

1 Paul F. Eckstein, No. 001822
Daniel C. Barr, No. 010149
2 David A. Gaona, No. 028414
PERKINS COIE LLP
3 2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
4 Telephone: 602.351.8000
Facsimile: 602.648.7000
5 PEckstein@perkinscoie.com
DBarr@perkinscoie.com
6 AGaona@perkinscoie.com
docketphx@perkinscoie.com
7

8 Attorneys for Intervenor-Defendants Ron Barber and
the Ron Barber for Congress Committee
9

10 ARIZONA SUPERIOR COURT
11 COCHISE COUNTY
12

13 WILLIAM J. ODLE, a qualified elector
14 and taxpayer of Cochise County and
Arizona Congressional District 2,
15

16 Plaintiff,

17 v.

18 JUANITA MURRAY, Cochise County
Election Director; CHRISTINE RHODES,
Cochise County Recorder,
19

20 Defendants.

No. CV2012-00744

**RESPONSE OF INTERVENOR-
DEFENDANT RON BARBER FOR
CONGRESS TO PLAINTIFF'S REQUEST
FOR TEMPORARY RESTRAINING
ORDER**

(Assigned to Hon. Wallace R. Hoggatt)

21 Intervenor-Defendant Ron Barber for Congress hereby submits the following response to
22 Plaintiff's request for a temporary restraining order. John MacKinnon, co-counsel for Intervenor-
23 Defendant, will be present during this morning's hearing and will be able to speak to the relevant
24 facts.
25
26

1 **Analysis**

2 The Plaintiff cannot demonstrate that it is entitled to a temporary restraining order
3 (“TRO”) that would prevent Cochise County from counting the ballots in question. A party
4 seeking a TRO—like one seeking a preliminary injunction—must establish four “traditional
5 equitable criteria”:

- 6
- 7 1) A strong likelihood that he will succeed at trial on the merits;
 - 8 2) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted;
 - 9 3) A balance of hardships favors himself; and
 - 10 4) Public policy favors the injunction.
- 11

12 *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ct. App. 1990) (citations omitted).
13 A court applying this standard may apply a “sliding scale,” under which “the moving party may
14 establish either 1) probable success on the merits and the possibility of irreparable injury; or 2)
15 the presence of serious questions and [that] ‘the balance of hardships tip[s] sharply’” in its favor.
16 *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410-11 ¶ 10, 132 P.3d 1187,
17 1190-91 (2006). The grant of injunctive relief, however, is an extraordinary remedy, and
18 whatever the standard applied by the court, the Plaintiffs cannot prevail.

19 **A. The Plaintiff Will Not Succeed At Trial on the Merits.**

20 *First*, the Plaintiff cannot (and will not) succeed at a trial on the merits of this action
21 because his claim has no basis in Arizona law. It is clear from the plain language of the law
22 governing the handling and counting of provisional ballots that no act of “sealing” is required at
23 all, to say nothing of requiring “sealing” at a particular point in time. *See Bither v. Country Mut.*
24 *Ins. Co.*, 226 Ariz. 198, 200 ¶ 8, 245 P.3d 883, 885 (Ct. App. 2010) (“The best indication of
25 legislative intent is the plain language of the statute.”) (citation omitted). Indeed, all that the
26

1 statute contemplates is that the provisional ballot be placed into an envelope and then verified by
2 election officials through a specific procedure:

3 *On completion of the ballot, the election official shall remove the*
4 *ballot stub, shall place the ballot in a provisional ballot envelope*
5 *and shall deposit the envelope in the ballot box. Within ten*
6 *calendar days after a general election that includes an election for a*
7 *federal office and within five business days after any other election*
8 *or no later than the time at which challenged early voting ballots are*
9 *resolved, the signature shall be compared to the precinct signature*
10 *roster of the former precinct where the voter was registered. If the*
11 *voter's name is not signed on the roster and if there is no indication*
12 *that the voter voted an early ballot, the provisional ballot envelope*
13 *shall be opened and the ballot shall be counted. If there is*
14 *information showing the person did vote, the provisional ballot*
15 *shall remain unopened and shall not be counted. When provisional*
16 *ballots are confirmed for counting, the county recorder shall use the*
17 *information supplied on the provisional ballot envelope to correct*
18 *the address record of the voter.*

19 A.R.S. § 16-584(D) (emphasis added). The Plaintiff simply cannot point to anything in
20 section 16-584(D)—or any other section of the election code, for that matter—which would
21 require that provisional ballots be sealed when presented to election officials for verification. As
22 a result, it cannot make the requisite showing that it would prevail on the merits at trial.

