

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Tyler Bowyer, et al.,	)	
	)	
Plaintiffs,	)	CV-20-2321-PHX-DJH
	)	
vs.	)	Phoenix, Arizona
	)	December 3, 2020
Doug Ducey, in his official	)	2:00 p.m.
capacity as Governor of the	)	
State of Arizona, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

BEFORE: THE HONORABLE DIANE J. HUMETEWA, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONIC STATUS CONFERENCE

Official Court Reporter:  
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Proceedings Reported by Stenographic Court Reporter  
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A P P E A R A N C E S

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1 THE CLERK: Calling the court to order. The  
2 United States District Court for the District of Arizona is now  
3 in session, the Honorable Diane J. Humetewa presiding.

4 This is case number CV 20-2321, Tyler Bowyer versus  
5 Doug Ducey, et al., on for telephonic status conference.

6 Counsel, will you please announce your presence for  
7 the record, with plaintiffs going first.

8 MR. KLEINHENDLER: Howard Kleinhendler for the  
9 plaintiffs. I guess -- Sidney, do you want to go?

10 THE COURT: I'm sorry. Could you repeat that.

11 MR. KLEINHENDLER: Okay. It's Howard Kleinhendler,  
12 and with me are Ms. Sidney Powell, Mr. Lin Wood, Mr. --  
13 Ms. Julia Haller, Mr. Peter Haller, and Mr. Alex Kolodin. That  
14 is the plaintiffs' group of lawyers. Good afternoon, madam  
15 judge.

16 THE COURT: And good afternoon. And I take it,  
17 Mr. Kleinhendler, you will be speaking for plaintiffs; is that  
18 correct?

19 MR. KLEINHENDLER: I will be speaking together with  
20 Ms. Powell and Mr. Lin, the three of us.

21 THE COURT: Okay. It is important for you to identify  
22 yourself at the time that you're speaking so that we have a  
23 clear record of that.

24 And I understand that at least, I do believe,  
25 defendant Hobbs was served yesterday. Has service been

1 effected as to Governor Ducey?

2 MR. JOHNSON: Yes, Your Honor. This is Brett  
3 Johnson -- This is Brett Johnson on behalf of Governor Ducey,  
4 and with me today is Colin Ahler and Anni Foster, who is the  
5 general counsel for Governor Ducey.

6 THE COURT: All right. And, Mr. Johnson, you will be  
7 speaking on behalf of Governor Ducey; is that correct?

8 MR. JOHNSON: Yes, Your Honor.

9 THE COURT: And who is here for Katie Hobbs?

10 MR. GAONA: Good afternoon, Your Honor. This is Andy  
11 Gaona with Coppersmith Brockelman. I'm joined by Justin  
12 Nelson, Steve Morrissey, and Davida Brook from Susman Godfrey  
13 on behalf of Secretary of State Hobbs.

14 Mr. Nelson will be the primary speaker today on behalf  
15 of the Secretary.

16 THE COURT: All right. One moment.

17 One moment, counsel. We're having a technical  
18 difficulty here.

19 All right. I think we're up and running again.

20 I wanted to get some clarification from the parties on  
21 a number of I think what can be considered as housekeeping  
22 issues. And of course there are some timing issues that are at  
23 play here.

24 MR. HERRERA: Your Honor, if I can be heard for just a  
25 moment, because I haven't announced yet, and this is Roy

1 Herrera on behalf of the proposed intervenor Arizona Democratic  
2 Party. And also on the line is Alexis Danneman and John  
3 Devaney, who are also representing the Arizona Democratic  
4 Party.

5 Just a few moments ago we filed a motion to intervene  
6 in this lawsuit, and so I'm not sure if the Court has seen that  
7 yet. We're happy to e-mail that over to you right now, but it  
8 has been filed. So I just wanted to make sure you knew that  
9 that motion has been filed and that we are seeking intervention  
10 in this case.

11 THE COURT: All right. And I have seen that. Of  
12 course there has not -- I've not read it. I saw the document  
13 come in, but I have not read it. And so that was Mr. Herrera;  
14 is that correct?

15 MR. HERRERA: Yes, Your Honor.

16 THE COURT: All right. And so let me just get an idea  
17 of where we are technically and where we need to go in the next  
18 few days. I understand that there are a number of still  
19 outstanding pro hac vice applications, and I'll look for those  
20 to be coming forthwith.

21 And I also wanted to inquire -- and, Mr. Kleinhendler,  
22 I'll direct this to you -- I want to understand whether any  
23 named plaintiff has the same or similar case pending in the  
24 state court.

