**IN THE SUPREME COURT**
**STATE OF ARIZONA**

JEANNE KENTCH; TED BOYD; ABRAHAM HAMADEH; and REPUBLICAN NATIONAL COMMITTEE,

Petitioners/Plaintiffs/Contestant,

v.

HON. LEE F. JANTZEN, Judge of the Superior Court of the State of Arizona, in and for the County of Mohave,

Respondent,

and

KRIS MAYES, an individual,

Real Party in Interest/ Contestee,

and

ADRIAN FONTES, in his official capacity as the Secretary of State, *et al.*,

Nominal Defendants.

Supreme Court No. CV-23-0205-SA

Court of Appeals
Division One
1 CA-CV 23-0472

Mohave County
Superior Court
No. S8015CV202201468

# RESPONSE TO PETITION FOR SPECIAL ACTION

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August 11, 2023

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## Introduction

"Special actions are appropriate only in limited circumstances, and those circumstances are not present here." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 426 ¶ 120 (2020) (Bolick, J., dissenting).

This case has been pending in Mohave County superior court since December 9, 2022, when Jeanne Kentch, Ted Boyd, Abraham Hamadeh, and the Republican National Committee ("Petitioners") filed their election contest. The superior court has not entered final judgment—largely because of Petitioners' own litigation strategy.

Trial in this election contest ended on December 23, 2022, 232 days ago. Not only did Petitioners acknowledge at the trial that they did not have enough evidence to sustain their challenge, but also, they took no steps to expedite review of various rulings about which they now complain. Instead, they asked the court to incorporate its rulings in an order that they conceded was "not a final order," and then later filed a motion for a new trial, which they did not ask to expedite.

When the superior court finally denied their motion, the Petitioners did not ask the Court to enter final judgment. They still have not asked

for judgment. Instead, they filed an admittedly early notice of appeal. And now, they've asked this Court for sprawling relief.

This Court has ordered the parties to address only three threshold issues bearing on this Court's jurisdiction. Examination of each counsels heavily against the Court accepting jurisdiction in this case.

*First*, special action jurisdiction should be denied under Rule 8(a) of the Rules of Procedure for Special Actions because Petitioners do not even try to explain why they lack an equally plain, speedy, and adequate remedy by appeal. Their silence is no surprise. All the relief they request here—other than an order directing entry of a judgment—would be available to request by appeal.

*Second*, Rule 3 does not authorize consideration of central points raised in the Petition. On some of these points, Petitioners do not even try to allege an abuse of discretion or cite any duty that the trial court ignored. And on other points, Petitioners make up argument out of whole cloth—such as their supposed "repeated" attempts to get the court to enter judgment, something they have not requested to this day.

*Third*, Petitioners fail to provide any reason for filing first in this Court, as opposed to the court of appeals, as Rule 7(b) requires.

Petitioners cite none of the "extremely unusual circumstances" that could justify leapfrogging over the court of appeals. *Kelley v. Ariz. Dep't of Corr.*, 154 Ariz. 476, 476 (1987). They certainly cannot claim the need for emergency appellate review given their own strategic choice to delay a final judgment.

Kris Mayes requests that this Court decline to exercise its discretion to accept jurisdiction in this case and permit this case to proceed through the appellate process.

**Statement of the Issues**

As ordered by this Court in its August 4, 2023 Order Directing Service, and Fixing Time for Response and Reply, this Response addresses three issues:

1. "[W]hether there is an equally plain, speedy and adequate remedy by appeal[.]"
2. "[W]hether the petition meets the criteria of Rule 3, Ariz. R.P. Spec. Act[.]"
3. "[W]hether the petition meets the criteria of Rule 7(b), Ariz. R.P. Spec. Act."

## Statement of Material Facts

The following facts are relevant to the limited question of whether this Court should accept jurisdiction over the Petition.

### *Pretrial proceedings*

**Ballot and other discovery requests.** Petitioners filed this election contest on December 9, 2022. After the contest was filed, the superior court permitted "a limited inspection of ballots" pursuant to A.R.S. § 16-677, which allows for inspection of ballots in certain circumstances. [APPV2-038, 043–45] The trial court, however, denied Petitioners' requests to compel Maricopa County to provide (1) a "list of all voters who [sic] [p]rovisional [b]allot was rejected along with the reason for the rejection of the provisional ballot" and (2) an electronic copy of the Cast Vote Record "CVR." [APPV1-058–61]

On December 22, 2022, Petitioners' designated ballot inspectors reviewed thousands of ballots located in three counties.

