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

LAURIE AGUILERA, a registered
voter in Maricopa County,
Arizona; DOES I-X;

Plaintiffs,

vs.

ADRIAN FONTES, in his official
capacity as Maricopa County
Recorder; CLINT HICKMAN, JACK
SELLERS, STEVE CHUCRI, BILL
GATES, AND STEVE GALLARDO, in
their official capacities as
members of the Maricopa County
Board of Supervisors; Maricopa
County, a political subdivision
of the State of Arizona;

Defendants.

CV 2020-014562

Phoenix, Arizona

November 16, 2020

BEFORE: The Honorable MARGARET MAHONEY, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Prepared for: (COPY)

Reported by: Mr. Scott M. Coniam, RDR, CRR
Certified Court Reporter #50269

A P P E A R A N C E S

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KOLODIN LAW GROUP PLLC
By: Messrs. Alexander Kolodin
and Christopher Viskovic

PUBLIC INTEREST LEGAL FOUNDATION
By: Ms. Sue Becker

Maricopa County Attorney's Office
By: Mr. Joseph E. LaRue
Ms. Emily Craiger

PERKINS COIE LLP
By: Ms. Sarah R. Gonski

BALLARD SPAHR LLP
By: Mr. Daniel A. Arellano

P R O C E E D I N G S

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THE COURT: Okay, Counsel, we're going to try it again.

5

Can you hear me now?

6

Excellent. All right.

7

8

So I'm calling number four on the calendar, CV 2020-014562. And it is time set for an order to show cause return hearing.

9

Appearances, please.

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MR. KOLODIN: Your Honor, Alex -- I'm getting --

13

14

THE COURT: Mr. Kolodin says he's getting an echo.

15

(Pause.)

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THE COURT: Okay. Folks, I'm back. This is supposed to be the easy part of the hearing but fortunately our IT fellow, Manny, is going to stay with us in the courtroom because it can be a challenge, so sorry for the delay.

21

22

23

I've called the case twice, I think. I don't know whether anybody ever heard that but I have called it twice so I won't do it again.

24

25

How about appearances. Mr. Kolodin, that's where we lost you guys before.

1 MR. KOLODIN: Thank you, Your Honor.
2 Alexander Kolodin, Chris Viskovic, Kolodin
3 Law Group, here on behalf of plaintiffs.

4 Sue Becker, Public Interest Legal
5 Foundation, our co-counsel.

6 THE COURT: Thank you.

7 MR. LARUE: Good afternoon, Your Honor.
8 Joseph LaRue and Emily Craiger here for the county
9 defendants.

10 THE COURT: All right. Thank you.

11 MS. GONSKI: Good afternoon. This is Sarah
12 Gonski and Daniel Arellano, here with the proposed
13 intervenor, the Arizona Democratic Party.

14 THE COURT: Thank you.

15 Mr. LaRue, I had been told that Mr. Vigil
16 was on the line. I don't know if I heard you announce for
17 him and I just missed it or is he not on the line?

18 MR. LARUE: He's not actually on -- he's on
19 the public line listening in --

20 THE COURT: Oh.

21 MR. LARUE: -- with the rest of the public.
22 I had misunderstood where he was calling in to.

23 THE COURT: Okay. No worries. No worries.

24 So, folks, welcome back. And we have now a
25 new complaint, which I have read. We have a couple of new

1 to respond orally on the record today with our reply to
2 that response if that's helpful.

3 THE COURT: Okay. All right. So there's
4 that item to take care of.

5 And then the next item would be of course
6 setting a time for plaintiffs to respond to the county
7 defendants' motion to dismiss. And, Mr. Kolodin, have you
8 given any thought to that?

9 I do intend, folks, for this case to move
10 forward very, very quickly. I think that's in the best
11 interest of everything involved. And unfortunately I'll
12 be in the dentist chair for a root canal first thing
13 tomorrow morning, but other than that, I have canceled
14 what I had on Friday -- or not canceled. I moved the
15 proceedings that I had set on Friday that was going to
16 take up my time so I could open up Friday to get you folks
17 into court hopefully on a similar schedule to what I had
18 determined in "Aguilera I" was going to be in the best
19 interest of getting the case resolved quickly for
20 everyone. So that would still be my general hope is that
21 everything can get filed that needs to get filed with
22 enough time and in enough brevity so I have enough minutes
23 in the day to read what you're sending to me and then get
24 into court on Friday and hear oral argument on the motion
25 to dismiss, hear evidence that needs to be presented.

1 I do caution you folks, you know, unlike a
2 Federal District Court judge, we don't have clerks. We
3 don't have anybody that helps us. We literally read
4 everything you submit and -- on our own. And in that
5 respect, shorter is better because everything is being
6 done in an abbreviated fashion.

7 So I know the county defendants filed what
8 is effectively by way of the explanatory text a ten page
9 motion to dismiss, I'm going to call it that because the
10 caption and the mailing certificate and all doesn't count.
11 But what I'd like to do is order that plaintiffs'
12 opposition to that, assuming plaintiff is going to be
13 opposing that motion to dismiss, that it likewise be
14 limited to ten pages of explanatory text.

