Clerk of the Superior Court
*** Electronically Filed ***
M. Bouise, Deputy
12/28/2020 10:16:02 PM
Filing ID 12372342

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix, Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Dennis I. Wilenchik, #005350
Lee Miller, #012530
John "Jack" D. Wilenchik, #029353 (lead attorney)
jackw@wb-law.com
admin@wb-law.com
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA REPUBLICAN PARTY, **Plaintiff;** **vs.** **MARICOPA COUNTY BOARD OF SUPERVISORS, et al.** **Defendants.**	**Case No. CV2020-014553** **PLAINTIFF'S RESPONSE TO MOTION FOR SANCTIONS** **(Oral Argument Requested)** **(Assigned to the Honorable John R. Hannah, Jr.)**

Plaintiff hereby responds to Intervenor Katie Hobbs' "Application for Attorneys' Fees," which is in effect a Motion for Sanctions under A.R.S. § 12-349.

Intervenor fails to show by a preponderance of the evidence that Plaintiff brought claims (1) "without substantial justification" or (2) "solely or primarily for delay or harassment."[1]

[1] *In re Estate of Stephenson*, 217 Ariz. 284, 289, 173 P.3d 448, 453 (App. 2007) (party seeking fees pursuant to A.R.S. § 12-349 must show the statute has been violated by a preponderance of the evidence).

1. Intervenor fails to show by a preponderance of evidence that Plaintiff's claims were brought with substantial justification

Plaintiff's action was based on a thoughtful, well-reasoned, and well-supported position on the law, which is that (1) the plain language of the "hand count" statute (A.R.S. § 16-602) requires a sampling of "at least two percent of the precincts"; (2) the legislature used different words, "two percent of polling places," to describe the requirement for presidential-preference elections in the same statute,[2] and "we assume that when the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language, indicating that the choice of language was deliberate";[3] and (3) while the statute provides that "[t]he hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state [in the Elections Procedures Manual, or EPM]," the manual is in conflict with the statute and therefore the statute must control pursuant to Article 5, Section 1 of the Arizona Constitution and *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 431, 814 P.2d 767, 772 (1991)("our statutes do not authorize, nor would our constitution permit" the Secretary of State's office to pass judgment on the law, because that is a "judicial function"; and a party cannot rely on documentation produced by the Secretary of State which contradicts the law, "any more than they can rely on a statute that conflicts with the constitution"); *see also* A.R.S. Const. Art. 5 § 1 (providing that the Secretary of State is subservient to both the Arizona Constitution and statutory law), as well as pages 2-5 of the Application for Order to Show Cause filed in this matter on November 12, 2020 (arguing these authorities in detail).

[2] A.R.S. § 16-602(B)(3).

[3] *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249-250, 141 P.3d 422, 424-25 (Ct. App. 2006); see pages 2-5 of the Application for Order to Show Cause filed in this matter.

