

1 Alexander Kolodin (SBN 030826)
2 Christopher Viskovic (SBN 035860)
3 **KOLODIN LAW GROUP PLLC**
4 Alexander.Kolodin@KolodinLaw.com
5 CViskovic@KolodinLaw.com
6 3443 N. Central Ave. Ste. 1009
7 Phoenix, AZ 85012
8 Telephone: (602) 730-2985
9 Facsimile: (602) 801-2539

10 Sue Becker (MO 64721)
11 **Public Interest Legal Foundation**
12 32 E. Washington Street, Suite 1675
13 Indianapolis, IN 46204
14 Tel: (317) 203-5599 Fax: (888) 815-5641
15 sbecker@publicinterestlegal.org
16 *Pro hac motion forthcoming
17 *Attorneys for Plaintiffs*

18 **SUPERIOR COURT OF THE STATE OF ARIZONA**
19 **FOR THE COUNTY OF MARICOPA**

20 LAURIE AGUILERA, a registered voter in
21 Maricopa County, Arizona; DONOVAN
22 DROBINA, a registered voter in Maricopa
23 County, Arizona;

24 *Plaintiffs,*

25 v.

26 ADRIAN FONTES, in his official capacity as
27 Maricopa County Recorder; CLINT
28 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.

Case No. CV2020-014562

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
EXCLUDE WITNESSES**

1 Come now Plaintiffs, Laurie Aguilera and Donovan Drobina, and oppose
2 Defendants'¹ motion *in limine* filed 30 minutes ago to exclude several of Plaintiffs' fact
3 witnesses from testifying at the evidentiary hearing scheduled to begin less than 24 hours
4 from now.

5 As Defendants assert, under Arizona Rule of Evidence 401, evidence is relevant if
6 it has any tendency to make a fact more or less probable than it would be without the
7 evidence and the fact is of consequence in determining the action.

8 Plaintiffs claim that their votes were not properly read by Defendants' tabulators
9 though they completed their ballots according to the instructions. Joshua Banko will testify
10 that he worked at the polls all day on election day and observed, first hand, many other
11 undamaged ballots that appeared to be completed according to the instructions that the
12 tabulators at his voting center also had difficulty reading. This makes it more probable
13 Plaintiffs are not mistaken about what happened to them.

14 Several of Plaintiffs' causes of action depend on their ballots having been misread
15 through no fault of their own. For example, their first cause of action that the County's
16 electronic voting system did not comply with the requirements of state law that such
17 systems be able to read and tabulate ballots cast according to the instructions with perfect
18 accuracy depends on it. So to, for example, does their fifth cause of action about the devices
19 being given to voters to vote falling short of the requirements of state law because they do
20 not make it apparent that the tabulators will read an error on the ballot since the voter has
21 made none. Hence, the fact is of consequence of determining the action.²

22 Similarly, the evidence is not cumulative or duplicative as Defendants can be
23 expected to argue that Plaintiffs are mistaken about what happened to them. Hence the
24

25 ¹ Plaintiffs objected to the *déjà vu* of intervenors being admitted in order to eliminate and
26 reduce big law firm style filings but here we are. Intervenors have been happy to either
27 join or assist Defendants in all of their motions and have joined in the motion filed earlier
28 today.

² In addition, for the reasons already briefed, Plaintiffs have standing to bring an action to
observe violations of election law such as the failure of the tabulators to live up to the
requirements of statute notwithstanding whether these problems happened to them or
other voters.

1 testimony of someone who observed this happen to many other voters using Defendants'
2 tabulation equipment is of paramount importance.

3 For similar reasons, the testimony of Childers, Noviki, and Banko is of importance
4 in establishing that this is a real issue that effected people like Plaintiffs. Defendants
5 complain that their declarations are fill-in-the blank and so it is strange that they would
6 have a problem with them filling in those blanks. Plaintiffs do not plan to call Long.

