October 20, 2022

Lawyer Regulation Division
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

Dear Lawyer Regulation Division:

The 65 Project is a bipartisan, nonprofit effort to protect democracy from abuse of the legal system by holding accountable lawyers who engage in fraudulent and malicious efforts to overturn legitimate elections.

We write to request that the Lawyer Regulation Division investigate the actions taken by John Wilenchik relating to his effort to overturn the 2020 presidential election. Mr. Wilenchik served as part of a coordinated attempt to abuse the judicial system to promote and amplify bogus, unsupported claims of fraud to discredit an election that Mr. Trump lost.

Mr. Wilenchik initiated two separate matters in Arizona and his actions led a court to award attorney's fees against him for filing meritless claims. More incredibly, Mr. Wilenchik played a leading role in coordinating the false elector scheme in Arizona that sought to create a mechanism for Vice President Pence to unilaterally reject Joe Biden's victory.

A full investigation by the Lawyer Regulation Division will demonstrate the egregious nature of Mr. Wilenchik's actions, especially when considered in light of his purposes, the direct and possible consequences of his behavior, and the serious risk that Mr. Wilenchik will repeat such conduct unless disciplined.

BACKGROUND

Joe Biden received over 81 million votes in November 2020, defeating Mr. Trump by over seven million votes and over four percentage points.[1] Mr. Trump's head of the U.S. Cybersecurity and Infrastructure Security Agency, Christopher Krebs, announced that the "November 3rd election was the most secure in American history. . . . There is no evidence that any voting system deleted or lost votes or changed votes or was in any way compromised." Mr. Trump fired him. William

[1] *See* Federal Election Commission, *Official 2020 Presidential General Election Results*, available at https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf.

Barr, Mr. Trump's own Attorney General, declared that the Department of Justice has "not seen fraud on a scale that could have effected a different outcome in the election." Attorney General Barr announced his resignation less than two weeks later, but not before again confirming that the 2020 elections had been free and fair.[2]

Many of Mr. Trump's own senior advisors agreed with Attorney General Barr and Mr. Krebs.[3] Indeed, Deputy (and later Acting) Attorney General Jeffrey Rosen and Associate (and later Acting) Deputy Attorney General Richard Donoghue regularly refuted the false information and allegations that Mr. Trump and his allies asserted about a fraudulent election.[4] Mr. Rosen has testified that on December 15, 2020, at a meeting that included Mark Meadows, White House Chief of Staff, he and others told Mr. Trump that the information he was receiving from his political allies was not correct.[5] And Mr. Donoghue has testified to the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) that on December 27, 2020, he told Mr. Trump "in very clear terms" that after "dozens of investigations, hundreds of interviews" looking at "Georgia, Pennsylvania, Michigan, and Nevada," the Department of Justice – Mr. Trump's own Department of Justice – had concluded that "the major allegations are not supported by the evidence developed."[6]

Despite clear proof that no fraud occurred, and that no one stole the election from him, Mr. Trump and his lawyers sought to overturn the legitimate results by filing 65 baseless lawsuits across the country.[7] None succeeded and, in fact, courts have imposed sanctions on the lawyers who participated in these suits and referred them for sanctions to their respective state bars.[8]

CONDUCT GIVING RISE TO THE COMPLAINT

Mr. Wilenchik helped lead the charge on behalf of Mr. Trump in Arizona.

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[2] M. Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Associated Press (Dec. 1, 2020), https://perma.cc/4U8N-SMB5.

[3] *See* Deposition of Jason Wilenchik (Feb. 3, 2022), available at https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf; Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the Judiciary, 117th Cong. 30, available at https://www.judiciary.senate.gov/rosen-transcript-final.

[4] *See* Interview of Jeffrey Rosen *see also* Interview of Richard Donoghue (Oct. 1, 2021), available at https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf

[5] Interview of Jeffrey Rosen.

[6] Interview with Richard Donoghue.

[7] W. Cummings, J. Garrison & J. Sergent, *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA Today (Jan. 6, 2021), available at https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/.

[8] *See, e.g.*, *King v. Whitmer*, No. 20-13134 (U.S. Dist. Ct. E. Dist. Mich. Aug. 25, 2021), available at https://www.michigan.gov/documents/ag/172_opinion__order_King_733786_7.pdf.

On November 12, 2020, Mr. Wilenchik initiated *Arizona Republican Party v. Fontes* in Maricopa County Superior Court and sought to delay an election audit by expanding its scope. On November 24, 2020, Mr. Wilenchik then filed *Ward v. Jackson*, which attempted to allow inspection of mail-in ballots and prevent certification of the election results. As noted above, these lawsuits were part of a larger, national effort to sow the false sense of election fraud and to delay Mr. Biden's victory.

Importantly, your office need not review the pleadings Mr. Wilenchik filed and pass judgment on their merits. The courts have already done that. For example, in *Ward v. Jackson*, both the trial court and the Arizona Supreme Court found no evidence to support the claims brought by Mr. Wilenchik. Indeed, Chief Justice Robert Brutinel, for a unanimous Arizona Supreme Court, wrote that Mr. Wilenchik failed to "present any evidence of 'misconduct,' 'illegal votes' or that the Biden Electors 'did not in fact receive the highest number of votes for office,' let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results." The key here is that Mr. Wilenchik did not even "present" such evidence. Because none existed and, therefore, the matter should never have been brought in the first place.

