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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 In the matter of the contest of TOWN OF  
9 GILBERT, QUESTION NO. 1—  
10 PURPOSE: STREETS,  
11 TRANSPORTATION AND  
12 INFRASTRUCTURE RELATED  
13 IMPROVEMENT BONDS.

Case No. CV2021-017974

**APPLICATION FOR AN ORDER  
TO SHOW CAUSE**

13 JIM TORGESON; an individual,  
14  
15 Plaintiff,  
16  
17 vs.

(contest of election pursuant to A.R.S. §  
16-672 *et. seq.*)

17 TOWN OF GILBERT, a municipal  
18 corporation, BRIGETTE PETERSON, in  
19 her official capacity as Mayor of the Town  
20 of Gilbert, SCOTT ANDERSON, in his  
21 official capacity as Gilbert Town  
22 Councilmember, LAURIN HENDRIX, in  
23 his official capacity as Gilbert Town  
24 Councilmember, YUNG KOPROWSKI, her  
25 official capacity as Gilbert Town  
26 Councilmember, SCOTT SEPTEMBER, in  
27 his official capacity as Gilbert Town  
28 Councilmember, KATHY TILQUE, in her  
official capacity as Gilbert Town  
Councilmember, AIMEE YENTES, in her  
official capacity as Gilbert Town  
Councilmember,

Defendants.

1 **I. APPLICATION**

2 Pursuant to Rule 65 of the Arizona Rules of Civil Procedure, Plaintiff JIM  
3 TORGESON (“Plaintiff”) respectfully moves this Court for an Order (i) directing the  
4 Defendants to show cause why Plaintiff should not be granted the relief sought in his  
5 Complaint for Special Action and this Application, and (ii) setting a return hearing as  
6 expeditiously as possible. This is an election challenge with amount the shortest (five  
7 calendar days) statute of limitations of any cause of action and these cause of action must  
8 be decided on an expedited basis so that the public may know whether the Town of  
9 Gilbert approved election canvass will stand. The hearing on this matter must be set by  
10 law within 15 days. A.R.S. § 16-676(A).  
11  
12

13 The following memorandum of points and authorities supports this Application  
14 and Motion.  
15

16 **II. AN ELECTION CHALLENGE IS AN APPROPRIATE VEHICLE FOR  
17 RELIEF BASED ON THE EXTENSIVE MISCONDUCT OF THE TOWN**

18 The basis for relief is set forth in the Verified Complaint for Special  
19 Action/Statement of Election Contest. But in addition, Plaintiff wishes to make the  
20 following points.

21 To be sure, seeking to have an election result annulled is not a decision taken  
22 lightly by the Plaintiff. Had the Gilbert Bond Question not purportedly passed by such a  
23 narrow, 164 vote margin, this suit likely would not have been instituted, though Plaintiff  
24 may have still availed himself of his rights under the United States Constitution and 42  
25 United States Code Section 1983 to seek monetary damages for the obvious violation of  
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1 the Plaintiff's free speech rights under the United States and Arizona Constitutions, and  
2 under statutory law.

3 Under Arizona law, it is clear that the lower the vote difference margin, the less  
4 impactful the alleged misconduct must be to permit a successful election challenge.  
5 However, in this instance, though the vote difference is very small, the misconduct is  
6 significant.  
7

8 **A. The Town's Significant Constitutional Violations of Torgeson's Rights**  
9 **Amounts to Voter Disenfranchisement**

10 This has been said many times by many courts, but one district court phrased it in  
11 a way that is particularly appropriate to this case:

12 The State has the authority to regulate expressive conduct and can require  
13 reasonable time and place restrictions that are content neutral. But once a  
14 State law, or the State's enforcement of that law, targets certain speech for  
15 restriction because of its content—especially when  
16 the target is political speech in a public forum—the law is presumptively  
17 unconstitutional. When the restriction is content-based, the State bears an  
18 “extraordinarily heavy burden” of showing that the law or its enforcement  
19 is the least restrictive means to further a compelling State interest.

20 *Watters v. Otter*, 854 F.Supp.2d 823, 825 (D.Idaho 2012).

21 The place where the signs were placed, the public right of way, is clearly a  
22 traditional public forum. But regardless of a forum's classification, viewpoint based  
23 restrictions are unconstitutional. *Pittsburgh League of Young Voters Educ. Fund v. Port*  
24 *Authority of Allegheny County*, 653 F.3d 290, 296 (3<sup>rd</sup> Cir. 2011)(“Viewpoint  
25 discrimination is anathema to free expression and is impermissible in both public and  
26 non-public fora.”) A viewpoint restriction “targets not subject matter, but particular  
27 views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of Univ. of Va.*,  
28 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). In other words, if the

1 government allows speech on a certain subject in any forum, it must accept all viewpoints  
2 on the subject, even those that it disfavors or finds unpopular. *Pittsburgh League of*  
3 *Young Voters Educ.*, 653 F.3d at 296.