7 Similarly, the Declarations Defendants seek to exclude should be permitted into
8 evidence. Plaintiffs cannot call as a witness every declaration that someone has submitted
9 due to the time constraints in this case. They plan to offer external indica of trustworthiness
10 testimony from the paralegal who gathered these declarations and spoke to these voters as
11 to his process for doing so. In addition, Defendants complain about the potential of
12 duplicative testimony. Allowing these declarations in would avoid that problem.

13 As further explained below, Plaintiffs request the motion be denied as 1) barred by
14 estoppel principles, 2) disallowed by lack of its appearance on the Scheduling Order or in
15 expedited Special Actions, 3) meritless as the witness testimony complained of is directly
16 relevant and supports Plaintiffs claims, and 4) prejudicial to Plaintiffs.

17 **RECENT HISTORY IN THE WILD, WILD WEST**

18 From Day One, Plaintiffs requested that all declarant testimony already filed in the
19 docket be admitted into evidence by stipulation so that this case, as an expedited election
20 matter, could be properly streamlined for all involved. Defendants objected, stating that
21 all the declarants needed to be presented live so that they could have a chance to cross-
22 examine the declarants about their declarations. After the Court ruled that all fact witness
23 declarants did indeed need to testify live, Plaintiffs requested a second day to put on their
24 case, but that was request was denied.

25 Today the Court took under advisement the precise election deadlines related to
26 this case, which is only one: November 30 is the deadline for the Secretary to certify the
27 election results and Plaintiff Aguilera has requested, among other relief, that her vote be
28 added to the final count. It is Plaintiffs' preference to begin the hearing on November 23,

1 which still gives the Court seven full days to decide that one point of requested relief,
2 which is the only time-sensitive relief requested. One day has been allotted for the
3 evidentiary hearing which now must include argument on 1) Defendant County's Motion
4 to Dismiss, 2) Intervenor's Motion to Dismiss, 3) Joint Motion to exclude Witnesses, and
5 4) Joint Motion to Quash, and 5) Whatever Other Motions are filed before this is signed
6 and filed.

7 The Court also confirmed today that Plaintiffs have a total of exactly 2.5 hours to
8 present their entire case. Plaintiffs timely identified 10 witnesses, nine of whom
9 submitted written declarations and several of whom Plaintiff offered to not call live, but
10 Defendants insisted that they be scheduled and arranged as live witnesses. Now, just
11 hours before the hearing, Defendants and Intervenors filed multiple motions and seek to
12 take time from the hearing date to do so.³ Plaintiffs have spent the better part of the week
13 preparing for the agreed-to scenario under the terms laid out in the Court's orders
14 concerning deadlines, but it appears that Defendants have been planning to ambush
15 Plaintiffs all along. The Court should not allow it.

16 **I. Defendants' Surprise Motion Should Be Denied on Grounds of Estoppel.**

17 Defendants have known about Mr. Banko's testimony since November 4, when
18 Plaintiffs' first case was filed, and were again put on notice on November 12, when
19 Plaintiffs filed their second case. Mr. Banko's testimony was attached as an exhibit to both
20 Complaints in the form of a written declaration, along with the declarations of the other
21 fact witnesses that Defendants now for the first time seek to exclude. They knew, at that
22 time, the scope of Mr. Banko and others' testimony and told the Court that they needed to
23 cross-examine the witnesses. At no time did they object to the written declarations as
24 irrelevant, as they do now on the eve of this expedited hearing. But more significant is that
25 they moved for a cease and desist restriction on Mr. Banko, stating affirmatively that he
26 was an employee of the Defendants and prohibited Plaintiffs' counsel from contacting him
27

28

³ See Hearing Exhibit 25, Maricopa Voting Plan, pp. 45-46.

1 at all. After agreeing to accept subpoena service for Mr. Banko, defense counsel later
2 reported that Banko was actually not an employee and that they had no control over him.
3 Now they are attempting to convince the Court that whatever Mr. Banko has to say is
4 irrelevant, which contradicts every action they have taken in this case to date, namely
5 obtaining a cease and desist order to prevent Plaintiffs from talking to him immediately
6 after the election.