The court in *Arizona Republican Party v. Fontes* went even further – imposing attorney's fees against Mr. Wilenchik for filing a frivolous action. At the outset, it's worth noting that the court specifically stated in its attorney's fee order that "The Republican Party *and its attorneys* are referred to collectively in this order as 'the plaintiff.' For the most part, the attorneys do not try to distinguish their actions and motives from those of their client."

Rather than simply summarizing the court's findings and conclusions, the full order is attached. Importantly, the court based the award on the fact that Mr. Wilenchik and his colleagues brought the claim without any substantial justification or solely or primarily for delay or harassment. The court faulted the plaintiffs not only for violating clear, well-established legal principles, but for then seeking inappropriate remedies and for suing the wrong parties. And when defending himself actions against the sanctions motion, Mr. Wilenchik offered a "specious argument" that further led the court to conclude that Mr. Wilenchik lacked good faith in bringing the matter, especially in light of the "flimsy" excuses for initiating the case.

Perhaps most importantly, in their effort to defeat the motion for attorney's fees, plaintiffs argued that "[p]ublic mistrust following this election motivated this lawsuit." In other words, Mr. Wilenchik acknowledged using the courts for an improper purpose – as the court noted, "'public mistrust' is a political issue, not a legal or factual basis for litigation." And, of course, Mr. Wilenchik himself is partly responsible for the unnecessary public distrust he was citing as motivation. Further, the court found that Mr. Wilenchik did not characterize the litigation posture or the court's inquiry "honestly" in his opposition filing.

Additionally, the court noted that – by their own admission – Mr. Wilenchik and his colleagues "made no serious pre-filing effort to determine the validity of the claims."

Finally, the court spoke powerfully to Mr. Wilenchik's bad faith:

> Perhaps the most telling fact of all is what the plaintiff did after the

> other parties disclosed, in response to the complaint, that the Maricopa County hand count was complete and that it showed the electronic tabulation was flawless. At that point the plaintiff could have quietly walked away from the lawsuit and publicized the audit results to reassure the public. Instead it filed its petition to enjoin the election canvass. In the petition the plaintiff said this:
>
> Given the importance of this election, and of doing everything with respect to this election "by the book," there are also powerful public-policy reasons to grant this injunction. If an injunction is not granted, then there will be lingering questions about the legitimacy of these results which could otherwise be answered through a proper hand count. This is also the basic prejudice that Plaintiff and the voting public will suffer if the Court declines to grant an injunction – it will create a cloud over the legitimacy of this election and its results.
>
> *Id.* at 3. *This* is why the Court raised the question whether the plaintiff brought suit in order to "cast false shadows on the election's legitimacy." Undercutting the election's legitimacy by raising "questions" *is exactly what the plaintiff did in this passage.* It is what the plaintiff does again when it suggests that an adverse ruling on the secretary of state's fee application will cause the public to question the Court's impartiality and undermine respect for the courts. Plaintiff's Response to Motion for Sanctions at 14. It is a threat to the rule of law posing as an expression of concern. It is direct evidence of bad faith.

In sum, Mr. Wilenchik sought to undermine the 2020 presidential election by filing baseless claims designed to cause public doubt about the integrity of the vote.

Failing to achieve their desired ends through the courts or the state legislatures, Mr. Trump's legal team turned to concocting various schemes to ensure that Mr. Trump remained in power despite Mr. Biden's victory.

The primary effort focused on pressuring Vice President Pence to usurp Congress's power by throwing out the electoral votes of seven states that Joe Biden won and thereafter declaring Mr. Trump (and, incidentally, Mr. Pence) victorious.

The plan began with a memorandum from Kenneth Chesebro, another attorney for Mr. Trump, outlining a plan to create slates of false electors from several states, who would claim that they were the legitimate electors. The memorandum relied on factual and legal misstatements and absurdities, and relegated to footnotes (if cited at all) the critical statutes, rules, and facts that disproved the memorandum's contentions.

Mr. Chesebro's memorandum appears to have made its way to John Eastman, another of Mr. Trump's attorneys.[9] Mr. Eastman then drafted two memoranda of his own, which have similarly been shown to be grounded in neither law nor fact, and that recommended that Mr. Pence take "BOLD" action to secure Mr. Trump's victory.[10] Mr. Pence would preside over the January 6, 2021 Joint Session of Congress, during which the electoral votes cast and certified in each state on December 14, 2020 would be opened and confirmed. Established law and precedent limited Mr. Pence's role to opening the Certificates of Votes and announcing the results of each, as well as the outcome. Mr. Eastman sought to have Mr. Pence disregard the vice president's constitutional and statutory obligations, and to instead claim unto himself the authority to invalidate seven states' electoral votes and unilaterally declare Mr. Trump the victor, without turning the matter over to Congress. The scheme required an existing controversy over which slate of electors should be viewed as valid from the seven states.[11] In other words, for Mr. Pence to throw out the electoral votes cast and certified by the seven states, there needed to be an alternative slate of electors who claimed to be the legitimate electors.

