

**ARIZONA COURT OF APPEALS**  
**DIVISION TWO**

ARIZONA ALLIANCE FOR RETIRED  
AMERICANS, INC. and STEPHANI  
STEPHENSON,

Plaintiffs/Appellees,

v.

TOM CROSBY, ANN ENGLISH, and  
PEGGY JUDD, in their official capacities  
as the Cochise County Board of  
Supervisors; DAVID STEVENS, in his  
official capacity as the Cochise County  
Recorder; and the Cochise County  
Elections Director,

Defendants/Appellants.

Court of Appeals, Division Two  
No. 2 CA-CV 22-0136

Cochise County Superior Court  
No. CV2022-00518

**AMICUS CURIAE ARIZONA SECRETARY OF STATE ADRIAN  
FONTES' BRIEF IN SUPPORT OF PLAINTIFFS/APPELLEES**

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## I. INTRODUCTION

This case is the aftermath of a few public officials' attempt to disregard the Peoples' will as expressed through their duly elected Legislature, ignore the separation of powers defining our democracy, and undermine the authority of Arizona's Chief Election Officer and the laws he is duty bound to uphold.

Defendants/Appellees Cochise County Board of Supervisors (the "Board") and Cochise County Recorder David Stevens (the "Recorder", collectively referred to with the Board as "Defendants") assert that *statutorily mandated* procedures prescribing the parameters for hand count audits of election results are *optional*.

To justify dismantling the most basic of legal fundamentals (*i.e.*, follow the law), Defendants boosted baseless conspiracies about hackable electronic voting systems and unreliable election outcomes undermining our democracy. And relying on that conjecture, Defendants passed a resolution declaring there is one solution to quell otherwise baseless paranoia: ignore some of our election statutes. [[ROA 20](#) at 5:10-6:8; [ROA 38](#) at 11–12].

Plaintiffs/Appellees Arizona Alliance for Retired Americans, Inc. and Stephani Stephenson (collectively, "Plaintiffs") sought mandamus and injunctive relief preventing Defendants from ignoring the law. Unsurprisingly, the superior court ordered Defendants to follow the statutory requirements for the 2022 general election hand count audit. Defendants did so (albeit begrudgingly).

By all counts (figuratively and literally), the controversy ended then. Our elections were confirmed as reliable and accurate. But Defendants seek to resuscitate this matter through this appeal and ask this Court to allow Defendants to ignore our election statutes at their whim. The irony of Defendants' position is palpable; they seek to allegedly effectuate the Peoples' will by unilaterally auditing the 2022 general election results, but can only do so by ignoring the Peoples' will as mandated through their Legislature (*i.e.*, our laws concerning hand count audits). This Court should not entertain Defendants' paradox any more than is necessary to reject it.

As Arizona's Chief Election Officer, Adrian Fontes, in his official capacity as Arizona Secretary of State (the "Secretary"), asks this Court to affirm the superior court for three reasons. First, this appeal should be dismissed as moot and any attempt to expand the facts on appeal to a future election is unripe and is an inappropriate request for an advisory opinion.

Second, Defendants, as county officials, seek to create for themselves powers unauthorized by statute. This Defendants cannot do. Such power lies only with the Legislature and the People through initiative.

Third, Defendants' unlawful conduct is rooted in election denialism which threatens the orderly operation of elections and undermines our democracy.



## II. INTEREST OF AMICUS CURIAE

The Secretary is Arizona's Chief Election Officer. He oversees the administration of Arizona elections and promulgates "rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A); Ariz. Sec'y of State, 2019 Elections Procedures Manual ("2019 EPM"), available at <https://tinyurl.com/EPMAZ>.

Defendants tried to implement a partisan, irregular, and unlawful election audit process. Defendants claim their efforts were lawful by relying on an unofficial and incorrect "opinion" from a Deputy Solicitor General then working for Arizona's former Attorney General. The Secretary, in his role as Arizona's Chief Election Officer, is duty bound to ensure our elections are lawful in every respect. This includes assuring all involved with our elections follow the law. Thus, he has a deep rooted interest in the outcome of this action and his point of view is uniquely relevant to this Court's consideration of the issues on appeal. *See* Ariz. R. Civ. App. P. 16(c)(1)(B) (state officers may file amicus briefs).

Accordingly, the Secretary submits this amicus brief in support of Plaintiffs to help ensure that Cochise County's election officials follow the law.