25 MR. KLEINHENDLER: To my knowledge, they do not.

1 Alex, can you confirm that?

2 MR. KOLODIN: Yes. Good afternoon, Your Honor.

3 Alexander Kolodin. One of the named plaintiffs, Kelli Ward,  
4 has a case pending in the state courts with a much more limited  
5 scope of these issues. To my knowledge, no other plaintiff  
6 does.

7 THE COURT: When you say a limited scope of the  
8 issues, are they the same or similar fact issues, or are they  
9 substantially different?

10 MR. KOLODIN: Very substantially different, Your  
11 Honor. Our complaint alleges a number of different issues.  
12 Based on my limited understanding of the state court case, I  
13 believe that it's focused only on absentee ballots and perhaps  
14 on some sort of read error or scan error with the machines.  
15 But, again, I'm not very well versed on that.

16 MR. KLEINHENDLER: Your Honor, if I may add one --

17 THE COURT: I'm sorry. Can you -- Who is speaking?

18 MR. KLEINHENDLER: Sorry. Howard Kleinhendler. When  
19 we prepared this case, I wasn't aware of that. And if that  
20 presents an issue, we will, you know, we are prepared to drop  
21 Ms. Ward from this case. That is not -- We don't believe that  
22 would be an issue. This case is brought primarily if not  
23 exclusively -- At least the motion currently before you, ma'am,  
24 is brought exclusively on behalf of the electors. In fact, we  
25 have all 11 electors, Republican-nominated electors for

1 Arizona, and Ms. Ward is not -- we are not arguing on her  
2 behalf in connection with the TRO and the preliminary  
3 injunction we are seeking. So to the extent there's any  
4 question in the Court's mind, we will immediately drop her from  
5 the case.

6 THE COURT: Well, I would ask you to go back and look  
7 carefully at that case that is pending in the state court that  
8 Ms. Ward has, because, if I understand what was just said by  
9 Mr. Kolodin, there is an allegation regarding errors with the  
10 machine. And if that is indeed the case, then I think that  
11 there are factually similar allegations in the complaint as far  
12 as I've read so far.

13 And so I would ask you to go back and examine that  
14 state case to determine whether or not there is a substantial  
15 similar claim or facts related to the complaint here and then  
16 to think about the judicial resources that you're asking us to  
17 expend with respect to that.

18 And so that is at least you can state to this court,  
19 Mr. Kleinhendler, to your knowledge, Ms. Ward is the only  
20 individual named plaintiff here that has a current pending case  
21 in the state court; is that correct?

22 MR. KLEINHENDLER: That is correct. And, again, just  
23 to clarify, there are no Arizona electors who have any claims  
24 in the state court. And the claims we are bringing here are  
25 primarily federal in nature and would not even belong in a



1 state court. So they're two really different cases, two  
2 different standings, two different levels of injury.

3 THE COURT: Okay. So I think that all remains to be  
4 seen, but I just want to make it clear that you go back and  
5 examine what those claims are and look at the complaint here  
6 and make that determination.

7 The question was asked with respect to the named  
8 plaintiffs. Now let me just ask you more generally were there  
9 any other cases brought in the state court related to the  
10 election that you are aware of, Mr. Kleinhendler, or any of  
11 plaintiffs' counsel are aware of?

12 MR. KOLODIN: Your Honor, I will address that.

13 THE COURT: Who is speaking again?

14 MR. KOLODIN: Alexander Kolodin, Your Honor. So this  
15 is the first case, to my knowledge, that's been brought in  
16 Arizona that actually alleges that there was fraud in the  
17 election. There have been a number of other state court cases  
18 dealing with other items, but, to my knowledge, none have  
19 alleged fraud. And I think that's the big distinction here,  
20 besides of course the fact that federal issues are concerned.

21 THE COURT: Anyone else?

22 All right. All right. And so I guess with respect to  
23 that then, what I would ask the parties to do in the next  
24 procedural steps is in any response to the complaint or any  
25 reply, I'm going to have you address the Arizona state statute

1 16-672 and in particular as it relates to subsection B.

2 And this Court is concerned that if there are existing  
3 cases in the state court, that there is always going to be the  
4 potential for inconsistent rulings. And so I would like you to  
5 focus on that. And to the extent you need an extension of  
6 pages in which to do so, you may seek leave to do so. And I  
7 can give you some guidance with respect to that if it is  
8 necessary.

9 I think the primary concern that I have here is I'd  
10 like to identify what time constraints govern the Court's  
11 decisional process.