Importantly, even the plan's main proponent, John Eastman, one of Mr. Trump's attorneys, admitted at the time that he was offering an interpretation of the Twelfth Amendment or the Electoral Count Act that not even one member of the Supreme Court would agree with.[12] In fact, in an email to Mr. Pence's lawyer, Mr. Eastman acknowledged he was proposing violating the Electoral Count Act – though he considered it only a "relatively minor violation."[13]

Boris Epshteyn, another attorney who worked alongside Rudy Giuliani, took up the cause. As Mr. Epshteyn has explained:

> This was in total congruence with the overall effort to send it back to the states. With the rampant fraud across the country, the interplay of the 12th Amendment and the Electoral Count Act made it important to have alternate slates of electors be available when a challenge to states' slate of electors would be successful.[14]

Many of the potential false electors refused to participate in the scheme. For example, Lawrence Tabas – the Chairman of the Pennsylvania Republican Party and *an election lawyer who*

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[9] The main Eastman memorandum is available at https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html.

[10] Available at https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html.

[11] *Id*.

[12] Deposition of Gregory Jacob (Feb 1, 2022), available at https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf.

[13] Email from John Eastman to Gregory Jacob on Jan. 6, 2021, available at https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf.

[14] B. Reinhard, et al., *As Giuliani Coordinated Plan for Trump Electoral Votes in States Biden Won, Some Elections Balked*, Washington Post (Jan. 20, 2022), available at https://www.washingtonpost.com/investigations/electors-giuliani-trump-electoral-college/2022/01/20/687e3698-7587-11ec-8b0a-bcfab800c430_story.html.

represented Mr. Trump in 2016 – rejected the effort and did not attend the gathering to select false electors.[15] Another originally slated elector, John Isakson, from Georgia later told the Washington Post: "It seemed like political gamesmanship, and that's not something I would have participated in. We have a process for certifying the election. We have a process for challenging the election. The challenges failed, *so I wouldn't have participated in something that was going against all of that*."[16]

The lawyers advancing the false elector effort met with lawyers from the Trump Campaign and the White House Counsel's office and heard repeatedly that the plan lacked any legal or factual basis, especially as Mr. Trump continued to lose lawsuit after lawsuit. Matthew Morgan, the campaign's general counsel, testified under oath that he sought to remove himself and others within the campaign from the false elector scheme: "I had Josh Finley email Mr. Chesebro politely to say this is your task. You are responsible for the Electoral College issues moving forward. And this was my way of taking that responsibility to zero."

Justin Clark, another campaign attorney, testified that:

> I just remember I either replied or called somebody saying, unless we have litigation pending this, like, in these states, like, I don't think this is appropriate or, you know, this isn't the right thing to do. I don't remember how I phrased it, but I got into a little bit of a back and forth and I think it was with Ken Chesebro, where I said, Alright, you know, you just get after it, like, I'm out.

Mr. Wilenchik, however, eagerly joined the effort. He acted as a liaison for Mr. Epshteyn in Arizona, even as he acknowledged that they were creating "fake" electors to create a path for Mr. Pence to unilaterally overturn the election.[17] And, importantly, the plan included sending the false certificates to the U.S. District Court, as electoral certificates are required to be sent to the Chief Judge.

On December 14, 2020, the false electors met in Arizona and declared themselves the "duly elected and qualified Electors for President and Vice President of the United States of America" and certified that their state cast its electoral votes for Mr. Trump.

They then transmitted these false documents, stating:

> "Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of [State]'s electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate

[15] *Id.*
[16] *Id.*
[17] M. Haberman & L. Broadwater, *'Kind of Wild/Creative': Emails She Light on Trump Fake Electors Plan*, N.Y. Times (July 26, 2022), available at https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html.

> and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge."[18]

These false electors acted without any legal authority or mandate. Indeed, their acts contradicted federal and state statutes, as well as federal and state court rulings. The individuals who signed these documents did so knowing that they were false at the time they signed and transmitted them, nor did they ever act to correct or retract the fraudulent papers. And they submitted to each state's chief United States District Court judge.

A SUBSTANTIAL BASIS EXISTS FOR THE LAWYER REGULATION DIVISION TO INVESTIGATE MR. WILENCHIK'S CONDUCT AND TO IMPOSE APPROPRIATE DISCIPLINE

The Lawyer Regulation Division should investigate Mr. Wilenchik's actions on the following basis:

1. Mr. Wilenchik Violated Rule 3.1 By Bringing and Defending a Matter He Knew Lacked Merit

Rule 3.1 provides, in part, as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Comment 2 states that: "The action is frivolous…if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."

"Knowledge" under the Rules of Professional Conduct can be "inferred from circumstances."[19]

The court's order granting defendants' motion for attorney's fees clearly establishes that Mr. Wilenchik filed a matter that he knew lacked merit. The court addressed the good faith element, as well, demonstrating conclusively that Mr. Wilenchik had no legitimate purpose or grounds for bringing the case.

In short, for the many reasons provided above, Mr. Wilenchik's conduct violated Rule 3.1.

2. Mr. Wilenchik Violated Rule 1.2 by Assisting in Criminal Conduct

Rule 1.2(d) commands that a lawyer not "assist a client [] in conduct that the lawyer knows is criminal or fraudulent."

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[18] American Oversight obtained the false elector certificates. They are available at https://www.americanoversight.org/american-oversight-obtains-seven-phony-certificates-of-pro-trump-electors.

[19] Rule 1.0(f).

In many respects, the question of whether Mr. Wilenchik aided criminal or fraudulent efforts has already been answered affirmatively by a federal court.