### III. THE FACTS

#### A. ARIZONA ONLY USES RIGOROUSLY TESTED AND CERTIFIED ELECTRONIC VOTING SYSTEMS TO TABULATE VOTES

Since 1966, Arizona has authorized the use of electronic voting systems to tabulate votes. H.B. 204, 27th Leg., 2d. Reg. Sess. (Ariz. 1966), *available at* <https://tinyurl.com/bdz2htp2> (starts at page 260 of 432). All electronic voting systems are tested, certified, and audited before and after an election. *See* A.R.S. § 16-442; *see also, e.g.*, 2019 EPM at Ch. 4 (“Voting Equipment”), Ch. 8(III) (“Designation of Political Party and other Observers”), Ch. 8(V) (“Preparation of Ballots”), Ch. 10 (“Central Counting Place Procedures”), Ch. 11 (“Hand Count Audit”), Ch. 12(II) (“Conducting Post-Election Logic & Accuracy Test”). The Secretary engages “personnel who are experts in electronic voting systems and procedures and in electronic voting system security to field check and review electronic voting systems and recommend needed statutory and procedural changes.” A.R.S. § 16-452(D).

All electronic voting systems must comply with the Help America Vote Act of 2002 and be approved by an accredited voting system testing laboratory. *See* A.R.S. § 16-442(B); 2019 EPM Ch. 4(I). There are two testing labs accredited by the United States Election Assistance Commission (“EAC”): Pro V&V and SLI Compliance. Thirteen Arizona counties, including Cochise County, use electronic voting systems from Election Systems and Software (“ES&S”). SLI Compliance

tested and certified the ES&S systems used in the 2022 primary and general elections. *EVS 6.0.4.0*, U.S. ELECTION ASSISTANCE COMM'N, <https://tinyurl.com/vvdkfc8u> (last visited May 5, 2023). And the Secretary and EAC certified each electronic voting system before use in the 2022 primary and general elections. *See id.*; [[ROA 38](#) at 2 (“Arizona uses certified electronic machines to count and report the results of its elections.”)]; A.R.S. § 16-449 (required tests for electronic voting systems); *2022 Election Cycle / Voting Equipment*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/27ex883d> (list of electronic voting systems used by each county for 2022 primary and general elections) (last visited May 5, 2023); *Engineering Change Orders (ECO) made to Certified Voting Systems*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/2tfvbfh7> (certified engineering changes made to tabulating equipment) (last visited May 5, 2023); *System Certification Process*, U.S. ELECTION ASSISTANCE COMM'N, <https://tinyurl.com/yc3xenur> (map of certified electronic voting systems) (last visited May 5, 2023).

**B. ALL RESULTS FROM ELECTRONIC VOTING SYSTEMS UNDERGO MANDATORY HAND COUNT AUDITS THAT MUST FOLLOW A.R.S. § 16-602**

Electronic voting system results are audited twice before, and twice after, an election. A.R.S. § 16-449 (pre-election logic and accuracy tests); 2019 EPM at Ch. 4(II); A.R.S. § 16-602. Counties using electronic voting systems must follow

A.R.S. § 16-602 when performing the two post-election audits. A.R.S. § 16-444(B). One audit is for ballots cast at precincts and the other audit is for early ballots. A.R.S. § 16-602(B), (F).

Each audit must start with a limited number of ballots from random samples. *See id.* Additional ballots are audited *only* if a specific margin of error is found. *See id.* If audit results are below the margin of error, then the electronic voting system's results are the official count. A.R.S. § 16-602(C), (F); *Ariz. Republican Party v. Richer*, 2023 WL 3013295, at \*1, ¶ 3, 1 CA-CV-21-0201 (Ariz. App. Apr. 20, 2023).<sup>1</sup> *This is the law.*

Cochise County used electronic voting systems for the 2022 primary and general elections. [[ROA 20](#) at 5]. For the 2022 primary election, early voting began in July 2022 and in-person voting was on August 2, 2022. *Elections Calendar & Upcoming Dates*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/4a2dre7b> (last visited May 5, 2023). Cochise County performed a limited hand count audit pursuant to A.R.S. § 16-602. *2022 Primary Hand Count Report - Cochise County*, ARIZ. SEC'Y OF STATE (Aug. 8, 2022), <https://tinyurl.com/2x93yuhh>. The “Cochise County Party Chairs from the Democratic and Republican Parties” together “randomly chose, by lot,” two vote centers and two batches of early votes. *Id.*

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<sup>1</sup> This is an Opinion but only the Westlaw citation is currently available.

Four races were randomly drawn by lot for this audit. *Id.* Cochise County’s Elections Director reported “everything that was hand counted matched the machine determined results with no discrepancy in any race.” *Id.* Therefore, the electronic voting system results are the official counts. *Id.* Again, *this is the law.* A.R.S. § 16-602.

