

ARIZONA SUPERIOR COURT, PIMA COUNTY
FOR THE COUNTY OF COCHISE

HON. CASEY F MCGINLEY

CASE NO. CV202200518

DATE: November 07, 2022

ARIZONA ALLIANCE FOR RETIRED AMERICANS,
INC., ET AL.
Plaintiffs

VS.

TOM CROSBY, ET AL.
Defendants

RULING

IN CHAMBERS

Pending before the Court is Plaintiffs' Petition for Writ of Mandamus, or in the Alternative, Motion for Preliminary Injunction, filed October 31, 2022. The Court held an all-day evidentiary hearing on November 4, 2022, and took the matter under advisement. The Court has considered the briefs supplied by counsel, including an amicus curiae brief submitted by the Arizona Secretary of State. It has also considered the testimony of the witnesses, the arguments of the parties, and the relevant law. Finding that the Plaintiffs are entitled to the relief they seek, the Court issues the writ and preliminary injunction as outlined below.

FACTS AND HISTORY OF THE CASE

On November 8, 2022, registered voters across the country will participate in the General Election. However, in Arizona, the General Election began on October 12, 2022, when county Recorders sent out early ballots to those who had requested them and made voting centers available for registered voters to vote early in person.

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A registered Arizona voter generally can cast their ballot in one of three ways. First, they can vote in person on Election Day at their assigned precinct or voting center (hereafter referred to as precinct ballots). Second, they may request an early ballot to fill out and return to election officials either by United States Mail or by utilizing a ballot drop box. Finally, during the early voting period, a registered voter can obtain an early ballot at specific locations, fill it out on site, and cast their vote as an early ballot.

Arizona uses certified electronic machines to count and report the results of its elections. To ensure that the electronic vote tally is accurate, statutes and the Election Procedures Manual promulgated by the Arizona Secretary of State require that elections officials audit a small percentage of ballots by hand. This process involves hand counting the results of a limited number of races and comparing that hand count to the electronically calculated results. If the hand count produces results within a designated margin of the electronic results, the audit ends, and the electronic tally becomes official. If the audit produces results which are greater than that margin, the process is repeated and expanded to ensure the accuracy of the election results is properly established.

On October 24, 2022, by a 2-1 vote the Cochise County Board of Supervisors, asserting that it was “widely known that many voters lacked confidence in the voting system” and finding that “[a] 100% County wide audit of the 2022 General Election [would] enhance voter confidence,” adopted a resolution requiring the County Recorder or other officer in charge of elections “to perform a hand count audit of all County precincts for the 2022 General Election...”

Plaintiff Arizona Alliance for Retired Americans, Inc., is a 504(c)(4) nonprofit organization which represents retired people from every county in Arizona on a variety of issues. Their membership includes 1,200 to 1,300 residents of Cochise County. They also provide support and education to retired individuals on topics pertaining to voting and elections. Plaintiff Stephani Stephenson is a Cochise County resident who cast an early ballot for the 2022 election. Her ballot has been accepted, validated, and is ready for tabulation. On October 31, 2022, Plaintiffs collectively filed a special action with the Cochise County Superior Court seeking a declaratory judgment and injunctive relief to prevent the full hand count audit. Additionally, they filed a

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Petition seeking either a writ of mandamus or a preliminary injunction to prevent the proposed full hand count audit of the election.

Defendant David Stevens (Defendant Stevens) is the duly elected County Recorder for Cochise County. His office is responsible for, among other statutory requirements, registering voters, providing early ballots, and ensuring that early ballots are properly provided to the County Elections Director for tabulation. He has never supervised an audit or hand count of an election. Defendant Lisa Marra (Defendant Marra) is the appointed Elections Director for Cochise County. She has served as the officer in charge of elections for various primary and general elections in Cochise County, most recently this year's primary election and the 2020 general election. She has already started the process of tabulating early ballots and sequestering ballots for the statutorily required audit. Defendants Tom Crosby, Ann English, and Peggy Judd (Defendant Board of Supervisors) are the duly elected members of the Cochise County Board of Supervisors, which voted to adopt the full hand count audit procedure challenged by Plaintiffs. Defendant Marra agrees that Plaintiffs are entitled to the relief they seek. The remaining Defendants contend that Plaintiffs lack standing to assert their claims or that Defendant Board of Supervisors' action was lawful. Defendants Stevens and the Board of Supervisors allege that Plaintiffs lack standing to raise the challenges pursued here.