The Court chose not to consider or address these authorities or arguments in its unsigned rulings dated November 19, 2020 (providing that "a minute entry order explaining the Court's decision will follow shortly") and on December 21, 2020 (which noted only, at page 7 of the Order, that the EPM "directs county election officials to treat the voting centers as precincts," without addressing the conflict that Plaintiff identified in between the Secretary's manual and the statute, or any of the related authorities or arguments above). That is plainly the Court's prerogative (just as it would be Plaintiff's prerogative to appeal from any signed and appealable order in this matter). But to suggest that this case was brought "without substantial justification," when the legal issue is not only "debatable" but rests on simply *quoting what the statute plainly says* and traditional forms of statutory interpretation, is a far cry from bringing a claim "without substantial justification" according to the appellate courts of this State. *See e.g. Reed v. Mitchell & Timberland, P.C.*, 183 Ariz. 313,903 P.2d 621 (App. 1995)(reversing award of fees under A.R.S. § 12-349 where a party had raised a "debatable issue"); *Goldman v. Sahl*, 248 Ariz. 512, 531, 462 P.3d 1017, 1036 (Ct. App. 2020), *review denied* (Aug. 25, 2020)(reversing award of fees under A.R.S. § 12-349 where "even if [the attorney] believed his claim was a long shot," his brief contained a "thoughtful" position on the law, and noting that A.R.S. § 12-349 shares the Rule 11 standard); *Johnson v. Mohave Cty.*, 206 Ariz. 330, 334-335, 78 P.3d 1051, 1055-56 (Ct. App. 2003)(reversing award of fees under A.R.S. § 12-349 where the claim "raised nonfrivolous issues"). The Court of Appeals has admonished trial court judges not to discourage litigation of even debatable legal issues, much less issues of public importance, through the use of 12-349 and similar statutes. *Lynch v. Lynch*, 164 Ariz. 127, 132, 791 P.2d 653, 658 (App. 1990); *see also City of Casa Grande v. Arizona Water Company*, 199 Ariz. 547, 556, 20 P.3d 590, 599 (App. 2001). A claim is not groundless or frivolous for purposes of A.R.S. § 12-349 where there is any "rational argument" to support the claim. *Rogone v. Correia*, 236 Ariz. 43, 50, 335 P.3d 1122, 1129 (Ct. App. 2014). "The basis for a sanction according to Civil

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

Procedure Rule 11 is the same as A.R.S. § 12-349(A)(1)"; and caselaw regarding Rule 11 (as well as the text of Rule 11 itself) will sustain any "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Ariz.R.Civ.P. 11(b)(2). This legal issue in this case was clearly debatable and supported by rational argument. Finally, "[f]or the purposes of this section [A.R.S. § 12-349], 'without substantial justification' means that the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(F). Both of these elements must be proven, and proven by a preponderance of the evidence. *Johnson*, 206 Ariz. 330, 334, 78 P.3d 1051, 1055. The claims here were not groundless, and as addressed in following section, they were made in good faith.

Further, undersigned counsel cannot emphasize enough that he was first approached about this case, and had to write up the Complaint and Application for Order to Show Cause, *on the same night* in *between 6 PM and midnight*, on November 11, 2020. (See Declaration of John D. Wilenchik, Esq., Exhibit "A" attached hereto.) Counsel was extremely mindful of the (infamous) elections-law case of *Lubin v. Thomas*, 213 Ariz. 496, 499, 144 P.3d 510, 513 (2006), in which the Arizona Supreme Court found that a filing was untimely even though it was filed within the statutory time limits, simply because the Court felt that it had "a very short time in which to review and decide the matter." 213 Ariz. at 498, 144 P.3d at 512. In spite of this, the Application showed a well-reasoned (and certainly "debatable") argument, which the Court chose not to accept; but to even contemplate sanctions on the basis of lacking substantial justification is wholly unwarranted.

At footnote no. 4 in its Ruling, the Court questions what undersigned counsel "knew about the audit when he filed the complaint." The hand-count results for Maricopa County were not published on the Secretary of State's website as of November 11, 2020. (A print-out of the website as it existed on that night, courtesy of the "Wayback Machine," is attached to counsel's declaration.) Further, as of November 11, Maricopa County was still in the process of counting

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

votes (which it did not finish until late on Friday November 13th, according to the news reports which counsel was following). The hand-count statute itself provides that the audit process "shall not begin" until all ballots have been delivered to the counting center and "[t]he unofficial vote totals from all precincts" have been made public—which logically cannot happen until all votes have been counted. A.R.S. § 16-602(B)(1). In other words, Maricopa County apparently started and finished its hand-count well before the "unofficial vote totals from all precincts" were reported, in apparent violation of the law. While we are beyond litigating the legality *vel non* of the county's actions at this point, it is enough to say that all of the foregoing led counsel to allege – with more than a good-faith basis – that the county had not yet done a hand count at the time of the Complaint, but that a hand count was expected to happen very soon (and that the county has never performed a hand count in strict accordance with the law, even as of today).

