 2018), available at <https://www.theguardian.com/us-news/2018/aug/03/documents-disprove-white-house-voter-claims-says-ex-member-of-trump-commission>.

¹² See, e.g., 42 U.S.C. § 1985(3); 52 U.S.C. § 10307(b).

¹³ See, e.g., 42 U.S.C. § 1988(b).

¹⁴ See 18 U.S.C. § 594 (making intentional voter intimidation a federal crime punishable by imprisonment); see also 52 U.S.C. § 20511(1) (imposing criminal penalties for anyone who knowingly and willfully intimidates or coerces prospective voters in registering to vote, or for voting, in any election for federal office).

¹⁵ See 42 U.S.C. § 1986.

regardless of whether your company is a participant in that conspiracy.¹⁶ As a result, should your company, its officers, or employees have any knowledge whatsoever that any participants in the Cyber Ninjas “Audit” or any funders thereof may be participating in bad faith in order to raise false accusations of unlawful voting or to frighten voters, you should immediately take steps to stop those efforts and also report any such activities to, among other entities, the Civil Rights Division of the United States Department of Justice. Failure to do so likewise may expose you to penalties under federal law.

Arizona law contains additional restrictions on voter intimidation, and exposes your companies to additional criminal and civil liability.

In addition to the restrictions imposed by federal law, the proposed tactics envisioned by the Cyber Ninjas “Audit” also may violate Arizona criminal and civil law.

Under Arizona law, it is a class 5 felony to knowingly engage in or attempt any activity with the intent *or* effect of threatening, harassing, intimidating, or coercing voters (or conspiring with others to do so) to influence a voter in casting their vote or to deter them from casting their vote.¹⁷ This includes influencing how they vote or hindering the free exercise of the right to vote in any way.¹⁸ The Arizona Election Procedures Manual lists “directly confronting or questioning voters in a harassing or intimidating manner” as an example of a prohibited intimidation tactic.¹⁹ To be sure, your companies’ plan to directly question voters about their past voting activities—particularly in the context of a so-called “Audit” of the election—reasonably could deter people from voting in the future for fear of reprisals or further harassment. As a result, such questioning and investigations—particularly after there have already been multiple post-election audits that have confirmed the election’s integrity—may violate Arizona law.

Additionally, it is unlawful in Arizona for any person to knowingly “in any manner . . . practice intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting for a particular person or measure at any election provided by law, or on account of such person having voted or refrained from voting at an election.”²⁰ The unfounded and unnecessary door-to-door questioning of voters and the implication that these voters have been engaged in unlawful election activity is clearly intimidating activity that is likely to dissuade eligible voters from engaging in the political process.

In addition to violating Arizona’s criminal laws, many of the tactics envisioned by the Cyber Ninjas “Audit” also risk exposing your company to civil liability under state law, including but not limited to various torts.

Demand to preserve records.

Litigation may be imminent should your companies continue to pursue the activities described in the Statement of Work as part of the Cyber Ninjas “Audit” or engage in any other

¹⁶ See, e.g., *Park v. City of Atlanta*, 120 F.3d 1157, 1160 (11th Cir. 1997) (“Though we agree with the district court that § 1986 requires a violation of § 1985, it does not follow that individuals liable under § 1986 must be involved in the § 1985 conspiracy.”).

¹⁷ Ariz. Sec. State 2019 Election Procedures Manual at 180; A.R.S. § 16-1006(A)(1).

¹⁸ A.R.S. § 16-1006(A)-(B).

¹⁹ Ariz. Sec. State 2019 Election Procedures Manual at 181.

²⁰ A.R.S. § 16-1013(A)(1).

conduct that intimidates voters. Therefore, you should be on notice of your obligation to preserve any and all records related to the Cyber Ninjas “Audit” or other records concerning audits of the 2020 presidential election, including but not limited to (i) records concerning negotiation, bidding, planning, and implementation of the Cyber Ninjas “Audit,” (ii) any and all communications related to the Cyber Ninjas “Audit” as well as any other efforts to challenge or verify the 2020 election results; (iii) any and all records—including communications—by your companies, officers or employees related to challenging or verifying 2020 election results; (iv) any and all communications with legislators and their staff concerning the “Audit”; and (v) any and all records—including but not limited to communications and social media posts—by your companies, their officers, and employees related to the accuracy of the 2020 election results. Failure to comply with this demand could expose you to sanctions for spoliation.²¹ In addition, failure to preserve records—as well as any alteration or improper disclosure—may also result in additional criminal liability.²²

Sincerely,

/s/ Sara Chimene-Weiss
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²¹ See e.g., *Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 267 (2010) (discussing availability of sanctions for spoliation).