15 And if there's anybody else -- I don't know
16 if there's anybody else that would be intending to file
17 anything responsive to the county defendants' motion to
18 dismiss. Is there?

19 Or would it only be plaintiffs?

20 MS. GONSKI: Your Honor, if we were granted
21 intervention, then we would also like to file a motion to
22 dismiss.

23 We do completely understand that -- you
24 know, the page limit request and especially in light of
25 the fact there's already a motion to dismiss on file, if

1 you -- you know, we are prepared to do it within the
2 original five page typed page limit that you had set out
3 in "Aguilera I". We're happy to comply with that if
4 that's helpful. That way you aren't flooded with
5 additional pages.

6 THE COURT: And, Ms. Gonski, when would you
7 be proposing filing that?

8 MS. GONSKI: We could file that very
9 quickly. We could file that as early as by midnight
10 tonight, if needed, but it sounds like if we weren't going
11 to have a hearing until Friday, then maybe we could have
12 until tomorrow to file that.

13 We also would, of course, be amenable to
14 plaintiff having an additional three, four, five pages if
15 they wanted to have an additional five pages to make one
16 joint response, then we're also of course happy with that.

17 THE COURT: One joint response you mean;
18 correct?

19 MS. GONSKI: Correct.

20 THE COURT: A combined response?
21 Okay.

22 MS. GONSKI: Sure. Yes.

23 THE COURT: All right. So other than
24 Ms. Gonski, I assume there's nobody else who would be
25 filing anything responsive to the county defendants'

1 motion to dismiss, am I right?

2 I'm not seeing anybody jumping up and down
3 so I'm going to assume that is accurate.

4 So Ms. -- and, folks, that's everything that
5 has made its way to my desk. You know, stuff gets filed
6 as you are required to through E-file. We find out about
7 it either because people have alerted us to it or it makes
8 its way to us in the cue. As we told you before, I think
9 maybe last time, you probably know it on your own, that
10 can take up to 48 hours to get to our attention, so I do
11 ask you that every single thing you file as we go through
12 this you contemporaneously e-mail to my staff and
13 opposing -- or not even opposing, but all other lawyers as
14 well so that everybody has -- given the short trigger
15 we've got on everything here, everyone has it kind of
16 live, real time.

17 So is there anybody else that has filed
18 anything that I haven't seen because that's the extent of
19 what has -- I think that's the extent of what has reached
20 me.

21 All right. I'm not seeing any other -- I'm
22 not seeing any other responses.

23 So, Ms. Gonski and Mr. Kolodin -- I know
24 Mr. Kolodin filed an opposition to the motion to
25 intervene. Was there anybody else that intended to oppose

1 the motion to intervene or -- yeah, anybody else that
2 was -- that wants to oppose it?

3 I see no one else indicating that.

4 All right. So I guess it's, Ms. Gonski, you
5 and Mr. Kolodin on that issue.

6 Ms. Gonski, you begin sort of in the nature
7 of a reply now having seen Mr. Kolodin's response, if you
8 can, please.

9 MS. GONSKI: Sure.

10 Yeah. And I'll just respond to just a few
11 points.

12 First, at the outset, I just want to say
13 that a lot of the response briefing to be a series of
14 personal criticisms against a member of plaintiffs'
15 counsels' team. Of course we obviously disagree with
16 those assertions, but we don't think that they're
17 appropriate or necessary topics here, so we're just going
18 to stick to the requirements of Rule 24.

19 There are four requirements for intervention
20 as a right and, Your Honor, we meet all four. I will go
21 through them briefly one by one and will address the
22 points that plaintiffs made in response to our motion,
23 but, you know, just to be clear at the outset, I think
24 it's worth it to point out that over the past several
25 weeks alone, three different courts have granted

1 intervention to the Arizona Democratic Party in election
2 related cases and that was Judge Kiley, Judge Hannah just
3 this morning, and Your Honor in a case with nearly these
4 same parties just two weeks ago. So there's no --
5 certainly no reason to depart from that precedent here and
6 plaintiffs don't offer any.

7 But Rule 4 -- Rule 24 presents four prongs
8 for intervention as a right and, again, I think we meet
9 all four. First, no one disputes that this motion is
10 timely, of course.

11 The second and third prongs are interrelated
12 and ADP meets both. It has a protectable interest that
13 would actually be impaired here. And that's for a couple
14 of reasons. I think, first, as a participant in this
15 election, ADP obviously has an interest in a fair and
16 predictable and orderly ballot tabulation process. I
17 think it also has an interest in ensuring that voters
18 don't flout that process by, for example, trying to cast a
19 ballot twice or trying to retroactively cast a ballot
20 after the election.