### C. DEFENDANTS DECLARE THEY WILL IGNORE A.R.S. § 16-602

After the 2022 general election, Defendants decided to ignore the law and do their own thing despite clear statutory direction and the Secretary’s admonition to follow the law.

On October 12, 2022, early voting began. *Elections Calendar & Upcoming Dates*, ARIZ. SEC’Y OF STATE, <https://tinyurl.com/4a2dre7b> (last visited May 5, 2023). On October 24, 2022, two of the three Board members voted for a resolution granting themselves the otherwise nonexistent discretion to ignore A.R.S. § 16-602 (the “Resolution”). [[ROA 38](#) at 1]. Under the Resolution, Cochise County would perform “a hand count audit of *all* County precincts” under A.R.S. § 16-602(B). [*Id.* at 2 (emphasis added)]. This proposed post-election audit would not start with a limited number of ballots drawn from random samples or even be completed within the statutory timeframe. [*Id.*]; A.R.S. § 16-602(I) (prescribing timeframe to conduct an audit). Instead, Defendants decided there would be a hand count audit of *all* ballots cast in the first instance. [*Id.*].

The Board concluded, without empirical support, that “many voters lacked confidence in the voting system” and the Resolution would “enhance voter confidence.” [*Id.* at 11–12]. The Secretary informed the Board that the Resolution was *illegal*. [[ROA 7](#) at Ex. D]. The Cochise County Attorney’s Office informed the Board that the Resolution was *illegal*. [*Id.* at Ex. A; [ROA 20](#) at Ex. A (at Ex. 1)]. Cochise County’s then-Elections Director Lisa Marra agreed that the Resolution was *illegal*. [[ROA 38](#) at 3 (“Defendant Marra agrees that Plaintiffs are entitled to the relief they seek.”)]. And a plain reading of Arizona law undoubtedly reveals that the Resolution is illegal. A.R.S. §§ 16-444(B) (all laws related to elections apply where electronic voting systems used), 16-602 (prescribing mandatory hand count audit procedures). Defendants pressed forward anyway, largely relying on a rushed informal and substantively wrong “opinion” from a former Deputy Solicitor General with the Attorney General’s Office. [[ROA 38](#) at 8; [ROA 7](#) at Exs. A, D; [ROA 20](#) at Ex. 1].

Plaintiffs filed a petition for mandamus, or in the alternative injunctive relief to enjoin the Resolution. [[ROA 38](#) at 11]. The superior court correctly found that the Resolution violates A.R.S. § 16-602 (the “Ruling”). [*Id.*].

Then, Defendants performed a limited hand count audit pursuant to A.R.S. § 16-602. *2022 General Hand Count Report - Cochise County, ARIZ. SEC’Y OF STATE* (Nov. 12, 2022), <https://tinyurl.com/4sxn5s3a>. “There were no discrepancies

in any race audited by any Board.” *Id.* at 2. Accordingly, Cochise County’s 2022 general election results were certified. *2022 General Election Statewide Canvass*, ARIZ. SEC’Y OF STATE (Dec. 5, 2022), <https://tinyurl.com/2p9mhxa6>.

Defendants appealed the Ruling. [[ROA 39](#)].

#### IV. ARGUMENT

##### A. THIS APPEAL IS MOOT

“A court will not decide a question which is unrelated to an *actual controversy* or which by a change in a condition of affairs has become moot. Appellate courts do not give opinions on moot questions. Nor do they act as a fountain of legal advice.” *Contempo-Tempe Mobile Home Owners Ass’n v. Steinert*, 144 Ariz. 227 (App. 1985) (emphasis added, citations omitted). This appeal is moot for two reasons.

First, the 2022 general election is over. The Resolution only concerned Cochise County’s post-election total hand count audit *for the 2022 general election*. [[ROA 38](#) at 2]. Defendants, however, followed the Ruling and only conducted a limited hand count audit from random samples. *2022 General Hand Count Report - Cochise County*, ARIZ. SEC’Y OF STATE (Nov. 12, 2022), <https://tinyurl.com/4sxn5s3a>. Defendants could have tried to obtain a stay of the Ruling or could have filed an immediate special action seeking this Court’s intervention. [Misc. Order filed Nov. 10, 2022]; Ariz. R. P. Spec. Act. 7 (procedure

for appellate special actions). But Defendants did not do so. [Misc. Order filed Nov. 10, 2022]. Instead, after the Ruling, Defendants filed a notice of appeal. [[ROA 39](#)]. Defendants then asked for “expedited consideration” of this appeal “in light of the (then) upcoming election.” Opening Brief (“OB”) at 6. The Recorder also asked this Court to view this appeal as a special action. [Misc. Order filed Nov. 10, 2022]. But this Court correctly denied Defendants’ requests. *Id.*

Meantime, all post-election hand count audits for the 2022 elections were completed. The 2022 general election ended. The results were certified, and elected officials have long since taken office. Power has transitioned. This case is now therefore moot. If Defendants wished to avoid mootness, then they should have tried to timely stop the Ruling’s enforcement. They did not. Under our facts, this appeal is too little too late.