²² Federal law requires retention of records related to elections for federal office for 22 months. 52 U.S.C. § 20701. Any official or custodian who steals, destroys, conceals, mutilates, or alters such records can be punished by up to one year in prison and \$1,000. 52 U.S.C. § 20702; see also *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1344 (N.D. Ga. 2016) (“Allowing disclosure of unredacted voter applications is inconsistent also with Congress’s concern for individual privacy evidenced in Federal statutes, including statutes such as [52 U.S.C. § 20701.]”).

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CC:

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Clint Hickman, Maricopa County Board of Supervisors
Jack Sellers, Maricopa County Board of Supervisors
Steve Chucri, Maricopa County Board of Supervisors
Bill Gates, Maricopa County Board of Supervisors
Steve Gallardo, Maricopa County Board of Supervisors

EXHIBIT “E”

Congress of the United States

House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION

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<https://cha.house.gov>

March 19, 2021

The Honorable Zoe Lofgren
Chairperson
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Dear Chairperson Lofgren:

At our most recent business meeting, you stated that the American people deserve a transparent, fair, and nonpartisan resolution of the nation's elections. We agree. In order for us to conduct a fair and nonpartisan process, we must hold ourselves to the highest standards of ethical conduct as we continue proceedings to consider the election contests before our Committee.

We write to bring to your attention to a serious conflict of interest regarding Marc Elias, an attorney with the law firm Perkins Coie. In the election contests currently before us, Mr. Elias simultaneously represents Members of the Committee, the triers of fact and law, and parties to these contests, an arrangement clearly prohibited by attorney ethics rules and obligations. *See* Notice of Contest Regarding Election for Representative in the One Hundred Seventeenth Congress from Iowa's Second Congressional District; Contestee's Motion to dismiss Contestant's Notice of Contest Regarding the Election for Representative in the 117th Congress from Illinois' fourteenth Congressional District. Marc Elias and his firm, Perkins Coie, represent you, Representative Pete Aguilar, and Representative Mary Gay Scanlon, one-half of the Democratic Members of the House Committee on House Administration, the Committee charged with hearing election contests. Further, Mr. Elias and Perkins Coie represent Rita Hart, the Contestant in the IA-02 election contest, and Rep. Lauren Underwood, the Contestee in the IL-14 election contest.

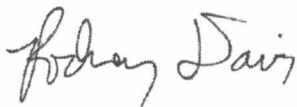
Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct clearly prohibit an attorney from engaging in representation that involves "a concurrent conflict of interest." Such a conflict exists here: You, Mr. Aguilar, and Ms. Scanlon serve as triers of fact and law on the tribunal charged with deciding election contests, and Mr. Elias represents you; Ms. Hart and Ms. Underwood are parties to election contests before the Committee, and Mr. Elias represents them. Your interests are quite clearly "directly adverse" to one another, and Mr. Elias' ability to offer advice to both sides certainly "will be materially limited by [his] responsibilities to another client[]", namely you, Mr. Aguilar, Ms. Scanlon, and the parties to the election contests before the Committee. Rule 1.7(a). We are gravely concerned that these serious conflicts of interest and ethical lapses on the part of counsel compromise the work of this Committee, and, more specifically, demonstrate further

that the Democratic Members of this Committee operate not in search of the truth but solely in search of partisan, political gain.¹

