

1 ALLISTER ADEL
2 MARICOPA COUNTY ATTORNEY

3 Thomas P. Liddy (019384)
4 Emily Craiger (021728)
5 Joseph I. Vigil (018677)
6 Joseph J. Branco (031474)
7 Joseph E. LaRue (031348)
8 Deputy County Attorneys
liddy@mcao.maricopa.gov
craigere@mcao.maricopa.gov
vigilj@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
laruej@mcao.maricopa.gov

9 CIVIL SERVICES DIVISION
10 225 West Madison Street
11 Phoenix, Arizona 85003
12 Telephone (602) 506-8541
13 Facsimile (602) 506-4317
14 ca-civilmailbox@mcao.maricopa.gov

15 *Attorneys for Maricopa County Defendants*

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

18 Arizona Republican Party,
19 Plaintiff,

20 v.

21 Adrian Fontes, as Maricopa County
22 Recorder; and the Maricopa County Board
23 of Supervisors, by and through Clint
24 Hickman, Jack Sellers, Steve Chucri, Bill
25 Gates, and Steve Gallardo,
26 Defendants.

NO. CV2020-014553

**MARICOPA COUNTY
DEFENDANTS' MOTION TO
DISMISS**

(Honorable John Hannah)

Introduction

27 Plaintiff seeks mandamus relief through a special action to require “Defendant
28 Fontes to perform the hand count of ‘precincts,’ and not of vote centers.” (*See* Cmplt., ¶¶
18–21, B). “The special action requests extraordinary relief, and acceptance of jurisdiction

1 of a special action is highly discretionary with the court to which the application is made.”
2 Ariz. R. P. Special Action 3, St. Bar Comm. Note (emphasis added).

3 Here, extraordinary relief is not available because **(1)** the County complied with its
4 legal duty to perform a hand count audit of ballots of the November 3, 2020 General
5 Election using a sample of vote centers; **(2)** the relief is barred by laches because Plaintiff
6 had notice of the process for sampling the ballots at vote centers rather than the ballots at
7 precincts years ago and a member of Plaintiff participated in the hand count process this
8 year consistent with § 16-602(B)(1) and the 2019 Elections Procedures Manual; and **(3)**
9 the requested relief is moot because the County already completed the hand count. Further,
10 Recorder Fontes is not a proper party because he does not conduct the hand count and has
11 no responsibility concerning it.

12 This Court should exercise its broad discretion to decline jurisdiction over this
13 action. Alternatively, as a matter of law, this Court should accept jurisdiction, deny relief,
14 and dismiss this action with prejudice.

15 **Background¹**

16 **I. Vote-center-based and precinct-based voting**

17 Arizona law grants a county discretion to establish a vote center model or a precinct
18 model for voting. *See* A.R.S. § 16-411(B)(4) (“On a specific resolution of the board, the
19 board may authorize the use of voting centers *in place of* or in addition to specifically
20 designated polling places.” (Emphasis added)). For the November 3, 2020 General
21 Election, the County exercised its discretion to establish a vote center model. *See*
22 Maricopa Cnty. Elections Dep’t, *Election Day & Emergency Voting Plan—November*
23 *General Election 3* (Sept. 16, 2020), available at
24 [https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Electio](https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Electio%20n%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf)
25 [n%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf](https://recorder.maricopa.gov/pdf/Final%20November%202020%20General%20Electio%20n%20Day%20and%20Emergency%20Voting%20Plan%209-16-20.pdf). With a vote
26 center model, a voter can cast a ballot “anywhere” rather than at a specifically-assigned

27 ¹ The exhibits referenced in this Motion are “public records” addressing matters in the
28 Complaint, and this Court may consider them without converting this Motion into one for
summary judgment. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012).

1 precinct polling place. *Id.* at 3. Maricopa County exercised its discretion to adopt a vote
2 center model made necessary by the pandemic. *Id.* at 5.