21 I think, as a practical matter, to ensure
22 that kind of predictable and equitable electoral
23 environment, ADP also notes that it would have to divert
24 scarce resources to allocate additional volunteer hours to
25 attend and observe any additional in-person public

1 observation and/or tabulation that were to go on, so that
2 is a personal stake -- personal interest that's at stake
3 as well.

4 As to plaintiffs' motion -- or their
5 response brief, it is pretty telling that the plaintiffs
6 don't actually cite a single case that supports their
7 proposition that that factor isn't met. In their motion,
8 the plaintiffs argue that in order to have a protectable
9 interest, ADP must have individual voting rights as an
10 organization or they must intervene on behalf of
11 individually named members or that ADP as a political
12 party has "no more right to participate in the process
13 than any other group or member of the public." And, by
14 the way, "its work ended with the election."

15 I appreciate that that is the plaintiffs'
16 preferred point of view but no court, to my knowledge, has
17 ever agreed with those arguments. And if there are courts
18 out there that have said these sort of things, plaintiffs
19 certainly don't offer any for the court's consideration.

20 I think fourth and finally, the -- ADP's
21 interest here, as many courts have recognized, diverge
22 from the interest of the government defendants enough to
23 support the adequacy of representation prong of Rule 24.
24 And that's because political parties are routinely granted
25 intervention in election cases and court after court

1 including, as I mentioned, several in the last week alone,
2 have recognized that political parties are participants
3 and stakeholders in the electoral process and have
4 interests that are distinct from interests of government
5 defendants in election disputes.

6 And, again, I'll point out that plaintiffs
7 offered no single authority to support their contention
8 that the interests of political parties are somehow
9 aligned precisely with the state and no compelling reason
10 for the court to depart from other recent precedent to the
11 contrary.

12 Even if the court disagrees with other
13 courts and disagrees that we meet all four prongs under
14 Rule 24(a) of intervention by right, permissive
15 intervention is still absolutely appropriate here. For
16 all the reasons listed above, permissive intervention
17 would absolutely be warranted. There being no prejudice
18 to other parties from our participation. Certainly no
19 delay. As I mentioned before, we are happy to meet and
20 prepared to meet any briefing schedule that this court
21 orders. We are happy to make sure that our briefs are
22 succinct. We are absolutely willing to agree to joint
23 response briefs. We're not here to delay. We are here
24 for a quick resolution of this matter. But it is -- it
25 seems that plaintiffs object to permissive intervention

1 purely on the issue of standing, according to their brief,
2 but it's a little bit unclear because of course ADP seeks
3 to intervene as a defendant here and so isn't subject to
4 the standing requirement of Article 3 or of being a
5 plaintiff. If you are a defendant -- intervening as a
6 defendant, you are subject to Rule 24's requirement that
7 you have a significantly protectable interest, which is
8 distinct from standing, although of course it's somewhat
9 of an interrelated inquiry. And as our initial motion
10 points out and as I think we've established here, we
11 certainly have a protectable interest.

12 Again, I just would point out that if it's
13 plaintiffs' position that we don't have a protectable
14 interest here, then they have completely failed to address
15 the court after court that has said otherwise and
16 explained why that result shouldn't control here.

17 Lastly I think that our perspective would
18 just share some common nexus with the county defendants to
19 be sure, but our interests and our perspective here aren't
20 the same. I think that our participation would
21 meaningfully illuminate these issue for the court. And
22 for all of those reasons, we submit that we absolutely
23 fulfill the requirements of Rule 24 and we request that
24 the court would grant our intervention.

25 THE COURT: Sorry. I was muted. I had

1 muted myself.

2 Mr. Kolodin, your response.

3 MR. KOLODIN: Yes, Your Honor.

4 So let's first address the intervention as a
5 matter of right under Rule 24(a)(2).

6 Intervention as a matter of right under
7 Rule 24(a)(2) requires that the party seeking intervention
8 demonstrate that disposing of the action in the person's
9 absence may, as a practical matter, impair or impede a
10 person's ability to protect that interest unless existing
11 parties adequately represent that interest.

12 What the proposed intervenor, Arizona
13 Democratic Party, has failed to do is articulate any
14 unique interest whatsoever that they have separate and
15 apart from the county. Before today's hearing, I went
16 through their proposed answer and it looks like they're
17 seeking exactly the same thing that defendant county is
18 seeking, which is the complete dismissal of all of
19 plaintiffs' claims. It appears their interests are
20 actually completely identical. So it's very hard to see
21 how the county, which is already represented by not three,
22 not four, but five able attorneys is not going to be able
23 to protect that interest.

24 What the Arizona Democratic Party wants to
25 do is make this a pile on, increase the -- increase the

1 briefing pages, increase the complexity of the matter, but
2 there's -- but for no end, right, except, except to put
3 all of the guns on one side.

4 Also, intervention as a right requires that
5 it be the only practical way to protect that interest.
6 What Arizona Democratic Party failed to point out is that
7 we of course had tried to intervene in Trump v. Hobbs to
8 assert our unique protectable interests or plaintiffs'
9 unique protectable interests and Arizona Democratic Party
10 objected to that. So they certainly had an opportunity to
11 be involved with this litigation if they had wanted to and
12 they failed to take that opportunity, so they no longer
13 satisfy the requirement of intervention as a matter of
14 right for that reason.