For what it is worth, the Plaintiff Arizona Republican Party was also unaware of a hand count having occurred in Maricopa County (and correspondingly did not inform counsel of it) as of the filing of the Complaint. While it has been alleged that Republican *county* committee members participated in a hand count, Plaintiff is the *statewide* party. Immediately following election day (on Nov. 4), the Maricopa county chair suddenly and unexpectedly resigned and stopped communicating with the state party. The county chairs are volunteers who have no paid professional staff to provide continuity of operations when they resign or leave; and they are typically the primary if not sole liaison with the state party. As the direct result, no information flowed to the state party about the county party's post-elections activities; and if county party members participated in any hand count, then the state party was not informed and had no expedient way of even trying to find out. (See Declaration of Dr. Kelli Ward, Exhibit "B" attached hereto). Nor would it have made sense to spend additional days or weeks trying to get an answer, given that the Court was already liable to criticize the Plaintiff for laches (and trying to conduct some kind of "inquest" into whether county party members knew anything about a

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

hand count, which by law should not have been performed that early anyway, would only have delayed filing even further). In other words, it would clearly be unfair to say that the party should have spent even more time trying to investigate the matter, but on the other hand that the party unreasonably delayed filing and should have filed even sooner.

Further, as is *de rigeur* for elections cases, this matter moved extremely quickly. Maricopa County declined to accept service of the suit, necessitating physical service of process. The Court set a hearing on the next business day (Monday), but the county's refusal to accept service imperiled that hearing – so undersigned counsel had to rush to get the case formally served Friday for a Monday hearing. Undersigned counsel talked to the Secretary of State's lawyer on a completely unrelated case the same day (Friday), during which call they discussed this case (and undersigned counsel's frustration with the county's refusal to accept service) – and a couple of hours later, the Secretary's lawyer asked to intervene, to which undersigned counsel readily agreed.

To be clear, the Secretary was not a necessary or indispensable party to this case simply because of the fact that its "laws" (its manual) were at issue (as the Court's ruling suggested)—any more than a when a litigant's case rests on the interpretation of a statute, the litigant has some obligation to sue the legislature or join it as a party because the legislature's "laws" are involved in the suit. The relief that was sought was simply to have Maricopa County perform a quick hand-count in compliance with the law (by precinct) – a relief that involved only the county and that would not be binding on, or even naturally involve the Secretary of State in any way. Even the request for declaratory relief was intended to be binding on the county for that purpose alone. These are entirely proper litigation choices and should not be characterized as somehow fatal to any claim or claims in the case; and relief could very clearly have been awarded without any involvement by the Secretary of State whatsoever. Of course, in recognition of the fact that the Secretary's manual played a role in this case, Plaintiff was happy

WILENCHIK & BARTNESS
— A PROFESSIONAL CORPORATION —

to agree to Secretary's intervention without any question; but Plaintiff deserves not to be peculiarly criticized on this point. The Court's ruling stated that "plaintiff chose to sue Maricopa County election officials instead of the secretary of state. County officials have no power to rewrite the Elections Procedures Manual. As a result, the plaintiffs request for a declaratory judgment against them was futile. Fortunately for the plaintiff, the secretary of state chose to intervene. But for that decision, the declaratory judgment claim would have been dismissed out of hand." This statement overlooks the Court's own power to decide what the law is, as the Arizona Supreme Court explained in *W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. at 431, 814 P.2d at 772 (see above and Plaintiff's Application for Order to Show Cause)—and that belongs to this Court alone, not the Secretary of State.