LEGAL STANDARDS

A party seeking a preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief. *Fann v. State*, 251 Ariz. 425, 432, 493 P.3d 246, 253 (2021), citing *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10, 132 P.3d 1187, 1190 (2006). This is a sliding scale, not a strict balancing of factors. *Id.* "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." *Id.*

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“A writ of mandamus may be issued by the supreme or superior court to any person...on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office...” A.R.S. § 12-2021. A plaintiff who establishes that a public official has acted unlawfully and exceeded their constitutional and statutory authority need not satisfy the standard for injunctive relief. *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. at 64, 475 P.3d at 307, citing *Burton v. Celentano*, 134 Ariz. 594, 596, 658 P.2d 247, 249 (App. 1982) (“[W]hen the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor.”)

ANALYSIS

1. Standing

The law usually requires a specific injury before a plaintiff has standing to a claim. See *Sears v. Hull*, 192 Ariz. 65, 69, 961 P.2d 1013, 1017 (1998) (“To gain standing ... a plaintiff must allege a distinct and palpable injury.”) However, a more relaxed standard for standing exists in mandamus actions such as this one. The statute governing writs of mandamus allows a “party beneficially interested” in an action to compel a public official to perform an act imposed by law. See A.R.S. 12-2021; See also *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370, 295 P.3d 943, 947 (2013) (“An action is in the nature of mandamus if it seeks to compel a public official to perform a non-discretionary duty imposed by law.”).

The phrase “party beneficially interested” is “applied liberally to promote the ends of justice.” *Barry v. Phx. Union High School*, 67 Ariz. 384, 387, 197 P.2d 533 (1948). “Thus, the ‘mandamus statute [§ 12-2021] reflects the Legislature's desire to broadly afford standing to members of the public to bring lawsuits to compel officials to perform their public duties.” *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62, 475 P.3d 303, 307 (2020), citing *Ariz. Dep't of Water Resources v. McClennen*, 238 Ariz. 371, 377, 360 P.3d 1023, 1029 (2015).

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Plaintiffs are a registered voter in Cochise County who submitted an early ballot prior to the Board of Supervisors' Action, and an organization which represents other registered voters in Cochise County who are affected by said action. They seek to compel Defendants Marra and Stevens to perform her non-discretionary duty to conduct hand count and audit procedures which comply with A.R.S. §16-602 and the Elections Procedures Manual. In seeking to compel these public officials to perform their public duties, Plaintiffs have shown a sufficient beneficial interest to establish standing.

2. Legality of the Board's Action

The question before the Court is whether A.R.S. §16-602(B) or (F), as supplemented by the EPM, permit an election official to conduct a hand count or manual audit starting with and consisting solely of 100% of the ballots cast in an election, rather than by using the increments of ballots established by statute. The Court finds that they do not.

Laws pertaining to the tabulation of votes cast in an election are generally found in A.R.S. §16-602, et. Seq., However, the Arizona Legislature has also delegated to the Secretary of State certain rule-making authority regarding elections. Among others, this authority includes the ability to “prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting...” A.R.S. §16-452(A). Any rules promulgated by the Secretary of State are to be “prescribed in an official instructions and procedures manual” an updated version of which is to be issued before the last day of every odd-numbered year. A.R.S. §16-452(B). Before it can be issued, however, the manual (commonly referred to as an Elections Procedure Manual, or “EPM,”) must be approved by both the Governor and Attorney General. “Once adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.” *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 62, 475 P.3d 303, 307 (2020); *see also* A.R.S. §16-452(C). However, “an EPM regulation that contradicts statutory requirements does not have the force of the law.” *Leibsohn v. Hobbs*, 76 Ariz. Cases Digest 16, 517 P.3d 45, (2022), citing *Leach v. Hobbs*, 250 Ariz. 572, 576, 483 P.3d 194, 198 (2021).