15 Unlike the other cases where intervention
16 has been granted over the past few weeks, in this
17 particular case the outcome of the election is simply not
18 going to be affected, right. There's no race in this
19 county that I'm aware of for any state, local, or federal
20 office where the margin of victory is one vote. And so
21 certainly in the other places that Arizona Democratic
22 Party sought intervention, they had interest in protecting
23 their candidates and making sure that things were fair
24 with respect to their candidates and that their candidates
25 had the best chance of success and all of that. In a case

1 where for this election one vote will be changed if we
2 prevail, they don't have that redress, right. That's
3 simply not going to happen.

4 Moving now to 24(b)(1)(b), the permissive
5 intervention. Again, you know, that rule requires that
6 the party seeking intervention of a claim or defense that
7 shares with the main action a common question of law or
8 fact. It doesn't appear that Arizona Democratic Party
9 again has any unique claim or defense. They say that they
10 bring a unique perspective and that their interest
11 diverges from the county's. But, again, looking at their
12 answer, it appears they're seeking exactly the same thing
13 as the county which is complete dismissal of this action
14 and so they have no claim or defense whatsoever, let alone
15 one that shares what the main action a common question of
16 law or fact.

17 For that -- as this court has pointed out,
18 this case is on an extremely expedited schedule. We'd
19 like to keep our response brief to ten pages. We don't
20 want another party increasing the work that we have to do
21 to 15 and increasing the size of the briefs that we have
22 to oppose to 15 pages. And it's frankly not necessary
23 since with five attorneys on their side and seeking
24 exactly what Arizona Democratic Party proposes to seek,
25 the county is more than capable of putting up a good

1 defense to try to get all of our claims dismissed.

2 And so for those reasons, we'd urge the
3 court to deny intervention.

4 THE COURT: Thank you, Mr. Kolodin.

5 Ms. Gonski, a very brief reply and reply
6 specifically -- among whatever other comments you might
7 have -- to Mr. Kolodin's contention that you are seeking
8 the exact same thing as the county defendants and you
9 really don't have any separate or individual discernable
10 interest.

11 MS. GONSKI: Yeah. Your Honor, to that I
12 would mainly say that if it's plaintiffs' position that
13 two parties don't have divergent interests that they both
14 plan to move to dismiss a complaint, then it is certainly
15 their obligation to present some sort of reason for the
16 court as to why an entire raft of case law saying
17 otherwise should be ignored here. Case after case has
18 held that intervenors are appropriate even where they have
19 significant overlap actually with claims or defenses. And
20 the fact that both parties are seeking to dismiss the
21 complaint here by no means indicates that they are coming
22 from the same perspective, that the clients are the same,
23 that the interests that the clients represent are the
24 same. It might just mean that the complaint is vulnerable
25 to dismissal.

1 THE COURT: Okay. Thank you, Ms. Gonski.
2 I am going to grant the Arizona Democratic
3 Party's motion to intervene. Rules 24(a) and (b) are both
4 to be liberally construed. The court does understand the
5 parties' different positions and respective positions,
6 et cetera, to the degree that in "Aguilera I" some of this
7 was put before the court but, regardless, the court
8 believes that Ms. Gonski, in both her motion and in the
9 oral reply here today, has established that the elements
10 that need to be established under 24(a) for intervention
11 of right or, alternatively, 24(b) under permissive
12 intervention have been satisfied and so the court is
13 granting that motion.

14 That being said, folks, let's talk about a
15 schedule. And, Mr. Kolodin, I think you first need to
16 tell me how promptly you can file your response --
17 plaintiffs' response, I should say, to the county
18 defendants' motion to dismiss which is already on file as
19 of, I guess, noontime today.

20 MR. KOLODIN: So, Your Honor, you're
21 specifically then not asking about responding to the
22 Arizona Democratic Party's expected brief; is that
23 correct?

24 THE COURT: Right now I'm asking first about
25 the county defendants' brief because that's the only one I

1 have in front of me.

2 Are you -- I know the Arizona Democratic
3 Party attached a proposed answer, but you have not seen a
4 motion to dismiss from the Arizona Democratic Party that I
5 haven't seen, have you, Mr. Kolodin?

6 MR. KOLODIN: No, Your Honor. As Ms. Gonski
7 indicated, they plan to get that on file this evening.

8 So with respect to the county's motion to
9 dismiss, we should be able to get a responsive pleading on
10 file by midnight on the 18th if that will suit the court.

11 THE COURT: No. Sorry, that's too far out,
12 Mr. Kolodin. Midnight on the 18th is more than 48 hours
13 from now and the -- if we're doing a hearing on Friday --
14 I don't know whether the county defendants would be
15 intending to file a reply, but you can't -- you can't --
16 all these briefs can't come to me the day before -- the
17 day before the hearing and there would be no opportunity
18 to get through them all, to read them all.