3 **II. Hand count audit**

4 Arizona law mandates that “the county officer in charge of the election shall
5 conduct a hand count at one or more secure facilities.” A.R.S. § 16-602(B). “The hand
6 count shall be conducted as prescribed by this section and in accordance with hand count
7 procedures established by the secretary of state in the official instructions and procedures
8 manual adopted pursuant to § 16-452.” *Id.*

9 That “official instructions and procedures manual,” referenced in A.R.S. § 16-
10 602(B), is the “Elections Procedures Manual,” or “EPM” for short. It is prepared by the
11 secretary of state, in consultation with the elections officers from all of Arizona’s fifteen
12 counties. A.R.S. § 16-452(A). By law, the Secretary must “prescribe rules [in the EPM]
13 to achieve and maintain the maximum degree of correctness, impartiality, uniformity and
14 efficiency on the procedures for [,]” among other things, “voting, ...counting, [and]
15 tabulating” ballots. *Id.* Before the Elections Procedures Manual can be issued, it must be
16 approved by the governor and attorney general. After approval, the Elections Procedures
17 Manual has the force of law, and anyone violating any of its rules is guilty of a class 2
18 misdemeanor. A.R.S. § 16-452(C).

19 By law, the Elections Procedures Manual must be issued by December 31 in each
20 odd-numbered year. A.R.S. § 16-452(B). The most recent Elections Procedures Manual
21 was issued in December, 2019. It is a public document, available online, to the Plaintiffs
22 and all other interested parties of which this Court may take judicial notice.²

23 Returning now to the statutory provisions for post-election, hand count audits,
24 Section 16-602(B)(1) addresses the sampling of ballots at “precincts” for the hand count
25 audit; it does not address sampling vote centers. *See* A.R.S. § 16-602(B)(1) (“At least two

26 ² EPM (2019), available at [https://azsos.gov/sites/default/files/2019_ELECTIONS_-
27 PROCEDURES_MANUAL_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_-_PROCEDURES_MANUAL_APPROVED.pdf). The December, 2019, approval letters
28 from Governor Ducey and Attorney General Brnovich are included as unnumbered pages
at the beginning of the EPM (2019).

1 percent of the precincts in that county, or two precincts, whichever is greater, shall be
2 selected at random from a pool consisting of every precinct in that county.”). However,
3 as already mentioned, the legislature chose to authorize counties to use vote centers in
4 place of precinct-based polling locations. A.R.S. § 16-411(B)(4). To fill that gap—and,
5 consistent with § 16-602(B) and § 16-452—the EPM provides that “[i]n counties that
6 utilize vote centers, each vote center is considered to be a precinct/polling location and
7 the officer in charge of elections must conduct a hand count of regular ballots from at least
8 2% of the vote centers, or 2 vote centers, whichever is greater.” EPM (2019) at 216.
9 Without this well-reasoned addition to the EPM, arguably no hand count audit would be
10 authorized by statute in those counties using vote centers instead of precinct-based polling
11 locations consistent with A.R.S. § 16-411(B)(4).

12 Political parties participate in the sampling of ballots of vote centers for hand count
13 audits. EPM (2019) at 215 (“The county political party chairpersons (or designees) shall
14 take turns randomly drawing the precincts, vote centers, or consolidated polling places for
15 the hand count.”); A.R.S. § 16-602(B)(1) (“The county political party chairman for each
16 political part[ies] that is entitled to continued representation on the state ballot or the
17 chairman’s designee shall conduct the selection of the precincts to be hand counted.”); *see*
18 *also* EPM (2019) at 215–16 (establishing process for sampling vote centers).

19 **III. Maricopa County’s November 2020 Hand Count Audit**

20 In accordance with Arizona law, the County conducted a hand count audit of the
21 November 2020 General Election (“November 2020 Hand Count Audit” or “Hand Count
22 Audit”). (*See* Exh. A (Maricopa Cnty. Nov. 2020 Hand Count Audit)). A member of
23 Plaintiff participated in the sampling of vote centers for the Hand Count Audit: “The hand
24 count beg[a]n on **Wednesday, November 4, 2020 at 6:08 p.m.** when the Maricopa
25 County Chairs of the **Republican, Democrat and Libertarian** Party met to select the
26 polling places (vote centers), races and early ballot audit batches to be audited.” (*Id.* at 1).
27 Further, “the specific polling places (vote centers) to be counted were selected with the
28 participating County Party Chairs alternating the various selections” and “[t]he

1 **Republican** party was selected to go first.” (*Id.*). The November 2020 Hand Count Audit
2 was finished Monday, November 9, 2020 at 1:15 p.m., and it determined that “No
3 discrepancies were found by the Hand Count Audit Boards.” (*Id.* (emphasis added)).