4 A viewpoint-based restriction on speech is clearly what occurred here. The Town  
5 of Gilbert clearly set out to restrict Torgeson's First Amendment rights based on the  
6 content of his speech. The Town did this by removing his signs, and his signs alone.  
7 Others who engaged in free speech activities in precisely the same realm were not  
8 targeted in this way. And last election, when a person or entity posted political signs  
9 against attacking mayoral candidate Matt Nielsen, the Town did nothing to remove these  
10 political signs, despite the fact that the anti-Nielsen signs omitted the same information  
11 that the Torgeson signs omitted that the Town claims justified removing these signs. In  
12 fact, the anti-Nielsen signs contained no information as to who had sponsored the signs.  
13

14 Of course, the anti-Nielsen signs fell into just the opposite place as Torgeson's  
15 signs did in terms of the Town's view of the political message conveyed. That is, Nielsen  
16 ran against the now current Mayor, Brigette Peterson. And Ms. Peterson was the  
17 candidate favored by the Town Council majority at that time—Nielsen was the outsider.  
18 As such, the anti-Nielsen signs, in contrast to the anti-bond signs, did not convey a  
19 message that the Town found undesirable, and the Town did not remove them.  
20

21 Even if the Town's actions fall into the slightly less constitutionally objectionable  
22 category of mere "content-based restrictions on speech, those provisions can stand only if  
23 they survive strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2231, 576  
24 U.S. 155, 171 (2015). This would require the Town "to prove that the restriction furthers  
25 a compelling interest and is narrowly tailored to achieve that interest." *Id.* Of course,  
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1 they could never do this, because the Town's targeting of only Torgeson's signs, and not  
2 the signs of those attacking Matt Nielsen, or the myriad commercial signs, would be, in  
3 the Supreme Court's description of the Gilbert ordinance it found unconstitutional in  
4 *Reed*, "hopelessly underinclusive" because it only targeted Torgeson's signs! *Id.*

5  
6 **B. The Town Also Engaged in Voter Disenfranchisement by Putting Its  
7 Thumb on the Scale with the Publicity Pamphlet**

8 The Town published and distributed a publicity pamphlet that was clearly an  
9 advocacy piece. This violated Arizona law, and skewed the election. A.R.S. § 9-  
10 500.14(A).

11 Anyone who read the publicity pamphlet was told that the bonds were necessary,  
12 or residents could say good-bye to "Gilbert's long-term sustainability and quality of life."  
13 (Exhibit U to Amended Verified Complaint). As do all publicity pamphlets, this one  
14 contained a section for arguments in favor and against the Gilbert Bond Question. Unlike  
15 the portion prepared by the Town, advocacy is the point of this ballot arguments section.  
16 It is no coincidence that this "quality of life" talking point was echoed in the partisan  
17 ballot arguments of Councilmembers Koprowski and Tilque, co-chairs of the pro-bond  
18 political action committee. *Id.*

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21 Readers were told that the bonds were necessary to repair "failing streets and  
22 signals." *Id.* (emphasis added). And readers were also provided answers to supposed  
23 frequently asked questions. *Id.* But these frequently asked questions focused on why the  
24 voters should pass the bond: "Why do we need these projects?" "How does this bond  
25 package improve my commute?" "How does this bond package improve safety?" *Id.*  
26  
27 There were no questions that focused on any of the negative aspects of this \$515 million  
28

1 bond, or potential alternatives to debt financing. And of course, the very wording of the  
2 questions ensured that the answers would tout passage of the bond.

3 **C. Annuling an Election is a Drastic Remedy, but it Is Appropriate Here**

4 To be sure, annulling an election is a radical remedy, but the law supports it here.  
5 A.R.S. § 16-672 provides the grounds for a potential election contest, and Torgeson has  
6 asserted that the actions of the Town were an offense against the elective franchise. Just  
7 this year, the Arizona Supreme Court restated the standard for one challenging an  
8 election:  
9

10 Elections will not be held invalid for mere irregularities “unless it [can] be  
11 shown that the result has been affected by such irregularity.” *Territory v.*  
12 *Board of Sup’rs*, 2 Ariz. 248, 253 (1887). The validity of an election is not  
13 voided by honest mistakes or omissions “unless they affect the result, or at  
14 least render it uncertain.” *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929).

15 *People ex rel. B.J.B. v. Ducey*, 2021 WL 1997667, at \*1 (Ariz. 2021).

16 The Arizona Court of Appeals has indicated that a contestant is obliged to show  
17 fraud or “that the alleged disenfranchisement may have affected the result of the  
18 election.” *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). And this Court clearly  
19 has the power to annul an election if a challenge is successful. Under A.R.S. § 16-  
20 676(B), a Court shall issue an order, after an election challenge hearing, “either  
21 confirming or annulling and setting aside the election”  
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23 The wrongdoing here may not be accurately described as fraud. However, the  
24 systemic effort to violate Torgeson’s rights may be just as objectionable. And of course,  
25 with such a narrow margin, the Town’s misdeeds clearly may have affected the result of  
26 the election.  
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1 A Court might think that it should stop short of annulling an election because of  
2 the availability of other remedies. As to federal monetary damages, Torgeson may seek  
3 these. But as a remedy, they hardly would bring full satisfaction. It is unclear if there are  
4 any monetary damages remedies under state law<sup>1</sup>.