19 So we're at Monday now, the 16th. You said
20 midnight -- when you said midnight on the 18th,
21 Mr. Kolodin -- maybe I'm thinking about turning the
22 calendar page differently than you. Do you mean work on
23 it -- work on the response all day tomorrow and get it
24 filed at midnight tomorrow or midnight Wednesday?

25 MR. KOLODIN: No. Your Honor, I have a

1 deposition tomorrow that I'm taking in the morning, so I
2 would seek until as late as possible on Wednesday to get
3 it on file. Let me just put it that way. Especially if
4 we're going to have to be responding to multiple motions
5 to dismiss.

6 THE COURT: Well, Mr. Kolodin, you know, I'm
7 not sure what to tell you. I'm moving things off of my
8 calendar -- and I'm not suggesting that this is more
9 important than the case you have a deposition in, but you
10 have other people in your law firm and I know you've got
11 somebody that's working on this matter with you who's
12 appeared, Mr. Viskovic, and we have to move it. We can't
13 just kind of assume we're going to get to do business as
14 usual for other things that were on our calendars before
15 this erupted because coming back -- you know, plaintiff
16 brought this back to court, so we've got to get this --
17 got to get this all thrashed out this week is my view.

18 Let me hear from Mr. LaRue, what are your
19 thoughts, sir, you're the folks that filed that motion to
20 dismiss.

21 MR. LARUE: Your Honor, if the court wants
22 to have a hearing on Friday, as you suggested earlier,
23 that's fine with us. We just would agree with what I
24 think Your Honor is saying that it's important that
25 Your Honor be able to actually read whatever is filed and

1 so, you know, we would ask that the court impose deadlines
2 on all the parties that will allow you, Your Honor, to be
3 able to review materials prior to the hearing which will
4 make for the best hearing.

5 THE COURT: So, Mr. LaRue, what's the time
6 frame that you think would be appropriate if we're going
7 to get to a hearing on Friday?

8 MR. LARUE: Your Honor, if we're going to
9 get to a hearing on Friday, assuming this works for you, I
10 would say that Ms. Gonski should file by midnight tonight.
11 That plaintiffs should have until midnight tomorrow night
12 to file any response. And with that type of timetable,
13 understanding that you have other things on your plate, we
14 would be willing to waive any reply. You know, but this
15 needs to come to you so that you have time to digest it,
16 we feel, in order to -- for you to prepare for the hearing
17 and for the hearing to, you know, best promote the goal of
18 achieving justice and judicial efficiency.

19 THE COURT: All right. Thank you,
20 Mr. LaRue.

21 Ms. Gonski, I think you did say originally
22 that you could file your motion to dismiss, limit it to
23 five pages, and get it filed by midnight tonight. Do I
24 remember that correctly?

25 MS. GONSKI: Yes, Your Honor.

1 THE COURT: Okay. I'll go ahead and make
2 that order right now.

3 And then, Mr. Kolodin, are you anticipating
4 filing one combined response to both what the county
5 already has filed -- county defendants have already filed
6 and what Ms. Gonski would file?

7 MR. KOLODIN: Your Honor, we would
8 anticipate filing two separate responses.

9 THE COURT: Okay. So two separate
10 responses. Is the idea to file them at different times?
11 You know, if you just want to separate them, that's fine,
12 but are you trying to stagger them in terms of when
13 they're filed?

14 MR. KOLODIN: Yes, Your Honor, that's what
15 we would be looking to do.

16 THE COURT: So, Mr. Kolodin, what if I order
17 that you file by midnight tomorrow night the response to
18 the county defendants' motion to dismiss, which everyone
19 has had since 11:00 o'clock this morning, so that's
20 basically a day and a half. And then Ms. Gonski is going
21 to file by midnight tonight her client's motion to
22 dismiss. And you're -- and that is limited to five pages,
23 so likewise the plaintiffs' response would be limited to
24 five pages. And that would be filed by -- that gets us
25 out to --

1 MR. KOLODIN: Wednesday, Your Honor.
2 Wednesday at midnight.

3 THE COURT: Wednesday at midnight. Yes.
4 Okay. And, Ms. Gonski, I heard Mr. LaRue
5 say that the county defendants would waive a reply. What
6 about you, do you intend to file a reply?

7 MS. GONSKI: We are also happy to waive a
8 reply.

9 And just to be clear, I know that midnight
10 is a little bit ambiguous, but 11:59 p.m. is when we can
11 get ours on file.

12 And, yes, we are happy to waive a reply as
13 the county is doing as well.

14 THE COURT: All right. So both of the
15 movants, the county defendants and the Arizona Democratic
16 Party, are waiving filing a reply. We will address all of
17 that orally at the Friday hearing, which I'll get to in
18 just a moment, but before we get there, Mr. Kolodin, would
19 you also be intending to put on evidence on Friday?