7
8 Defendants have had Mr. Banko's testimony in their possession since Day One and
9 have sought to prevent the Court from hearing what he witnessed and saw and heard on
10 election day. They should be estopped from now preventing him from testifying live after
11 they have previously INSISTED that he appear live. Perhaps they thought he wouldn't
12 show up, but either way, they are estopped from excluding him after insisting that he
13 appear.

14 **II. Defendants Cannot Have It Both Ways- Either Discovery and Evidence**
15 **Rules Apply or They Do Not in this Special Action.**

16 The rules of special actions cannot be twisted both ways to serve Defendants. They
17 do not contemplate time for typical discovery, nor do they adhere to the strict rules of
18 evidence. The reasons are obvious -- special actions and expedited election matters move
19 quickly and must utilize the evidence available, which includes hearsay and the acceptance
20 of liberal standards of evidence. It is, after all, the Court and not a jury that will hear the
21 evidence and the Court is certainly capable of deducing the relevance and weight of
22 evidence.
23

24 Defendants are attempting to use the expedited status as both a shield and a sword.
25 They claim they need not produce witnesses or records because there is not enough time,
26 yet they have been using up precious time by filing extraneous motions to which Plaintiffs
27 must respond. Their argument against producing any discovery at all, including poll
28

1 workers, is that formal discovery rules do not apply. Yet, when the formal rules benefit
2 them, suddenly the rules of evidence and formal discovery do apply.

3
4 **III. Plaintiffs Will Be Prejudiced By the Exclusion of Their Key Witnesses**
5 **18 Hours Before the Hearing.**

6 Plaintiffs claims are proved with evidence that exists beyond their own testimony,
7 which is the concept of providing witnesses. Plaintiffs claims include six causes of action,
8 including allegations that 1) election procedures were not followed, 2) voters and their
9 ballots were treated differently although similarly situated, 3) Ms. Aguilera's ballot
10 tabulator took her ballot but displayed no acceptance message and she was not allowed to
11 cure her ballot, and 4) Mr. Drobina's perfectly marked ballot was rejected by the machines.
12 Plaintiffs can obviously testify as to their own experiences, but Plaintiffs' other witnesses
13 will testify that the same experience happened to them, that their correctly marked ballots
14 were rejected by the machines, and that their correctly marked ballots were kept by the
15 machine without any acceptance message. This goes to whether it becomes more likely
16 than not that the events Plaintiffs testify to are true and could have happened. The witness
17 testimony goes to whether Plaintiffs' testimony is credible and reliable. Mr. Banko's
18 testimony, for example, is that he witnessed perfectly marked ballots being rejected
19 multiple times as he worked as an election clerk. The testimony is more than relevant
20 because it goes to whether it is possible, as Defendants are expected to claim, that this only
21 happened to two people- Ms. Aguilera and Mr. Drobina.

22 **CONCLUSION**

23 At this late date, just hours away from the start of the hearing, Defendants seek to
24 cut out lay witness testimony as to the events that occurred on election day, despite being
25 aware of it for over two weeks. For all of the foregoing reasons, Intervenor's motion should
26 be denied.

27 Respectfully submitted this 19th day of November, 2020.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By /s/Christopher Alfredo Viskovic

Alexander Kolodin
Christopher Viskovic
Kolodin Law Group PLLC
3443 N. Central Ave. Ste. 1009
Phoenix, AZ 85012

Attorneys for Plaintiffs

I CERTIFY that a copy of this document will be served upon any opposing parties in conformity with the applicable rule of procedure.

By /s/Christopher Alfredo Viskovic

Christopher Alfredo Viskovic
Kolodin Law Group PLLC
3443 N. Central Ave. Ste. 1009
Phoenix, AZ 85012