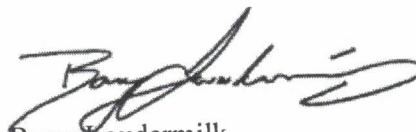
Further, we want to bring to your attention that the U.S. Court of Appeals for the Fifth Circuit sanctioned recently Mr. Elias and his colleagues from Perkins Coie for their failure to meet their duty of candor to that tribunal by filing “redundant and misleading” information. The Fifth Circuit’s conscience was so shocked by this conduct that it required Mr. Elias and his colleagues to cover their opponents’ fees and pay punitive damages. Order at 3, *Texas Alliance for Retired Americans v. Ruth Hughs*, 976 F.3d 564 (5th Cir. March 11, 2021) (No. 20-40643). Further, the Court “encouraged [but did] not require” Mr. Elias and his colleagues “to review Rule 3.3 of the Model Rules of Professional Conduct (Candor Toward the Tribunal) and complete one hour of Continuing Legal Education in the area of Ethics and Professionalism, specifically candor with the court.” *Id.* The Court made clear that this punishment was intended to “deter future violation[s]”, implying concern that such violations would continue but for these sanctions. *Id.* Madam Chair, as an attorney, we know you understand the severity of these sanctions and this ethical lapse by Mr. Elias and his colleagues. We question whether you can ensure a transparent, fair, and nonpartisan process when your attorneys have been proven not to speak with candor when representing clients before a tribunal.

We strongly urge you to take immediate, affirmative steps to ensure that this Committee follows a fair process for all parties involved in this election contest and guarantees to all parties involved that counsel will provide only true, accurate, and candid information to the tribunal considering this contest, this Committee.

Sincerely,



Rodney Davis
Ranking Member
Committee on House Administration



Barry Loudermilk
Member
Committee on House Administration



Bryan Steil
Member
Committee on House Administration

¹ Mr. Elias and Perkins Coie are attorneys of record for the DCCC, the Democratic National Committee, and the DSCC. Further, Mr. Elias and Perkins Coie represent a lengthy laundry list of Democratic Member of Congress, including Speaker Nancy Pelosi, Majority Leader Steny Hoyer, Majority Whip James Clyburn, DCCC Chair Sean Patrick Maloney, former DNC Chair Debbie Wasserman Schultz, Representative Rashida Tlaib, Representative Ayanna Pressley, and at least 78 others.

EXHIBIT “F”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

----- X
CLAUDIA TENNEY, :
 :
 Petitioner, :
 :
 -against- :
 :
 OSWEGO COUNTY BOARD OF :
 ELECTIONS, et al., :
 :
 Respondents. :
 :
 For an Order, etc. :
----- X

INDEX NO. EFC-2020-1376
(Justice DelConte)

MEMORANDUM IN SUPPORT OF
PROPOSED ORDER TO SHOW CAUSE
OF RESPONDENT ANTHONY BRINDISI

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Bruce V. Spiva (admitted *pro hac vice*)
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INTRODUCTION

The General Election for the public office of member of Congress, 22nd District of New York occurred on November 3, 2020. Since then, substantial errors and irregularities in the conduct of the election have come to light. As these proceedings have continued, that evidence has only mounted. In addition to failures to follow New York’s election law, particularly by Respondent the Oneida County Board of Elections (“Oneida County”), (*see generally* NY St Cts Elec Filing [NYSCEF] Doc No. 110; NYSCEF Doc No. 187), there has also been mounting evidence of significant irregularities in the tabulation of ballots. Because the candidates are currently divided by a vote count of a mere 122 ballots as of this morning, these errors and irregularities threaten to deny the voters the election of their candidate of choice. As a result, a hand audit is warranted under New York law and should be immediately ordered. Specifically, and in the language of the statute, there is substantial evidence which “indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally, or a discrepancy as defined in subdivision three of section 9-208 of this chapter, which creates a substantial possibility that the winner of the election as reflected in the voting machine or system tally could change if a voter verifiable record audit of additional voting machines or systems or of all voting machines or systems applicable to such election were conducted.” N.Y. Elec § 16-113(2).

Accordingly, Respondent and Cross-Petitioner Representative Anthony Brindisi respectfully moves this Court for an Order to Show Cause as to why: (1) a hand audit should not be ordered pursuant to Section 16-113(2) and Article 9 of the Election Laws and (2) this Court’s Friday January 29, 2021 Order vacating the injunction against the County Boards and the State Board of Elections from certifying results in the 22nd Congressional District and ordering Respondent County Boards of Elections to immediately certify such results should not also be

stayed pending the outcome of such a hand audit and the resolution of appeals from Orders of the Court. (*See* NYSCEF Doc No. 187).