Second, there are strict statutory deadlines associated with elections and those must be followed; otherwise uncertainty would reign. Arizona courts recognize “the requirement that time elements in election statutes be strictly construed.” *Bohart v. Hanna*, 213 Ariz. 480, 482, ¶ 6 (2006); *see also Smith v. Bd. of Dirs., Hosp. Dist. No. 1, Pinal Cnty.*, 148 Ariz. 598, 599 (App. 1985) (“Time elements in election statutes are to be construed strictly and Rule 6(a) does not apply to them.”). Relevant here:

The hand counts prescribed by [A.R.S. § 16-602] *shall begin within twenty-four hours after the closing of the polls and shall be completed*



*before the canvassing of the election for that county.* The results of those hand counts shall be provided to the secretary of state, who shall make those results publicly available on the secretary of state's website.

A.R.S. § 16-602(I) (emphasis added). This does not mean that the hand counts can occur at a later time or after an appeal is decided long outside the legislatively prescribed timeline. And while Defendants would prefer this Court endorse their Resolution all these many months later, “we are not permitted to read into [an election statute] what is not there ....” *Grounds v. Lawe*, 67 Ariz. 176, 187 (1948) (prohibiting amendment after trial in an election contest). And A.R.S. § 16-602 does not allow a hand count outside the timeframe set forth in that statute.

Moreover, apart from being legally incorrect, endorsing the Resolution would render the timelines and parameters in A.R.S. § 16-602 a nullity – a result that must be avoided. *See State v. Arthur*, 125 Ariz. 153, 155 (App. 1980) (“Whenever possible, a statute will be given such an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant.”). Thus, given the passage of time and the clear timeline within which to conduct any authorized hand count, the issues on appeal are moot.

Defendants, however, assert this appeal should not be dismissed because it “falls under the ‘great public importance’ exception to the prudential doctrine of mootness.” Reply Brief (“RB”) at 5. But there can be no “broad public impact beyond resolution” of this appeal, because Cochise County’s 2022 general election

results have been certified for months, and as of now no new resolution stating that Cochise County will ignore A.R.S. § 16-602 in another election yet exists.

*Kondaur Cap. Corp. v. Pinal Cnty.*, 235 Ariz. 189, 193, ¶ 10 (App. 2014); A.R.S. § 38-341.01(A) (“All legal action of public bodies shall occur during a public meeting.”); RB at 4–5 (Defendants representing they will comply with the Ruling should this appeal be dismissed). Indeed, Defendants did not follow through with the Resolution or seek a stay, and instead followed A.R.S. § 16-602. So, again, this appeal is truly moot.

Defendants also assert there is no “straightforward application” of A.R.S. § 16-602 given an informal Deputy Solicitor General opinion that supports the Resolution. RB at 6; OB at 7. To the contrary, the superior court resolved this action through a “straightforward application” of A.R.S. § 16-602. [[ROA 38](#) at 9 (“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.”)]; *Kondaur*, 235 Ariz. at 193, ¶ 10 (holding “public importance” exception inapplicable where issues “were resolved through straightforward application of statutory language[ ]”). And it goes without saying that an informal opinion from a Deputy Solicitor General is neither binding nor entitled to any deference or consideration. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 469 (App. 2007) (quoting *Ruiz v. Hull*, 191 Ariz. 441, 449 (1998)). This

is especially so where the opinion (1) admittedly failed to pass through the “several layers of review” that such opinions must go through beforehand [[ROA 7](#) at Ex. B], and (2) respectfully, is legally incorrect.

The Ruling, on the other hand, *is* binding on Defendants. It is well-reasoned and relied on the plain mandate set forth in A.R.S. § 16-602. And no binding legal authority remotely supports Defendants’ position. [[ROA 38](#)]; *cf. Richer*, 2023 WL 3013295, at \*1, ¶¶ 2–3 (Ariz. App. Apr. 20, 2023) (audits under A.R.S. § 16-602 start with a random sample, “expands in stages[]” if initial audit shows electronic tabulation is inaccurate, and electronic tabulation results are the official count if there initial audit does not show sufficient inaccuracies).

