ARIZONA COURT OF APPEALS
DIVISION 2

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.	No. 2CA-CV2022-0136 Cochise County Superior Court No. CV2022-00518

APPELLANTS' RESPONSE TO BRIEF OF AMICUS CURIAE ARIZONA SECRETARY OF STATE ADRIAN FONTES

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I. INTRODUCTION

Amicus Curiae Arizona Secretary of State Adrian Fontes ("Secretary")—foreshadowing the entire content of his brief—introduces his argument with mischaracterizations and hyperbole, claiming, for example, that Defendants-Appellants Cochise County Board of Supervisors (the "Board") and Recorder David Stevens (collectively "Defendants") are attempting to "disregard the People's will" and to "undermine" his authority. SOS Br. at 1. In fact, however, this case is actually the aftermath of Defendants' attempt to "restore confidence" in the elections process among *their constituents* [ROA 38 ep 2] in a county where Republican voters outnumber Democrats by about 30,000 to 19,000. Ariz. Sec'y of State, *State of Arizona Registration Report* (Apr. 1, 2023).[1] And while Secretary Fontes claims that Defendants are attempting to undermine his authority, it is the Arizona Secretary of State who initially approved the 2019 Elections Procedures Manual ("2019 EPM")[2] provision at issue in this case, which states that "Counties may elect to audit a higher number of [early] ballots at their discretion." 2019 EPM at 215.

Secretary Fontes also claims that Defendants "assert that statutorily

[1] Available at https://azsos.gov/elections/results-data/voter-registration-statistics.
[2] Available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

mandated procedures…are optional" (when in fact they make no such assertion) and that Defendants, in order "to quell otherwise baseless paranoia," "boosted baseless conspiracies about hackable electronic voting systems and unreliable election outcomes undermining our democracy." SOS Br. at 1. Of course, Secretary Fontes fails to cite to the record to support any of these mischaracterizations. That is because the record offers no such support. Instead, Secretary Fontes uses dramatic language to sway the Court with peacocking ethos and transparent pathos, characterizing Defendants as conspiratorial election deniers (mouth-breathers, perhaps) who ignore the law and seek to undermine democracy itself.

Regardless of the unfortunate partisan nature of elections cases such as this one, however, this Court need not be pulled down into the muck of the Secretary's irrelevant assertions of "fact" or his palpable disdain for Defendants' principles, for this case presents a purely legal question that does not rely on the accuracy of voting tabulators or the practicality of hand counts or the partisan opinions of the current elected Secretary of State or Attorney General for its answer. Instead, it merely requires this Court's interpretation of the law as written, an interpretation which will settle a purely legal question of public importance one way or the other, despite the partisan nature of the events that brought us here and the parties' desires.

The Court can and should address this important question because (1) this case is neither moot nor unripe, (2) Defendants do not seek to exercise unauthorized powers, and (3) Defendants' conduct is not rooted in election denialism but is instead motivated by their desire, as the elected representatives of Cochise County, to serve their constituents.

II. REGARDING THE INTEREST OF AMICUS CURIAE

Defendants take no issue with the Secretary's interest in this case. However, they do take issue with the Secretary's contention that "Defendants tried to implement a partisan, irregular, and unlawful election audit process" based on "an unofficial and incorrect 'opinion' from a Deputy Solicitor General then working for Arizona's former Attorney General." SOS Br. at 3. Defendants based their attempted audit process on Arizona's election statutes (which at the time had never been interpreted by a court), the language in the 2019 EPM, and the *informal* (not "unofficial" or "incorrect") opinion of Deputy Solicitor General Michael S. Catlett, who has since been appointed to Division One of the Arizona Court of Appeals. *See* Court of Appeals, Division One, *Michael S. Catlett*, AZ.COURTS.GOV. [3]

III. REGARDING THE "FACTS"

As noted above, the "facts" asserted by Secretary Fontes in his amicus brief are irrelevant to the disposition of this case, which concerns the purely legal

[3] https://www.azcourts.gov/coa1/Court-Information/Judges/Michael-S-Catlett.

question of whether A.R.S. § 16-602 prohibits a full hand-count audit of early and election-day ballots. The answer to this question does not rely on whether "Arizona only uses rigorously tested and certified electronic voting systems to tabulate votes." SOS Br. at 4 (capitalization altered). Nor does it depend on what the County did or did not do during the 2022 General Election. *Id.* at 5-9.

A.R.S. § 16-602 either prohibits or does not prohibit counties from conducting full hand-count audits if they *choose* to use machine tabulators but nevertheless wish to go above and beyond the mandatory but limited hand-count requirements described in the statute, which only applies when counties choose to use machines to tabulate votes.[4] Title 11 and various statutes in Title 16—as outlined in Defendants' Opening and Reply Briefs—either confer or do not confer authority to counties to canvass and certify elections by verifying results with a full hand count. Again, the events that brought us here—and the conflicting partisan beliefs about those events—are simply irrelevant to these questions.

