IN THE SUPREME COURT
STATE OF ARIZONA

JEANNE KENTCH, *et al.*,

Petitioners/Plaintiffs/Contestants,

v.

HON. LEE F. JANTZEN,

Respondent,

and

KRIS MAYES,

Real Party in Interest/Contestee,

and

ADRIAN FONTES, *et al.*,

Nominal Defendants.

No. CV-23-0205-SA

Court of Appeals No.
1 CA-CV 23-0472

Mohave County Superior Court
No. S8015CV202201468

BRIEF OF *AMICI CURIAE* SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA SENATE WARREN PETERSEN

Kory Langhofer, Ariz. Bar No. 024722
Thomas Basile, Ariz. Bar. No. 031150
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
kory@statecraftlaw.com
tom@statecraftlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

Rules

Pursuant to A.R.C.A.P. 16(b)(1)(B) and Rule of Procedure for Special Actions 7(i), Warren Petersen, in his capacity as President of the Arizona Senate, and Ben Toma, in his capacity as the Speaker of the Arizona House of Representatives, respectfully submit this brief as *amici curiae*.[1]

INTRODUCTION

Our system of government depends on the accurate tabulation of every legal vote. This imperative does not lapse on Inauguration Day; it imparts to the courts an enduring obligation to guarantee a full and fair adjudication of every *bona fide* dispute that may be material to the determination of an election. The nearly unprecedented circumstances surrounding this proceeding underscore the judiciary's indispensable role in affirming that the certified winner of an election did, in fact, receive the highest number of lawful votes.

At the time this election contest began, the Contestee had mustered a lead of just 511 votes out of more than 2.5 million cast, which already qualified this election as the closest for statewide office in Arizona's history. As the recount revealed—and as at least some of the Defendants and/or their counsel allegedly were aware

[1] Pursuant to A.R.C.A.P. 16(b)(3), the undersigned certifies that no person other than the Arizona Legislature has provided financial resources for the preparation of the brief. In the interests of transparency, undersigned counsel for the *amici* note that their firm previously represented Contestants Hamadeh and the Republican National Committee in a prior related proceeding, *Hamadeh v. Mayes*, Maricopa County Superior Court No. CV2022-015445. They do not currently represent any named party in connection with this special action or the underlying trial court proceeding.

during the trial in this case—Pinal County's initial canvass was afflicted with substantial errors. The aggregated recount returns slashed the Contestee's already miniscule lead by 45%, to merely 280 votes. As the President and Speaker emphasized in their *amicus curiae* brief to the trial court over six months ago, this litigation has been afflicted with a barrage of indignant fulminations and obstructive machinations from the Contestee and at least some of the governmental defendants. Those litigation tactics have obstructed any searching judicial examination of the election's administration. Although the trial court found that the Contestants had pleaded valid election contest claims, it largely indulged the Defendants' frantic efforts to thwart any additional unearthing and exposition of relevant facts. The Contestants were permitted only a severely truncated inspection of ballots in three counties and denied any meaningful pre-trial discovery.

For the reasons discussed below, those errors constituted an abuse of discretion. The trial court's interpretation of the timing and ballot inspection parameters of A.R.S. §§ 16-676(A) and 16-677 imparted an artificially constricted scope to provisions that the Legislature intended to secure a robust fact-finding process. If left uncorrected, the trial court's misconception of these statutes would effectively disable mechanisms the Legislature established to ensure a rigorous verification and vetting of the vote count when, as here, there are genuine and good faith questions concerning the accuracy of the final tabulation. These consequential

errors, compounded with the acutely important statewide interests presented by this election contest, warrant the Court's acceptance of special action jurisdiction.

INTEREST OF THE *AMICI*

Warren Petersen is the President of the Arizona Senate, and Ben Toma is the Speaker of the Arizona House of Representatives. The *amici* proffer this brief as presiding officers of their respective chambers to articulate the perspective of the legislative branch on important issues bearing on the application—and underlying aspirations—of statutes it has enacted. The *amici* take no position on which candidate received the highest number of votes for the office of Arizona Attorney General in the November 8, 2022 general election. Rather, they urge the Court to effectuate the purpose of the election contest statutes and afford the parties a full and fair opportunity to adduce the facts necessary to answer that pivotal question.