4 Importantly, Plaintiff Arizona Republican Party cannot claim that the Maricopa
5 County Republican Party is a different entity entirely, such that the ARP was not
6 represented at the selection process for the Hand Count Audit. Arizona law makes the
7 local county political parties a subgroup of the respective state political parties. So, for
8 example, “[t]he state committee of each party shall consist in addition to the chairman of
9 the several county committees, of one member of the county committee for every three
10 members of the county committee elected pursuant to § 16-821.” A.R.S. § 16-825. In
11 other words, the state committee of the Arizona Republican Party is comprised of
12 representatives from the several county Republican Parties, including the Maricopa
13 County Republican Party—the very party that was present at, and participated in, the Hand
14 Count Audit.

15 Nor can Plaintiff Arizona Republican Party claim that it was unaware that the
16 Maricopa County Republican Party participated in the Hand Count Audit. No later than
17 November 11, 2020—before this current lawsuit was filed—Plaintiff received a copy of
18 the Hand Count Audit in connection with its participation as a party in *Trump v. Hobbs*,
19 Case No. CV2020-014248 (Maricopa Cnty. Superior Court), in which it was filed as
20 Exhibit 42. (Exh. B).

21 Furthermore, the Arizona Attorney General’s Office notified the Honorable Karen
22 Fann, President of the Arizona State Senate, and the Honorable Russell Bowers, Speaker
23 of the Arizona House of Representatives—both registered Republicans—that the
24 sampling of vote centers instead of “precincts” is consistent with Arizona law. (Exh. C)).
25 Plaintiff knew, or should have known, that members of their Party participated in the Hand
26 Count Audit and that the Attorney General—also a Republican—agrees that Maricopa
27 County complied with the law in its Hand Count Audit. Yet, Plaintiff soldiered on and
28 brought its lawsuit anyway.

1 Additionally, the County is not alone in following the Manual’s sampling of vote
2 centers for hand count audits. *See generally* Ariz. Secretary of State, 2020 General
3 Election Hand Count Results, [https://azsos.gov/election/2020-general-election-hand-](https://azsos.gov/election/2020-general-election-hand-count-results)
4 [count-results](https://azsos.gov/election/2020-general-election-hand-count-results) (last visited Nov. 13, 2020) (listing county hand count results). This year,
5 Cochise, Greenlee, and Yavapai Counties have performed hand count audits by sampling
6 ballots at vote centers. (*See* Exh. D).

7 **IV. This lawsuit**

8 On November 12, 2020, Plaintiff filed this Verified Complaint seeking mandamus
9 relief via special action. Specifically, Plaintiff asks that “the Court enter an order
10 compelling *Defendant Fontes* [who, as will be explained, has *nothing* to do with hand
11 count audits] to perform the hand count of ‘precincts,’ and not of vote centers.” (Cmplt.,
12 ¶ B). Despite a member of Plaintiff participating in the Hand Count Audit sampling of
13 vote centers and Plaintiff receiving a copy of the completed November 2020 Hand Count
14 Audit not later than November 11, 2020, Plaintiff alleges that “Maricopa County intends
15 to conduct the sampling in accordance with the Secretary of State’s manual, i.e. it intends
16 to sample 2% of polling places (vote centers) and not 2% of precincts.” (*Id.*, ¶ 16
17 (emphasis added)).

18 **Argument**

19 **I. Mandamus relief is unavailable.**

20 Plaintiffs seek mandamus relief available in a special action. (*See* Cmplt., ¶¶ 18–
21 21, A, B). “Mandamus is an extraordinary remedy issued by a court to compel a public
22 officer to perform an act which the law specifically imposes as a duty.” *Sears v. Hull*, 192
23 Ariz. 65, 68, ¶ 11 (1998). “[T]he general rule is that if the action of a public officer is
24 discretionary that discretion may not be controlled by mandamus.” *Id.* At bottom,
25 mandamus is not “available to compel an officer to perform acts not authorized or required
26 by some plain provision of the law.” *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995).