IV. ARGUMENT

This Court can and should address these important questions for the reasons Defendants stated in their Opening and Reply Briefs, which they fully incorporate

[4] Secretary Fontes concedes that counties have the authority to decline the use of machine tabulators. *See* SOS Br. at 17 ("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)").

here, rather than sweeping them under the rug to be aired out another day during the middle of another election cycle. The fact that the Secretary feels the need to assert his opinions regarding these questions—even if those opinions mimic Plaintiffs' and add nothing new to the analysis—is further evidence that these questions are important to the State of Arizona. Moreover, as presented in this appeal, these questions are (1) neither moot nor unripe, (2) do not involve facts that do not yet exist, and (3) are not an attempt by Defendants to create their own statutes.

A. This appeal is not moot, nor is it unripe.

For the reasons stated in Defendants' Reply Brief, which they again fully incorporate here, this appeal is not moot; however, if the Court finds that the case *is* moot, then it should apply the "great public importance" exception to the mootness doctrine, which is prudential and discretionary. *Miceli v. Indus. Comm'n*, 135 Ariz. 71, 73 (1983) ("It is, however, within an appellate court's discretion to decide questions which have become moot."). In *Miceli*, the court declined to dismiss the case at bar as moot because the issue presented was "one of general interest and importance…and involve[d] a question of statutory construction." *Id.* Further, it was also "an issue of the type likely to reoccur" and "was adequately briefed and argued by counsel and the amici prior to becoming moot." *Id.* That is precisely the situation here, and the Secretary has failed to argue otherwise.

Instead, the Secretary argues that this appeal is moot because (1) "the 2022 general election is over," and Defendants chose to seek an expedited appeal in this case rather than seeking a stay or filing a special action, SOS Br. at 9, and because (2) A.R.S. § 16-602 does not allow a hand count outside the timeframe set forth in that statute," *id* at 11. On the first point, the Secretary fails to offer any legal authority. The second point ignores the fact that a live controversy remains—which not only renders the case *not* moot but also renders it ripe for review—because Defendants cannot attempt to conduct a full hand count unless the trial court's ruling is overturned. Otherwise, Defendants face uncertainty and ambiguity regarding their authority to conduct any type of hand count.

"Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise." *Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 280 ¶ 36 (2019) (citation omitted). "Though federal justiciability jurisprudence is not binding on Arizona courts, the factors federal courts use to determine whether a case is justiciable are instructive. Thus, as a general matter, if the plaintiff has incurred an injury, the case is ripe." *Id.* (citations omitted). "A case is also ripe if there is an actual controversy between the parties." *Id.* (citing *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312-13 (1972) (stating that challengers of statute forbidding abortions under certain circumstances were not required to wait for criminal prosecution because

that statute allegedly chilled their constitutional rights and therefore constituted an actual controversy)).

As in *Planned Parenthood*, Defendants suffered an actual injury (they were denied the power to canvass and certify election results as conferred by statute). Moreover, this case presents an actual controversy because the Board wishes to conduct full hand-count audits in the future but cannot do so without facing, at a minimum, another lawsuit by Plaintiffs. There can be no doubt that Plaintiffs—and the Secretary and other political opponents—will be on standby to sue Defendants if they adopt another resolution to conduct a full hand-count audit in a future election. As explained in their Reply Brief, Defendants are in a Catch-22 situation, which is why the doctrines of mootness and ripeness are prudential, and courts have the discretion to issue opinions in cases such as this one (which, nevertheless, is neither moot nor unripe).

B. This appeal does *not* involve facts that do not yet exist.

The Secretary takes issue with Defendants' statement that they "should not have to wait until the next election to file a declaratory action," construing that statement as a "complain[t]" and further confirmation "that the issue on appeal pertaining to the Resolution is moot and Defendants seek relief related to a future hypothetical set of facts." SOS Br. at 14 & n.2. But this argument ignores the actual facts of this case. The Board wanted to conduct a full hand-count audit of

2022 election results. Plaintiffs took them to court over it. The court sided with Plaintiffs. Defendants attempted to appeal the case before the deadline to certify election results. They failed. This Court allowed them to refile their appeal on a non-expedited timeline, which they did, and now they are entitled to have their appeal decided.

C. Defendants are not seeking to "create their own statutes."

Defendants are *not* entitled to create their own statutes, however, as Secretary Fontes argues they are attempting to do. SOS Br. at 15. Instead, Defendants are seeking the Court's interpretation of statutes that are already on the books, which Defendants contend provide them with the authority to conduct full hand-count audits and that also do not prohibit them from doing so. But just as Plaintiffs have done, Appellees' Br. at 13, the Secretary is attempting to introduce a red herring into this lawsuit by claiming that Defendants are seeking to exceed authority that they do not have, authority which is necessarily conferred via statute by the legislature, SOS Br. at 15-17.