12 And I'll hear from plaintiffs' counsel, and then I can  
13 hear from Governor Ducey's and Secretary Hobbs'.

14 MR. KLEINHENDLER: Thank you very much, Your Honor.  
15 The time constraints here are, frankly, enormous. December 8th  
16 is a date set forth in the federal statute 3 U.S.C. 5 as a safe  
17 harbor for states to have completed any election disputes  
18 regarding the results of an election. I point out to you, Your  
19 Honor, that this date was only certified on November 30th. By  
20 December 2nd we had filed a case.

21 Now, we don't -- we are of the view that a decision on  
22 a constitutional cause of action can be rendered even after  
23 December 8th but certainly by December 14th, which is when the  
24 legislature convenes to vote for the President -- where the  
25 electors convene to vote for the President. And the crux of

1 our complaint and motion for a TRO is we want the current slate  
2 of electors, the democratic slate, not to be seated and not to  
3 be voted for.

4 On the contrary, we want everything to come to a stop  
5 and that either -- there's basically a menu here -- either  
6 decertify the election because of what we have alleged or at  
7 least put a hold on the procedure until the Court can delve a  
8 little deeper into the allegations presented here.

9 I do not believe that the allegations before you with  
10 the detail and the subsequent back-up in the form of sworn  
11 affidavits, sworn declarations, documentary evidence from a  
12 host of different types of experts and fact witnesses has been  
13 merely presented not only nowhere in the state but nowhere in  
14 the country outside of the other cases that this group of  
15 lawyers have brought. And we have three cases pending, Your  
16 Honor, one in Georgia, one in Wisconsin, one in Michigan, and  
17 one here in Arizona.

18 And just for your information, the case in Georgia we  
19 got a partial TRO. That case has been granted immediate  
20 appellate review by the Eleventh Circuit and is being looked at  
21 right now.

22 So while we have a very distinguished host of lawyers  
23 on the call, including many that want to intervene, our time  
24 goal right now -- And this isn't going to be easy for you,  
25 ma'am. But our time goal right now is for you to try to make a

1 decision on our TRO as quickly as possible, so that either  
2 party, regardless of how it comes down, can seek immediate  
3 appellate review if, at the best, before December 8th but at  
4 least before December 14th.

5 That's why we would ask you to treat this motion as  
6 you would normally treat a regular TRO, which is, look, TRO  
7 came in, if you want to get some emergency briefing on it,  
8 fine, but what we'd ask you for is grant the TRO pending a  
9 hearing. And we are prepared to put on an evidentiary hearing  
10 Monday morning in your court. That is the plaintiffs'  
11 position.

12 THE COURT: All right. Let me hear from Governor  
13 Ducey's counsel. Is it Mr. Johnson?

14 MR. JOHNSON: Yes, Your Honor. It's Brett Johnson on  
15 behalf of Governor Ducey. I will defer in a minute to the  
16 Secretary's counsel, who is going to be more versed on the  
17 upcoming dates. But from Governor Ducey's perspective -- and  
18 I've explained this to plaintiffs' counsel -- Governor Ducey  
19 had a nominal role in observing or being present during the  
20 canvass on Monday November 30th. That canvass was complete.  
21 At the end of that canvass, the results of that canvass were  
22 transmitted by the Governor's Office in coordination with the  
23 Secretary's Office to the National Archivist.

24 At that time Governor Ducey's role, to the extent that  
25 it was nominal and ministerial in any way, was complete.

1           So from Governor Ducey's perspective, his involvement  
2 in this case is now completely nominal and quite honestly  
3 unnecessary.

4           With that being said, I would turn it and defer over  
5 to Secretary's counsel to give a greater timeline on the  
6 election process.

7           THE COURT: All right.

8           MR. NELSON: Thank you, Your Honor. This is Justin --  
9 Thank you, Your Honor. This is Justin Nelson from Susman  
10 Godfrey on behalf of the Secretary.

11           We agree that this should be heard quickly. There are  
12 dates coming up. We take issue with a lot of what plaintiff  
13 said with respect to the effect of the dates. But we agree  
14 that this Court should resolve this expeditiously.

15           We take issue because we believe that there are  
16 numerous legal errors that completely destroy any type of  
17 ability for plaintiff to bring these claims in the first  
18 instance, putting aside their fanciful factual allegations.

19           And I'd note in the motion to intervene, the electors  
20 in the Arizona Democratic Party have proposed a schedule  
21 whereby this Court hears expeditiously any motion to dismiss  
22 prior to deciding the TRO, and we would support that position.

23           And we are of course open to any schedule that this  
24 Court may deem necessary to hear this expeditiously.

