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*Attorneys for Maricopa County Defendants*

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

KELLI WARD,

Plaintiff,

v.

CONSTANCE JACKSON; FELICIA  
ROTELLINI; FRED YASHITA; JAMES  
MCLAUGHLIN; JONATHAN NEZ;  
LUIS ALBERTO HEREDIA; NED  
NORRIS; REGINA ROMERO; SANDRA  
D. KENNEDY; STEPHEN ROE LEWIS;  
and STEVE GALLARDO;

Defendants.

NO. CV2020-015285

**COUNTY INTERVENORS'  
MOTION TO SEAL EXHIBIT 89**

(Honorable Randall Warner)

1 Pursuant to Arizona Rule of Civil Procedure 5.4(c) and (d), Intervenor Maricopa  
2 County Board of Supervisors and Proposed Intervenor Maricopa County Recorder Adrian  
3 Fontes (“County Intervenor”) respectfully requests that this Court enter an order granting  
4 advance authorization under Rule 5.4(c)(3)(C) to County Intervenor to submit under seal  
5 what the County Intervenor has marked as Exhibit 89, Signature Verification Excerpts.<sup>1</sup>  
6 Consistent with Rule 5.4, County Intervenor has addressed this matter with opposing  
7 counsel. But as of the time of this filing in this accelerated election case, County  
8 Intervenor has not heard back from opposing counsel. Because of the exigency to get  
9 this Motion filed and the Court’s indication that it will address this matter at tomorrow’s  
10 hearing, the County Intervenor is filing this Motion.

### 11 **Statement of Facts and Legal Authority<sup>2</sup>**

12 In support of this Court’s fact-finding function in this matter, County Intervenor  
13 intend to submit signature verification excerpts that contain voter signatures and  
14 corresponding voter registration information as Exhibit 89, Signature Verification  
15 Excerpts (“Individual Voter Information Exhibit”). County Intervenor request advance  
16 authorization under Arizona Rule of Civil Procedure 5.4(c)(3)(C) to submit these  
17 documents under seal because they contain confidential voter information that personally  
18 identifies individual voters. These voters are not parties to this lawsuit and are enmeshed  
19 in this controversy simply because they exercised their fundamental right to vote. *See*  
20 *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that voting is of the most  
21 fundamental significance under our constitutional structure.” (Internal quotation mark  
22 omitted)).

23 Under Rule 5.4(c)(1), “a court may order a document to be filed under seal if this  
24 rule’s requirements are met.” Rule 5.4(c)(2) provides two avenues for this Court to seal

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25 <sup>1</sup> At the Court’s instruction, County Intervenor has electronically shared this  
26 exhibit with the Court and the Parties in anticipation of addressing this matter at the  
27 beginning of tomorrow’s hearing.

28 <sup>2</sup> County Intervenor presents this section in compliance with Arizona Rule of Civil  
Procedure 5.4(d)(2).

an exhibit: (1) “authoriz[ation]” from a “statute, rule or prior court order”; and (2) a balancing test that weighs the interests in confidentiality against “the right of public access” to the document. Here, County Intervenors’ request to seal the Individual Voter Information Exhibit meets either requirement.

**I. The voter registration statutory scheme implicitly authorizes this Court to seal the Individual Voter Information Exhibit.**

Unmistakably, “the legislature has determined that voter registration information should have more protection from public access than other types of information.” *Primary Consultants, L.L.C. v. Maricopa Cnty. Recorder*, 210 Ariz. 393, 398, ¶ 16 (App. 2005). By default, under A.R.S. § 16-168(F), voter registration information contained in the Individual Voter Information Exhibit “shall not be accessible or reproduced by any person other than the voter.” That confidential information includes:

the month and day of birth date, the social security number or any portion thereof, the driver license number or nonoperating identification license number, the Indian census number, the father’s name or mother’s maiden name, the state or country of birth and the records containing a voter’s signature and a voter’s e-mail address.

A.R.S. § 16-168(F).

Specific exceptions for the access and reproduction of this information exist (1) for “an authorized government official in the scope of the official’s duties,” (2) “for any purpose by an entity designated by the secretary of state as a voter registration agency pursuant to the national voter registration act of 1993,” (3) “for signature verification on petitions and candidate filings,” (4) “for election purposes,” (5) “for news gathering purposes by a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station,” or (6) “pursuant to a court order.” *Id.* But “[n]otwithstanding any other law, a voter’s e-mail address may not be released for any purpose.” *Id.* The statute makes unauthorized access to this information a class 6 felony. *Id.*

Although this statute does not explicitly “authorize[]” voter registration files and

1 voter affidavits “to be filed under seal,” that authorization is implicit by making  
2 confidentiality the default. This Court should enter an order granting County Intervenor  
3 advance authorization to submit the Individual Voter Information Exhibit under seal  
4 consistent with Rule 5.4(c)(2) and § 16-168(F).