The Select Committee sought over 100 documents from Mr. Eastman that he refused to provide, asserting attorney-client privilege. In responding to Mr. Eastman's claims of privilege, the Select Committee argued that the crime-fraud exception governed and that no privilege existed regarding any documents that were used to aid Mr. Trump's efforts to prevent Congress from certifying Mr. Biden's victory on January 6. The crime-fraud exception to the attorney-client privilege applies when a "client consults an attorney for advice that will serve [them] in the commission of a fraud or crime" and the communications are "sufficiently related to" and were made "in furtherance of" the crime."[20]

The federal court examining the matter determined that by a preponderance of evidence, the Select Committee demonstrated that Mr. Trump and Mr. Eastman violated 18 U.S.C. § 1512(c)(2) by obstructing or seeking to obstruct an official proceeding based on Mr. Eastman's plans regarding the Electoral Count Act.[21] Additionally, the court concluded that the evidence showed that Mr. Trump and Mr. Eastman "more likely than not" also violated 18 U.S.C. § 371 in conspiring to "defraud the United States by disrupting the electoral count."[22]

It is not necessary that Mr. Wilenchik himself engaged in criminal or fraudulent conduct to implicate Rule 1.6(d). Instead, the Rule requires only that Mr. Wilenchik have assisted his client with fraudulent or criminal conduct. And Mr. Wilenchik did just that – helping orchestrate in Arizona the plan to create a false slate of electors and using that effort to then pressure Mr. Pence to ignore his constitutional and statutory obligations so that Mr. Trump would remain in power, despite having lost the 2020 presidential election. In fact, after labeling the proposed electors as "fake," Mr. Wilenchik thought better of it and, in a follow up email, suggested that they use the word "alternative." No matter what he may call them, Mr. Wilenchik assisted his client in a fraudulent scheme and violated Rule 1.2.

3. <u>Mr. Wilenchik Violated Rule 4.4's Command That Lawyers Respect the Rights of Third Parties</u>

Pursuant to Rule 4.4, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."

Comment 1 to the Rule states, "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."

In the interests of his client, Mr. Wilenchik sought to have millions of voters lose their right to decide the 2020 presidential election.

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[20] *Eastman v. Thompson, et al*., Case No. 8:22-cv-00099 (C.D. Cal.), Order Re Privilege of Documents Dated January 4-7, 2021, available at https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.260.0.pdf.
[21] *Id*. at 33, 36, 40.
[22] *Id*.

Mr. Wilenchik disregarded the potential consequences of his proposed remedy – showing no respect for the rights of millions of third persons whose votes would be invalidated – and his actions warrant discipline.

4. Mr. Wilenchik Engaged in Misconduct that Violates Rule 8.4

Under Rule 8.4, "It is professional misconduct for a lawyer to…violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] engage in conduct that is prejudicial to the administration of justice."

Mr. Wilenchik participated in a purposefully dishonest effort to undermine the 2020 election. He brought frivolous claims that the Constitution, prior court decisions, and relevant statutes barred.

Moreover, the court noted that Mr. Wilenchik's pleading failed to address their arguments and the court's questions honestly. This dishonesty may, on its own, rise to the level of violating Rule 3.3's duty of candor, but it – at the very least – violates Rule 8.4's standard against dishonesty or misrepresentation.

Finally, as the court noted, Mr. Wilenchik did not seek the same standard of audits in counties that Mr. Trump won – despite later suggesting that the effort was designed to ensure complete "by-the-book" audits to quell public distrust. This fact demonstrates a deceitful and improper purpose. Indeed, it all amounted to a dishonest attempt to undermine the public confidence in the 2020 election. It is easy – indeed, necessary – to also recognize the direct link between the use of the courts to sow these seeds of doubt and confusion and the events of January 6, 2021, when people believing that the 2020 was stolen stormed the Capitol in a violent insurrection.

Mr. Wilenchik's actions must be scrutinized and disciplined.

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The United States Supreme Court has long recognized in upholding disciplinary actions that "speech by an attorney is subject to greater regulation than speech by others."[23] As officers of the court an attorney is "an intimate and trusted and essential part of the machinery of justice" and a "crucial source of information and opinion."[24] Although attorneys, of course, maintain First Amendment rights, the actions in question here cross far beyond protected speech. Indeed, disciplinary boards and courts considering the conduct of other lawyers involved in the effort to overturn the 2020 election have rejected assertions that the attorneys enjoyed First Amendment protections for their conduct.

That members of our esteemed profession would engage in such actions – conduct that contributed to substantial harm to American democracy – should cause considerable distress within the entire legal community.

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[23] *Ohralik v. Ohio State Bar Assn*., 436 U.S. 447, 465 (1978).
[24] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1072 (1991).

> False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information.[25]

Mr. Wilenchik chose to offer his professional license to an assault on our democracy. He pursued litigation that lacked any basis in law or fact. He participated in an organized effort to sow discord and doubt about the 2020 elections. He helped lead the charge in Arizona to disenfranchise millions of his fellow citizens because he did not like how they voted.

For the reasons set forth above, we respectfully request that the Lawyer Regulation Division investigate Mr. Wilenchik's conduct and pursue appropriate discipline.

Sincerely,

Managing Director

[redacted]

On behalf of The 65 Project

[25] *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021 at 30-31.

Clerk of the Superior Court
*** Electronically Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-014553 03/12/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
R. Sheppard
Deputy

ARIZONA REPUBLICAN PARTY JOHN DOUGLAS WILENCHIK

v.