5  
6 The people, who have already been deprived of having the most robust possible  
7 discussion on the bonds thanks to the Town's actions, will ultimately pay any monetary  
8 judgment that is awarded. And for the Town officers and employees who engaged in the  
9 misconduct, they may not even care about paying a monetary judgment. They are not  
10 going to have to pay it themselves, and they might consider it a small price to pay to put a  
11 \$515 million bond over the top. They can simply add it to the taxpayers' tab. Under that  
12 scenario, Torgeson and his fellow taxpayers have to take it from all sides—they are  
13 deprived of a full and robust debate on this issue, the bond passes in a skewed election  
14 setting, and then they have to pay for the Town's transgressions!

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16  
17 The bottom line is that the right to vote, the elective franchise, means little if the  
18 government is allowed to stamp out speech that advocates opposing views. It is the  
19 uniquely bad acts of the Town of Gilbert that has forced the need for the drastic judicial  
20 action that is requested. That is what happens when the alternative result, allowing the  
21 election to stand, is far less tenable than annulling the result. *See Krieger v. City of*  
22

23  
24  
25 <sup>1</sup> A case featuring this very issue is actually pending in the Arizona Court of Appeals.  
26 *ABC Sand and Rock Co., Inc. v. Maricopa County*, case no. 1-CA-CV 21-0108.  
27 Defendant Maricopa County has argued there is no state monetary damages remedy for  
28 violations of the Arizona Constitution. Both parties agree that at least two federal district  
court judges have described this as an open question. *Diaz v. Arizona*, 2012 WL 1203692,  
\*5 (D. Ariz. 2012); *see also Cesare v. County of Pima*, 2015 WL 13741218, \*24 (D.  
Ariz. 2015).

1 Peoria, 2014 WL 4187500, at \*1 (D.Ariz. 2014)(issuing an order, four days before the  
2 election, that the City of Peoria not count the ballots and instead schedule a special  
3 election where, due to an honest mistake, the candidate's name was left off the ballot).

4 Lastly, the Town of Gilbert's history of voter disenfranchisement cannot be  
5 ignored. Torgeson already mentioned the Town's indifference to political signs attacking  
6 Town-disfavored candidates. But the Town of Gilbert has also used its full resources to  
7 try to keep a candidate elected by the voters out of office as long as possible, in violation  
8 of the law.  
9

10 In August of 2020, now Councilman Laurin Hendrix won a special election. He  
11 defeated a candidate who had been appointed by the Town Council. The law in Arizona  
12 treats candidates who win special elections against appointed officeholders differently  
13 than a candidate who wins a regular election. To wit, those who win a special election  
14 are generally entitled by law to take their seat earlier than with a regular election.  
15

16 This was the case with Laurin Hendrix—he was entitled to take his seat early, but  
17 the Town tried to keep him out as long as they could and its favored councilmember, Bill  
18 Spence, in. Hendrix had to sue the Town in Court, and the Court ordered the Town to  
19 seat Hendrix and pay tens of thousands of dollars in Mr. Hendrix's legal fees. *Hendrix v.*  
20 *Town of Gilbert*, Maricopa County Superior Court, Case No. CV2020-009892.  
21

### 22 **III. THE LAW ON ELECTION CHALLENGES AND INJUNCTIONS**

23 By law, a prompt resolution of this matter is required. A.R.S. § 16-676 provides:

24 A. In any contest brought under the provisions of section 16-672 or 16-674,  
25 upon the filing of the answer, or if no answer is filed, upon the expiration of  
26 the time specified in the summons, the court shall set a time for the hearing  
27 of the contest, not later than ten days after the date on which the statement  
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of contest was filed, which may be continued for not to exceed five days for good cause shown.

B. The court shall continue in session to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment, either confirming or annulling and setting aside the election.

As such, Torgeson asks that this Court schedule this matter for hearing promptly.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiff asks that this Court enter the requested show cause order, and set a hearing on this matter as promptly as possible.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of November, 2021.

**TIMOTHY A. LA SOTA, PLC**

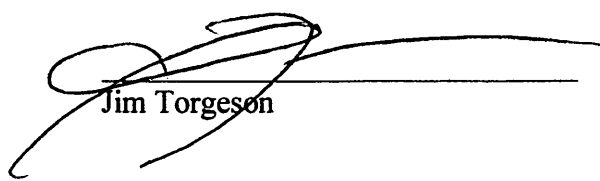
**By: /s/ Timothy A. La Sota**

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**Rule 80 Declaration**

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I declare under penalty of perjury of the laws of the State of Arizona that the foregoing Application for Order to Show Cause is true and correct and that this Declaration is executed by me on the 22<sup>nd</sup> day of November, 2021, in Maricopa County, Arizona.

  
Jim Torgeson