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When interpreting a statute, a Court should find and give effect to legislative intent. *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 47, 445 P.3d 2,4 (2019). “The best indicator of that intent is the statute’s plain language ... and when that language is unambiguous, we apply it without resorting to secondary statutory interpretation principles.” *SolarCity Corp. v. Ariz. Dep’t of Revenue*, 243 Ariz. 477, 480, 413 P.3d 678, 681 (2018). If a statute has only one reasonable meaning when considered in context, the Court applies that meaning without further analysis. *Leibsohn v. Hobbs*, 517 P.3d 45, 48 (Ariz. 2022), citing *Leach v. Reagan*, 245 Ariz. 430, 438, 430 P.3d 1241, 1249 (2018); see also *Glazer v. State*, 244 Ariz. 612, 614, 423 P.3d 993, 995 (2018). If the statute has more than one reasonable meaning, the Court should then apply secondary interpretive principles, including considering the statute's subject matter and purpose, to identify legislative intent. “A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11, 432 P.3d 925, 927 (2019).

“The law-making powers of the county .. are entirely derivative. The Board of Supervisors can exercise only those powers specifically ceded to it by the legislature.” *Hart v. Bayless Investment & Trading Co.*, 86 Ariz. 379, 384, 346 P.2d 1101, 1105 (1959). A county board of supervisors has only those powers “expressly conferred by statute, or [as] necessarily implied therefrom.” *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363, 430 P.2d 122, 125 (1967). County supervisors “may exercise no powers except those specifically granted by statute and in the manner fixed by statute.” *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978) (citation omitted). Actions taken by a board of supervisors by methods unrecognized by statute are “without jurisdiction and wholly void.” *Id.*

State law requires election officials to conduct hand counts of electronically tabulated ballots to ensure the accuracy the results received. Such hand counts are governed by A.R.S. §16-602, as well as an Elections Procedures Manual. See A.R.S. §16-602(B). (“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....”). Precinct ballots are subjected to a hand count outlined in A.R.S. §16-

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602(B), whereas early ballots are grouped separately and subjected to a manual audit pursuant to A.R.S. §16-602(F). A simplified overview of those processes is important to describe here.

In conducting a hand count of precinct ballots, election officials randomly select 2% of the county's precincts, or two precincts total, whichever is greater, to begin the count. A.R.S. §16-602(B)(1). Officials then randomly select contested races meeting certain criteria in order to compare the hand counts against the electronically tabulated counts for those races on those ballots. A.R.S. §16-602(B)(2). If the hand count for any race is within an expected margin of the electronic tabulation for that same race, the electronic tabulation becomes the official count for that race in that jurisdiction. A.R.S. §16-602(C). If the difference is equal to or greater than the designated margin, a second hand count of the same ballots is required. *Id.* If that second count again meets or exceeds the designated margin, the number of ballots subjected to the hand count is doubled, with the additional precincts again chosen at random, and the process is repeated. *Id.* After this expanded hand count, if any race is still not within the designated margin, the hand count is once again expanded to consist of the entire jurisdiction of the county. A.R.S. §16-602(D).

The audit of early ballots proceeds differently. First, officials randomly select and sequester one or more batches of ballots that have already been tabulated. A.R.S. §16-602(F). Then, officials randomly select from those sequestered ballots "a number equal to one percent of the total number of early ballots cast, or five thousand ballots whichever is less" upon which to conduct the audit. *Id.* Officials count votes for the same races that were reviewed in the hand count of precinct ballots, and compare the votes counted in the audit to the unofficial electronic tally for the same ballots. *Id.* If the manual audit for any race is within the designated margin, then the electronic tabulation becomes the official count for that race. If the manual audit is greater than or equal to the designated margin, an additional 1% or 5,000 ballots, whichever is less, are added to the audit. *Id.* The process is repeated until the audit results in a ballot count within the designated margin. *Id.* "If at any point in the manual audit of early ballots the difference between any manual count of early ballots is less than the designated margin when compared to the electronic tabulation of those ballots, the electronic tabulation shall be included in the canvass and no further manual audit of the early ballots shall be conducted." *Id.*