20 MR. KOLODIN: We would, Your Honor.

21 THE COURT: Okay. And give me an
22 understanding of what you would want to show to the court
23 at that day -- at that time. I'm sorry.

24 MR. KOLODIN: Well, Your Honor, we've
25 already provided the court with a fair amount of our

1 evidence as attachments to our verified complaint. We
2 would anticipate that additional evidence that day would
3 consist mainly of testimony but obviously these things do
4 develop very quickly, so there may be one or two
5 additional things, but primarily we would put on people to
6 talk about what happened, our clients, and, you know,
7 other people who may have observed the issue.

8 THE COURT: And, Mr. Kolodin, are those
9 people that you would put on in addition to or the same as
10 the declarants? In other words, the declarations that are
11 attached to your clients' complaint?

12 MR. KOLODIN: At this juncture, Your Honor,
13 we would anticipate that it would be declarant testimony
14 but, again, these things develop very quickly so if, you
15 know, somebody approaches us and has additional testimony
16 and they aren't a declarant yet, we might put that person
17 on.

18 THE COURT: Mr. Kolodin, how much time do
19 you think in its entirety on Friday you need for purposes
20 of presenting evidence and your argument?

21 MR. KOLODIN: Oh. And -- I'm sorry.
22 Ms. Becker can probably address this.

23 Are we having an expert, Ms. Becker?

24 MS. BECKER: I anticipate that we may have
25 one expert at the most. It just depends on his

1 availability. But I would think if we had -- one, maybe
2 two hours.

3 MR. KOLODIN: For the expert?

4 MS. BECKER: Yeah.

5 Perhaps we could let the court know after we
6 confer as to the extent of the evidence we intend to
7 permit -- or to present, I'm sorry.

8 THE COURT: Well, Mr. --

9 MR. KOLODIN: Your Honor, for now let's say
10 half a day for us to put on.

11 THE COURT: Mr. Kolodin, hold on.

12 Ms. Becker, what -- who would -- what issue
13 would the expert be testifying on?

14 MS. BECKER: Well, the expert would just be
15 testifying -- you know, if we choose one, Your Honor, and
16 we still have not -- we wanted to see what your deadlines
17 were. There may not be time. But, frankly, it would just
18 be to confirm that when Ms. Aguilera canceled her ballot
19 because she was told that she should spoil it and then be
20 allowed to cast another one, what that mechanically looks
21 like with the voting system. So whether it was -- was it
22 canceled at the pole book? Was she simply removed from
23 checking in so that she could start over or was her ballot
24 literally canceled in the tabulating machine that somehow
25 spoiled her ballot?

1 What we do know is that they told her that
2 she should cancel it and that she could get a new ballot
3 and then after she did so, she was not given a new ballot.
4 So we just wanted to check with a consultant as to what
5 does this mean in terms of the voting procedures and the
6 equipment. What plaintiff is saying happened could that,
7 in fact, happen and we think it did and we'd explain to
8 the court how and why it happened.

9 THE COURT: Okay. Mr. LaRue, I don't think
10 I said this up front but I have not read the motion to
11 dismiss that the county defendants filed. Maybe you told
12 me that -- maybe I told you that.

13 Is -- are there issues raised in your motion
14 to dismiss that implicated -- and I know plaintiffs may
15 just have a whole different tact than the county
16 defendants have put forward in their motion to dismiss,
17 but is there anything in your motion to dismiss that
18 dovetails with or that is implicated by Ms. Becker's
19 desire to have an expert in that field?

20 MR. LARUE: Your Honor, as we say in our
21 motion to dismiss, we think that this can be dismissed as
22 a matter of law. We don't think that any of this evidence
23 is necessary. That said, we understand that the court has
24 a job to do and wants to make sure that it can do it
25 timely, so we don't object to the evidentiary hearing.

1 We're just not sure that any of this ultimately matters.
2 As a matter of law, it should be dismissed, the complaint
3 should be.

4 That said, if they're going to put forward
5 an expert witness or any witnesses, I think that it's only
6 fair that the parties notify one another before the
7 hearing what we're looking at. You know, this moves
8 quickly. I'm not faulting plaintiffs with what I'm about
9 to say, but this is the first we've heard about the
10 possibility of an expert witness and so I think that it
11 might make sense for the court to order the parties to
12 exchange witness lists by tomorrow and then allow for --
13 if the court wants to order simultaneous exchange, the
14 county would be fine with that, and then allow for the
15 parties to move the court if they believe that they need
16 to supplement their witness or evidence list based on what
17 the other party presented.