**Court rejects Petitioners' "suggestion" trial be moved.** The superior court set the trial for December 23. On December 22, during a hearing to address discovery issues, counsel for Petitioners made the "suggest[ion]" orally that if the court was inclined to give the Petitioners

"the relief [they] asked [for]," that the court "push the hearing to Tuesday," December 27. [Appx009:14–16] The only record of any decision on this point is contained in a portion of the hearing transcript the Petitioners did not provide. The court rejected this suggestion and said that the "hearing should go on" as planned for the next day, even though the judge observed he could "technically possibly push it back." [Appx050:15–51:2]

### *Trial*

Trial took place on Friday, December 23, 2022. [*See* Appx058–176] In total, the evidence offered by Petitioners in support of their election contest was (1) the brief testimony of their chosen ballot inspector for Maricopa County, [Appx083:14–94:9], and (2) six ballots that their inspector argued should have been cast for Mr. Hamadeh, [*see, e.g.*, *id.* at 148:5–10].[1] At the end of the trial, counsel for Petitioners conceded in closing that the evidence "won't actually be enough to sustain this

[1] This testimony was controverted. For example, Maricopa County's Elections Director Scott Jarrett testified that adherence to the Secretary of State's formal voter intent guidelines would have resulted in a three-vote swing in *favor* of Ms. Mayes. [Appx117:9–118:2]

particular contest." [*Id.* at 169:6–13] The court denied the election contest on the merits from the bench. [*Id.* at 174]

***Delay of final judgment***

**Petitioners want written order "eventually."** At the conclusion of trial, the trial court asked whether Petitioners needed a "written order." [*Id.*] Counsel for Petitioners responded: "I don't think we need a written order. And I mean, eventually. But I think basically you'll do a written order. But I don't think you need to work on Monday[,]" December 26, a holiday, "to do that . . . ." [*Id* at 174:22–175:2]

**Petitioners expressly ask for a non-final order.** Then, on December 28, Petitioners filed "Motion for an Order Reflecting Additional Rulings of the Court." [APPV1-079–82] In the motion and proposed order, Petitioners asked among other things, for the trial court to enter certain orders they claimed reflected the court's decisions. [APPV1-89] And foreshadowing their motion for a new trial, Petitioners expressly noted that their proposed order "is not a final order and does not inhibit the ability of any other party to make further motions to this Court." [APPV1-081; *see also* APPV1-89 (proposed order not including final judgment language and reciting that "this Court may make additional orders")]

Ms. Mayes opposed the motion on the grounds that, among other things, the proposed order was unnecessary and did not accurately reflect the trial court record, and noted that the court was required to enter "judgment" pursuant to A.R.S. § 16-676(B). [APPV1-93–94]

Petitioners' motion is still pending in the superior court.

***Motions for sanctions and to compensate ballot inspectors***

On January 3, 2023, Ms. Mayes asked for sanctions based on Petitioners' filing and taking their election contest to trial without *any* evidence to support their claims. [Appx177–98] The Secretary of State joined in that request. Separately, Ms. Mayes and certain of the county defendants have also moved to compensate ballot inspectors, pursuant to A.R.S. § 16-677(C).

The sanctions motions and motions to compensate inspectors remain pending before the superior court.

***Motion for a new trial***

**New trial motion practice.** Kris Mayes was sworn in as Attorney General on January 3, 2023. The very next day, Petitioners filed a motion for a new trial. [APPV1-101–19] Petitioners did not move to expedite the motion.

Defendants opposed the motion for new trial. For her part, now Attorney General Mayes argued multiple independent grounds for denying the motion, including that (1) the motion failed on the merits, (2) motions for new trials are not permitted under the election contest statutes, which require courts to promptly enter judgment, and (3) the motion must be denied based on both laches and mootness. [*See* Appx199–234]

Petitioners filed their reply on February 6, raising various new and old arguments. [APPV2-03–29]

**Oral argument and decision.** Petitioners' motion sat, with no action by Petitioners, until April 11, when the trial court ordered oral argument for May 16, 2023. [APPV2-056]

The trial court issued an order denying the motion for a new trial on July 14, 2023. [APPV2-61] In denying the motion, the court explained that it would issue a "full written minute entry discussing this ruling and addressing the other pleadings that have been filed in this case" by July 17. [*Id.*]

The court later issued an order explaining its ruling on the motion for the new trial. [APPV2-065–69] The court held that "a new trial with

extended discovery is not available under the road map laid out by the Legislature." [APPV2-067] And it held in the alternative that, even if such procedures were allowed, Petitioners had not met their burden of showing they were entitled to a new trial. [*Id.*]

The court's order did not address the other pending motions, including the requests for sanctions filed by Ms. Mayes and the Arizona Secretary of State.