ADRIAN FONTES, et al. THOMAS PURCELL LIDDY

JOSEPH J BRANCO
EMILY M CRAIGER
ROOPALI HARDIN DESAI
SARAH R GONSKI
JOSEPH EUGENE LA RUE
JOSEPH I VIGIL
JUDGE HANNAH

RULING

The Court has read and considered Arizona Secretary of State Katie Hobbs' Application for Attorneys' Fees under A.R.S. section 12-349, the response on behalf of the Arizona Republican Party ("the Republican Party") and the applicant's reply, in the context of the record in this case. The application is granted, and fees are awarded against the Arizona Republican Party and its attorneys, jointly and severally.[1] This order sets forth the specific reasons for the fee award, as required by A.R.S. section 12-350.

[1] The Republican Party and its attorneys are referred to collectively in this order as "the plaintiff." For the most part, the attorneys do not try to distinguish their actions and motives from those of their client. Conversely, the Chairwoman of the State Committee of the Arizona Republican Party unambiguously endorses the position taken by counsel. Plaintiff's Response to Motion for Sanctions filed 12/28/2020, Exhibit B (Declaration of Ward). They are identified separately, however, as necessary to address specific statements or actions of one or the other.

DUE PROCESS

The Court has considered only those facts and circumstances that both the Republican Party and its attorneys have had a fair opportunity to address, either during the litigation on the merits or in response to the Secretary of State's fee application. The Court has not relied on any information source outside the record. In light of those considerations, and the type and severity of the sanction, both the Republican Party and the attorneys have been afforded due process in connection with the fee award. *See Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555-557, 880 P.2d 1098 (App. 1993). The requests for oral argument and evidentiary hearing are denied in the Court's discretion.

SECTION 12-349 AS LEGAL BASIS FOR FEE AWARD

A.R.S. section 12-349 requires the court to assess reasonable attorney's fees and expenses against an attorney or party that brings or defends a claim without substantial justification or solely or primarily for delay or harassment. *See Phoenix Newspapers, Inc. v. Department of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801 (App. 1997) (section 12-349 fee award is "mandatory"). A claim lacks substantial justification when it is groundless and not made in good faith. A.R.S. § 12-349(F). A claim is groundless "if the proponent can present no rational argument based upon the evidence or law in support of that claim." *Rogone v. Correia*, 236 Ariz. 43, 335 P.3d 1122 ¶ 22 (App. 2014), *quoting Evergreen W., Inc. v. Boyd*, 167 Ariz. 614, 621, 810 P.2d 612, 619 (App.1991). An objective standard is utilized to determine groundlessness, but a subjective standard determines bad faith. *Goldman v. Sahl*, 248 Ariz. 512, 462 P.3d 1017 ¶ 66 (App. 2020).

"WITHOUT SUBSTANTIAL JUSTIFICATION": GROUNDLESSNESS

The plaintiff's lawsuit was groundless because the relief sought was not legally available from the parties that were sued at the time the suit was filed. The other parties pointed out these procedural defects in their motions to dismiss, but the plaintiff's response to the motions barely addressed them. The response to the fee application mostly continues to brush them aside even though they were the basis of the dismissal order. The plaintiff focuses instead on what section 16-602 says about hand count audit procedures, on the reasons for the hasty filing of the complaint, and on perceived public concerns about the election's "integrity" or "legitimacy." None of that addresses the viability of the actual claims.

The plaintiff's defense of the lawsuit's timing conflates the equitable principle of laches with the election-law rules that unambiguously barred the claim after the election. Those were two separate grounds for dismissal. The delay in filing theoretically could have been overlooked as a matter of equity. But there was no avoiding the legal rule: "If parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may

not, after the people have voted, then question the procedure." *Kerby v. Griffin*, 48 Ariz. 434, 444, 62 P.2d 1131 (1936). After the election,

> general statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.

Findley v. Sorenson, 35 Ariz. 265, 269, 276 P. 843, 844 (1929). The plaintiff has never even acknowledged this rule, let alone tried to explain why it doesn't control this case.

The plaintiff also asserts that "every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity" after the fact, through an election contest pursuant to A.R.S. section 16-673. Plaintiff's Response to Motion for Sanctions at 12-13. That statement shows the groundlessness of the plaintiff's legal position, because it is flat wrong as a matter of law. A demand for "strict legal compliance" with statutory election procedures is not cognizable after the election under *any* circumstances, including an election contest pursuant to A.R.S. section 16-673. *See, e.g.*, *Moore v. City of Page*, 148 Ariz. 151, 159, 713 P.2d 812, 821 (App. 1986). An election challenge based on a procedural statute states a cause of action only if the plaintiff alleges that fraud has occurred or that the result would have been different had proper procedures been followed. *See id., citing Findley v. Sorenson, supra.* To say as the plaintiff does that this case was "about auditing results, which by definition is simply checking them to ensure voter confidence and integrity," Plaintiff's Response to Motion for Sanctions at 11, and that fraud was "not germane to the case," *id.* at 13, is to say that there was no colorable cause of action in the first place.