27 **1.** As an initial matter, Recorder Fontes has no legal duty to record a hand
28 count audit of *any* ballots—not those cast in vote centers; and, not those cast in polling

1 locations. The duty to oversee the hand count of ballots cast in vote centers under § 16-
2 602(B) rests with “the county officer in charge of the election.” In Maricopa County,
3 Recorder Fontes is not tasked with that duty with respect to vote centers. Instead, it is a
4 function of the Maricopa County Elections Department overseen by the Maricopa County
5 Board of Supervisors. *See* Maricopa Cnty. Elections Dep’t, *Election Day & Emergency*
6 *Voting Plan—November General Election* 4, 45 (Sept. 16, 2020) (describing general
7 division of labor between County and Recorder in administering elections, and addressing
8 hand count process). Despite that, Plaintiff asks this Court to order Recorder Fontes to
9 conduct a hand count audit, in contradiction of Arizona law. Yet, the Recorder cannot
10 violate a legal duty that he does not have. The relief Plaintiff seeks is not available by
11 mandamus or any other action.

12 **2.** Further, it would be futile for Plaintiff to amend its complaint³ by seeking
13 an order compelling the Board of Supervisors to conduct a hand count audit of precincts,
14 because the County complied with its legal duty to perform a hand count audit under §
15 16-602(B) and the Elections Procedures Manual at pages 213 to 234 by sampling vote
16 centers. As a result, mandamus is unavailable as a remedy and this special action is without
17 merit.

18 As discussed above, § 16-411(B)(4) gives a county discretion to select a vote-
19 center-based model for voting that the County selected for the November 3, 2020 General
20 Election. Consistent with § 16-602(B) and § 16-452, the 2019 Elections Procedures
21 Manual permits the County to take a sample of vote centers as part of its duty under § 16-
22 602(B) to conduct a hand count audit. EPM (2019) at 215, 216.

23
24 ³ Plaintiff claims its Complaint is “verified.” Perhaps it is; but, if so, it is not apparent
25 *how*, exactly, the Arizona Republican Party verified it. The verification page is signed by
26 Mr. Jack Wilenchik, one of the attorneys bringing the lawsuit. But it is not apparent that
27 Mr. Wilenchik has authority to speak for the Arizona Republican Party. He is not listed
28 as one of its elected officers on its website, *see* Republican Party of Arizona, “Elected
Officers,” *available at* <https://azgop.com/directory/state-party>, and his verification page
does not identify the delegation of authority allowing him to verify the complaint on behalf
of the Arizona Republican Party.

1 Consistent with this legal framework, the County’s sampling of ballots at vote
2 centers rather than ballots at precincts therefore complied with Arizona law. (*See also*
3 Exh. C). As a result, there is no basis for mandamus relief because the County did not
4 violate a legal duty. Instead, Plaintiff seeks to compel the County to perform an act that is
5 not required by law.

6 **3.** Further, Plaintiff’s special action is barred by laches because this process is
7 not new and Plaintiff participated in the process to select vote centers—rather than
8 precincts—to be hand counted in accordance with the 2019 Elections Procedures Manual.
9 *See* EPM (2019) at 215 (“The county political party chairpersons (or designees) shall take
10 turns randomly drawing the precincts, vote centers, or consolidated polling places for the
11 hand count.”); A.R.S. § 16-602(B)(1) (“The county political party chairman for each
12 political party that is entitled to continued representation on the state ballot or the
13 chairman's designee shall conduct the selection of the precincts to be hand counted.”); *see*
14 *generally* EPM (2019) at 215–16 (establishing selection process for selecting vote centers
15 to be hand counted).

16 The equitable doctrine of laches “seeks to prevent dilatory conduct and will bar a
17 claim if a party’s unreasonable delay prejudices the opposing party or the administration
18 of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). In deciding whether a
19 plaintiff’s delay is unreasonable, a court should consider “the justification for the delay,
20 the extent of the plaintiff’s advance knowledge of the basis for the challenge, and whether
21 the plaintiff exercised diligence.” *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920,
22 923 (D. Ariz. 2016) (citation omitted).