***Status of superior court case***

Following the superior court's denial of the motion for new trial, Petitioners did not submit a proposed form of judgment to the court or otherwise move for entry of judgment.

Instead, they chose to file a notice of appeal on July 18 that recognized that other motions are pending and that the order did not "contain[] final judgment language." [Appx239][2]

Separately, on August 4, 2023, Ms. Mayes and the Secretary filed a notice in the superior court listing the few remaining motions and asking for rulings before the court enters final judgment. [Appx249–57]

[2] The Secretary and Ms. Mayes have moved to dismiss the appeal as premature. [Appx245–48]

### *Petitioners' Special Action*

On August 3, 2023, Petitioners filed this Petition. As a result, Petitioners are presently pursuing actions in the superior court, court of appeals, and this Court.

The Petition raises numerous substantive issues, and sub-issues, many of which are difficult to parse. But it appears to raise the following challenges, which can be broadly grouped into six categories:

(1) **Failure to issue judgment.** The Petition challenges the superior court's failure to enter final judgment pursuant to Arizona Rule of Civil Procedure 54(c). *See* Petition at 5.

(2) **Pre-trial "discovery" orders.** The Petition argues (at 21–24) that the superior court abused its discretion by failing to compel certain "discovery" prior to trial.

(3) **Refusal to "continue" trial.** The Petition argues (at 21) that the superior court abused its discretion by failing to continue the trial.

(4) **Denial of new trial.** The Petition challenges the superior court's denial of Petitioners' new trial motion. *See* Petition at 5, 27–33.

(5) **Unconstitutional participation of defendants.** The Petition argues (at 24–26) that the participation of the Secretary of State

and Maricopa County as Defendants in the election contest violated the Arizona Constitution.

(6) **Request for "uniform procedures."** Finally, the Petition requests (at 33–35) this Court make general declarations, without reference to the facts of this case, about "uniform procedures for election contests," including about the nature of the contest statutes, the Supreme Court's rulemaking authority, the role of election officials in election contests, and procedures for ballot inspections under A.R.S. § 16-677.[3]

**Argument and Jurisdictional Statement**

"The special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made." Ariz. R. P. Spec. Act. 3, state bar committee note. It is Petitioners' "burden of persuasion" to demonstrate that this Court should exercise jurisdiction. *Id.* They have not carried this burden.

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[3] While unclear, the Petition also seems to make several other arguments that Petitioners have not developed enough for Ms. Mayes to decipher or sufficiently engage in, including (at 7) that the contest provisions are unconstitutional and (at 5) that the trial court cannot now issue final judgment, as that would be "in excess of legal authority."

## I. There is an equally plain, speedy, and adequate remedy by appeal.

As noted in this Court's August 4 Order (at 2), the third issue the parties must address is "whether there is an equally plain, speedy and adequate remedy by appeal, *see* Rule 8(a), Ariz. R.P. Spec. Act." Petitioners omit any such analysis of this rule from their Petition, and, as to all but their request for a judgment that does not comply with Rule 54(c),[4] an appeal would provide them with the precise relief they seek. On this ground alone, the Court should decline to accept jurisdiction.

As the Rules of Procedure for Special Actions confirm, "nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition." Ariz. R. P. Spec. Act. 1(a). Based on that jurisdictional scope, "[e]xcept as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal." *Id.*; *see also* Ariz. R. P. Spec. Act. 8(a) (similar).

These rules "reflect[]" the "strong Arizona policy against using extraordinary writs as substitutes for appeals." *State ex rel. Neely v.*

[4] Petitioners' request for entry of judgment is not appropriate for special actions for the reasons set forth below.

*Rodriguez*, 165 Ariz. 74, 76 (1990) (citing Ariz. R. P. Spec. Act. 1(a)). For this reason, Arizona courts have "declin[ed] to accept jurisdiction of [an] argument" when a party "has an adequate remedy by appeal," particularly when that argument, even if correct, "would not terminate the litigation." *Tucson Unified Sch. Dist. v. Borek ex rel. Cnty. of Pima*, 234 Ariz. 364, 367 ¶ 6 (App. 2014).

Here, an appeal provides Petitioners with an equally plain, speedy, and adequate remedy.