Again, the bottom line here is that Plaintiff's legal position was "debatable" at the minimum and of course Plaintiff still maintains that it is correct. While Plaintiff is loathe to turn this into any more of a "draft appeal" or critique of the Court's rulings than it needs to be, it must be said that the Court's Ruling was based on (1) an analysis of the mandamus claim that overlooked Plaintiff's legal arguments about the inconsistent wording of the statute, the conflict in between the statute and manual, and whether the wording in the statute controls over the manual, in favor of (2) dismissing the claims based on an equitable and discretionary basis that was unrelated to legal merits, namely the equitable principle of laches. As an Arizona Supreme Court Chief Justice once wrote, "concerned and interested private parties and citizens' groups on all sides of various questions frequently seek resolution of thorny legal matters on short notice. When these matters involve significant issues of public concern…this court should not avoid the merits by raising a shield called laches. Rather, as trial courts do, we should make every effort to hear the merits of the case….[T]his court could have properly resolved the issues presented without compromising the integrity of the process or its result. Simply put, judicial inconvenience is not the same as laches. Absent a showing of prejudice attributable to short

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

notice, this court should not refuse to hear the merits. [The Court's] rationale falls under its own weight. If, due to the shortness of time, the court could not adequately assess the merits of the single legal issue raised by plaintiffs' challenge, how could it adequately assess the merits of a laches defense in the same time period?... [T]here is simply no showing of real, relevant prejudice [and] this court could have and should have decided the substantive issue." *Mathieu v. Mahoney*, 174 Ariz. 456, 463, 851 P.2d 81, 88 (1993)(C.J. Feldman, dissenting).

2. Intervenor fails to show by a preponderance of evidence that Plaintiff's claims were brought solely or primarily for delay or harassment

There is no evidence, much less admissible evidence, that the "Republican Party and its attorneys brought the case in bad faith [solely or primarily] to delay certification of the election or to cast false shadows on the election's legitimacy." (Court's ruling, page 2.) First, the Court's framing of the issue omits two important words – "solely or primarily." A.R.S. § 12-349(A)(2)("[b]rings or defends a claim solely or primarily for delay or harassment"). These words are highly significant given the legislative history of the statue and related bodies of caselaw concerning the common-law tort of abuse of process.[4] The concept of "primarily" acting for an improper motive appears heavily in the caselaw surrounding abuse of process, in which courts have required that "a claimant must present more than mere speculation to support the assertion that the defendant has used court processes with an improper intent. Instead, a plaintiff must show that the defendant's improper purpose was the primary motivation for its actions, not merely an incidental motivation." *Crackel v. Allstate Ins. Co*., 208 Ariz. 252, 259, 92 P.3d 882, 889 (Ct. App. 2004); *see also Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d

[4] In the 1980's, a number of "abusive litigation" statutes were enacted in different States to codify the common-law principles of abuse of process, and A.R.S. § 12-349 was one of them. *Compare e.g.* A.R.S. § 12-349 with George's statute, OCGA §§ 51-7-80 to 51-7-85; *see also Yost v. Torok*, 256 Ga. 92, 95, 344 S.E.2d 414, 417 (1986)(discussing Georgia statute as codifying the torts of abuse of process and malicious prosecution); *Coen v. Aptean, Inc.*, 838 S.E.2d 860 (Ga. 2020)(same).

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

876, 881 (Ct. App. 1982); Restatement (Second) of Torts § 682 (1977). According to the Restatement, "[t]he significance of this word ['primarily'] is that there is no action…when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." *Id.* The standard has also been articulated as that where a litigant "took an action that could not logically be explained without reference to…improper motives," or took an action that was "so lacking in justification as to lose its legitimate function," only then does it qualify as being "primarily" for an improper purpose. *Crackel*, 208 Ariz. at 259, 92 P.3d at 889. Arizona courts have imposed these stringent requirements in order to deter "frivolous, unfounded, or ill-defined claims" that litigants are acting "primarily" for harassment or delay, and to ensure that there is not "an amorphous cloud that hangs over everything a litigant does"—because at the end of the day, essentially anything that a litigant does can be seen as "bad faith" in another's eyes. Finally, while groundlessness is determined objectively, the court determines subjectively whether the litigant (or counsel) acted primarily for harassment and bad faith. *Rogone v. Correia*, 236 Ariz. 43, 50, 335 P.3d 1122, 1129 (Ct. App. 2014).