This appeal is moot and should be dismissed.

**B. TO THE EXTENT DEFENDANTS SEEK TO JUSTIFY THEIR UNLAWFUL CONDUCT IN FUTURE ELECTIONS, THIS COURT CANNOT PROVIDE AN ADVISORY OPINION CONCERNING FACTS THAT DO NOT YET EXIST**

“The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that *may* never occur.” *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997) (emphasis added). Thus, this Court should be hesitant to issue what amounts to an advisory opinion declaring rights in hypothetical situations not actually – or which may never be – before this Court. *See id.*; *see also Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548 (App. 1985) (“Nor should an appellate court give advisory opinions

... or decide issues unless it is required to do so in order to dispose of the appeal under consideration.”).

Defendants state they will “conduct full hand count audits in *upcoming* elections and intend[] to do so *if and only if* this Court reverses” the superior court’s Ruling.<sup>2</sup> RB at 4 (emphasis added); OB at 5 (“Cochise County intends to conduct full hand counts in future elections, including the upcoming election in May 2023, *if* [Defendants] are successful on appeal.” (emphasis added)). In fact, the Board “*cannot* adopt” another resolution treating A.R.S. § 16-602 as optional “*unless and until* this Court rules that the Board may do so legally.” RB at 5 (emphasis added). Thus, there is no actual controversy, because Defendants represent they seek reversal of the Ruling not as it relates to the existing Resolution or the 2022 general election, but so Defendants can feel free to ignore the law in *future* elections that have not yet occurred and which do not yet qualify for a statutory hand count pursuant to A.R.S. § 16-602. *Id.* These “facts” are not yet real, let alone before this Court.

Defendants also complain they “should not have to wait until the next election to file a declaratory action[] . . . .” RB at 5.<sup>3</sup> But this appeal is not the

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<sup>2</sup> This further confirms that the issue on appeal pertaining to the Resolution is moot and Defendants seek relief related to a future hypothetical set of facts.

<sup>3</sup> The Cochise County Jail District special election on May 16, 2023 is the next election. *Cochise County Jail Tax Pamphlet*, COCHISE CNTY.,

place to raise unripe hypothetical future controversies. And issuing a decision about what may not be advisable or permissible in the future, based on hypothetical future facts, is by definition an advisory opinion. This Court should reject Defendants' invitation to issue a decision about hypothetical future events that may never matter.

**C. DEFENDANTS ARE NOT ENTITLED TO CREATE THEIR OWN STATUTES**

If this Court reaches the merits on appeal, then this Court should affirm the Ruling. [[ROA 38](#)].

The Secretary is concerned that allowing county officials to manufacture additional election powers for themselves without statutory authorization will erode the electoral process and undermine the separation of powers upon which our democracy rests. [[ROA 20](#); [ROA 38](#) at 5]. Indeed, the superior court's analysis below is apt:

The law-making powers of the county . . . are entirely derivative. The Board of Supervisors can exercise only those power 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

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<https://tinyurl.com/4wveppds> (last visited May 5, 2023). Early voting began on April 19, 2023. *Id.* at 2. Defendants seek relief from this Court in part to ignore A.R.S. § 16-602 for this election. OB at 5. Again, Defendants did not seek to stay the Ruling or pass another resolution, and future elections are not at issue here. If Defendants file a declaratory action related to this election, then that will cut against their representations to this Court. And that action will fail for the same reasons the Resolution failed. But they did not file such a declaratory action and this appeal is not the place to resolve an unripe controversy.

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.*

[[ROA 38](#) at 6].

Defendants want to supplant the Peoples’ will and ignore the portions of A.R.S. § 16-602 that Defendants dislike. RB at 1 (asserting “that the Board may conduct a 100% audit after the initial tally of ballots by machine tabulators—i.e., without going through the procedures of A.R.S. § 16-602, which merely establish *the bare minimum requirements* that counties must follow when they *choose* to use machine tabulators.”).<sup>4</sup> But “[o]urs is a ‘government of the people, by the people, for the people.’” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (quoting A. Lincoln, Gettysburg Address (1863)). So Defendants are not empowered to substitute their whim in place of otherwise duly enacted laws or

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<sup>4</sup> This is one among many reasons Defendants’ position is so confusing. They admit “each county in Arizona that uses tabulation machines *must* count some ballots twice—once by machine and once by hand—pursuant to A.R.S. § 16-602.” OB at 1 (emphasis added). This is a requirement of A.R.S. § 16-602. Aside from fallacious special pleading, there is no basis to ignore the other required procedures set forth in the statute that preclude a hand count audit of all ballots in the first instance.

supplant the Secretary's authority as Chief Election Officer. Defendants chose to use machine tabulators so they must follow A.R.S. § 16-602 as written. A.R.S. § 16-444(B). More critically, there is no legal basis upon which Defendants can rewrite the law to suit their political agenda. We will explain why.