On the other major procedural defect that led to the dismissal, concerning available remedies, the plaintiff again fails to offer a rational argument in support of its position in the litigation. The relief sought, according to the plaintiff, was "simply to have Maricopa County perform a quick hand-count in compliance with the law (by precinct) . . . ." *Id.* at 6. But the plaintiff cites no statute or case that says the Court had authority to issue an order directing election officials to do (or redo) the hand count in a specific way. The plaintiff points to "the Court's own power to decide what the law is," *id.* at 7, but that power is not a roving commission to declare the law and order people to follow it. Remedies can be ordered only as the law permits.

The plaintiff entirely fails to address the law concerning mandamus, specifically the longstanding rule that a writ of mandamus cannot issue to public officials who have no legal discretion concerning the matter at issue. *Adams v. Bolin*, 77 Ariz. 316, 322-323, 271 P.2d 472 (1954). That rule applied squarely in this case. Maricopa County election officials were legally required to follow the Election Procedures Manual's instructions, *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303 ¶16 (2020), on pain of criminal sanctions if they disobeyed. *See* A.R.S. § 16-452(C). A writ of mandamus compelling them to "perform a quick hand count" of precincts therefore was not an available remedy.

The plaintiff's request for a declaratory judgment was equally misdirected. A declaratory judgment action must name as a defendant the entity or official responsible for implementing the law at issue. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216 ¶ 36 (App. 2007). The Arizona state official responsible for implementing election law is the secretary of state. The plaintiff claimed that the secretary of state misstated the law in the Election Procedures Manual. But the plaintiff did not name the secretary of state as a defendant in the suit, not even after she appeared voluntarily as an intervenor. Instead the plaintiff pressed its claim against county election officials acting as the Election Procedures Manual directed. Framed that way, the claim was groundless.

The plaintiff refuses to admit having sued the wrong party. Instead the plaintiff offers a specious argument that the secretary of state "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 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." Plaintiff's Response to Motion for Sanctions at 11. When a litigant resorts to that kind of sophistry, instead of simply admitting it made a mistake, it invites inquiry into its motives. The Court now turns to that inquiry.

"WITHOUT SUBSTANTIAL JUSTIFICATION": LACK OF GOOD FAITH

On the second element of liability under section 12-349(A), whether the claim was brought in good faith, the Court agrees with the plaintiff that the standard resembles the "ulterior purpose" element of the tort of abuse of process. Plaintiff's Response to Motion for Sanctions at 8-9. By that measure, a litigant fails to act in good faith when "improper purpose was the primary motivation for its actions, not merely an incidental motivation," such that the action "could not logically be explained without reference to the defendant's improper motives." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 92 P.3d 882 ¶¶ 18-19 (App. 2004). Though the inquiry is subjective, a lack of good faith may be shown by circumstantial evidence that reveals a litigant's state of mind. *See Phoenix Newspapers, Inc. v. Dep't. of Corrections*, 188 Ariz. at 245, 934 P.2d at 809.

The purpose of laws that prescribe election procedures is "to insure the conduct of the election so that the true number of legal votes and their effect can be ascertained with certainty." *Findley v. Sorenson*, 35 Ariz. 265, 269-270, 276 P. 843, 844 (1929). Accordingly, "a fair election and an honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end." *Id.* The hand count audit statute similarly prioritizes honest outcomes over technical details. Under the statute, the audit ends with the hand count of the sampled ballots, and the electronic tabulation becomes the official count, unless difference between the hand count and the machine count of those same ballots exceeds a "designated margin" determined in advance by experts. A.R.S. § 16-602(C).[2] Anything discrepancy less than the "designated margin" is treated as a minor irregularity that does not justify further official scrutiny of an otherwise fair election.[3]

The plaintiff tried to justify its case at the outset by portraying the manner of sampling ballots for the hand count as a critical component of a fair election. The plaintiff argued, "there were only around 175 polling centers (or 'vote centers') this election, but there were 748 precincts, potentially resulting in a more precise (or larger) sampling if precincts are used." Application for Order to Show Cause at 3 (footnote omitted). The plaintiff also argued that a precinct-focused

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[2] The "designated margin" is determined at least once every two years by the "vote count verification committee," a seven-member body appointed by the secretary of state and consisting of individuals with expertise in "any two or more of the areas of advanced mathematics, statistics, random selection methods, systems operations or voting systems," not more than three of whom may be members of the same political party. A.R.S. § 16-602(K)(1)-(3). The designated margin must be provided to the secretary of state, who in turn must make the information available to the public, before each election. A.R.S. § 16-602(K)(4). The current "designated margin" for precinct and voting center ("polling place") locations -- in other words, the threshold below which a discrepancy between the electronic count and the hand count casts is deemed too statistically insignificant to cast doubt on the election result -- is one percent. *See* Arizona Secretary of State Website, https://www.azsos.gov/elections/voting-election/voting-equipment (last visited February 25, 2021).

[3] The Court is aware that Judge Thomason has affirmed the authority of State Senate officials to compel Maricopa County to produce the materials associated with the 2020 election, including tabulation devices, software and ballots, for the avowed purposes of "assessing electoral integrity" and "examining potential reforms to the electoral process" and apparently also "to determine if the result of the Arizona election was correct and to see if there was a further basis to challenge the election outcome." *Maricopa County v. Fann*, Maricopa County Superior Court No. CV2020-016840, Order entered 02/25/2021. This Court, like Judge Thomason, expresses no view on the wisdom of that endeavor. It is enough to note that the appropriate forum in which to advocate more exacting scrutiny of the electoral process is the legislature, not the courts.

hand count would make it "much easier for Plaintiff and/or members of the public to cross-reference or cross-check with other voter registration data, since voter registration data is already 'sortable' by precinct (but not by 'vote center')." *Id.* The idea, as best the Court could figure it out, was that that precinct-by-precinct hand counts would reveal precincts where the number of votes exceeded the number of registered voters.