25           THE COURT: Well, I guess for my purposes, then, I

1 would like really to get an understanding at this point,  
2 Mr. Nelson -- and I assume -- I have this assumption that  
3 you're speaking on behalf of Mr. Johnson as well -- are you  
4 intending to file a response to the TRO, or are you going to  
5 file a motion to dismiss, or are you going to file a  
6 combination of that? And in what time frame are you going to  
7 do so?

8 MR. NELSON: We are prepared to file both, Your Honor,  
9 and to file as early as tomorrow night, at midnight tomorrow  
10 night to do our filings. We think it's appropriate for the  
11 motion to dismiss to come prior to any opposition to the  
12 temporary restraining order, but of course we're at the  
13 pleasure of the Court and are prepared to do both.

14 THE COURT: And assuming you are able to file both of  
15 those motions by Friday, I assume, midnight, then I'll turn to  
16 Mr. Kleinhendler and ask you then when would you or would you  
17 wish to reply, and, if so, how much time would you need?

18 MR. KLEINHENDLER: Your Honor, if I could just address  
19 that, if they could get their papers in by 10:00 p.m. on Friday  
20 night, we would be in a position to respond by 10:00 p.m.  
21 Saturday night.

22 MR. NELSON: Your Honor, we have no objection to that.  
23 We would appreciate a reply that would be due on Sunday night  
24 at the same time.

25 UNIDENTIFIED MALE SPEAKER: Your Honor --

1 THE COURT: I'm sorry. Who's speaking?

2 UNIDENTIFIED MALE SPEAKER: Your Honor, I apologize.  
3 I know there are a lot of people on the phone. I just wanted  
4 to respond to the request for a reply.

5 THE COURT: Wait, wait, wait.

6 I asked you a question. Who is speaking, please? Is  
7 this Mr. Kleinhendler?

8 MR. KLEINHENDLER: Your Honor, the last thing I said  
9 was I'd appreciate it if the defendants filed whatever they're  
10 going to file by 10:00 p.m. Friday night and that the  
11 plaintiffs had until 10:00 p.m. Saturday night to respond.  
12 That's the last thing I was allowed to say.

13 MR. NELSON: Your Honor, this is Justin Nelson. I  
14 commented that 10:00 p.m. as opposed to midnight is amenable to  
15 the Secretary and that we would ask for the opportunity for a  
16 reply to our motion to dismiss that would be due at 10:00 p.m.  
17 on Sunday night.

18 MR. JOHNSON: Your Honor, this is Brett Johnson for  
19 Governor Ducey. We have not coordinated with Mr. Nelson, but  
20 we are amenable to that timeline if the plaintiffs decline to  
21 dismiss us voluntarily.

22 THE COURT: All right. Now, let me ask a question,  
23 and I hope perhaps Mr. Nelson can address this. And if not, it  
24 may address one of the issues that is outstanding here.

25 If you know, Mr. Nelson, what generally occurs with

1 the servers, the software, the voting machines, and so on after  
2 an election has been certified? Are those items preserved, and  
3 if they are, how so and for how long?

4 MR. NELSON: Thank you, Your Honor. This is Justin  
5 Nelson. Unfortunately I cannot give an answer to the degree  
6 necessary as an officer of this court to that question right  
7 now and would need to consult with my client to get back to  
8 you, and of course we can do that expeditiously.

9 THE COURT: Well, I would suggest, because it is one  
10 of the requests in the TRO, I would suggest that, Mr. Nelson,  
11 that you gather that information and perhaps share it with  
12 plaintiffs' counsel. It may alleviate at least for the time  
13 being the necessity to enter a TRO with respect to that aspect  
14 of what they're seeking.

15 Of course there might be some modification to however  
16 that preservation is made. I'm operating on an assumption that  
17 there is some process by which those systems are preserved,  
18 but --

19 UNIDENTIFIED MALE SPEAKER: Your Honor, this is --

20 THE COURT: -- in any event I would ask you to find  
21 out what the process is and share that information with  
22 plaintiffs' counsel. And perhaps there might be a way to  
23 alleviate having to address that issue.

24 So if you could -- if you could do that, I would  
25 appreciate it.



1 MR. NELSON: Thank you, Your Honor. This is Justin  
2 Nelson. Excuse me, Your Honor.

3 THE COURT: Go ahead.

4 MR. NELSON: What I was going to say is that the  
5 machines do not reside with the Secretary of State. These are  
6 at the county level. And of course we will inquire. But the  
7 plaintiffs have not named any of the counties who have  
8 possession and under Arizona law are in charge of the  
9 administering of the elections. And want to make sure that  
10 that's clear to the plaintiffs as well.