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As permitted by the Legislature, the Secretary of State drafted an Elections Procedures Manual in 2019 which was approved by both the Governor and the Attorney General. A 2021 Manual was drafted, but never received approval. Accordingly, the 2019 EPM applies to the 2022 General Election. As far as the parameters of a hand count of precinct or vote center ballots is concerned, the 2019 EPM generally tracks A.R.S. §16-602(B). However, as it pertains to the manual audit of early ballots, the EPM adds additional direction. The EPM states that the officer in charge of the elections must “conduct a hand count of 1% of the total number of early ballots cast, or 5,000 ballots, whichever is less. *Counties may elect to audit a higher number of ballots at their discretion.*” EPM §III B, page 216 (citation omitted, emphasis added). The Board of Supervisors and Recorder Stevens rely on this last sentence to support their contention that a full hand count of all ballots cast is lawful. In support of their position, these Defendants provided the Court an informal opinion rendered by a Deputy Solicitor General from the Attorney General’s Office, which opined that the sentence at issue permitted a full hand count audit of all ballots cast in an election.

The precinct ballot hand count statute commands that “[a]t least two percent of the precincts in that county, or two precincts, whichever is greater, shall be selected at random from a pool consisting of every precinct in the county...” (for the purpose of a hand count.) A.R.S. §16-602(B)(1). A plain reading of this language permits elections officials to lawfully choose to hand count a higher number of ballots simply by selecting a higher percentage of the precincts in that county.

However, in addition to the number requirement, there is a requirement that the ballots be *randomly* selected for a hand count. By common definition, a selection of precincts is not random if all precincts are chosen. In this regard, any directive to begin a hand count under A.R.S. §16-602(B) by counting votes cast exceeds the authority granted by statute.

Additionally, the statute establishes a mechanism under which small portions of precinct ballots are hand counted and compared to the electronic tabulation, expanding that hand count if necessary, and culminating in a jurisdiction wide hand count if required. *See* A.R.S. §16-602(C) through (D). This entire process would be rendered superfluous if the Court were to construe A.R.S. §16-602(B) to permit officials to initially select 100% of the precinct ballots as its starting

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point.¹ The Court cannot interpret any statute in any manner which renders a portion of that statute superfluous. *See Nicaise, supra*. Because the statute does not permit elections officials to begin the precinct hand count by counting all ballots cast, the Board's requirement that elections officials do so here is unlawful.

The early ballot manual audit statute utilizes a different procedure to determine what ballots will be audited. The law first requires the sequestration of batches of early ballots, and then requires the random selection from those sequestered batches "a number equal to one percent of the total number of early ballots or five thousand ballots, whichever is less." A.R.S. §16-602(F) (emphasis added). Thus, instead of establishing a minimum number of ballots which can be initially reviewed (as is the case with §16-602(B)) §16-604(F)'s plain language establishes that the maximum number of early ballots which can be initially audited in an election is 5,000.² Because the Board's directive would require the initial audit of approximately 30,000 early ballots, it is not permitted by the plain language of §16-602(F).

The 2019 EPM declaration that "[c]ounties may elect to audit a higher number of ballots at their discretion" is not found anywhere in A.R.S. §16-602, and has no basis or authority in any other statute. It is unclear why this provision was included in the EPM. Inasmuch as EPM permits a county to begin a hand count audit of early ballots by auditing 100% ballots cast, it runs afoul of A.R.S. §16-602(F) and its requirement that the initial hand count audit not exceed a review of 5,000 ballots. Because "an EPM regulation that contradicts statutory requirements does not have the force of the law," *Leibsohn, supra*, clause at issue cannot be relied upon to conduct a full hand count audit as proposed by the Board of Supervisors.

The language of the Board's Action of October 24, 2022, read in conjunction with the description provided, demonstrates that the proposed hand count cannot be lawfully conducted

¹ County Recorder Stevens testified at the Evidentiary Hearing that performing a full hand count of all precinct votes and all early votes would necessarily mean that certain processes required by statutes or the EPM would no longer be needed. The fact that the Board's directive necessarily eliminates established statutory procedures casts further doubt on its lawfulness.