As an initial matter, Petitioners fail to attempt to meet their burden for establishing this jurisdictional prerequisite. *See Graham v. Ridge*, 107 Ariz. 387, 388 (1971) ("Part of the petitioner's burden of persuasion is to show that no other remedy is adequate."). Petitioners fail to make any argument as to this point, instead only summarily advocating for jurisdiction in one sentence at the end of their jurisdiction statement (at 5): "Under the unique posture of this case and the significant issues raised, this Court should accept special action jurisdiction." Petitioners do not explain why an appeal does not provide an equally plain, speedy, and adequate remedy. This failure, alone, warrants declining jurisdiction.

Even excusing this failure, nothing in the Petition establishes that an appeal would be insufficient.

An appeal would be similarly speedy if Petitioners would only undertake the basic steps to advance their appeal. Petitioners could have appealed the denial of their Motion for a New Trial. *See* A.R.S. § 12-2101(A)(5)(a). Petitioners have not done so.[5] To the extent Petitioners want to appeal the entire case, they could simply ask the superior court to issue its final judgment and then notice their appeal. *See* Ariz. R. Civ. P. 54(h) (proposed forms of judgment). Again, they have never done so. And to the extent Petitioners now supposedly need speedy relief, they could move to expedite their appeal. *See, e.g.*, Ariz. R. Civ. App. P. ("ARCAP") 29.

Petitioners should not be rewarded for their deliberate failure to take the requisite actions for advancing their appeal. *See Neary v. Frantz*, 141 Ariz. 171, 177 (App. 1984) ("A remedy does not become inadequate

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[5] Instead, in noticing their appeal, they have appealed the entire case, including four specific rulings and "all other rulings and orders in this matter." [Appx238–39] But by doing so, and as Petitioners concede in their Petition, their "notice of appeal filed in the absence of a final judgment is premature . . . [and the appellate court] lack[s] jurisdiction to hear the action[.]" [Petition at 3 (alterations in original) (quoting *Ghadimi v. Soraya*, 230 Ariz. 621, 622 ¶ 8 (App. 2012))]

merely because more time would transpire by pursuing a conventional action.").

Additionally, Petitioners have an "adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a). As noted above, Petitioners can appeal the denial of their Motion for a New Trial. *See* A.R.S. § 12-2101(A)(5)(a). They can appeal this case once the superior court rules on the remaining fees and other motions and enters a signed judgment. *See* A.R.S. § 12-2101(A)(1). And they even can attempt to have the appellate court review their forfeited arguments that they did not raise before the superior court. Petitioners fail to identify any relief they request here—apart from an order directing entry of judgment—that would be unavailable through a traditional appeal.

As compared to a special action, in fact, an appeal provides not merely an "equally . . . adequate remedy," Ariz. R. P. Spec. Act. 1(a), but a better one. Petitioners have essentially trifurcated this case into three separate, simultaneous actions before all three levels of Arizona's courts: a special action before this Court, an appeal before the court of appeals, and the existing case before the superior court, which is still considering Petitioners' (and Defendants') motions. Having Petitioners proceed

through the regular—and preferable—appellate process would eliminate the jurisdictional and prudential morass that Petitioners have manufactured. *See Summerfield v. Super. Ct. In & For Maricopa Cnty.*, 144 Ariz. 467, 469 (1985) (accepting jurisdiction where—unlike here—"[n]ormal appellate procedures will result in unnecessary cost and delay to all litigants").

In short, in this case "there is an adequate remedy by way of appeal and, therefore," special-action review would be "improper[]." *Graham*, 107 Ariz. at 388.

## II. Central points of the Petition do not meet the criteria of Rule 3 of the Rules of Procedure for Special Actions.

Rule 3 of the Rules of Procedure for Special Actions circumscribes the questions that may be considered on special action. The Petition exceeds those boundaries in several respects.

Rule 3 confirms that the "only questions that may be raised in a special action" are those identified in the rule. Those questions are:

> (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
> (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or

(c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Ariz. R. P. Spec. Act. 3.

To invoke the Court's jurisdiction, the Petition first must provide a clear statement, or allegation of the basis for jurisdiction. *Arizonans for Second Chances*, 249 Ariz. at 404 ¶ 17. And the Petition must actually present one of the limited questions the Court is authorized to consider. *Id.* Otherwise, jurisdiction is lacking. *See Neely*, 165 Ariz. at 76 ("The subject matter jurisdiction of courts to issue the traditional writs is conferred by constitution and by statute; the procedural rules [for special actions] afforded no expansion of that subject matter jurisdiction.").