BACKGROUND

That discrepancies between the number of votes cast and the number of votes tabulated have been pervasive in the counting of ballots for this race made itself undeniably evident on multiple occasions during the second and third canvasses in Oneida County. At each canvas, affidavit or absentee ballots were opened and first counted and tabulated at the counting tables. (Affidavit of Lucy MacIntosh (“MacIntosh Aff.”) ¶¶ 3-7). Oneida County then transported the ballots from the canvassing location back to the Oneida Board of Elections Office for machine tabulation. (MacIntosh Aff. ¶ 8). Most evenings, the results as manually counted at the canvassing tables were different than those tabulated on the Oneida County tabulation machines. (MacIntosh Aff. ¶ 9). For example:

- On December 21, 2020, the manual tabulation at the table resulted in 33 votes for Petitioner Claudia Tenney (“Tenney”), 49 votes for Cross-Petitioner Representative Anthony Brindisi (“Brindisi”), and 3 “undervotes,” but the machine tabulation resulted in 33 votes for Tenney, 47 votes for Brindisi, and 5 “undervotes.” (*See* MacIntosh Aff. ¶ 10; *also compare* Exhibits 1 & 2 (showing Oneida County machine tabulations for December 21) *with* Exhibits 3 & 4 (showing Oneida County hand tabulations for December 21)).
- On December 22, 2020, the manual tabulation at the table resulted in 92 votes for Tenney, 125 votes for Brindisi, and 11 “undervotes,” but the machine tabulation resulted in 91 votes for Tenney, 122 votes for Brindisi, and 15 “undervotes.” (*See* MacIntosh Aff. ¶ 11; *also compare* Exhibit 5 (showing Oneida County machine

tabulations for December 22) *with* Exhibits 7 through 9 (showing Oneida County hand tabulations for December 22).

- On December 28, 2020, the manual tabulation at the table resulted in 103 votes for Tenney, 50 votes for Brindisi, and 7 “undervotes,” but the machine tabulation resulted in 103 votes for Tenney, 49 votes for Brindisi, and 8 “undervotes.” (*See* MacIntosh Aff. ¶ 12; *also compare* Exhibit 11 (showing Oneida County machine tabulations for December 28) *with* Exhibits 12 & 13 (showing Oneida County hand tabulations for December 28)).
- On January 27, 2021, the manual tabulation at the table resulted in 133 votes for Tenney, 40 votes for Brindisi, and 8 “undervotes,” but the machine tabulation resulted in 133 votes for Tenney, 39 votes for Brindisi, and 9 “undervotes.” (MacIntosh Aff. ¶ 13).
- On January 28, 2021, the manual tabulation at the table resulted in 77 votes for Tenney, 72 votes for Brindisi, and 7 “undervotes,” but the machine tabulation resulted in 77 votes for Tenney, 71 votes for Brindisi, and 8 “undervotes.” (MacIntosh Aff. ¶ 14).¹
- In addition, on December 22, 23, 28, and 29, and again on January 27, 28, and 29 of Oneida’s second and third canvasses, a total of 52 ballots were tabulated by hand

¹ Notably, there can be no dispute between representatives for Tenney and Brindisi as to these discrepancies. Each day, a representative for Brindisi confirmed the hand tabulations at the tables with a representative for Tenney, and each day both representatives were in agreement as to the day’s total hand tabulations. (MacIntosh Aff. ¶ 15).

only because they were not readable by the machines at all, and these hand counted ballots were then added to the machine tabulated totals.²

All told, there was a discrepancy of nine changed votes during the second and third canvasses of Oneida's administratively rejected affidavit and absentee ballots alone. Oneida County counted 1,127 ballots during the course of its second and third recanvasses. The nine-vote change yields an error rate of 0.8%. There were 325,548 votes cast in total in the race for New York's 22nd Congressional District. Applying the same error rate to 325,548 ballots, there may have been as many as 2,599 votes that the machines did not read. Even if the problem was with Oneida County tabulation machines only, of the around 100,000 ballots cast in Oneida, there may have been 800 votes that the Oneida County machines failed to read alone. That figure far exceeds the margin between the two candidates in this race, and based on this small sample size at least, appears to disproportionately affect Brindisi.