The Secretary offers nothing but mere speculation or innuendo to support that either the Plaintiff or counsel brought claims in bad faith primarily to delay certification of the election or to cast "false shadows on the election's legitimacy." First of all, as to "delaying certification" – the suggestion is personally offensive to undersigned counsel, for a number of reasons. When undersigned counsel filed this lawsuit on November 12, 2020, the suit did not even ask to delay certification because counsel and client did not believe it would be necessary. Counsel originally contemplated at most a very short evidentiary hearing on the issue of whether a recount by "precinct" could still be performed, and whether it could performed in time for the county's deadline to certify the canvass–which was nearly two weeks later, on Monday November 23rd. At the beginning of the initial return hearing on the matter, the Court seemed to indicate

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

agreement with counsel's thoughts on scheduling, by saying something to the effect of it just being a short one-witness hearing that might take half an hour. The Defendant Democratic Party then suggested having the hearing in the following day or two, which would have ultimately avoided any issue of delaying certification of the canvass and been acceptable to Plaintiff. However, the county then disclosed that it intended to certify the canvass early, on that Thursday (even though in reality, it actually did not certify until Friday and its deadline was not until the following Monday); and it was the *Court* which then determined that it was unavailable to conduct an evidentiary hearing for over another week, i.e. Tuesday November 24th—effectively creating the "laches" problem. And it was the *Secretary*'s counsel who asked the Court to dismiss the case on the grounds that it would become moot after certification of the vote Thursday, and who complained that no request had been made to enjoin the certification. The Court noted that it did not have a written application to enjoin the certification of the vote in front of it, and then set a deadline for Plaintiff to make the application the next day. When Plaintiff did so, Plaintiff made a point of asking the Court to consider assigning the matter to another Division that would be available to handle a hearing sooner, so as to avoid any disruption to the certification or deadline. Finally, on Wednesday, Plaintiff made a point of even filing a brief in which Plaintiff recommended to the Court a possible remedy that could be accomplished quickly, before the county's alleged intended date of certification. In other words, Plaintiff and its counsel were at pains to do everything that they could think of to *avoid* delaying the date of certification; and the problem was fundamentally caused by the Court's calendar, as well as the Secretary's insistence that not holding a hearing before certification of the vote would moot out the case. Finally, delaying the certification date would have absolutely no practical benefit for Plaintiff whatsoever, other than avoiding the Secretary's argument that the case would became moot; and Plaintiff's request was only made in direct response to that. There was no other conceivable "advantage" to be gained from delaying the certification a day or two

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

(pending a court ruling), which was all that was requested. The certification date does not affect when candidates actually take office (in January), which is what really matters. Further, with the exception of President and Senator, Plaintiff's candidates retained every single office in this election (and gained some); so the notion that it was in Plaintiff's best interest to delay canvassing is doubly absurd, much less the idea that Plaintiff "primarily" filed this suit for that purpose. In reality, it was the last thing that Plaintiff or its counsel wanted to cause or do, they stood to receive absolutely no practical benefit from it, and were at pains to avoid either doing it even having to ask for it.

The Court also asks whether the suit was brought solely or primarily to "cast false shadows on the election's legitimacy." There is no admissible evidence that anyone can articulate to support this accusation, much less explain what it really means. Plaintiff did not even allege that the election was "illegitimate" as part of this suit, much less file the suit primarily to "falsely" prove that it was, given that this was not even an element or issue of proof in the suit. The suit was about auditing results, which by definition is simply checking them to ensure voter confidence and integrity.