18 THE COURT: So, folks, I think we're sort of
19 back to, unfortunately, where we were in "Aguilera I" when
20 I talked to you at this juncture about me not really being
21 in a position to know what each and every party intends or
22 thinks, hey, this is really what's critical to my
23 approach, to my issues, to my facts. I need to be able to
24 hone in on this and that. And I think that was what I was
25 trying to accomplish last time by ordering the parties to

1 confer with one another, which you all did. I think you
2 did a great job on that because I know you had, I think,
3 two different meetings and it looked like things came
4 together very well but I think I'm probably not in a
5 position to sort of micromanage that now, which suggests
6 to me that I ought to order the parties to do the same
7 thing you did the first time, which is get together and
8 confer with one another, whether that's by phone, Zoom,
9 whatever, but confer with one another and determine those
10 types of sort of nitty-gritty details like Mr. LaRue's
11 discussion about exchanging simultaneous witness lists and
12 then, you know, lengths of time, whether there's an expert
13 involved. I don't think we should try to hammer that out
14 here because this is a fast moving train and I don't
15 think -- I'm certainly not informed to the degree you all
16 are. You've all been working with these issues for some
17 period of time in one setting or another, you know who and
18 how you intend to present things. As I said, I didn't
19 have enough time to read the motion to dismiss so I don't
20 even know what those arguments are at this point. So I
21 think it's probably more fruitful and more efficient to
22 let the parties do that.

23 Mr. Kolodin, I saw you nodding your head.
24 Are you in agreement with that, sir?

25 MR. KOLODIN: I am, Your Honor.

1 THE COURT: Okay. Mr. LaRue, do you agree?

2 MR. LARUE: Your Honor, we're happy to
3 confer with the plaintiffs. You know, and maybe they can
4 persuade us. At this point I just don't understand the
5 purpose of expert witnesses and whatnot, but we're happy
6 to confer and see if we can reach a resolution on that.

7 THE COURT: Mr. LaRue, let me clarify
8 because I think I miscommunicated there. I'm not talking
9 about just the issue of whether an expert witness is
10 appropriate, needed, et cetera, but how to -- how to
11 put -- how much time is going to be needed, how it's going
12 to be divided up amongst the parties, which witnesses are
13 going to testify. You know, I know the county defendants'
14 position is you don't even need to get to any evidence
15 because we think we win on the law and we'll persuade you
16 of that in our motion to dismiss. But we've got such a
17 compressed time window within which to get this
18 determined, I think I have to do both of those on Friday,
19 because if I'm not persuaded by the county's motion, we
20 don't want to then be out another week trying to schedule
21 things the next week, so we're going to do it all on
22 Friday. I think that's really called for here. Which
23 means the parties -- really to be more clear than I was,
24 I'm directing the parties as I did last time to speak with
25 one another, to arrange, if you will, the schedule for

1 what we're going to do on Friday. I will go back and look
2 at my calendar and I will have my JA send an e-mail to you
3 today about exactly what hours I'll give you on Friday. I
4 know I've got something else there that I think maybe is
5 in the middle of the day but in any event, let me just
6 look at that. I will give you as much time as possible
7 but I -- people are going to need to be efficient and
8 economical with what they put on, you know. If there's
9 not a -- well, I won't go down that road because I don't
10 want to interfere with anybody's objections or views about
11 how to present things. But it will have to -- it will
12 have to all be encompassed on -- in the time that is
13 available to do that on Friday. And as Mr. LaRue said,
14 I -- that's -- his point is exactly what drives me to
15 direct that counsel file things sooner rather than later
16 because, you know, it's a garbage in, garbage out. If you
17 don't give me information far enough ahead of time so that
18 I can actually read it -- and it is my practice to read
19 everything that the parties provide to me before I ever
20 come into the courtroom. So in order to do that -- it
21 will make me very anxious if I haven't been able to do
22 that, I'll tell you that, too. I'm just kind of nervous
23 about that. I don't ever want to do that. And I think
24 the parties are entitled to that, so you've got to give it
25 to me with enough time. I'm not a speed reader. I do

1 read a lot every day here with the number of filings we
2 get and I'm trying to clear the deck so I can focus on
3 what you folks are giving me. It's important to do that.
4 But it's got to get to me in a reasonable time because I
5 won't be able to just flip the pages and digest what
6 you've told me.

7 So let's have the parties -- I know --
8 Mr. Kolodin, I'm not sure what you are going to do about
9 your deposition tomorrow. Mr. Viskovic is going to jump
10 in and save the day or how this is going to work.

11 MR. KOLODIN: We'll figure it out.

12 THE COURT: Okay. Good.

13 So why don't the -- what would be a
14 reasonable time tomorrow for the parties to have had an
15 opportunity to talk with one another, battle out whatever
16 there might be a disagreement on about scheduling,
17 et cetera. By the time you do that, I will have had my JA
18 send to you the time frame that you know you're working
19 with. Generally I will give you the bulk of Friday. You
20 know, my staff does have to eat and they do have to have
21 breaks, et cetera, so we will be out of session at a
22 minimum for an hour and a half at lunchtime and we won't
23 be starting, you know, at 6 a.m. or anything like that but
24 you'll have to just be efficient. And the more you, you
25 know, enable me to look at ahead of time in terms of what

1 you're going to want to present then the better off
2 we'll -- the more quickly we'll be able to move forward.