These were flimsy excuses for a lawsuit. The hand count is not meant to create data points for political parties to "cross-check with other voter registration data." "The purpose of the hand count audit is to compare the results of the machine count to the hand count to assure that the machines are working properly and accurately counting votes." Arizona Secretary of State, State of Arizona Elections Procedures Manual (December 2019) ("Election Procedures Manual"), *available at* https://azsos.gov/about-office/media-center/documents (last visited March 11, 2021). An audit of voting centers almost certainly was going to recount far *more* ballots than an audit of precincts, since there were more than four times as many precincts as voting centers. And, of course, there was no evidence at all of phantom voters or manipulated vote totals or any other wrongdoing that might show up in a "cross-check" against voter rolls.

The plaintiff has retreated from the position that a fair election requires a hand count audit based on a sample of precincts. The plaintiff now professes to have wanted nothing more than a hand count audit conducted "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." Plaintiff's Response to Motion for Sanctions at 13. The plaintiff goes on to say that "[p]ublic mistrust following this election motivated this lawsuit. *Id.* at 14.

The plaintiff is effectively admitting that the suit was brought primarily for an improper purpose. It is conceding that the method of sampling ballots for the hand count audit is a minor procedural requirement, not a necessary step toward a fair election. It is saying that it filed this lawsuit for political reasons. "Public mistrust" is a political issue, not a legal or factual basis for litigation.

The plaintiff tries to cover by distancing itself from its own arguments. What the plaintiff once described as advantages of a precinct-focused audit that "vastly outweighed" countervailing considerations like cost, delay and disruption, Application for Order to Show Cause at 3, are now characterized as "hypotheticals" offered to appease the Court's demand for evidence of "actual fraud." Plaintiff's Response to Motion for Sanctions at 14. The plaintiff suggests that counsel was asked unfairly to explain the "public policy" behind the hand count audit statute. "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)." *Id.*

The plaintiff is not characterizing either its litigation posture or the Court's inquiry honestly. *The Court's questions addressed the plaintiff's own arguments.* For the plaintiff to suggest otherwise is gaslighting. It evinces a lack of good faith.

It is not even true that the audit procedure advocated by the plaintiff would have been "completely by the book and in strict accordance with the law." The plaintiff's interpretation of the key section of the election statute, section 16-602(B), is barely colorable. That alone would not put the plaintiff on the wrong side of section 12-349, because "barely colorable" is different from "groundless." But the plaintiff's insistence that the audit procedure was so clearly illegal as to "compel" action in defense of election "integrity" is disingenuous. It is additional circumstantial evidence of lack of good faith.

Section 16-602(B) says, in pertinent part (with emphasis added), "The 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 official instructions and procedures manual adopted pursuant to § 16-452*." The highlighted passage expressly delegates to the secretary of state the authority to devise hand count audit procedures for voting center elections. The plaintiff has never even acknowledged that. Instead the plaintiff has repeatedly suggested that the statute does not authorize the secretary of state to prescribe audit procedures, using quoted language from a case that arose in a different legal context. *See, e.g.* Plaintiff's Response to Motion for Sanctions at 2, *quoting Western 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" . . . .)[4] On its face the statute here *does* authorize the secretary of state to "pass judgment on" what the law requires.

Perhaps more to the point, the ballot sampling method chosen by the secretary of state is consistent with section 16-602(B), not in conflict with it. The history of the statute, described in the ruling on the motions to dismiss, makes that clear. Ruling filed 12/21/2020 at 3-4. Before 2011, the pertinent part of section 16-602(B) said simply, "The hand count shall be conducted as prescribed by this section." The statute prescribed sampling of "polling places" for presidential preference elections, A.R.S. section 16-602(B)(3), and "precincts" for all other elections, reflecting the manner in which Arizona conducted elections at that time. In the 2011 enactment that authorized the use of voting centers instead of precincts for Arizona's primary and general elections, the legislature added the language that directs the secretary of state to establish hand count audit procedures but left the provisions for sampling of "polling places and "precincts" intact. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (West) § 8. That shows the legislature decided

[4] *Western Devcor* dealt with the sufficiency of referendum petitions. Unlike election procedures challenged after an election, the process leading up to a referendum must strictly comply with all legal requirements. 168 Ariz. at 428-429, 814 P.2d at 769-770.

to let the secretary of state decide how election officials would sample ballots for hand count audit after a voting center election, instead of mandating hand counts of either "precincts" or "polling places." Exercising that delegated authority, the secretary of state chose to adopt the "polling place" sampling method for voting center elections.

Again, the plaintiff has ignored the issue. The parties walked through the legislative history and its implications in their respective motions to dismiss. *E.g.* Arizona Secretary of State Katie Hobbs' Motion to Dismiss filed 11/16/2020 at 2-4. The plaintiff's response barely addressed it, Plaintiff's Response to Defendant/Intervenors' Motions to Dismiss filed 11/17/2020 at 2, and the response to the fee application does not mention it at all. Instead the plaintiff simply repeats the same argument, relying on a statutory construction tenet concerning interpretation of terms that does not apply when the statute's history makes clear what the legislature intended. The tactic bespeaks a lack of good faith.