But more troublingly, there is a degree of bias in the way that the Court frames this issue – to "cast false shadows on the election's legitimacy." The Court has apparently concluded, even though it was not an issue to be litigated in this suit, that it would be "false"—and even constitute harassment—to doubt the legitimacy of this election. This puts the Court at odds with around a third of the general population, and around half of the Republican Party in this State,

. . .

. . .

. . .

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

according to polls conducted by NPR, Reuters and Politico among others.[5] It can hardly be said that a political belief shared be one out of three people in this democracy is so "false" and improper, and such "bad faith," that it could only constitute sanctionable "harassment." The Court is troublingly close to engaging in very serious interference with the First Amendment right to petition government for a redress of grievances, by equating a widely-held political belief with mere "harassment," and threatening to impose sanctions and oppress that belief. To further appreciate the point, the Court might consider replacing the words "cast false shadows on the election's legitimacy" with "cast false shadows on the legitimacy of gun rights," or "cast false shadows on the legitimacy of marijuana use," or "cast false shadows on the legitimacy of religion." Hopefully the Court sees the very serious First Amendment problem that it is risking by even contemplating a possibility of these kinds of sanctions.

Of course, a much more salutary view for the Court to adopt is that every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity – which is why Arizona has had an elections-challenge statute on its books for over a hundred years, A.R.S. § 16-673, which allows parties to do exactly that. The statute provides that any

---

[5] Separate polls conducted by NPR and Reuters indicate that around one-third of the general public nationwide does not believe that the results of the 2020 election were accurate, around twice the percentile that questioned the results of the 2016 election. A poll by Politico found that distrust is especially high in this State. Altogether, only 55% of adults in the United States said they believed the Nov. 3 presidential election was "legitimate and accurate," which is down 7 points from a similar poll that ran shortly after the 2016 election. The 28% who said they thought the election was "the result of illegal voting or election rigging" is up 12 points from four years ago.

https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ

https://www.npr.org/2020/12/09/944385798/poll-just-a-quarter-of-republicans-accept-election-outcome

https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION

election may be challenged on or after the date of certification of the vote, based on "misconduct on the part of election boards" or election officials; "illegal votes"; "by reason of erroneous count of votes"; etc. Of course, seeking a legal audit (hand count) is one very appropriate and legal way of determining whether there was an erroneous count of votes – and in fact the *only* way, as explained below, before the votes are certified. But under the Court's framing of this issue, any person who files an elections challenge under A.R.S. § 16-673 is potentially daring to "cast false shadows on [an] election's legitimacy" in the eyes of the court, and therefore subject to sanctions for harassment—rendering both these statutes and litigants' First Amendment right to seek redress as nugatory and without meaning.

The Court must understand that in the State of Arizona, this "hand count" audit process is the *only* automatic check that gets performed on the counting of actual ballots. Unlike in other states, where candidates are entitled to request a recount (conditioned on payment of costs, typically)—or where the election results are automatically subject to much larger and/or more easily-triggered recounts— Arizona only provides for this "two percent of precincts" hand count; and that is it. (Arizona law does provide for an automatic recount when a race is only fewer two hundred votes apart, or "one-tenth of one per cent of the number of votes cast," but this is extremely rare. A.R.S. § 16-661.) In other words, because this "hand-count audit" is literally the only check that gets performed on the actual vote, it takes on a heightened significance, as does the importance of doing it completely by the book and in strict accordance with the law, even to the point of conducting another quick sampling in strict legal compliance as was requested in this suit.