23 Importantly, *Miller v. Picacho Peak School District*, 179 Ariz. 178, 877 P.2d 277 (1994)
24 does not compel a contrary result. In *Miller*, voters in a school district contested the results of a
25 budget override election after school district employees were “closely involved with the
26 distribution and collection of absentee ballots,” acts that violated A.R.S. 16-542(B) which “which
require[d] that absentee ballots be mailed to electors who ask for them and that only electors may
possess ballots.” *Id.* at 178, 877 P.2d at 277. The Supreme Court held that the conduct of the
school district employees violated the express terms of a “non-technical statute,” that the
absentee ballots in question affected the outcome of the election, and that as a result, the election
had to be set aside. *Id.* at 180, 877 P.2d at 279. The Court discussed its holding in detail as
follows:

This is not a case of mere technical violation or one of dotting one's

1 “i’s” and crossing one’s “t’s.” At first blush, mailing versus hand
2 delivery may seem unimportant. But in the context of absentee
3 voting, it is very important. Under the Arizona Constitution, voting
4 is to be by secret ballot. Ariz. Const. art. VII, § 1. Section 16-
5 542(B) advances this constitutional goal by setting forth procedural
6 safeguards to prevent undue influence, fraud, ballot tampering, and
7 voter intimidation. *Here, the dangers were the very ones the statute*
8 *was designed to prevent. District employees with a pecuniary*
9 *interest in the override’s passage delivered ballots to electors whom*
10 *they knew. Although these electors did not ask for ballots, school*
11 *employees urged them to vote and even encouraged them to vote for*
12 *the override. District employees went to the homes of the electors*
13 *and stood beside them as they voted. Even if the elector voted his*
14 *or her conscience, the ballots still would never have been cast but*
15 *for the procedures adopted by the district. Thus, testimony that the*
16 *vote reflected the voter’s intent is irrelevant. These tactics achieved*
17 *the desired result—they turned the election around. These were*
18 *substantive irregularities.*

19 *Id.* (emphasis added).

20 Quite unlike the handling of the provisional ballots at issue in the instant case by elections
21 officials, *Miller* involved the direct involvement of parties unquestionably interested in the
22 outcome of the election in direct contravention of a statutory command. The parties who opened
23 the provisional ballots here were officials charged with the responsibility of opening and counting
24 those same ballots to remove “provisional ballot information sheets” for review by the Cochise
25 County Recorder’s Office, and in so doing, those officials did not violate the express terms of *any*
26 statute. As a result, *Miller* does not change or contradict the plain language of section 16-584(D),
and thus does nothing to establish that the Plaintiff would succeed on the merits at a trial in this
matter.

B. The Plaintiff Will Not Sustain Irreparable Injury if Relief is Not Granted.

21 *Second*, and beyond the Republican Party’s inability to demonstrate that it would succeed
22 on the merits at trial, it also cannot establish that it would sustain irreparable harm absent the
23 entry of a TRO. If the provisional ballots are counted and affect the outcome of the election, the
24 Republican Party clearly has a remedy at law through an election contest brought pursuant to
25 A.R.S. § 16-672. That statute clearly provides that any elector may contest the election of any
26

1 person “declared elected to a state office” for, among other things, the counting of “illegal votes.”
2 A.R.S. § 16-672(A)(4). That is precisely the procedure followed in *Miller*, cited *supra*. Because
3 the legislature has provided the Plaintiff with an adequate remedy at law that is not yet ripe, it will
4 not sustain irreparable injury if it does not obtain its requested TRO.

5 **C. The Balance of Hardships Favors the Non-Moving Party.**

6 *Third*, in weighing the balance of hardships, there is no doubt that a TRO preventing
7 elections officials from counting the provisional ballots would prejudice Congressman Barber and
8 those who potentially cast ballots in his favor, not the Plaintiff and his efforts to invalidate those
9 ballots.

10 **D. The Public Interest Favors the Counting of All Ballots.**

11 *Finally*, and above all, the public interest does not favor casting aside 135 valid
12 provisional ballots as a result of an invented technicality that has no basis in Arizona law. To the
13 contrary, those ballots *must* be counted consistent with the constitutional significance of the act of
14 participation in the political process. *See Burdick v. Takushi*, 504 U.S. 428, 433 (“It is beyond
15 cavil that voting is of the most fundamental significance under our constitutional structure.”)
16 (citation and internal quotation marks omitted); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No
17 right is more precious in a free country than that of having a voice in the election of those who
18 make the laws under which, as good citizens, we must live. Other rights, even the most basic, are
19 illusory if the right to vote is undermined.”). The Court—at least at this juncture—should not
20 interfere with the process of counting all valid ballots and permitting elections officials to fulfill
21 their statutory duties to perform a full canvass of the votes which can later be certified by the
22 Board of Supervisors.

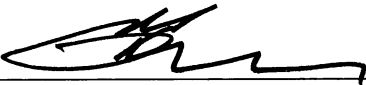
23 **Conclusion**

24 For the foregoing reasons, Intervenor-Defendant Ron Barber for Congress respectfully
25 request that the Court deny Plaintiff’s request for a temporary restraining order in this matter.
26

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

Dated: November 13, 2012

PERKINS COIE LLP

By: 
Paul F. Eckstein
Daniel C. Barr
David A. Gaona
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012-2788

Attorneys for Intervenor-Defendants Ron
Barber and the Ron Barber for Congress
Committee

Copy of the foregoing delivered via
email on November 13, 2012 to:

Honorable Wallace R. Hoggatt
Cochise County Superior Court
P.O. Drawer CK
Bisbee, Arizona 85603

Eric H. Spencer
Michael T. Liburdi
Snell & Wilmer
One Arizona Center
400 E. Van Buren
Phoenix, Arizona, 85004



LEGAL25150805.1