**1. DEFENDANTS' STATUTORY AUTHORITY DOES NOT INCLUDE THE POWER TO IGNORE ANY PORTION OF A.R.S. § 16-602**

Defendants desire "broad authority" to ignore election statutes such as A.R.S. § 16-602. OB at 13–16. For instance, the Recorder testified that the Resolution "would necessarily mean that certain processes required by statutes or the EPM would no longer be needed." [ROA 38 at 9]. The window dressing for Defendants' position is that the procedures A.R.S. § 16-602 requires are a floor rather than a ceiling. RB at 12. There is no textual support for this position.

"The provisions of all state laws relating to elections not inconsistent with [Title 16, Chapter 4, Article 4 – Voting Equipment] apply to all elections where electronic tabulating devices *are used*." A.R.S. § 16-444(B) (emphasis added). Cochise County used electronic voting systems for the 2022 primary and general elections. [ROA 38 at 2]; *2022 Election Cycle / Voting Equipment*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/27ex883d> (last visited May 5, 2023). A.R.S. § 16-602 is a law related to elections. So, A.R.S. § 16-602 governs the 2022 general election

in Cochise County. A.R.S. § 16-444(B).<sup>5</sup>

For hand count audits of precinct ballots, “the county officer in charge of the election *shall* conduct a hand count at one or more secure facilities.” A.R.S. § 16-602(B) (emphasis added). “The hand count *shall* be conducted as prescribed by this section and in accordance with the hand count procedures established by” the Secretary in the EPM. A.R.S. § 16-602(B) (emphasis added). “The hand count *shall* be conducted in the” order set forth in A.R.S. § 16-602(B)(1)–(7). *Id.* (emphasis added). And for hand count audits of early ballots, the number audited ballots “*shall* . . . only be expanded . . . to a number of additional early ballots equal to one percent of the total early ballots or an additional five thousand ballots, whichever is less . . .” A.R.S. § 16-602(F) (emphasis added).

“The ordinary meaning of ‘shall’ in a statute is to impose a mandatory provision.” *State v. Jackson*, 210 Ariz. 466, 471, ¶ 21 (App. 2005) (citation omitted). Defendants want to deviate from the order in A.R.S. § 16-602(B)(1)–(7), and the requirements in subsection (F). RB at 12. But “shall” is mandatory, and because the procedures in A.R.S. § 16-602 are mandatory, Defendants cannot deviate from them. [[ROA 38](#) at 11].

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<sup>5</sup> Defendants ask “[w]hy then would counties not be allowed to conduct a full hand count *audit* to certify the vote when they have the discretion whether to use machine tabulators at all?” RB at 9. The answer is because a statute says so. *See* A.R.S. § 16-602.



Critically, Defendants' fail to muster any authority supporting their position. For example, Defendants cite A.R.S. § 11-251(3) for the proposition that their power to canvass elections includes the power to ignore A.R.S. § 16-602. OB at 14–16; RB at 7–8. But A.R.S. § 11-251(3) provides “the [Board], *under such limitations and restrictions as are prescribed by law*, may [e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof.” A.R.S. § 11-251(3) (emphasis added). Limitations and restrictions prescribed by law are contained within A.R.S. § 16-602, and those limitations and restrictions modify any authority conferred by A.R.S. § 11-251(3).

Defendants also string cite various statutes to support their position, none of which permit them to ignore A.R.S. § 16-602. RB at 10 (citing A.R.S. §§ 16-621(A), 16-622(A), 16-443, 16-445(A), 16-450, 16-451). Although Defendants opine the only way to “harmonize” these statutes is to accept their position, the opposite is true. If each “shall” in A.R.S. § 16-602 commanding Defendants to follow specific procedures is just optional, then Defendants do not have broad authority. Rather, they would have *unlimited* authority to conduct elections as they see fit while picking and choosing which statutes to follow. A.R.S. § 16-602 is neither a floor nor a trampoline to bounce away from what the law requires.

## 2. DEFENDANTS' CONDUCT IS AN AFFRONT TO ARIZONA'S COMMITMENT TO THE SEPARATION OF POWERS

The Legislature creates laws and the Executive enforces laws. Ariz. Const. art. III. “Our constitution’s framers devoted an entire article to separation of powers, comprised of a single command: . . . Arizona shall be divided into three separate departments,” and “no one of such departments shall exercise the powers properly belonging to either of the others.” *Roberts v. State*, 253 Ariz. 259, ¶ 28 (2022).