Other counties also reported issues relating to their attempts to accurately tabulate total votes cast. Specifically, Respondent the Oswego County Board of Elections ("Oswego County") encountered "voting machine issues in Constantia Districts 1 and 3 and Williamstown," which required all ballots cast to be "hand counted and added to the machine totals in those election districts." (NYSCEF Doc No. 104 at ¶ 7). Oswego County further averred to this Court that it last tested its voting machines in May 2020, and before the June 2020 Primary Election, admitting that

² Specifically, on December 22, 2020, Tenney received 5 additional votes, Brindisi received 7 additional votes, and Keith Price ("Price") received 1 additional vote. (See Exhibit 5). On December 23, 2020, Tenney received 8 additional votes, Brindisi received 2 additional votes, Price received 1 additional vote, and there was 1 additional undervote. (See Exhibit 13). On December 28, 2020, Price received 1 additional vote. (See Exhibit 10). On December 29, 2020, Tenney received 1 additional vote. (See Exhibit 14). On January 27, 2021, Tenney received 3 additional votes. (See Exhibit 15). On January 28, 2021, Tenney received 4 additional votes and Brindisi received 11 additional votes. (See Exhibit 16). On January 29, 2021, Tenney received 4 additional votes and Brindisi received 4 additional votes. (See Exhibit 17).

it was in violation of N.Y. Comp. Codes R. & Regs. tit. 9, § 6210.2(e), which requires testing prior to each general election. This testing of election equipment before *each* election is extremely important, as it serves as the only check on each tabulation machine's accuracy by requiring that each tabulation machine satisfy state-mandated accuracy standards to be used.

In addition to the table-to-machine count discrepancies of which the parties are aware, there have also been procedural inconsistencies that question the integrity of the process, as conducted by the counties. For example, on November 24, 2020, Respondent the Herkimer County Board of Elections ("Herkimer County") provided its "final numbers (all ballots)" for the vote count in the 22nd Congressional District race. (NYSCEF Doc No. 67). However, five days later, on November 29, 2020, Brindisi learned through a talk radio host that Herkimer County's vote totals had changed *since* that "final" tally, because of "incorrect numbers being transcribed in a few Election Districts." *Id.* Only after hours of attempts by Brindisi and his counsel to contact Herkimer County for further information regarding same did counsel for Herkimer County advise that the "correction" result in "an additional 10 votes for Brindisi and an additional 35 votes for Tenney." *Id.* It is still unclear why a talk radio host was advised of these developments before this Court and the candidates, and there has never been sufficient explanation provided by Herkimer County as to why this was discovered during a holiday weekend and days after the County had provided purported final tabulations to this Court. (*see also* NYSCEF Doc No. 76 & 78).

Herkimer County's announcement of its error then prompted a flurry of further changes in purported "final" tabulations from two other additional counties: Respondents the Madison County Board of Elections ("Madison County") and Oswego County. (*see* NYSCEF Doc No. 80; *see also* Exhibit 18 (Madison County Commissioner explaining to Brindisi's Campaign Manager on November 25, 2020, that, "Yesterday we were finally able to work through some discrepancies.

Once we get all the ballot counts in, we figure out the blanks & voids to get the totals to match the voter totals. In that process we noticed 2 districts had too many blanks on the presidential line to make sense. The error was in the absentee count. So we went back through the absentees & recounted those districts.”); NYSCEF Doc No. 72 (Oswego County)).

Around that same time, Respondent the Chenango County Board of Elections (“Chenango County”) reported for the first time that it somehow “found 55 early voting ballots that were not previously canvassed,” which were “apparently mislaid” and therefore “never counted.” (*see* NYSCEF Doc No. 82). Accordingly, the purported final tabulations as provided by Chenango County to this Court on November 24, 2020 were also incorrect.