*First*, as to at least one category of challenges, or requests, the Petition neither alleges nor presents a question that may be raised in a special action under Rule 3. Petitioners (at 33–35) "invite this Court" to make various legal holdings to ensure "uniform procedures" in election contests, without reference to the facts of this case. As to this request, raised for the very first time here, Petitioners nowhere allege a ground for jurisdiction of Rule 3. And one does not exist. Petitioners do not allege that the superior court failed to exercise discretion, perform a duty, or is threatening to proceed in excess of jurisdiction. Ariz. R. P. Spec. Act. 3(a),

(b). Nor do they challenge any "determination" made by the court. *Id.* at 3(c).

*Second*, the Petitioners' argument (at 24–26) that the active participation of the Secretary of State and Maricopa County Defendants—whom they chose to sue—in the contest violated the Arizona Constitution (Category 5) does not present a question specified in Rule 3. Petitioners claim (at 27) that this question is one of whether the "trial court abused its discretion and/or was arbitrary and capricious in its application of court rules and procedures." How so? Petitioners never raised this issue before the superior court. And they point to no "determination" by the superior court, let alone one that was arbitrary or an abuse of discretion. Ariz. R. P. Spec. Act. 3(c). And so, it makes sense that they do not attach such a determination to the Petition, as required by the rules. *See id.* at 7(e) ("A copy of the decision from which the petition is being taken shall be attached to the petition.").

*Next*, Petitioners argue (at 5, 18) that the superior court "fail[ed] to perform a duty required by law when it failed to issue a final judgment" in the contest and on the motion for the new trial, "as prescribed by Arizona Rule of Procedure 54(c)." They allege that this presents a

question under Rule 3(a), which asks, among other things, "[w]hether the defendant has failed . . . to perform a duty required by law as to which he has no discretion."[6] *Id.* But Petitioners fail to allege a rule requiring the Court to enter final judgment besides Rule 54, which simply prescribes the rules for judgments.[7]

Even putting this aside, Petitioners misrepresent the "failing" of the superior court they now claim. Petitioners' representation (at 19) that they have "repeated[ly]" attempted to get the superior court to enter judgment is false. Petitioners have never asked the superior court to enter a final judgment with the requisite finality language at any stage of this case. Not once. Nor have they lodged any proposed judgments with the superior court.

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[6] In arguing for relief (at 18), however, the Petitioners also argue that the trial court "abused its discretion," presumably relying on Rule 3(c). Rule 3(c) is only about "determination[s]" of the trial court. As to this issue, however, Petitioners do not claim any "determination" was made. They expressly claim no determination was made when it should have been.

[7] Petitioners also cite to the constitutional requirement that decisions shall be issued within sixty days. Ariz. Const. art. VI, § 21. But they do not seem to seek relief based on this rule. The superior court has decided both the new trial motion and contest—the rulings on which the Petitioners seek final judgment (at 18).

Petitioners make the startling assertion (at 18) that they "raised this deficiency [the lack of final judgment after the contest] in their Motion for an Order Reflecting Additional Rulings of the Court." They did the opposite. Petitioners' motion recited that their proposed order "is not a final order and does not inhibit the ability of any other party to make further motions to this Court." [APPV1-81] Petitioners wanted to leave the door open for their motion for a new trial.

Ms. Mayes, however, objected to this gambit and asked the superior court to enter judgment after resolving the fees motions, as required by A.R.S. § 16-676(B). [APPV1-092–100; *see also* A.R.S. § 16-676(B) ("After hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment . . . confirming . . . the election.")] But, at the urging of Petitioners, the court instead entertained many months of argument and briefing on the motion for new trial.

At present, motions filed by multiple parties are still pending before the superior court. Petitioners still have not asked the superior court for final judgment. And the superior court has not expressly refused to enter judgment; it has not yet ruled on all pending motions. [*See* Appx249–57

(noticing pending resolutions and requesting again final judgment)] As a result, this case is distinguishable from the case cited by Petitioners (at 19), in which there is a "refusal to enter an appealable order." *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 53 ¶ 20 (1999).

If Petitioners want a final appealable judgment as to all or part of the case, they should first ask the superior court for one before being entitled to the extraordinary remedy of special action in this Court.

*Finally*, the Petition identifies various "determinations" by the superior court before and after trial that Petitioners argue were an abuse of discretion. To start, Petitioners point to determinations not to compel certain information (at 21–24) prior to trial. The trial court made these decisions *more than eight months ago*. Petitioners also point (at 21) to the trial court's "den[ial] [of] Petitioners' motion to continue the trial," which they argue was made based on counsel's suggestion to the court and occurred orally. Even to the extent this was a motion (it was not), it was also made nearly eight months ago. And, finally, they challenge the denial of Petitioners' fact-intensive new trial motion (at 27–33).[8]

[8] Not surprisingly, none of these "determinations" are attached to the Petition. *See* Ariz. R. P. Spec. Act. 7(e) ("A copy of the decision from which the petition is being taken shall be attached to the petition.").