11 THE COURT: All right. All right. And so it sounds  
12 like we have an agreement as to the briefing here. I'm going  
13 to have to consult my court schedule for availability on Monday  
14 or Tuesday. We are here operating on a limited court access  
15 basis due to COVID, and so we are sharing space, in other  
16 words.

17 And so I'll have to make sure that I have a courtroom  
18 available for the matter. And what I will do after the  
19 completion of this status conference is I will issue a minute  
20 entry confirming the briefing schedule as well as a hearing on  
21 both the motion to dismiss and the motion for temporary  
22 restraining order.

23 And so those are the critical issues that I wanted to  
24 discuss with respect to the timing of all of this as well as to  
25 understand if there is duplication of effort going on in the

1 state courts.

2 And is there anything further by way of housekeeping  
3 matters from your perspective, Mr. Kleinhendler?

4 MR. KLEINHENDLER: No, Your Honor. I want to thank  
5 you for your immediate attention. I just wanted to clarify one  
6 thing. Are there going to be page limitations if we get briefs  
7 from multiple parties and we, plaintiffs, have to deal with  
8 multiple briefs and multiple motions?

9 THE COURT: At the moment I just was handed another  
10 motion to intervene. And I would suspect that many of these  
11 issues can be addressed simultaneously. But to the extent you  
12 find that you're in need of additional page extensions, simply  
13 seek the page extensions. Be very brief, if you can. And that  
14 will enable me to get through the multiple pleadings that have  
15 come through so far.

16 But it shouldn't take in excess of five pages per  
17 intervenor, I would think. So if you are reasonable in the  
18 request, I'll generally just through a minute entry will grant  
19 that request.

20 Is there anything further, Mr. Kleinhendler?

21 MR. KLEINHENDLER: I just wanted, just for the record,  
22 we would like an ability to at least consider and perhaps  
23 object to any intervenors. So our position at this point is  
24 the State is adequately served with their esteemed counsel, and  
25 I would like an opportunity, even on a very short schedule, to

1 address any proposed additional intervenors.

2 THE COURT: All right. Very well. Is there anything  
3 further from you, Mr. Johnson?

4 MR. JOHNSON: No, Your Honor. Thank you for your  
5 time.

6 THE COURT: Mr. Nelson?

7 MR. NELSON: Two logistical issues, Your Honor, for  
8 clarification.

9 First, with respect to the page limits, we would ask  
10 for additional briefing, given the fact that, as I understand  
11 the Court's order, we would be discussing both the motion to  
12 dismiss and the opposition to the temporary restraining order  
13 at the same time. And we would ask for an additional ten  
14 pages, if Your Honor finds that acceptable.

15 THE COURT: Yes, I will permit you to do so.

16 MR. NELSON: Thank you, Your Honor. Second, for  
17 logistical planning purposes, is it Your Honor's intention to  
18 hold the hearing in person or via Zoom?

19 THE COURT: Well, the -- our technology, frankly, is  
20 saturated at the moment. We're holding all criminal matters  
21 via technology, so our bandwidth is an issue. To the extent  
22 that we can have -- To the extent that we can have live  
23 counsel, I'm going to limit that to two counsel per side for  
24 social distancing purposes. And otherwise we'll have to  
25 determine what our bandwidth availability is -- it will likely

1 be in the morning -- and what courtroom availability we will  
2 have on Monday or Tuesday. And so do stand by for that. We  
3 should have that resolved before the end of today.

4 And certainly, Mr. Nelson, if you are local counsel  
5 and you are here and you wish to be physically present, I have  
6 no objection to that, again, with the maximum number of counsel  
7 per party being two, to permit social distancing.

8 MR. KLEINHENDLER: Your Honor, if I may, would it be  
9 two counsel plus our local counsel, or is it two total?

10 THE COURT: Two total.

11 MR. KLEINHENDLER: Also, Your Honor, may I just  
12 inquire -- This is Howard Kleinhendler again. I apologize.

13 Will we have the ability to put on any expert or  
14 witness testimony? Which we very much would like the  
15 opportunity to do.

16 THE COURT: Let me just tell you at this moment,  
17 having not read the substance of all of the affidavits that  
18 were filed, you should operate on the assumption that you will.  
19 And we'll work technology-wise to try to accommodate that.

20 So there being nothing further, then we will issue a  
21 minute entry again reiterating the deadlines that you have all  
22 agreed to. And we will set a hearing on the motions shortly.

23 All right. Then this matter is adjourned. Thank you,  
24 counsel.

25 (Proceedings recessed at 2:36 p.m.)

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C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 4th day of December, 2020.

s/Linda Schroeder  
Linda Schroeder, RDR, CRR