As mounting errors by the Respondent County Boards of Elections increasingly came to light as a result of proceedings in this matter, Brindisi, by and through counsel, requested and obtained audit reports from the Boards. The audit reports provided by Oneida County explicitly noted that the audit results revealed “unexplained discrepancies” but failed to provide any explanation, in the report or otherwise, what caused those discrepancies or if they were ever resolved. *See* Exhibit 19.

ARGUMENT

A. Brindisi is Entitled to A Manual Audit Under Section 16-113 and Article 9 of the Election Laws.

Under New York law, a court may order a manual audit of an election upon consideration of evidence that “indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally” to an extent that “creates a substantial possibility” that the outcome of the election would change as a result of the audit. Elec. Law § 16-113(2). For decades, this State’s courts have reviewed requests for manual audits liberally, affording candidates opportunities to present evidence supporting the petition, particularly in close

contests. (*See Slisz v. Beyer*, 937 N.Y.S.2d 800, 802 (2012) (reversing dismissal of audit where petitioner had not been given opportunity to present evidence of discrepancies in race with a one-vote margin)).

The right to request a manual audit under Section 16-113 (as Brindisi does here) is not the same as right to request a full hand recount of all ballots. And the proper scope of a manual audit necessarily varies under the circumstances.³ However, “[i]f the audit officials are unable to reconcile the manual count with the electronic vote tabulation on a voting machine or system, then the Board of Elections *shall* conduct such further investigation of the discrepancies as may be necessary for the purpose of determining whether or not to certify the election results, expand the audit, or prohibit that voting machine or system’s use in such jurisdiction.” N.Y. Comp. Codes R. & Regs., tit. 9, § 6210.18(i) (emphasis added). Here, the pervasiveness of issues, not only with the tabulation and counting of ballots, but also with the conduct of the election more generally, necessitates the type of full and further investigation and reconciliation of discrepancies authorized by N.Y. Comp. Codes R. & Regs., tit. 9, § 6210.18, before county results are certified.

The margin in this case has been a moving target for nearly three months, but even now, with the margin as large as it has ever been, it is still infinitesimally small. Over 325,000 ballots

³ As N.Y. Comp. Codes R. & Regs., tit. 9, § 6210.18(h) makes clear, the scope of a manual audit properly depends on factors such as: “(1) whether the discrepancies were exclusively or predominantly found on one type of voting machine or system; (2) the size of the discrepancies; (3) the number of discrepancies; (4) the percentage of machines or systems with discrepancies; (5) the number and distribution of unusable voter-verified paper audit trail records as described in subdivision (j) of this section; (6) the number of cancellations recorded on the voter-verified paper audit trail records reported pursuant to paragraph (c)(1) of this section; and (7) whether, when projected to a full audit, the discrepancies detected (no matter how small) might alter the outcome of the contest, question or proposal result,” Boards “retain the authority to order manual counts of those records in whole or in part under such other and additional circumstances as they deem warranted.”

were cast and counted in this race, and with a current margin of around 122 votes (a number that is subject to change yet again today, as the final canvassing of ballots ordered cast and canvassed by this Court's January 29th Order proceeds in the courtroom), the vote margin between the leading candidates is less than 0.04%. Notably, if this election were to have taken place this year, this vote differential would put this race well within the automatic recount margin set forth in the newly enacted Election Law § 9-208(4) (2020), which will act to trigger a *full* recount whenever the results of an election are within a 0.5% margin. In fact, under Section 9-208(4), a full recount would have been triggered in this race if the candidates were separated by as many as 1,625 votes (out of over 350,000 cast), obviously a much more significant margin than the 122 that presently separates the candidates here.

Brindisi acknowledges that Section 9-208(4) did not yet apply to this election, but the fact that the vote differential would have put this race so comfortably within the margin to trigger a full recount reflects proper legislative concerns that when elections are this close, a winner should not be declared when the count is still in any question. In fact, Section § 9-208(4) imposes a new legislative presumption that, even when there is *no* evidence of errors or irregularities, a margin of 0.5% or less will be reason *alone* to trigger a recount. But just because Section § 9-208(4) was not yet in force, that does not mean that the Court should proceed to certification under the circumstances. To the contrary, and under the law as applicable to the election at issue, where, as here, there is substantial evidence of deeply concerning errors and irregularities, any number of which "creates a substantial possibility" that the outcome of the election could change as a result of a hand audit, the Court has the power and obligation to order a hand audit under the mechanism set forth in Section § 16-113(2).