Defendants are executive officers for Cochise County. They must enforce the applicable laws the Legislature enacts. Defendants may not rewrite the law or enforce nonexistent laws based on their own policy preferences, nor can Defendants undermine or supplant the Secretary’s authority as Arizona’s Chief Election Officer. See [[ROA 38](#) at 11 (public officials who try to “change the law based on their own perceptions of what they think it *should* be[]” will “undermine public confidence in our democratic system and destroy the integrity of the electoral process.” (citation omitted))]. “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.” [*Id.*]. Defendants simply lack the authority to rewrite or deviate from

A.R.S. § 16-602. If they seek change, then they must do so legislatively or through initiative.

### 3. THE 2019 EPM DOES NOT SUPPORT DEFENDANTS

The Secretary agrees with Plaintiffs and the superior court that the 2019 EPM sentence stating that counties “may elect to audit a higher number of [early] ballots at their discretion” lacks the force and effect of law. *See* 2019 EPM Ch. 11(III)(B); [[ROA 20](#) at 13]; [[ROA 38](#) at 9].

“[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute’s purpose does not have the force of law.” *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 20 (2021). This EPM provision contradicts the text of A.R.S. § 16-602(F). An audit of early ballots starts with one percent or 5,000 ballots “whichever is less” and continues only if a specific margin of error is met. A.R.S. § 16-602(F). Defendants lack any statutory discretion to exceed that limit.

Defendants harp on this provision being promulgated by the Secretary. RB at 6. But the Secretary has a duty to ensure that election officials conform to the law. A.R.S. § 16-452. This includes the Secretary’s own office. *Id.*; [[ROA 20](#) at 7 n.4 (prior Secretary recognizing the 2019 EPM sentence at issue lacks the force of law)]. The remaining provisions of the EPM spell out what A.R.S. § 16-602 requires. 2019 EPM at Ch. 11. Because these remaining provisions follow A.R.S. §§ 16-602 and 16-452, they have the force and effect of law. *Richer*, 2023 WL

3013295, at \*2, ¶ 7 (Ariz. App. Apr. 20, 2023) (“as recognized by our supreme court, the ‘EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.’”). Defendants must follow them. *Id.*

**D. PARANOIA DOES NOT JUSTIFY IGNORING OUR ELECTION STATUTES**

At bottom, Defendants’ actions result from refusing to accept reality. Arizona uses electronic voting systems. Defendants dislike this and have cast baseless aspersions about Arizona’s election results. [[ROA 38](#) at 2, 11]. The superior court found “there is no evidence . . . 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.” [[ROA 38](#) at 11]. Yet Defendants appear to continue to embrace denialism. Jonathan J. Cooper, *Arizona county’s new elections head shared voter fraud memes*, ASSOCIATED PRESS (Apr. 25, 2023), <https://tinyurl.com/2hxcfab> (the Board appointed a new Elections Director who spread former President Trump’s lie that electronic voting systems “manipulated” 2020 election results).

Despite Arizona’s rigorous and transparent testing of electronic voting systems, Defendants complain, *without evidence*, that such systems are uncertified and unreliable. [[ROA 38](#) at 2, 11]. For example, Defendant Tom Crosby recently asserted that the “labs certifying the voting machines were not accredited.” Gloria Rebecca Gomez, *Cochise supervisors ordered to pay legal fees in election*

*certification suit*, AZ MIRROR (Apr. 6, 2023), <https://tinyurl.com/yckty7mv>. Such assertions never survive scrutiny. *See, e.g.*, Minute Entry filed Dec. 16, 2022 at 6, *Finchem v. Fontes*, (Maricopa Cnty. Superior Ct.), <https://tinyurl.com/s4wzwztd> (“The EAC has affirmed that Pro V&V and SLI Compliance retain their testing certification.”); Minute Entry filed Mar. 1, 2023 at 4, *Finchem v. Fontes* (Maricopa Cnty. Superior Ct.), <https://tinyurl.com/3nxryfmd> (sanctioning election contestant and his counsel in part for bringing meritless case against certifications of electronic voting systems).