1. Defendants do not claim authority to "ignore" any statute.

As Defendants argued in their Opening and Reply Briefs, the EPM, Title 11, and Title 16 confer broad authority and discretion to the Board regarding how they choose to canvass and certify votes, including the discretion to conduct hand

counts outside of the mandatory provisions of A.R.S. § 16-602.[5] *See* Appellants' Br. at 12-16, Reply Br. at 7-15. The Board's authority to canvass and certify elections, which is granted to counties in the various statutes, can be easily harmonized with the more limited hand-count procedures in A.R.S. § 16-602 if that statute is understood to establish *minimum* requirements when counties choose to use tabulators, but counties may always go above and beyond those procedures if they wish to conduct a thorough audit when fulfilling their duty to canvass and certify election results. In other words, A.R.S. § 16-602 exists to ensure that counties *will* audit the results of machine tabulators by *mandating* them to do so. It does not exist to prohibit counties from conducting full hand-count audits.

Without rehashing their prior arguments, which Defendants incorporate into this brief, Defendants respond to the Secretary's contention regarding their "authority to ignore statutes" by simply noting that reading the various related statutes alongside one another and harmonizing them does not mean that Defendants are claiming the authority to ignore any statute. This is another red herring, and the Court should dismiss this argument.

2. Defendants' conduct is not "an affront to Arizona's commitment to the separation of powers.

Again, Defendants do not attempt to usurp the legislature's power. Rather,

[5] *See also supra* n.4 (noting that the Secretary concedes that Defendants are not required to use machines to tabulate votes at all and my tabulate them by hand).

they are seeking judicial review of the statutes at issue in this case, which are necessarily products of the legislature. Seeking judicial interpretation of statutes enacted by the legislature comports with separation of powers, which is the opposite of an *affront* to it. That Defendants passed a resolution that they believed would help to assuage the fears of their constituents does not in any way imply that they attempted to "rewrite the law or enforce nonexistent laws based on their own policy preferences," nor were they trying to "undermine or supplant the Secretary's authority as Arizona's Chief Election Officer." SOS Br. at 15-17. Defendants simply interpreted the law differently than Plaintiffs did, as did the 2019 EPM and former Deputy Solicitor General Michael S. Catlett—who is now a Court of Appeals *judge*—who issued the informal opinion relied upon by Defendants. In fact, even the former Secretary of State once held the same opinion that Defendants hold, but she changed her position regarding the law for reasons of political expediency. Appellants' Br. at 3-4 (citing 2019 Elections Procedural Manual ("EPM") at 215) (explaining that former Secretary Hobbs changed her mind regarding the 2019 EPM's instruction that "[c]ounties may elect to audit a higher number of ballots at their discretion").

Defendants understand that Plaintiffs and the Secretary—who are on the opposite side of the political spectrum from Defendants—are offended by Defendants' interpretation of the law, but that does not mean Defendants disrespect

the law or the separation of powers any more than Secretary Fontes does. This argument is yet another red herring, and the Court should disregard it.

3. The language at issue in the 2019 EPM supports Defendants.

In its current wording, the 2019 EPM supports Defendants. However, because that language does not support the Secretary's desired interpretation of the law, he conveniently 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. SOS Br. at 21. Whether this provision lacks the force and effect of law, of course, ultimately turns on this Court's interpretation of the statutes at issue in this case. This Court reviews questions of law de novo. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 8 (2020). Defendants respectfully aver that the language in the EPM is supported by the statutes they have cited and urge the Court to uphold the language in the EPM.

D. Defendants are not motivated by "paranoia," nor do they attempt to "justify ignoring our election statutes."

Defendants hesitate to even respond to this misguided argument but do so lest there be any doubt as to the motivation underlying their desire to conduct full hand-count audits of election results when the circumstances warrant. As the Board stated in its resolution, it wanted to "restore confidence" in the elections process for the benefit of its constituents, which skew Republican. [ROA 38 ep 2.] Defendants

understand that its sexy to disparage Republicans as election deniers and to paint them as paranoid and irrational. However, as described in their Opening and Reply Briefs, Defendants' original motivation in 2022 to confirm for its constituents the integrity of a process that was fraught with countless issues this past election cycle—and the Secretary's choice words in describing that motivation—is ultimately irrelevant as to whether counties have the authority to conduct full hand-count audits under Arizona's election statutes. Defendants rely on this Court to interpret those statutes, and they will abide by the Court's interpretation, as they did when the trial court issued its decision below, regardless of the outcome. They have never "ignored" the statutes and do not intend to do so now.

V. CONCLUSION

For the foregoing reasons stated herein and in Defendants' other briefs, Defendants respectfully request that the Court reach the merits of this case, REVERSE the trial court's ruling, and DECLARE that it is within the County's authority to conduct a full hand-count audit of all ballots. Alternatively, this Court should REVERSE the decision of the trial court at least as to a full hand count of election-day ballots.

RESPECTFULLY SUBMITTED May 25, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Response Brief complies with ARCAP 14(a)(4) and (b). The brief is double-spaced and uses a proportionally spaced typeface of Times New Roman in 14-point font. It does not exceed 12,000 words.

By: /s/ Veronica Lucero

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing Appellants' Response Brief was e-filed with the Clerk of the Arizona Court of Appeals, Division Two, via the Court's e-filing system on May 25, 2023, and that a copy was served via email on this same date to the following:

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