ARGUMENT

I. The Legislature Has Designed a Robust Process to Uncover and Correct Material Mistakes in Election Administration

In contrast to our federal government of limited, enumerated powers, "the power of the [Arizona] legislature is plenary . . . unless that power is limited by express or inferential provisions of the Constitution," *Whitney v. Bolin*, 85 Ariz. 44, 47 (1958). Notably, the Framers of the Arizona Constitution not only authorized but affirmatively instructed the Legislature to "enact[] registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."

ARIZ. CONST. art. VII, § 12. Recognizing that this directive must entail post-election mechanisms to verify the accuracy of ballot processing and tabulation, the First Legislature devised an election contest regime, the key attributes of which remain intact today. *See* 1913 Ariz. Statutes, Title XII, Chapter XIV, §§ 3060-3064. While it is true that election contests are "purely statutory," *Grounds v. Lawe*, 67 Ariz. 176, 185 (1948), those statutes provide expansive predicates for probing the accuracy of canvassed election returns, to include an alleged "erroneous count of votes," and "misconduct" by elections officials. A.R.S. §§ 16-672(A)(1), (A)(5). Importantly, willful wrongdoing or knowing malfeasance by those overseeing elections is unnecessary; even good faith or unintentional deviations from controlling law are actionable if "they affect the result, or at least render it uncertain." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929).

II. The Trial Court Abused Its Discretion By Denying the Contestants Sufficient Time to Inspect All Ballots and Conduct Discovery

Its misconstruction of a controlling statute is, *per se*, an abuse of the trial court's discretion. *See State v. Bernstein*, 237 Ariz. 226, 228, ¶ 9 (2015) ("An error of law constitutes an abuse of discretion."). Here, the trial court erred in (1) deeming the time period allotted in A.R.S. § 16-676(A) for adjudicating an election contest to be effectively mandatory, and (2) confining discovery to only an abridged inspection of a small number of ballots.

A. The Statutory Adjudication Period Is Directory, Not Mandatory

While inflexible timing strictures certainly govern the ***initiation*** of an election contest, *see generally Brown v. Superior Court in and for Santa Cruz Cty.*, 81 Ariz. 236, 239–40 (1956); *Hunsaker v. Deal*, 135 Ariz. 616, 618 (App. 1983), they do not constrain its ***conclusion***. While courts must endeavor to resolve election contests within fifteen days of their commencement, *see* A.R.S. § 16-676(A), this endpoint is merely directory and not jurisdictional. *See Ariz. Downs v. Ariz. Horsemen's Foundation*, 130 Ariz. 550, 555 (1981) (concluding that "the word 'shall' [in a state statute] is used in a directory sense rather than in a mandatory sense" to give the entire statute "a reasonable and constitutional construction").

The notion that the adjudication period demarcated in Section 16-676(A) is a jurisdictional prerequisite finds no sustenance in the statutory text and would vitiate the legislative purpose animating Arizona's election contest regime. Courts "generally apply the interpretative principle that 'if a statute states the time for performance of an official duty, without any language denying performance after a specified time, it is directory' rather than mandatory." *Joshua J. v. Ariz. Dept. of Econ. Sec.*, 230 Ariz. 417, 423, ¶ 18 (App. 2012); *see also Dep't of Revenue v. S. Union Gas Co.*, 119 Ariz. 512, 514 (1978) (noting that if the Legislature had intended an adjudication deadline to be mandatory, "it could have plainly spelled it out in appropriate language"). Nothing in the text of A.R.S. § 16-676(A) compels

the summary dismissal of an election contest that remains pending after the expiration of the 15-day time limit, or otherwise conditions the court's continued exercise of jurisdiction on compliance with that putative deadline.

More broadly, "[w]ords in statutes should be read in context" and courts "may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7 (2017). In that vein, while the election contest statutes certainly evince a concern with celerity, they also envisage a comprehensive right to inspect all the ballots in preparation for trial, *see* A.R.S. § 16-677, and charge the trial court with "continu[ing] in session to hear and determine all issues arising" in the proceeding," *id.* § 16-676(B). In effectively subordinating these key fact-finding mechanisms to an unduly formalistic understanding of the adjudication period, the trial court's interpretation derogates both the text and the underlying aspirations of the election contest statutes. A sounder construction—which would effectuate all statutory provisions as complementary components of a coherent whole—is that courts must hear and decide election contests as expeditiously as possible, consistent with the contestant's right to fully inspect the ballots and prepare for trial. *See S. Union Gas*, 119 Ariz. at 514 ("Language, mandatory in form, may be deemed directory when the legislative purpose can best be carried out by such construction.").