Defendants have relied on electronic voting machines in Cochise County elections. *See, e.g.*, *2022 Primary Hand Count Report - Cochise County*, ARIZ. SEC’Y OF STATE (Aug. 8, 2022), <https://tinyurl.com/2x93yuhh>. Indeed, Defendants are elected officials who won races in the 2020 primary and general elections. *2020 General Election - Summary Results Report* at 4–5, COCHISE CNTY. (Nov. 3, 2020), <https://tinyurl.com/mt6m562m>. Those elections involved electronic voting systems with limited hand count audits that followed A.R.S. § 16-602. The Secretary is unaware of Defendants questioning the results of their own elections.

Defendants also assert, without any supporting authority, that “vote tabulators are demonstrably fallible in that they tend to undercount valid votes that a hand count would not miss.” RB at 6. But this is contradicted by the hand count audits performed by the counties, including Cochise County, after the last two

election cycles. See *2022 General Election Hand Count Results*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/b477h8jw> (last visited May 5, 2023); *2020 General Election Hand Count Results*, ARIZ. SEC'Y OF STATE, <https://tinyurl.com/mwb645ys> (last visited May 5, 2023).

As the Secretary discussed below, full hand counts have not been shown to produce better results than electronic voting systems audited by limited hand counts. [ROA 20 at 10 n.5 (citing Stephen N. Goggin, et al., *Post-Election Auditing: Effects of Procedure and Ballot Type on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence*, 11 ELECTION L.J. 1, 50 (2012) (found high error rates in full hand counts)]. Had Defendants gotten away with their scheme, then the 2022 general election would have been thrown into disarray. [ROA 20 at 8–9 (the Resolution would have disrupted election deadlines), 9–10 (the Resolution would have led to an inaccurate tally of votes), 11–12 (Defendants never “acknowledge[d] or accounted for the significant staff time” required for a full hand count audit in the first instance), 12 (the Resolution’s haphazard scheme would likely have resulted in violations of the Arizona constitution)].

If the Board does not want to use electronic voting systems, then they can advocate to the Legislature their aversion to tabulation machines, accessible electronic voting systems, calculators, and other machines that are not “capable of

actual judgment.” RB at 2. But when they choose to use such machines in elections, then they must follow the applicable statutes. It is the law.

Finally, Defendants note “two widely publicized cases concerning the 2022 General Election are ongoing . . . .” RB at 7.<sup>6</sup> In neither of those cases, or any other related to 2022 or even the 2020 elections, have election deniers prevailed. *See, e.g., Lake v. Hobbs*, No. CV-22-00677-PHX-JJT, 2022 WL 17351715, at \*13 (D. Ariz. Dec. 1, 2022) (sanctioning Kari Lake and Mark Finchem in part for lacking “an adequate factual or legal basis” to challenge Arizona’s use of electronic voting systems); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 724 (D. Ariz. 2020) (“Not only have Plaintiffs failed to provide the Court with factual support for their extraordinary claims, but they have wholly failed to establish that they have standing for the Court to consider them.”). Like others making similar arguments questioning the legitimacy of our elections and election officials, Defendants should fail to prevail here. Defendants must follow the law rather than partisan policy preferences.

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<sup>6</sup> Defendants omit a third case before this Court where the superior court sanctioned the election contestant and his counsel for making frivolous arguments in a bid to overturn a democratic election. *See Finchem v. Fontes*, No. 1 CA-CV 23-0064 (Ariz. App.); Minute Entry filed Mar. 1, 2023 at 4, *Finchem v. Fontes* (Maricopa Cnty. Superior Ct.), <https://tinyurl.com/3nxryfmd>.

## V. CONCLUSION

Defendants tried to rewrite the law to suit their whim. But the Legislature makes the law. And the Secretary is empowered to promulgate the EPM and prescribe policies that all must follow in connection with Arizona's elections. Neither of these powers belong to Defendants. Indeed, they are constrained to follow the law. And the law compels this Court to either dismiss this moot appeal or affirm the superior court.

RESPECTFULLY SUBMITTED this 5th day of May, 2023.

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**ARIZONA COURT OF APPEALS**

**DIVISION TWO**

ARIZONA ALLIANCE FOR RETIRED  
AMERICANS, INC. and STEPHANI  
STEPHENSON,

Plaintiffs/Appellees,

v.

TOM CROSBY, ANN ENGLISH, and  
PEGGY JUDD, in their official capacities  
as the Cochise County Board of  
Supervisors; DAVID STEVENS, in his  
official capacity as the Cochise County  
Recorder; and LISA MARRA, in her  
official capacity as the Cochise County  
Elections Director,

Defendants/Appellants.

Court of Appeals, Division Two  
No. 2 CA-CV 22-0136

Cochise County Superior Court  
No. CV2022-00518

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DATED: May 5, 2023

# Arizona Court of Appeals

## Division Two

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