² For purposes of illustration, consider two hypothetical counties. In County A, 40,000 early ballots are cast. One percent of 40,000 is 400, and because 400 is less than 5,000, County A can only initially audit 400 ballots under §16-602(F). In County B, 800,000 early ballots are cast. One percent of 800,000 is 8,000. Since that number exceeds 5,000, only 5,000 early ballots could be initially selected for audit under the statute.

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as written. The Action directs the Recorder or other officer in charge of elections to perform a hand count audit of all votes cast “[p]ursuant to ARS 16-602 B...” The Action thus requires the Recorder (or other officer) to audit all ballots in the manner prescribed for precinct ballots despite the statutory requirement that early ballots be audited by a separate procedure outlined in A.R.S. §16-602(F). The Board’s Action therefore requires election officials to audit ballots in a manner not permitted by law. Even if the Board’s Action is interpreted to require all ballots to be counted pursuant to their proper statute, the requirement that the officer in charge of the election conduct a full hand count of all ballots cast is otherwise unlawful.

CONCLUSION

Because Plaintiffs have established that the Board of Supervisors has acted unlawfully by ordering a full hand count, they need not satisfy the standard for injunctive relief here. *Arizona Public Integrity Alliance v. Fontes, supra*. Regardless, Plaintiffs have nonetheless satisfied the standard for injunctive relief in this case. Because the Board of Supervisors had no authority to order a full hand count audit of the electronic tabulation of votes cast in the general election, Plaintiffs are very likely to succeed on the merits of their special action. Additionally, because the proposed audit does not comply with clearly stated Arizona law, public policy and the public interest are served by enjoining the unlawful action. Plaintiffs have additionally established they are beneficially interested in compelling the Recorder or Elections Director to perform their non-discretionary legal duty of conducting an audit of votes only as permitted by statute, thus establishing their claim for mandamus under A.R.S § 12-2021.

Defendants urge the Court to consider that permitting a full hand count audit would help ameliorate fears that the electronic count was incorrect, and that it ensures that every vote is counted and counted correctly. However, there is no evidence before this Court that electronic tabulation is inaccurate in the first instance, or more importantly, that the audit system established by law is insufficient to detect any inaccuracy it may possess.

The Court understands and recognizes that many citizens believe that a full hand count is the only appropriate methodology to accurately count the people’s vote. However, the question of what methodology of vote counting is most appropriate, or most supported by the public, is not

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the question that is currently before this Court. The decision as to how to conduct and tabulate elections is appropriately in the domain of the State Legislature, supplemented by the delegated rule making authority of the Secretary of State. The Legislature has spoken clearly, and elected officials are required to follow its direction. As the Arizona Supreme Court has succinctly stated:

Election laws play an important role in protecting the integrity of the electoral process. Thus, public officials should, by their words and actions, seek to preserve and protect those laws. But when public officials, in the middle of an election, change the law based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.

Arizona Pub. Integrity All. v. Fontes, 250 Ariz. at 61, 475 P.3d 306 (emphasis in original). In order to ensure public confidence in our democratic system and uphold the integrity of the duly enacted electoral process, this Court must grant Plaintiffs' requests for preliminary injunction and writ of mandamus.

Based on the foregoing,

IT IS ORDERED that the Petition for Writ of Mandamus or in the Alternative Motion for Preliminary Injunction is **GRANTED**.

IT IS FURTHER ORDERED directing the Cochise County Recorder, Cochise County Director of Elections, or any other officer in charge elections for Cochise County shall conduct any hand count of precinct ballots or hand count audit of early ballots strictly in accordance with A.R.S. 16-602, as described in this Ruling. Such audit or hand count shall not constitute a review of all ballots cast unless such methodology is required based on the results of the ongoing hand count or audit.

IT IS FURTHER ORDERED enjoining the Cochise County Board of Supervisors' Action requiring a full hand count audit of all votes cast in Cochise County in the 2022 General Election.


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