The Petition's question of whether certain "determinations" are an "abuse of discretion" on their face mirrors the plain text of Rule 3(c). Even assuming these are appropriate questions under Rule 3(c), because there is an adequate remedy by appeal, and for the additional reasons set forth below, acceptance of jurisdiction on these questions is not appropriate in this case. *See Arizonans for Second Chances*, 249 Ariz. at 427 ¶ 122 (Bolick, J., dissenting) ("If the plaintiff fails to establish one of the grounds for special action, review should be denied.").

## III. The Petition does not meet the criteria of Rule 7(b).

Finally, Petitioners fail to provide any reason for filing first in this Court, as opposed to the court of appeals, as Rule 7(b) requires. And this case does not present one of the "extremely unusual circumstances" that justify skipping over the court of appeals. *Kelley*, 154 Ariz. at 476.

Rule 7(b) provides that when "a special action is brought in any appellate court," including this Court, "and if such an action might lawfully have been initiated in a lower court in the first instance, the petition shall also set forth the circumstances which in the opinion of the petitioner render it proper that the petition should be brought in the particular appellate court to which it is presented." Ariz. R. P. Spec. Act.

7(b). "If the appellate court finds such circumstances insufficient, the court will on that ground dismiss the petition." *Id.*

Nowhere in Petitioners' jurisdictional statement do they address Rule 7(b), except to cite it at the end of a lengthy "see also" cite (at 4). At best, Petitioners cite Rule 7 in their introduction (at 3) when summarily arguing that the trial court's "unexplainable and unnecessary delays on an issue of extreme statewide importance justify Petitioners' request to seek extraordinary relief from this Court directly via special action." Petitioners do not even attempt to explain why they filed in this Court. Petitioners' failure to plainly "set forth the circumstances" for filing in this Court in the first instance alone militates against accepting jurisdiction. *See* Ariz. R. P. Spec. Act. 3, State Bar committee note (noting that petitioner bears the "burden of persuasion" to establish "discretionary factors" in grating jurisdiction).

In any event, there is not a sufficient basis for this Court to hear—in the first instance—Petitioners' numerous substantive arguments.

Most notably, each of the issues raised in the Petition could have been raised in the court of appeals. "Merely because two courts have concurrent jurisdiction, however, does not necessarily mean that it is

appropriate to initiate a special action in the supreme court." *Gockley v. Ariz. Dep't of Corr.*, 151 Ariz. 74, 75–76 (1986); *see id.* at 76 ("We write this opinion to urge that [litigants], as well as attorneys, carefully consider the Rules of Procedure for Special Actions when determining the appropriate court in which to file.").

Here, there are no "extremely unusual circumstances" that warrant Petitioners filing in this Court in the first instance. *Kelley*, 154 Ariz. at 476; *see also Green v. Super. Ct. In & For Cochise Cnty.*, 132 Ariz. 468, 470 (1982) ("Direct filing in this court is exceptional . . . .").

For one thing, Petitioners do not argue time is of the essence—a circumstance that sometimes might warrant filing in this Court in the first instance.[9]

Petitioners identify no looming deadlines that necessitate this Court's immediate review. Attorney General Mayes was sworn into office on January 2, 2023, over seven months ago.

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[9] *See, e.g.*, *Tobin v. Rea*, 231 Ariz. 189, 193 ¶ 8 (2013) (accepting jurisdiction given "the time constraints for preparation, printing, and mailing of the Secretary of State's publicity pamphlet," a final ruling was needed quickly).

And, even if Petitioners were to argue time is of the essence, their own litigation history betrays them. Petitioners have sat on their hands for the last eight months. At the end of trial on December 23, 2022, Petitioners told the Court it need not rush to issue a final judgment and could do that "eventually." [174:25–175:2] Petitioners also never asked the superior court for a signed judgment. [*See supra* pp. 19–21] Then, they filed a motion for a new trial, which they did not ask to expedite.