23 Plainly, Plaintiff’s participation in the selection of vote centers for the hand count
24 audit on November 4, 2020—the very conduct they challenge in this suit—shows
25 Plaintiff’s unreasonable delay without justification. (*See* Exhibit A (Plaintiff’s
26 participation)). Further, as the Attorney General’s Office noted: “This is not a new
27 procedure. Since 2012, versions of the EPM drafted by Secretaries of State Ken Bennett,
28 Michele Reagan and Katie Hobbs have addressed voting centers with respect to the hand

1 count audit procedure. Two versions of those manuals were approved by Governors
2 Brewer and Ducey and Attorneys General Horne and Brnovich.” Laches thus bars this
3 action.

4 **4.** Finally, Plaintiff’s request for mandamus relief is moot. “A case is moot
5 when it seeks to determine an abstract question which does not arise upon existing facts
6 or rights.” *Contempo-Tempe Mobile Home Owners Ass’n v. Steinert*, 144 Ariz. 227, 229
7 (App. 1985). Here, the County already completed its hand count audit in compliance with
8 § 16-602(B) and the 2019 Elections Procedures Manual, and they completed it with
9 Plaintiff’s participation. (Exh. A). Indeed, the County provided the completed Hand Count
10 Audit to Plaintiff no later than Wednesday, November 11, 2020 in connection with another
11 lawsuit. (See Exh. B). Inexplicably, Plaintiffs bring this suit two days later to challenge a
12 completed process that shows “[n]o discrepancies were found by the Hand Count Audit
13 Boards.” (*Id.* (emphasis added)). The requested relief is moot.

14 **II. As a matter of law, this Court should dismiss Recorder Fontes.**

15 This Court should dismiss the Recorder because the requested mandamus relief does
16 not implicate his duties with respect to early voting.

17 **Conclusion**

18 For these reasons, this Court should decline jurisdiction over this special action.
19 Alternatively, this Court should accept jurisdiction, deny relief, and dismiss this action
20 with prejudice.

21 **RESPECTFULLY** submitted this 16th day of November 2020.

22 ALLISTER ADEL
23 MARICOPA COUNTY ATTORNEY

24 BY: /s/ Thomas P. Liddy

25 Thomas P. Liddy

26 Emily Craiger

27 Joseph I. Vigil

Joseph J. Branco

28 Joseph E. LaRue

Attorneys for Maricopa County Defendants

1 **ORIGINAL** of the foregoing e-filed with
2 AZTurboCourt this 16th day of November 2020
3 with electronic copies e-served to:

4 Honorable John Hannah
5 Gail Cody, Judicial Assistant
6 Gail.Cody@JBAZMC.Maricopa.Gov
7 East Court Building
8 101 W. Jefferson Street, Courtroom 811
9 Phoenix, Arizona 85003-2202

10 Dennis I. Wilenchik
11 Lee Miller
12 John “Jack” D. Wilenchik
13 WILENCHIK & BARTNESS
14 The Wilenchik & Bartness Building
15 North Third Street
16 Phoenix, AZ 85004
17 jackw@wb-law.com
18 admin@wb-law.com
19 *Attorneys for Plaintiff*

20 Roopali H. Desai (012434)
21 D. Andrew Gaona (028414)
22 Kristen Yost (034052)
23 **COPPERSMITH BROCKELMAN PLC**
24 2800 North Central Avenue, Suite 1900
25 Phoenix, Arizona 85004
26 rdesai@cblawyers.com
27 agaona@cblawyers.com
28 kyost@cblawyers.com
Attorneys for Defendant
Arizona Secretary of State Katie Hobbs
(Intervenors)

///

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1 Sarah R. Gonski
2 **PERKINS COIE LLP**
3 2901 North Central Avenue, Suite 2000
4 Phoenix, Arizona 85012-2788
5 SGonski@perkinscoie.com

6 Marc E Elias
7 **PERKINS COIE LLP**
8 700 Thirteenth Street NW, Suite 2000
9 Washington D.C. 20005-3960
10 MElias@perkinscoie.com

11 Roy Herrera
12 Daniel A. Arellano
13 **BALLARD SPAHR LLP**
14 1 East Washington Street, Suite 2300
15 Phoenix, Arizona 85004-2555
16 HerreraR@ballardspahr.com
17 ArellanoD@ballardspahr.com
18 *Attorneys for the Arizona Democratic Party*
19 *(Intervenors)*

20 /s/ J. Barksdale

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