Additional facts about the plaintiff's conduct before and during the litigation circumstantially demonstrate state of mind, and, therefore, the litigant's good faith or lack of it. Relevant factors may include (among others) the extent of any effort to determine the validity of a claim before the claim was asserted; the availability of facts to assist in determining the validity of a claim or defense; the extent of any post-filing effort to eliminate invalid claims; and the outcome of the claims in controversy. A.R.S. § 12-350.

By their own admission, the responsible individuals here made no serious pre-filing effort to determine the validity of the claims. They say the complaint was drafted on the day the hand count audit issue came to their attention, after business hours, and filed the next day. Plaintiff's Response to Motion for Sanctions, Exhibits A (Declaration of Wilenchik) and B (Declaration of Ward). Their haste is not an excuse for filing a groundless lawsuit.

The legal issues were easily accessible. The legislative history of the hand count audit statute can be found in a few minutes using standard on-line legal research tools. One of the plaintiff's attorneys was especially well equipped to give advice about the details of election procedure, having served as Deputy Secretary of State and worked on such matters. Application for Preliminary Injunction filed 11/16/2020 (affidavit of Miller). The Attorney General issued a letter, on the day that the suit was filed (and presumably in response to the same questions being asked of Republican Party officials), concluding that the Election Procedures Manual appropriately implemented the statute and explaining his reasoning. Arizona Secretary of State Katie Hobbs' Motion to Dismiss, Exhibit D (Kanefield letter of 11/12/2020).

The facts concerning the status of the hand count at the time of filing were likewise available. The Maricopa County Elections Department had publicly announced the completion of the hand count three days before the plaintiff filed suit, and issued the report the day before.

Arizona Secretary of State Katie Hobbs' Reply in Support of Application for Attorneys' Fees filed 1/12/2021, Exhibits A and B. The Republican Party state chair and the attorneys both deny knowing that, but they certainly had constructive knowledge, since the party's own representatives had participated in the audit. Ruling filed 12/21/2020 at 2, 5-6. And surely the plaintiff had a duty of inquiry. The statute itself includes information that gives notice of the need to inquire. *See* A.R.S. §16-602 (I) ("The hand counts prescribed by this section shall begin within twenty-four hours after the closing of the polls . . . ."). That the plaintiff did not do so suggests that it did not consider the information important -- another marker of lack of good faith.

The secretary of state points out yet another telling fact: that several Arizona counties used voting centers for the 2020 general election, and presumably sampled voting centers for their audits, but Maricopa County was the only one that got sued. Arizona Secretary of State Katie Hobbs' Application for Attorneys' Fees at 4. It would have been simple to file suit against the Secretary of State and each of those counties. That the plaintiff did not proceed that way suggest that its concern was something other than "strict compliance and "election integrity."

Perhaps the most telling fact of all is what the plaintiff did after the other parties disclosed, in response to the complaint, that the Maricopa County hand count was complete and that it showed the electronic tabulation was flawless. At that point the plaintiff could have quietly walked away from the lawsuit and publicized the audit results to reassure the public. Instead it filed its petition to enjoin the election canvass. Application for Preliminary Injunction filed 11/16/2020. In the petition the plaintiff said this:

> Given the importance of this election, and of doing everything with respect to this election "by the book," there are also powerful public-policy reasons to grant this injunction. If an injunction is not granted, then there will be lingering questions about the legitimacy of these results which could otherwise be answered through a proper hand count. This is also the basic prejudice that Plaintiff and the voting public will suffer if the Court declines to grant an injunction – it will create a cloud over the legitimacy of this election and its results.

Id. at 3. *This* is why the Court raised the question whether the plaintiff brought suit in order to "cast false shadows on the election's legitimacy." Undercutting the election's legitimacy by raising "questions" *is exactly what the plaintiff did in this passage.* It is what the plaintiff does again when it suggests that an adverse ruling on the secretary of state's fee application will cause the public to question the Court's impartiality and undermine respect for the courts. Plaintiff's Response to Motion for Sanctions at 14. It is a threat to the rule of law posing as an expression of concern. It is direct evidence of bad faith.

Last but not least is the plaintiff's "First Amendment" argument. No citation is needed for the proposition that the First Amendment does not give a litigant the right to file and maintain a groundless lawsuit.

Arizona law gives political parties a privileged position in the electoral process on which our self-government depends. The public has a right to expect the Arizona Republican Party to conduct itself respectfully when it participates in that process. It has failed to do so in this case.

THE COURT FINDS that the amount of attorneys' fees requested by Arizona Secretary of State Katie Hobbs, $18,237.59, is reasonable and appropriate.

IT IS ORDERED awarding attorneys' fees and costs to the Arizona Secretary of State in the amount of $18,237.59. The fees are awarded against the Arizona Republican Party, John D. Wilenchik, Lee Miller, and Wilenchik & Bartness, P.C., jointly and severally.

This is a final order. No matters remain pending in this case. Ariz. R. Civ. P. 54(c).

DATED this 12th day of March, 2021.

/ s / HON. JOHN R HANNAH, JR

HON. JOHN R. HANNAH, JR
JUDGE OF THE SUPERIOR COURT