As to their appeal, for reasons unknown to Defendants, Petitioners have not even feigned interest in advancing it. For example, despite their duty to file a notice of transcripts and statement of issues on appeal "[w]ithin 15 days after filing [their July 18, 2023] notice of appeal," ARCAP 11(c)(3), Petitioners still have not done so. Petitioners' excessive delays and failure to diligently advance their case thus "weighs heavily against [this Court] exercising extraordinary jurisdiction." *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n*, 229 Ariz. 525, 532 ¶ 21 (App. 2012).[10]

[10] Further, Petitioners have unnecessarily complicated this case by seeking relief in the superior court, the court of appeals, and this Court, all simultaneously. This self-created procedural morass only further saps precious judicial and party resources—and warrants declining

Even if a special action were jurisdictionally appropriate (it is not), Petitioners have "unreasonab[ly]" "delay[ed]" by waiting nearly eight months to file this action, particularly in this Court. *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (2009) (citation omitted). "Arizona courts have repeatedly found laches to be the only restriction on the time for filing a petition for special action." *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283 (App. 1989). There is no excuse for delaying nearly eight months to file a special action on pretrial decisions. And there was no excuse to wait until after Ms. Mayes took office to file a motion for a new trial. [*See* Appx213–16 (detailing reasons why new trial motion is barred by both laches and mootness)] Petitioners failed to diligently prosecute this election contest.

Prejudice may be shown "either to the opposing party or to the administration of justice, which may be demonstrated by showing injury or a change in position as a result of the delay." *Martin*, 219 Ariz. at

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jurisdiction. *See Gockley*, 151 Ariz. at 76 ("Adherence to the rules [including Ariz. R. P. Spec. Act. 7] is mandated not only by the constraints on judicial time and resources, but also by the well-reasoned policy of limiting appellate review to final judgments.").

558 ¶ 6 (internal citation omitted). Both exist here. First, prejudice exists as to Ms. Mayes. She is now the Attorney General. She has hired attorneys and staff; she is doing her job and has been since January. The unreasonable delay also has prejudiced "the administration of justice." *Id.* Petitioners' delay has prejudiced this Court by "plac[ing] the [C]ourt in a position of having to steamroll through the delicate legal issues." *Harris v. Purcell*, 193 Ariz. 409, 412–13 ¶ 17 (1998) (citation omitted). And, finally, "the prejudice to the Defendants and the [2.5] million Arizonans who voted in the [2022] General Election [for Arizona Attorney General] would be extreme, and entirely unprecedented, if [Petitioners] were allowed to have their claims heard at this late date." *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 719 (D. Ariz. 2020) (citing *SW Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)).

Further, this case is not one involving "legal issue[s] where most of the key facts . . . are not in dispute." *Arizonans for Second Chances*, 249 Ariz. at 405 ¶ 20. Most significantly, the arguments Petitioners raise about the new trial motion require this Court to engage in a heavily fact-dependent analysis.

In the end, "[a]dherence to the [Rules of Procedure for Special Actions] is mandated not only by the constraints on judicial [and party] time and resources, but also by the well-reasoned policy of limiting appellate review to final judgments. An exception to this policy, in the form of appellate court special actions, should be reserved for those extraordinary actions necessitating speedy relief. This is not such a case." *Gockley*, 151 Ariz. at 76.[11]

[11] Petitioners (at 5 n.4) urge this Court, "[i]n the event [it] declines jurisdiction," to transfer the Petition "to the Court of Appeals pursuant to A.R.S. § 12-120.22(B) with instructions to accept jurisdiction." No reason exists to transfer this Petition because it fails to meet the requisite jurisdictional requirements, as set forth above. In any event, nothing in A.R.S. § 12-120.22(B), the statute that allows for transfers, requires—or even authorizes—this Court to "instruct[]" the court of appeals "to accept jurisdiction," as Petitioners contend. Petitioners fail to cite any other authority for this proposition. When this Court has "referr[ed] [a special action] matter to the court of appeals," in fact, the court of appeals has retained its authority to accept or decline jurisdiction as it sees fit. *See, e.g.*, *Estate of McGill ex. Rel. McGill v. Albrecht*, 203 Ariz. 525, 527 ¶ 4 (2002) ("Plaintiffs brought a direct special action in this court, seeking relief from that order. We declined jurisdiction, referring the matter to the court of appeals. Rule 7, Ariz.R.P.Spec.Act. After the court of appeals declined jurisdiction, Plaintiffs sought review by this court.").

## Attorneys' Fees

### *Petitioners' Request*

Petitioners have failed to establish this Court's special action jurisdiction and thus are not entitled to fees. But even if the Court accepted jurisdiction, Petitioners would not be entitled to fees under either ground asserted in their Petition.