Moreover, a narrow interpretation of the trial court's temporal authority to hear election contests inevitably invites the dilatory behavior exhibited in this case. Rather than working with the Contestants in a civil, productive manner to complete briefing, discovery, and the presentation of evidence within 15 days, the defendants resolved to "run out the clock."

For more than three weeks, the Contestants were denied any substantive access to the ballots. The significant tabulation problems discovered in Pinal County were concealed. And the Contestee secured full briefing, argument, and decision on a motion to dismiss—to the exclusion of discovery—while the clock inexorably ran down to zero. Although motions to dismiss are a necessary part of litigation, including expedited election litigation, the primary effect here was not to narrow the scope of the claims, as intended by the Rules of Civil Procedure, but instead to extinguish them entirely through delay. Indeed, even as the Secretary and Contestee maneuvered to moot the case and avoid litigation, they simultaneously mocked and sought to sanction the Contestants for not presenting the very evidence that was being withheld.

It was, in short, an obstructive litigation strategy that paid dividends due to the trial court's unnecessarily narrow temporal strictures. And as long as the trial court's interpretation of the adjudication period stands, this pattern will recur; recalcitrant counties bristling at external oversight, and defendant candidates and

their allies desperate to avoid anything that might disturb their precarious lead in a tenuous tabulation, will delay and obfuscate.

B. The Right of Ballot Inspection Is Supplementary to, Not Exclusive of, Other Discovery Devices

Arizona law guarantees "either party" to an election contest a right to "have the ballots inspected before preparing for trial," A.R.S. § 16-677(A)—a prerogative established by the first Legislature that has remained substantially unaltered over the ensuing century. *See* 1913 Ariz. Civil Code § 3069. This investigatory mechanism, however, merely supplements discovery available through other means recognized by the Rule of Civil Procedure; it does not supplant them.

The trial court's conclusion that "[t]he only discovery allowed in these contested elections is a limited inspection of ballots" [APPV2-067] is incorrect. It is, to be sure, a settled maxim that "[e]lection contests are purely statutory. They are unknown to the common law." *McCall v. City of Tombstone*, 21 Ariz. 161, 163 (1919). The trial court seemingly derived from that premise an inference that, in enacting the ballot inspection statute, the Legislature intended to abrogate all discovery afforded by the Rules of Civil Procedure.

That supposition, though, is both textually and historically unsound. At the time the ballot inspection statute was adopted, the Rules of Civil Procedure did not yet exist. By definition, all discovery devices were statutory in nature. To that end, Arizona's early civil code afforded parties (somewhat complex) means of eliciting

deposition testimony under certain circumstances, *see* 1913 Ariz. Civil Code §§ 1689-1720, but did not provide for any extensive access to, or exchange of, documentary evidence prior to trial. *See generally* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 BOSTON COLL. L. REV. 691, 694-96, 719 (1998) (recounting that discovery historically was "extremely limited" in U.S. litigation, and even as late as the 1930s, "no one state allowed the total panoply of devices").

Considered in this context, the ballot inspection statute embodied an effort to ***liberalize*** discovery in election contests relative to the then-existing statutory baseline—not to constrain it. This Court inaugurated the Rules of Civil Procedure in 1939 to further facilitate information-sharing and advance the Legislature's "purpose of simplifying [civil pleading, practice and procedure] and of promoting the speedy determination of litigation upon its merits." 1939 Arizona Code § 19-202. Then, as now, the Rules of Civil Procedure govern "all suits of a civil nature" in Arizona courts. *Id.* § 21-201; *compare* Ariz. R. Civ. P. 1. The notion that either the Legislature or this Court intended A.R.S. § 16-677 to be somehow exclusive or preemptive of the Rules of Civil Procedure simply finds no textual or historical support. Indeed, the advent of modern ballot submission options (*e.g.*, provisional ballots documented with tracking envelopes) and data storage technologies (*e.g.*, electronic ballot images) means that simple disclosures through customary discovery

channels may often reduce (if not eliminate) the need for a cumbersome and costly physical inspection of ballots.