5 **II. Alternatively, County Intervenor’s request to seal the Individual Voter**  
6 **Information Exhibit satisfies Rule 5.4(c)(2)’s balancing test.**

7 Even if this Court concludes that § 16-168(F) does not “authorize[]” it to seal the  
8 Individual Voter Information Exhibit, the overriding interests of voters—particularly  
9 these voters—in keeping their personally identifiable information confidential meets Rule  
10 5.4(c)(2)’s balancing test. That Rule states that “a court may order that a document may  
11 be filed under seal only if it finds in a written order that”:

12 (A) an overriding interest exists that supports filing the document under seal  
13 and overcomes the right of public access to it;

14 (B) a substantial probability exists that the person seeking to file the  
15 document under seal (or another person) would be prejudiced if it is not filed  
16 under seal;

17 (C) the proposed restriction on public access to the document is no greater  
18 than necessary to preserve the confidentiality of the information subject to  
19 the overriding interest; and

20 (D) no reasonable, less restrictive alternative exists to preserve the  
21 confidentiality of the information subject to the overriding interest.

22 Ariz. R. Civ. P. 5.4(c)(2).

23 Here, the legislative intent behind § 16-168(F) shows “an overriding interest exists  
24 that supports filing” the Individual Voter Information Exhibit “under seal and overcomes  
25 the right of public access to it.” *See* Ariz. R. Civ. P. 5.4(c)(2)(A). As noted above, § 16-  
26 168(F) already significantly curtails public access to the information in the Individual  
27 Voter Information Exhibit. These documents contain the personal information of voters  
28 who are not parties to a lawsuit and simply exercised their fundamental constitutional right  
to cast a ballot. The exposure of this voter information to the public through legal

1 proceedings threatens a chilling effect for other voters in future elections who stand to  
2 have their personal information aired in court for the act of voting. These interests in  
3 confidentiality override any limited right to access the public may have in the Individual  
4 Voter Information Exhibit.

5 In addition to the general interest in the confidentiality of voter information  
6 expressed by the Arizona legislature in § 16-168(F), “a substantial probability exists” that  
7 these particular voters “would be prejudiced if [their personal information] is not filed  
8 under seal.” Ariz. R. Civ. P. 5.4(c)(2)(B). Surely, this Court is aware of the publicity that  
9 elections cases have attracted this year. Because the nature of these records provides a  
10 blueprint for identity theft and harassment, there is unquestionable prejudice in making  
11 these voters’ personal information publicly available in this litigation. Again, these voters  
12 are Arizona citizens who participated in the election process by voting. They are not  
13 parties to this suit. They are not candidates for public office. They are simply part of the  
14 electorate.

15 Additionally, “the proposed restriction on public access to the” Individual Voter  
16 Information Exhibit “is no greater than necessary to preserve the confidentiality of the  
17 information subject to the overriding interest” and there is “no reasonable, less restrictive  
18 alternative . . . to preserve” that confidentiality. Ariz. R. Civ. P. 5.4(c)(2)(C), (D). The  
19 advance authorization to submit the Individual Voter Information Exhibit under seal  
20 closely tracks the information already restricted by § 16-168(F). Further, there is no  
21 reasonable redaction that can take place—and certainly not on the accelerated timeline  
22 necessary for this litigation—that would avoid substantial prejudice to the individual  
23 voters whose signatures and personal information has been put at issue in this litigation.  
24 The public cannot access this information through the County under § 16-168(F); this  
25 Court should not permit the public to access this information through these proceedings.

### 26 **Conclusion**

27 With § 16-168(F), the Arizona legislature made the voter registration  
28 information—and by extension the voter’s signature on the affidavit—contained in the

1 Individual Voter Information Exhibit confidential, and it has implicitly authorized these  
2 documents to be filed under seal consistent with Arizona Rule of Civil Procedure 5.4(c).  
3 Alternatively, the Arizona legislature has tipped the scales of Rule 5.4(c)(2)'s balancing  
4 test in favor its "overriding interest" in confidentiality, and the interests of these voters—  
5 and Arizona's electoral process more generally—are best served by accepting these  
6 documents under seal. Consistent with Arizona Rule of Civil Procedure 5.4(c)(3)(C), this  
7 Court should grant Intervenor Maricopa County Board of Supervisors' and Proposed  
8 Intervenor Maricopa County Recorder's advance authorization to submit these documents  
9 under seal.

10 **RESPECTFULLY** submitted this 2nd day of December, 2020.

11 ALLISTER ADEL  
12 MARICOPA COUNTY ATTORNEY

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1 ORIGINAL of the foregoing e-filed with  
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3 with electronic copies e-served to:

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