In this case, there is reason to believe that voting tabulation machines misread *hundreds* if not *thousands* of valid votes as undervotes, (*supra* at 4), and that these tabulation machine errors disproportionately affected Brindisi, (*id.*). In addition, Oswego County admitted in a sworn statement to this Court that its tabulation machines were not tested and calibrated in the days leading up to the November 3, 2020 General Election as required by state law and necessary to ensure that the counts generated by tabulation machines are accurate. (*See supra* at 5; NYSCEF Doc No. 104).

The evidence induced in the many hearings held before this Court further establishes that the Boards of Elections—particularly Oneida County—have failed to comply with mandates of the New York State Election Law in administering the election for this congressional district. There have been an alarming number of errors discovered in the canvassing of ballots and recording of registrants. (*see generally* NYSCEF Doc No. 110; NYSCEF Doc No. 187). The totality of these errors corrupts the ability for the Respondent County Boards to certify this election absent a robust manual audit up to and including “manual counts” of all records as authorized by N.Y. Comp. Codes R. & Regs., tit. 9, § 6210.18. These material discrepancies cannot be resolved unless this Court stays any certification of the election based on the count conducted to date and orders a manual audit. This is what is properly contemplated by Section § 16-113(2), and the Court should not hesitate to promptly exercise its power to ensure that the will of the voters is correctly reflected in the final results of the election, once these myriad errors and irregularities are corrected.

B. The Court Should Stay its Order Directing the Certification of Uncertain Results Pending the Outcome of a Hand Audit and the Resolution Appeals from its Order.

Given the above evidence of material discrepancies in vote tallies that potentially affect hundreds of ballots, and the hundreds of ballots preserved for this Court’s review and review by

appellate courts, the portion of the Court's order directing County Boards to certify election results should be stayed until a hand audit can be conducted and appeals resolved. (*See* NYSCEF Doc No. 187 at 17). A stay of certification is particularly appropriate given that Section 16-113 and Article 9 of the Election Law contemplate that a manual audit will ordinarily take place after the apparent results are known (i.e., after the votes are tallied on a machine) but prior to certification of an election: the statute directs the court to examine whether the "winner of the election *as reflected in the voting machine or system tally* could change" as a result of the audit. N.Y. Elec. Law § 16-113 (emphasis added). Indeed, it would make little sense to permit a county to certify election results while simultaneously manually auditing those results precisely because anomalies call into question the accuracy of the results. Furthermore, allowing the counties to certify the apparent results in light of these abundant discrepancies without first conducting a robust and thorough manual audit, particularly as the discrepancies appear to disproportionately affect and undercount votes for Brindisi (*see supra* at 4), would be extremely prejudicial to Brindisi.

Staying the Court's order directing the counties to certify results is also independently justified by the pendency of appeals, whose resolution could also alter the outcome of the election. Indeed, the Court was thrust into the difficult position of resolving questions of statutory interpretation of first impression, as well as applying statutes and judicial precedents to unique and unprecedented circumstances in a pandemic election. The parties' appeals from these questions are far from meritless, and there exists at least a fair possibility that appellate courts could reach a different resolution on the Court's orders affecting hundreds of ballots. (*See, e.g.*, NYSCEF Doc No. 187 at 11 (noting "harsh result" of application of statutory provisions to novel factual situation); *id.* at 6 (noting absence of judicial interpretation of legislative amendments to statutory provisions); *Navy Yard Hous. Dev. Fund, Inc. v Carr*, 2002 NY Slip Op 50203(U) [Civ Ct May

23, 2002] (considering presumptive merits of appeal in application for stay and rejecting stay application on grounds that moving party failed to support purportedly meritorious defense with affirmative facts)). When an appellate court's resolution of appeals could alter the outcome of the election, certification prior to the resolution of those appeals distorts public perception of the election's outcome and risks undermining public confidence in the process.

Dated: February 1, 2020

/s/ Henry J. Brewster

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