3 So, Mr. LaRue, what time do you think
4 tomorrow -- and, Mr. Kolodin, Ms. Gonski, Ms. Becker,
5 anybody else who wants to weigh in on that, when do you
6 think you'll have had an opportunity tomorrow to have
7 conferred with one another and be able to tell me this is
8 how we see Friday playing out?

9 MR. KOLODIN: Your Honor, we plan to at
10 least explore with the county whether we can come to some
11 stipulations as to facts that might obviate the need to
12 call either an expert witness and/or to call a nonparty
13 witness, so somebody at the county. So we can confer with
14 them tonight and we're happy to do so. They may need
15 through part of the day tomorrow -- and I'm sure Mr. LaRue
16 can speak to this better than I can -- to see whether they
17 can agree to those stipulations.

18 THE COURT: Okay. That's great. To the
19 extent you folks can stipulate, that will enable us to
20 focus on the stuff that's really in dispute.

21 Mr. LaRue, again, I'm not talking just about
22 this issue about potentially an expert but the whole --
23 the whole shebang, what do you think, Mr. LaRue, by when
24 tomorrow, in the afternoon?

25 MR. LARUE: Yes, Your Honor. I'm happy to

1 confer with plaintiffs' counsel tonight. I'm sure there
2 will be some other members of our team who can join as
3 well. But as Mr. Kolodin said, we won't be able to agree
4 to anything tonight because we have to go to the client.
5 So I think certainly by tomorrow afternoon we can have
6 something to the court that outlines either a plan or
7 expresses that we just simply can't agree to things.

8 THE COURT: Okay. All right.

9 One second, Mr. Kolodin.

10 Ms. Gonski, anything from you before I hear
11 from Mr. Kolodin?

12 MS. GONSKI: Just -- we agree with Mr. LaRue
13 that I think we would need until tomorrow to be able to
14 agree on anything.

15 My question, I guess, is that -- I guess a
16 little bit of request is if Your Honor has any
17 clarification from us on who the filing or the drafting
18 party should be. Often when there's a joint report, it's
19 typically plaintiffs that takes it over, if that's
20 helpful, or if somebody else, that's fine, but I think
21 last time since there are so many parties there was a
22 little bit of confusion over which party would be the
23 party that ultimately is responsible for the draft and for
24 the filing. I think just clarification in the minute
25 entry would be really helpful.

1 THE COURT: Okay. Mr. Kolodin, I'll hear
2 from you last.

3 Generally, you know, the rules and practice
4 do tend to put the burden on the plaintiff when it's a
5 joint effort. It's the plaintiffs' case so unless
6 Mr. Kolodin has some violent objection to that, I would
7 suggest that because I think it's sort of in keeping with
8 what we expect from joint filings frequently.

9 Mr. Kolodin, you good with that?

10 MR. KOLODIN: Yeah. That's fine,
11 Your Honor.

12 And then based on what the county is saying,
13 I would suggest tomorrow by 5.

14 THE COURT: Okay. So tomorrow -- did I
15 leave anybody out? I tend to get lost in all these boxes
16 here, folks. Did I leave anybody out that's has a burning
17 desire to speak?

18 All right. Everybody's tired and worn out.

19 So by 5 p.m. tomorrow -- folks, I'm going to
20 say 4:45 just so that my -- before my staff leaves to
21 catch buses, et cetera, we'll know we have it and then I
22 will be able to have it to read tomorrow night. So the
23 parties will e-mail over to my JA and always endorse my
24 bailiff on it as well, please, and then everybody sees
25 things sooner rather than later. As Mr. LaRue so

1 eloquently put it, get me something, I think, is what he
2 said so go ahead and get me something by 4:45. And
3 Mr. Kolodin has graciously agreed to take a run at being
4 the primary drafter of but of course it's a joint effort
5 so everybody is going to have their views in there.
6 Again, shorter is better than longer, folks. Succinct.
7 If you can reach agreements as to stipulated facts,
8 et cetera, those types of things, that's wonderful. If
9 you can't, you can't. But I would suggest that that may
10 free up more time for the issues that you really want to
11 have more time to address if you are able to do that.

12 And then if I can get out of the courtroom
13 in the next few minutes, I will have an opportunity to
14 talk with my JA about my calendar and we'll get an e-mail
15 off to you before 5 with the time frame for the hearing on
16 Friday.

17 Okay. Anybody else need to say anything
18 before we adjourn?

19 All right. I see no one reacting.

20 Have a good night, everybody. Stay well.

21 MR. KOLODIN: Thank you, Your Honor.

22 MR. LARUE: Thank you, Your Honor.

23 THE COURT: Talk to you soon. Bye-bye.

24 You're welcome.

25 (Court stood in recess.)

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I, SCOTT M. CONIAM, a Certified Court Reporter, Certificate No. 50269, do hereby certify that the foregoing pages constitute a true and correct transcript of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, on November 17, 2020.

/s/ Scott M Coniam

SCOTT M. CONIAM, RDR, CRR
Certified Court Reporter
Certificate No. 50269

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