"When interpreting a statute, [courts'] primary goal is to give effect to the legislature's intent." *J.D. v. Hegyi*, 236 Ariz. 39, 40, ¶ 6 (2014). The election contest statutes bespeak the Legislature's enduring objective of ensuring that when (as here) there are colorable and good faith questions concerning the accuracy of an election certification, litigants and the courts are equipped with comprehensive and multifaceted mechanisms for collecting and assessing all relevant facts. The trial court committed a significant error of law, and thereby abused its discretion, in denying the Contestants an opportunity to fully inspect the ballots or to employ other discovery devices in preparing for trial.

III. The Petition Presents Questions of Statewide Importance Requiring an Expeditious Resolution

"Special action jurisdiction is appropriate in cases that involve 'purely legal questions of statewide importance' or that require an 'immediate and final resolution." *City of Surprise v. Arizona Corp. Comm'n*, 246 Ariz. 206, 209, ¶ 6, (2019). As discussed above, the trial court's denial of the Contestants' motion for a new trial pivoted, at least in large part, on two consequential errors of law in its construction of the statutes governing the timing of adjudicating an election contest and scope of permissible discovery. In addition, the imperative of finality—albeit a finality predicated on a full and complete adjudication of the facts—in the election

of a major statewide office also supports this Court's immediate intervention. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405, ¶ 20 (2020) (accepting special action jurisdiction where "there was a need for immediate, final relief").

Not content merely to urge this Court's declination of special action jurisdiction, however, the Contestee and the Secretary (and particularly the latter), also strain to discredit the Contestants' probity and integrity. Escalating rhetorical histrionics to fevered heights, the Secretary traduces the Contestants with charges of "weaponiz[ing] our Courts, sow[ing] unfounded distrust in our election processes, malign[ing] our public servants, and undermin[ing] our democracy – all for the purpose of trying to overturn the People's will and topple an election." Sec'y of State Resp. at 17. The Secretary cites nothing to support this *ad hominem* invective, which should trouble the Court for at least two reasons.

First, it is unfounded. The Petition is temperate in its tone and confined in its scope to a handful of discrete legal and procedural questions. It is devoid of fanciful conjectures or insinuations of sabotage. Indeed, the primary relief it seeks—*i.e.*, the reexamination and potential tabulation of a relatively small number of disqualified provisional ballots and ostensible "undervotes"—would, if granted, only result in the enfranchisement of ***more*** voters. Given his professed fidelity to "the People's

will," Sec'y Resp. at 17, the Secretary's frenzied opposition to this prospect is perplexing.

Second, the Secretary's rhetorical assault is gratuitous and abusive. The Contestants' arguments for a new trial do not allege or rely on any supposed malfeasance or wrongdoing by the Secretary. Rather, he is joined only as a nominal party, presumably for the limited ministerial purpose of issuing a revised canvass and certification, if ordered by a court to do so. More generally, as the Speaker and President argued in their *amicus curiae* brief below, citizens should not be disparaged and assailed by their own public servants for raising measured and modest claims—nearly all of which, it bears emphasis, the trial court deemed sufficient to survive a motion to dismiss—in the ***closest election for statewide office in Arizona history***. While the Secretary is correct that "[o]ur democracy thrives because, among other things, it demands accountability," Sec'y Resp. at 17, he misapprehends to whom the accountability is owed. The churlish imperiousness with which the Secretary reflexively greets even responsible and narrow questions surrounding the administration of the 2022 general election suggests he has forgotten that he serves ***all*** Arizona electors, including Mr. Hamadeh and his supporters. He, like all of Arizona's elected officials, are answerable to the Contestants and all other voters—not the other way around.

CONCLUSION

For the foregoing reasons, the Court should accept special action jurisdiction and grant the relief requested in the Petition.

RESPECTFULLY SUBMITTED this 16th day of August, 2023.

STATECRAFT PLLC

By: */s/Thomas Basile*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003

Attorneys for Amici Curiae *Speaker of the Arizona House of Representatives and President of the Arizona Senate*