Citing nothing but the statute, Petitioners argue (at 37) that they are entitled to fees under A.R.S. § 12-2030. They are not. A.R.S. § 12-2030(A) allows a court to award fees to a party that "prevails by an adjudication on the merits in a civil action brought by the party against the state, any political subdivision of this state or an intervenor to compel a state officer or any officer of any political subdivision of this state to perform an act imposed by law as a duty on the officer." For one thing, Petitioners should not prevail. And any relief would not lie against Ms. Mayes. Further, the only part of the Petition that could even conceivably be considered akin to a request for mandamus relief is Petitioners' request for an order directing the trial court to enter final judgment. And that relief is not available for the reasons set forth above.

With only a general, conclusory reference to it, Petitioners request that they be awarded their attorneys' fees pursuant to the private attorney general doctrine. That request should be denied. Under this doctrine, "a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance" may be awarded fees. *Ansley v. Banner Health Network*, 248 Ariz. 143, 153 ¶ 39 (2020). Here, Petitioners should not prevail for the reasons set forth above. Further, they have not identified any right they have vindicated, not identified who that right benefits, not demonstrated that the unidentified right requires private enforcement, and not demonstrated that the unidentified right is of societal importance.

***Ms. Mayes' Request***

Ms. Mayes seeks attorneys' fees incurred in responding to this Petition under ARCAP 25 and A.R.S. § 12-349. *See* ARCAP 21(a).

To begin, this Petition "[u]nreasonably expands or delays the proceeding[s]." A.R.S. § 12-349(A)(3).

Petitioners could have asked the superior court to enter final judgment. But rather than taking that bare minimum step, they have filed *both* (1) a petition for special action in this Court, asking for an order

that Petitioners never asked the trial court for themselves, *and* (2) a regular appeal in the court of appeals (despite acknowledging here that that appeal is "premature").

Through their Petition, Petitioners have (not for the first time) forced Defendants to divert time and resources away from carrying out the functions of state government and to responding to frivolous, lengthy filings instead. Ms. Mayes respectfully asks this Court to impose appropriate sanctions for such conduct.

Ms. Mayes also seeks sanctions under ARCAP 25, which authorizes this Court to "impose sanctions that are appropriate in the circumstances of the case, and to discourage similar conduct in the future." "Other rules similarly require candor in court proceedings." Order at 3, *Lake v. Hobbs*, No. CV-23-0046-PR (Ariz. Sup. Ct. May 4, 2023) (citing sources of authority including Ethical Rule 3.3 and Ariz. R. Civ. P. 11(b)).[12]

Petitioners have made at least two misrepresentations in this Petition that are integral to the extraordinary relief they seek and that are "unequivocally false." *Id.* at 5.

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[12] *See* https://www.azcourts.gov/Portals/21/ASC-CV230046%20-%205-4-2023%20-%20FILED%20-%20DECISION%20ORDER.pdf.

Petitioners (at 18) assert that they "raised this deficiency [the lack of final judgment after the contest] in their Motion for an Order Reflecting Additional Rulings of the Court."

Petitioners also state (at 13) that "Petitioners filed a Motion for an Order Reflecting Additional Rulings of the Court on December 28, 2022, specifically urging the trial court to issue a final judgment, and as to that portion of the motion, Contestee Mayes concurred."

Both statements are false. Petitioners' motion recited that their proposed order "is not a final order and does not inhibit the ability of any other party to make further motions to this Court." [APPV1-81] The proposed order they submitted stated: "IT IS FURTHER ORDERED that this Court may make additional orders in regard to the December 23, 2022 hearing and the briefs of the parties, including subsequent motions of the parties, as the Court sees fit." [APPV1-089] And in their Motion for a New Trial, Petitioners explicitly "ask[ed] that entry of any judgment *be stayed* pursuant to Rule 62(a) until a new trial is held and the case decided." [APPV1-114 (emphasis added)]

Ms. Mayes was the one who asked for final judgment in response to Petitioner's request. [*See* APPV1-094 ("Accordingly, this Court should

deny Plaintiffs' Motion and should enter judgment, as A.R.S. § 16-676(B) directs.")]

The extraordinary remedy of a sanction under ARCAP 25 is therefore appropriate.

## Conclusion and Relief Requested

For the foregoing reasons, Ms. Mayes respectfully requests that this Court decline to exercise its discretion to accept jurisdiction in this case and permit this case to proceed through the appellate process.

Should the Court accept jurisdiction on any of the issues raised in the Petition, Ms. Mayes respectfully requests that the Court permit the parties to file supplemental briefs on the merits of any such issues.

August 11, 2023

Respectfully submitted,

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