In addition, and for what it is worth – undersigned counsel actually went out of his way not to make accusations of actual fraud in this matter, since it was not germane to the case. At one point, the Court challenged undersigned counsel to explain why the plain wording of the statute required a hand count by precinct and not by polling place – to which counsel first

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

responded that it is the legislature's prerogative to write the law the way it did (leaving the public policy behind it a matter for legislators and not the courts). But counsel nevertheless tried to give a rationale and hypothetical to explain why the legislature may have written the law that way that it did: that sampling "by precinct" is much more likely to detect errors "by precinct." This is more important than detecting errors by "vote center," because candidates run for office in precincts and not "vote centers" (e.g. justices of peace, constables etc. run only in one precinct; and there are different voter forms for different precincts). So if there were a problem endemic to one precinct (or even just to one precinct's form), or to one precinct's race (for example, a single precinct or precinct race getting "hacked"), then sampling by precinct has a higher chance of detecting these errors or even fraud. But the moment that undersigned counsel mentioned the word "fraud," the Court seemed to react viscerally and demanded to know what "evidence" there was of actual fraud – even though undersigned counsel was simply trying to explain that a statutory audit is *intended to detect* these things and trying to answer the Court's question about public-policy rationales underlying the plain wording of the statute.

Public mistrust following this election motivated this lawsuit, and there is absolutely nothing improper or harassing about that. Courts are intended to be a forum for airing democratic grievances and safeguarding the integrity of elections. These goals are not well served when courts are openly hostile to anyone who dares to even question an election, much less when courts equate widely-held political beliefs to mere "harassment." Because in this territory, one man's "harassment" is another man's crusade; one man's heresy is another man's religion. This is dangerous First Amendment territory into which the Court should not dream of treading, both in order to maintain the appearance of impartiality of the Court, and to encourage like respect in the citizens that it serves as well as other hard-working officers of the court.

. . .

. . .

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION —

CONCLUSION

For all of the foregoing reasons, the Motion for Sanctions must be denied. If the Court is inclined to consider any form of sanctions after reading these briefs, then Plaintiff and its counsel ask the Court to give notice and opportunity to be heard in Court as to the legal or factual basis for such sanctions and to testify or give other evidence with respect to the same, and to make a record of the salient First Amendment issues involved. *See Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555, 880 P.2d 1098, 1101 (App. 1993)(finding that "notice and opportunity to be heard" must precede imposing any sanction).

RESPECTFULLY SUBMITTED on December 28, 2020.

WILENCHIK & BARTNESS, P.C.

/s/ John "Jack" D. Wilenchik
Dennis I. Wilenchik, Esq.
Lee Miller, Esq.
John "Jack" D. Wilenchik, Esq.
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, Arizona 85004
jackw@wb-law.com
admin@wb-law.com
Attorneys for Plaintiff

ELECTRONICALLY filed via AZTurboCourt.com this 28th day of December, 2020.

ELECTRONICALLY transmitted via AZTurboCourt.com and emailed this 28th day of December, 2020 to the Honorable John R. Hannah, Jr.

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION

COPIES electronically transmitted via AZTurboCourt.com and emailed this 28th day of December, 2020 upon:

Roopali H. Desai, Esq.
D. Andrew Gaona, Esq.
Kristen Yost, Esq.
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1900
Phoenix, Arizona 85004
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com
Attorneys for Intervenor
Arizona Secretary of State Katie Hobbs

Thomas P. Liddy, liddyt@mcao.maricopa.gov
Emily Craiger, craigere@mcao.maricopa.gov
Joseph I. Vigil, vigilj@mcao.maricopa.gov
Joseph J. Branco, brancoj@mcao.maricopa.gov
Joseph LaRue, laruej@mcao.maricopa.gov
MARICOPA COUNTY ATTORNEY'S OFFICE
225 West Madison Street
Phoenix, AZ 85003
Attorneys for Defendants

Sarah R. Gonski, Esq.
PERKINS COIE, LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012
SGonski@perkinscoie.com

Roy Herrera. Esq.
Daniel A. Arellano, Esq.
BALLARD SPAHR, LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004
HerreraR@ballardspahr.com
ArellanoD@ballardspahr.com

Attorneys for Intervenor Arizona Democratic Party

By: */s/Christine M. Ferreira*

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION