

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JEANNE KENTCH, an individual;) Court of Appeals
TED BOYD, an individual; ABRAHAM) Division One
HAMADEH, an individual; and) No. 1 CA-CV 23-0583 A
REPUBLICAN NATIONAL COMMITTEE, a)
federal political party) Mohave County
committee,) Superior Court
) No. S8015CV202201468
Plaintiffs/Appellants/)
Cross-Appellees,)
)
v.) **FILED 04-09-2024**
)
KRISTIN K. MAYES, et al.,)
)
Defendants/Appellees/)
Cross-Appellants.)
_____)
)
MARICOPA COUNTY, et al.,)
)
Defendants/Appellees,)
_____)

DECISION ORDER

The court, Chief Judge David B. Gass, Kent E. Cattani, and James B. Morse Jr., considered this accelerated appeal under Rule 29, Arizona Rules of Civil Appellate Procedure. Chief Judge Gass delivered the decision of the court, in which Judge Cattani joined. Judge Morse dissented.

A virtual firestorm of challenges followed the 2022 general election. Those flames have subsided. The winners were announced and took their oaths of office more than 15 months ago. This case, one of the last embers still glowing, does not burn hot enough to warrant relief.

Despite the urgency inherent in resolving issues affecting the validity of an election, Abraham Hamadeh¹ chose a slow road, allowing the remaining embers to cool. Rather than seeking special action review of pretrial rulings, Hamadeh waited until after the trial to file an appeal focusing on his asserted need for accelerated discovery and a trial continuance. Both were issues of statewide importance in December 2022 when Hamadeh challenged whether Kristin Mayes² won the 2022 general election for Attorney General. *Ariz. Libertarian Party, Inc. v. Bd. of Supr's of Cochise Cnty.*, 205 Ariz. 345, 346 ¶ 3 (App. 2003). And Hamadeh argues both involve issues of law this court should resolve in his favor. *Id.* Yet Hamadeh never filed a special action asking this court or the Arizona Supreme Court to take up those issues at the time. Instead, he belatedly argues this court should ignore current election law and look back to events in 1917 to undo the results of the 2022 election (a 280-vote margin in favor of Mayes) long after the fact. See *Hunt v. Campbell*, 19 Ariz. 254 (1917). Whatever merit Hamadeh's statutory interpretation claims may have had, they have been dampened by the passage of time. That point aside, Hamadeh was not then and is not now entitled to the relief he seeks because the superior court did not abuse its discretion when it ruled based on its factual findings. We affirm.

BACKGROUND

I. The election contest

On November 8, 2022, Arizona held its general election. On December 9, 2022, Hamadeh filed his Statement of Election Contest (Statement), the election-law equivalent of a civil complaint. Four days later, Hamadeh filed his Verified Petition to Inspect Ballots (Ballot Petition) and a Motion to Expedite Discovery (Discovery Motion).

¹ Hamadeh is joined by Jeanne Kentch, Ted Boyd, and the Republican National Committee (collectively "Hamadeh" unless otherwise separately identified).

² Besides Mayes, Hamadeh joined the following other defendants: Adrian Fontes in his capacity as Secretary of State, the county recorders of all 15 counties in their capacities as county recorders, the boards of supervisors of all counties also in their official capacities (collectively "Mayes" unless otherwise separately identified).

Hamadeh's Statement included five counts. Count V, which comprised a claim of improper verification of early-ballot affidavit signatures, is not at issue in this appeal. The superior court dismissed Count V as untimely because it challenged an election procedure adopted before the election but did so only after the election. Hamadeh does not appeal that ruling.

In the Ballot Petition, Hamadeh asked to inspect all duplicated ballots. In the Discovery Motion, Hamadeh sought the superior court's leave to make requests for production of the other parties. Several other parties opposed those requests for various reasons. The objections generally centered on whether A.R.S. § 16-677 limited discovery in election contests to ballot inspection, the feasibility of compliance with the discovery requests, and the composition of ballot inspection panels.

Hamadeh filed a Response to Court's Order Requiring Written Submissions Regarding Issues on Which No Agreement Has Been Reached ("Response to Order") on December 21, 2022, two days before the trial, and the superior court called an emergency hearing to address the parties' discovery issues. In the Response to Order, Hamadeh narrowed his discovery requests, asking only that the superior court compel Maricopa County to produce its unredacted cast vote record (CVR) and a list of county voters whose provisional ballots were "rejected along with the reason why the ballot was rejected." Hamadeh justified the request for Maricopa County's CVR with an expert declaration, also dated December 21, 2022, and attached to the Response to Order.

Hamadeh had not asked Maricopa County for its CVR in the initial Discovery Motion. And though he did ask in the motion for the list of Maricopa County voters whose provisional ballots were rejected, he did not also ask the county to give the reasons for rejecting the ballots. Hamadeh identified the CVR as a requested item later, but not until he filed his reply to Maricopa County's objection to the Discovery Motion.

After the emergency hearing, the superior court denied Hamadeh's request for the unredacted CVR, ordered the inspection of ballots before trial, affirmed the December 23, 2022 trial date, and implicitly denied Hamadeh's Discovery Motion.

At trial, Hamadeh offered evidence of only the fourth of the four remaining counts, Count IV, improper ballot adjudications. Hamadeh offered no evidence of Counts I, II, or III. Count I alleged the "wrongful disqualification of provisional and early ballots." Count II alleged the "wrongful exclusion of

provisional voters." And Count III alleged inaccurate ballot duplications.

At the end of the trial, Hamadeh's counsel conceded the evidence he presented "won't actually be enough to sustain this particular contest." Hamadeh's counsel repeated, in argument after the trial, "So again, as was said by the other side we've submitted no actual evidence, and that is true; but that's what a trial is for." The superior court denied Hamadeh's petition for any of the requested relief.

II. Hamadeh's Motion for a New Trial

Hamadeh moved for a new trial on three grounds: (1) an alleged "irregularity in the proceedings . . . depriving a party of a fair trial," (2) "newly discovered material evidence that could not have been discovered and produced at trial with reasonable diligence," and (3) "other errors of law at the trial or during the action." See Ariz. R. Civ. P. 59(a)(1)(A), (D), (F).

Hamadeh pointed to the following as newly discovered evidence: (1) Pinal County vote tally errors uncovered during the statewide recount of the Governor's race that were not disclosed until after Hamadeh's trial because of a court order in another lawsuit barring their disclosure until that suit concluded, (2) provisional voter lists Hamadeh received the week before filing the Rule 59 motion in response to a public records request submitted before the original trial, and (3) a ballot printing problem in Maricopa County involving "timing marks" that was "revealed" in a trial on a different matter that concluded the day before Hamadeh's trial.

In describing the printing problem, Hamadeh quoted testimony from Maricopa County Elections Director, Scott Jarrett, in that other trial. There, Jarrett said he could not know the precise consequences of running ballots with misprinted timing marks through the tabulator, but he acknowledged the printing of the timing marks "matter[ed]," based on his "historical knowledge." Without explaining any link between the misprinted timing marks in Maricopa County and miscounts in Pinal County, Hamadeh said, "as has recently been revealed, machine-read issues, combined with human error, were a significant cause of the Pinal County discrepancy. This problem was likely compounded for election day ballots cast in Maricopa County."

After oral argument, the superior court denied the motion.

This appeal followed. This court has jurisdiction under article VI, § 9, Constitution of Arizona, and A.R.S. §§ 12-120.21.A.1 and -2101.A.1, .A.5.(a). This court partially granted Hamadeh's opposed request to accelerate the appeal before the appeal was at issue and suspended Rule 29(b)(2), Arizona Rules of Civil Appellate Procedure (ARCAP), under ARCAP 3(a). See ARCAP 29 (governing accelerated appeals); ARCAP 3(a) (permitting this court to suspend civil appellate rules "to expedite its decision or for other good cause"); ARCAP 15(b) (defining an appeal as "at issue" at the earlier of the filing or deadline for filing of the final reply brief).

DISCUSSION

I. The superior court did not abuse its discretion when it denied Hamadeh's discovery requests.

Hamadeh argues the superior court abused its discretion, denying him due process, when it denied his discovery requests. Hamadeh limits his argument on appeal, however, specifically to his requests for Maricopa County's CVR and its list of rejected provisional ballots. Hamadeh argues the superior court incorrectly interpreted A.R.S. § 16-677.A as limiting discovery in election law contests to ballot inspection. In passing, Hamadeh argues his requests for the CVR and the provisional ballots list fit within the discovery allowed by the ballot inspection statute in section 16-677, saying: "[E]ven as defined by the trial court, Contestants' discovery requests were within that narrow definition [of discovery allowed by the inspection statute] because they were reasonably calculated to lead to discoverable ballots." But Hamadeh does not otherwise challenge the superior court's exercise of its discretion in denying the requested discovery under either the standard civil discovery framework or that authorized under section 16-677, the ballot inspection statute.

Most of the defendants argue the superior court did not err in its discovery rulings for two reasons. They argue the superior court did not exceed its broad discretion to rule on discovery motions. They also argue the ballot inspection statute, section 16-677, limits discovery to exclude the items Hamadeh requested.

The superior court "has broad discretion in ruling on disclosure and discovery matters, and this court will not disturb that ruling" unless the superior court abuses its discretion, or rules in a way "exceeding the bounds of reason." *Marquez v. Ortega*, 231 Ariz. 437, 441 ¶ 14 (App. 2013) (citations omitted). The

superior court may abuse its discretion when ruling on a discovery issue if it makes legal error "in the process of reaching its discretionary conclusion." *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253-54 ¶ 10 (2003) (quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456 (1982)).

We conclude the superior court did not abuse its discretion by denying Hamadeh's discovery requests. Because we can resolve the appeal on that basis, we need not interpret section 16-677. See *Harris v. Purcell*, 193 Ariz. 409, 412 n.7 (1998) (noting when the appellate court can resolve an election-related appeal on one ground, it need not resolve other issues).

A. The superior court did not abuse its discretion when it denied Hamadeh's request for the provisional ballot list because Hamadeh showed no prejudice from the denial.

In Hamadeh's first filing, the Statement, he said some registered voters were required to vote with a provisional ballot. That statement is true. In fact, many provisional ballots were cast and counted. Hamadeh then said, "However, a material number of these provisional ballots were rejected because the voter was not registered to vote even though the voter was a registered voter and had done nothing to invalidate their registration."

Before the trial and while litigating the discovery issue, Hamadeh never explained why he needed the list. Even after the trial, in his Motion for a New Trial before the superior court, Hamadeh did not explain why he thought the provisional ballots should be counted and why the information would probably affect the outcome of the election. His motion addressed the provisional ballot list in a single paragraph, most of which focused on the fact he had asked for the list before the trial but did not receive it until after. He then said, "Additionally, a new trial would allow Contestants to present evidence on provisional ballots and early ballots that Contestants believe remain (improperly) uncounted."

But Hamadeh did not say why he thought the ballots "remain (improperly) uncounted." As to the ballots' effect on the election's outcome, Hamadeh just said, "This new information [the provisional ballot list] also proves critical to evaluating any *additional* potential discrepancies and ensuring Arizonans receive an[] accurate vote total. . . . [W]ith the new mix of available evidence, it will be relevant to ensuring the accuracy of the election results." Again, Hamadeh left unanswered *why* this new evidence probably would affect the outcome. Instead, he asserted

an unexplained and unsupported possibility: “[I]n an election this close, such a discrepancy could undoubtedly tip the balance of votes.”

At oral argument before the superior court, Hamadeh’s counsel finally proffered the following explanation:

[A]fter interviewing hundreds of those voters, we found that many are voters who have connections to properties outside of their home county; and due to no fault of their own, but instead changes to the statewide computer system, their registration was moved from their county of residence to the county where they had some connection without the voter’s express knowledge, consent or intent in a way that lacks a requisite procedural due process requirement necessitated before depriving someone of their sacred right to vote.

At trial, we can get into the specific details of how, when and why we think these voter registrations were computer-systematically removed, but for the purposes of this motion, I think it[] suffice[s] to say that it appears that more than 1100 election day provisional voters were, we believe, wrongfully disenfranchised.

Turns out, with many of these declarations, we have their voting record and history, and we can see when and how it was changed, and it was not by their own intent; and we know their intent because they did not show up to vote in the secondary county that the - that was assigned to them.

But none of those declarations, or indeed the list itself, are part of the record before this court.

Furthermore, Hamadeh’s reply brief on appeal establishes he is challenging a procedure that had been in place for more than two years before the 2022 election. Hamadeh argues he needed the provisional ballot list to prove a procedural problem with the election. He argues some voters whose registrations had been changed to different precincts still voted where they had been registered to vote in the past. Then, with no proof in the record, Hamadeh says those voters’ registration changed as the result of an election procedure to be in place as of April 30, 2020. See Joint Motion and Stipulation for Dismissal Pursuant to Settlement Agreement, Ex. A paras. 3.1-3.27, 3.37, *League of Women Voters of Ariz. v. Reagan*, No. 18-cv-02620 (D. Ariz. Jan. 6, 2020), ECF No. 67-1 (procedure implementation timeline). Under that procedure, a voter’s registration is automatically updated when the voter makes

changes at the Arizona Motor Vehicle Division to an operator license application or renewal unless the voter "opts out" of the update. See *id.* paras. 3.1 (procedure), 2.3 (transactions covered by procedure). The procedure is designed to comply with the federal Motor Voter Law. See 52 U.S.C. § 20504.

Even if we accept for the purpose of discussion the problem existed as Hamadeh described, this procedural challenge comes too late. As this court recently said, "for decades Arizona courts have applied the principle that 'if parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure.'" *Ariz. Republican Party v. Richer*, 255 Ariz. 363, 369 ¶ 38 (App. 2023) (review granted Jan. 9, 2024). In making that statement, this court relied on decades of authority. See *Kerby v. Griffin*, 48 Ariz. 434, 444 (1936); *Sherman v. City of Tempe*, 202 Ariz. 333, 342 ¶ 9 (2002); *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). "[P]rocedures leading up to an election cannot be questioned after the people have voted[] but . . . must be challenged before the election is held." *Tilson*, 153 Ariz. at 470 (emphasis added).

Hamadeh's assertion this court has the power to order those votes be counted also fails. At the hearing on the Motion for a New Trial, Hamadeh's counsel told the superior court, without citing legal authority, "Your Honor, you have the power to order those votes to be counted." And Hamadeh's opening and reply brief on appeal make the same assertion, again without proffering any legal authority. In fact, neither the superior court nor this court has the power to order those votes counted.

Arizona law allows a provisional ballot to be counted only if cast in the precinct where the voter was lawfully registered 29 days before the election. See A.R.S. §§ 16-584.D and .E (provisional ballot only opened and counted if casting elector's registration is verified), -122 (precinct-registration requirement to vote); 120.A (29-day requirement to vote). If the voter does not meet that condition, the provisional ballot cannot be opened or counted. A.R.S. § 16-584.E.

Hamadeh does not say the 1,100 provisional ballots should be counted because they were cast in the precinct where the voter was registered 29 days before the 2022 general election as the law required. Rather, he argues those ballots should be counted because the voters' registrations were changed as the result of

the election procedure implemented on April 30, 2020.³ Again, even if voters cast provisional ballots in the wrong precinct because of the alleged faulty but unchallenged election procedure, the voters still were not registered to vote in the precincts where they cast those provisional ballots. Arizona law simply does not authorize opening the envelopes and counting those ballots.

Though Hamadeh also bears the burden of proving prejudice, the evidence of the provisional ballot list and the alleged declarations is not in the record. Instead, Hamadeh relies only on unsupported argument. And the core of his argument is some voters' provisional ballots were not counted because an election procedure established two years before the election changed their voter registration. Hamadeh points to no evidence in the record about those provisional ballots that establishes prejudice.

Hamadeh belatedly seeks to turn his procedural challenge into an argument about whether Maricopa County followed the proper procedure. In his reply brief, he argues the 2019 Election Procedures Manual (2019 Procedures) and federal law required Maricopa County confirm in writing with a voter before cancelling the voter's registration. See 2019 Procedures at 37-40. But that section of the 2019 Procedures says that based on a voter's change in address, "A County Recorder may update (and in some cases cancel) a registration record depending on the circumstances." See 2019 Procedures at 37. Nothing in that section requires a writing as Hamadeh argues. Hamadeh essentially argues the procedure should have required Maricopa County to mail a voter a notice about the voter's change in residence, an issue he did not raise before the election.

Finally, Hamadeh relies on a federal law about removing a voter from a list of eligible voters, but that federal law does not require Maricopa County to confirm an address change in writing before removing a voter from its voter roll. It provides, instead, "A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant . . . confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or . . . failed to respond."

³ Though Hamadeh challenges an Arizona Department of Transportation procedure for voter registration, the Department is not a party to this case, so it did not appear to defend its procedure.

52 U.S.C. § 20507(d)(1)(A), (B)(i). Maricopa County explained how Arizona complies with that requirement: when a voter changes their address to a new county, Arizona law requires the new county to send registration materials to the voter. Hamadeh neither argues the new counties of residence did not comply with that requirement nor points to newly discovered evidence showing such noncompliance. And Hamadeh does not argue the State did not meet its duty under the federal law by requiring the new counties to send the information.

B. The superior court did not abuse its discretion when it denied Hamadeh's request to compel Maricopa County to produce its unredacted CVR based on timing.

The superior court found Hamadeh did not bring his request for the CVR to the superior court's attention until Hamadeh filed the Response to Order two days before the trial. The record supports that finding.

As the superior court observed, Hamadeh did not request the CVR in the original Ballot Petition. Hamadeh first mentioned the CVR on the record in his "Consolidated Reply in Support of" his Ballot Petition and Discovery Motion (Consolidated Reply). The Consolidated Reply listed the unredacted CVR as one of a few items included in an amended request for production sent to Maricopa County the day before. Hamadeh included an email mentioning the request for production as an exhibit, but the actual request for production did not enter the record. In a footnote to the Consolidated Reply, Hamadeh also said the unredacted CVR "clearly [fell] under [the ballot inspection statute] Section 16-677."

When the time came to argue the Ballot Petition and Discovery Motion at a hearing three days later, Hamadeh largely limited his argument to support the Ballot Petition. Even so, Hamadeh did not mention the CVR, despite his Consolidated Reply's footnote asserting the CVR was part of ballot inspection. Instead, he collectively addressed the discovery requests mentioned in the Discovery Motion and the amended request for production cited in the Consolidated Reply only to the extent of acknowledging Maricopa County was "generally work[ing] very hard to . . . accommodate requests on a short timetable" and expressing confidence "the other discovery . . . is fairly easy" and "ought to be able to be worked out in short order by the parties."

Then when Maricopa County argued and asked the superior court to clarify whether the parties were to argue Hamadeh's Ballot Petition or "additional discovery," the superior court responded

it "[s]ounded like [Hamadeh's counsel] is optimistic [Maricopa County and they] can work those [additional discovery issues] out based on your history" and invited Maricopa County to "go ahead and just address the inspection of ballots issue." Still, Maricopa County briefly stated its statutory interpretation argument of limited discovery before devoting its remaining argument to the Ballot Petition. In rebuttal, Hamadeh did not address Maricopa County's discovery argument. Instead, Hamadeh again argued the Ballot Petition. Despite Hamadeh's footnote in the Consolidated Reply, in which Hamadeh said the CVR was part of ballot inspection, Hamadeh did not mention the CVR once in his oral argument on the Ballot Petition. And he did not pursue special action relief at a meaningful time or with the urgency we would expect after an adverse ruling Hamadeh now characterizes as offensive to due process as well as fatal to some of his claims.

In the superior court's order partially granting the motions to dismiss, it found Hamadeh had a right to gather more information by ballot inspection under A.R.S. § 16-677.⁴ The superior court then said:

It was clear from oral arguments that the parties are cooperating with each other and are attempting to get as many facts to [Hamadeh] to address the concerns [he] ha[s] raised in the pleadings. Some of those facts were shared with the Court. Those are facts this Court should be considering. This information does need to be part of the record which [sic] the Court.

The superior court also reiterated its expectation the parties follow the ballot inspection statute and ordered them to confer to choose inspectors and decide the scope of inspection by noon on December 21, 2022. The superior court also ordered the parties to address in a written filing any issues about the ballot inspection on which they failed to agree by four o'clock P.M., also on December 21, 2022.

Hamadeh finally directed the superior court's attention to the CVR only two days before the trial, in the Response to Order. There, Hamadeh asked the superior court to compel Maricopa County to provide an unredacted CVR on the ground it was a public record, or, alternatively, "a part of the 'ballots' for purposes of inspection under A.R.S. § 16-677."

⁴ The order itself cites "Section 16-377." The parties and this court treat that reference as being to section 16-677.

During the resulting emergency hearing the day before the trial, the superior court specifically asked Hamadeh's counsel about the belated request for the unredacted CVR: "Do you agree that when I read your original petition for inspection of ballots, there's no - the CVR is not even in it?" In response, Hamadeh's counsel said, "Well, Your Honor, we did put the CVR in a subsequent briefing to the court that we have to have the CVR in order to really make heads or tails of the ballots." Hamadeh continued, "So I mean, [the CVR]'s something that I think is just sort of part of the ballot inspection process—as Bennett says, it's sort of the tally of the ballots. So I mean, I think it is sort of—it's part and parcel of that." Bennett was appellant's expert. Bennett's explanation of the CVR also was not part of Hamadeh's Petition for Inspection or any of the briefing for Hamadeh's Discovery Motion.

The superior court denied Hamadeh's request to compel production of the unredacted CVR in the Response to Order because Hamadeh did not identify the CVR in the original Ballot Petition. The superior court said, "the CVR was not requested in the original Petition for Inspection of Ballots and [this court] shall not allow it at this time."

The dissent characterizes that ruling as the superior court delaying its ruling for the parties to resolve their discovery issues and then faulting Hamadeh for "the resulting delay." *Infra* at 25. But that characterization omits important context. As early as its response to Hamadeh's Discovery Motion, Maricopa County denied Hamadeh was entitled to any discovery outside the ballot inspection procedure provided for in section 16-677, much less unredacted voter information. Maricopa County maintained that position at the hearing on the Discovery Motion and Ballot Petition. Yet, at that hearing, Hamadeh did not rebut Maricopa County's argument or provide any other argument supporting his entitlement to discovery. And despite the briefing footnote alleging the CVR to be "part" of ballot inspection, Hamadeh never once brought up the CVR.

Hamadeh did not proffer a statutory basis for obtaining an unredacted CVR record, and he did not argue the CVR was part of ballot inspection until the emergency hearing the day before trial and through his request to compel filed the day before trial along with a new expert affidavit. Within that full context, nothing about the superior court's decision to deny Hamadeh's request for the unredacted CVR based on the request's timing suggests an abuse of discretion. This point is true even if the unredacted CVR were discoverable as a part of ballot inspection or on some other basis.

II. The superior court did not abuse its discretion when it denied Hamadeh's motion to continue the trial for four days.

Hamadeh argues the superior court abused its discretion by strictly construing the trial timeframe in A.R.S. § 16-676.A⁵ and ordering the trial to begin, as scheduled, on December 23, 2022, rather than continuing it to December 27, 2022, to allow Hamadeh more time to inspect the ballots. Hamadeh does not otherwise challenge the superior court's exercise of its discretion in denying his request to delay the start of the trial.

Mayes argues the superior court did not err for two reasons. The first argument centers on the superior court's broad discretion when ruling on a motion to continue. As with the discovery challenges, Hamadeh does not address the breadth of the superior court's inherent discretion. Mayes bases her second argument on a statutory interpretation issue of first impression and statewide importance.

The parties do not dispute subsection 16-676.A directed the superior court to hold the hearing by Saturday, December 24, 2022. But the parties dispute whether that timeframe is mandatory or directory. Hamadeh argues the superior court could have continued the hearing until December 27, 2022. See *Brousseau v. Fitzgerald*, 138 Ariz. 453, 456 (1984) (holding § 16-351.A's 10-day hearing deadline was directory, not mandatory); *Klebba v. Carpenter*, 213 Ariz. 91, 92 ¶ 6 n.2 (2006) (same). Mayes argues it could not. See *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"); *Babnew v. Linneman*, 154 Ariz. 90, 92 (App. 1987) (saying the superior court failed "to perform the duty imposed on it by statute" when it did not hold the hearing within the timeframe of A.R.S. § 16-676.A).

As with the discovery requests, we need not resolve the statutory interpretation issue. See *Harris*, 193 Ariz. at 412 n.7 (noting when the appellate court can resolve an election-related appeal on one ground, it need not resolve other issues). The superior court did not refuse to continue the trial from December 24, 2022, to December 27, 2022, based on whether the statutory timeframe was mandatory. Rather, the superior court explained,

⁵ Pending legislation would replace the ten-day timeframe with a twenty-day timeframe. See H.B. 2472, § 2, 56th Ariz. Leg., 2d Reg. Sess. (Ariz. 2024).

I believe I could technically possibly push it back to Tuesday, but that would be by interpreting in probably a common sense manner that we can't do it Christmas Eve, and we're not doing it on Christmas Day. And the court is closed on Boxing Day, a holiday I take that others don't. But so I can't do this hearing before the 27th, which is past the 24th. It would be before the hearing now set to announce the recount that's now set on the 29th.

But I believe the hearing should go on tomorrow.

"The granting of a motion to continue is not a matter of right, but is left to the sound discretion of the trial judge, and such a decision will not be disturbed unless there is a clear abuse of discretion and prejudice results." *State v. Williams*, 144 Ariz. 433, 441 (1985); *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 361 ¶ 38 (App. 2014) (citing *Alberta Sec. Comm'n v. Ryckman*, 200 Ariz. 540, 543 ¶ 11 (App. 2001)); *Quayle v. State*, 19 Ariz. 91, 96 (1917). The same analysis applies to motions to continue a trial in election contests, including when the request involves a statutory ten-day trial timeframe for election challenges. *C.f. Campbell v. Pico*, No. CV-18-0168-AP/EL, 2018 WL 11622757, at *1 (Ariz. June 29, 2018) (Chief Justice Bales, Vice Chief Justice Brutinel, Justice Timmer, and Justice Bolick) (concluding challenged party did not show the superior court abused its discretion when it declined to continue a trial beyond subsection 16-351.A's ten-day deadline). The party challenging the denial of a motion to continue must show not only an abuse of discretion but also resulting prejudice. *See Williams*, 144 Ariz. at 441; *Quayle*, 19 Ariz. at 96; *Campbell*, No. CV-18-0168-AP/EL, at *1 (finding appellant had not "shown prejudice from the denial, as she [had] not shown she could have rehabilitated sufficient signatures had she been allowed more time").

In deciding the trial should move forward as scheduled, the superior court recognized the difficult timing issues when scheduling election challenges, particularly post-election contests: "I've always found the things difficult, . . . but [because of] the issue of the timeliness and the speed of which these types of hearings have to be held, which is even more compressed in a post-election process." Neither Hamadeh's opening nor reply brief addresses the superior court's basis for denying Hamadeh's request to continue the hearing.

In evaluating the superior court's exercise of its discretion, this court also considers the basis Hamadeh proffered

to justify his proposed continuance when the superior court considered the request. At that time, Hamadeh requested the continuance to engage in discovery of Maricopa County's unredacted CVR and its list of voters whose provisional ballots were "rejected along with the reason why the ballot was rejected." Hamadeh's counsel started his argument by saying:

What I would suggest, Your Honor, is that - well, if you are inclined to give us the relief, we've asked is that we push the hearing to Tuesday. I think also in there you probably saw that the recount hearing has been reset for Thursday of next week. So I think we have a little bit more time than we had previously anticipated.

But I think that that's essentially what we should do. And we should tomorrow and maybe over the rest of today we should try to get to the work of inspecting the ballots, which necessarily involves the CVR.

Hamadeh's counsel concluded his argument on the same note: "We'd ask for today to have the CVR and get to the actual ballot inspection tomorrow and then have the hearing on Tuesday. That is our request of this court."

At bottom, Hamadeh's request to continue was conditioned on the superior court granting his discovery requests. As discussed above, the superior court did not abuse its discretion when it denied Hamadeh's requested discovery of Maricopa County's unredacted CVR and its list of certain voters. Because we affirm the denial of the discovery requests, we also affirm the denial of the motion to continue.

Hamadeh further argues the superior court's decision to limit the ballot review to one three-person panel per county also required a continuance. But Hamadeh did not argue that to the superior court when making his request. Instead, he argued in his Response to Order the superior court should "read [section 16-677.B] to allow multiple three-person teams to inspect ballots," rather than, as Mayes argued, limiting inspection to one team of three for the whole state. At the emergency hearing, Hamadeh's counsel refined his argument, saying Hamadeh "didn't want multiple panels in all the counties." And Hamadeh's counsel did not object to the superior court concluding ballot inspection needed to be completed by a separate three-person board in each of the three relevant counties. Finally, counsel acceded to the superior court's request to submit names for each three-person team. Accordingly, the superior court, in its minute entry for the hearing, noted its belief Hamadeh's "request was to inspect

Maricopa County, Pima County and Navajo County with three (3) separate three-person boards for each county, nine (9) people in total."

Based on the above, Hamadeh did not have a "right" to have his continuance request granted. And the superior court used its discretion to deny the request. The superior court's reasoning based on the timing of election contests and the reasons Hamadeh offered for the delay show no abuse of discretion. In any case, as discussed below in the context of the Motion for a New Trial, Hamadeh has not shown prejudice arising from the denial.

III. The superior court did not abuse its discretion by denying Hamadeh's Motion for a New Trial after finding Hamadeh failed to establish entitlement to relief under Rule 59, Arizona Rules of Civil Procedure.

In his opening brief, Hamadeh argues he is entitled to a new trial for two reasons. First, he says the superior court erred when it concluded Rule 59, Arizona Rules of Civil Procedure, does not apply to election contests. Second, he argues the superior court abused its discretion by denying on the merits Hamadeh's motion in which he asserted newly discovered evidence. Because the superior court did not abuse its discretion when it denied the motion on the merits, we need not resolve whether Rule 59 motions may be granted in election contests. See *Harris*, 193 Ariz. at 412 n.7 (noting when the appellate court can resolve an election-related appeal on one ground, it need not resolve other issues).

For the superior court to grant a new trial based on newly discovered evidence, "the moving party must demonstrate that the evidence (1) is material, (2) existed at the time of trial, (3) could not have been discovered before trial by the exercise of due diligence, and (4) would probably change the result at a new trial." *Waltner v. JPMorgan Chase Bank, N.A.*, 231 Ariz. 484, 490 ¶ 24 (App. 2013) (citing *Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 602 (App. 1984)); see also *Black v. Black*, 114 Ariz. 282, 285 (1977); *Roberts v. Morgensen Motors*, 135 Ariz. 162, 165 (App. 1982). The moving party also cannot have possessed the evidence at the time of trial. See *Wendling*, 143 Ariz. at 602.

Hamadeh argued three types of newly discovered evidence before the superior court: evidence of (1) undervote tabulation errors in Pinal County, (2) Maricopa County's failure to count provisional ballots of voters not registered to vote in Maricopa County on election day, and (3) ballot printing problems in Maricopa County. Hamadeh preserved arguments for only the first two on appeal because he does not mention the third in his briefs.

A. Evidence of the Pinal County undervote issue does not merit granting Hamadeh a new trial.

Hamadeh seeks a new trial in part based on evidence of erroneous tabulation in Pinal County of some ballots as having undervotes for Attorney General. When Pinal County corrected the error, Hamadeh gained 392 votes and Mayes gained 115, reducing Mayes's statewide lead to 280 votes.

The Pinal County evidence was new and material. It was not in Hamadeh's possession at the time of trial, and Hamadeh could not have discovered it with due diligence because of a court order in another case keeping it confidential. And the evidence changed the final vote tally, though not enough to alter the election outcome.

Even so, Hamadeh cannot carry his burden. After the Pinal County votes were correctly counted, Mayes was still the candidate with the most votes statewide. The superior court correctly concluded the newly discovered evidence of those Pinal County votes did not change the outcome.

And Hamadeh offered no evidence of any other county making the same error as Pinal County. Instead, Hamadeh speculates about what "may be" rather than "what is" and then seeks an opportunity to look for new evidence. He claims that if granted more time and discovery, he may be able to uncover new evidence in other counties, he may be able to show a result of more votes for Hamadeh, and those votes may be enough to change the election outcome. The superior court did not abuse its discretion by denying a new trial based on Hamadeh's speculative claims. The mere fact of tabulation errors in one county does not suggest the same error occurred in any other county.

B. Evidence of the Maricopa County provisional ballots does not merit granting Hamadeh a new trial.

Like the Pinal County evidence, the evidence of Maricopa County's provisional ballot list was newly discovered. Like the Pinal County evidence, it was not in Hamadeh's possession at the time of trial, and Hamadeh could not have discovered it because it was in Maricopa County's exclusive possession and the County had not produced it.

Even so, Hamadeh's reasoning is flawed. Unlike the Pinal County undervote evidence, Hamadeh's alleged newly discovered evidence of uncounted provisional ballots in Maricopa County was not in the record before the superior court and so is not in the

record before this court. And Hamadeh did not support his motion with affidavits. The answering briefs point out this flaw, but Hamadeh's reply brief is silent on it and does not explain how this court can conclude the superior court abused its discretion with no evidentiary showing in the record.

Setting aside the insufficient record, Hamadeh did not establish the uncounted provisional ballots "would probably change the result at a new trial." See *Waltner*, 231 Ariz. at 490 ¶ 24.

As discussed above, those provisional ballots were not counted because, according to Hamadeh, the voters who cast them were not registered to vote in the county where they tried to vote. Arizona law and the 2019 Procedures do not allow those ballots to be counted. See A.R.S. §§ 16-120.A (requiring voter to register with the county recorder at least 29 days before the election), -579.A.2 (prohibiting a county from issuing a regular ballot to a voter if the voter is not listed in the county's precinct roster). Indeed, a county cannot even open a voter's provisional ballot envelope cast in that county if the voter was not registered there for at least the 29 days before the election. A.R.S. §§ 16-120.A, -584.E. Thus, Hamadeh's argument fails.

IV. This court will not issue advisory opinions on issues it need not address to resolve issues in this accelerated appeal.

Hamadeh asks this court for various forms of relief unrelated to this appeal, including requests to (1) interpret statutes not at issue, (2) affirm the Arizona Supreme Court's constitutional rulemaking authority, (3) make a broad statement about the interplay between the Arizona Rules of Civil Procedure and the election contest statute, (4) relegate some parties to nominal-party status in all election contests (even, most importantly, cases not before this court) as a matter of law,⁶ and (5) establish a universal disclosure and discovery standard for election contests.

⁶ Hamadeh asks this court to rule the government parties in this case, including the Secretary of State and Maricopa County, were nominal parties and should not have been allowed to litigate the issues. Hamadeh waived this argument. See *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386 ¶ 12 (App. 2011) (holding a party waives an argument on appeal when the party fails to raise it before the superior court). He did not make this argument before the superior court or develop a record sufficient to press the argument on appeal. We thus do not address it. *Id.*

Arizona courts long have refrained from issuing advisory opinions. “[C]onsistent with notions of judicial restraint,” we decline Hamadeh’s invitation to do so in this accelerated appeal. See *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005) (citing *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6 (1985)). Our restraint “ensures that courts refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries.” See *id.* Indeed, for those very reasons we decline to reach some of the statutory issues argued here that were unnecessary to our resolution of the appeal.

V. The superior court did not abuse its discretion when it denied Mayes’s and the Arizona Secretary of State’s requests for attorney fees.

Both Mayes and the Secretary of State cross-appeal the superior court’s denial of their motions for attorney fees and expenses. Both sought an award under both (1) A.R.S. § 12-349.A.1, arguing Hamadeh filed claims “without substantial justification,” and (2) A.R.S. § 12-349.A.3, arguing Hamadeh “[u]nreasonably expand[ed] or delay[ed] the proceeding.”

Mayes and the Secretary of State correctly articulate this court’s standard of review: “Appellate courts review the superior court’s application of A.R.S. § 12-349 de novo and factual findings for clear error.” *Takieh v. O’Meara*, 252 Ariz. 51, 61-62 ¶ 39 (App. 2021) (review denied Apr. 7, 2022) (citation omitted) (cleaned up).

Even so, the superior court correctly interpreted the relevant subsections of A.R.S. § 12-349 and did not clearly err in making its factual findings. The superior court considered whether Hamadeh brought the action, including the Motion for a New Trial, “without substantial justification.” See A.R.S. § 12-349.A.1. To show Hamadeh’s claims were “without substantial justification,” Mayes and the Secretary of State had to establish Hamadeh’s claims were “groundless and not made in good faith.” See A.R.S. § 12-349.F.

The superior court must make an “objective determination” to decide whether a claim is groundless. See *Ariz. Republican Party v. Richer*, 255 Ariz. 363, 374 ¶ 35 (App. 2023). A claim is not groundless “if the proponent is [l]able to present any rational argument, based on the law or the evidence, supporting the claim.” See *id.* Though Mayes and the Secretary of State disagree with the superior court’s weighing of the evidence before it, we cannot say the superior court clearly erred in making its factual findings.

Indeed, Hamadeh's not engaging in "malicious or outrageous behavior" goes to the heart of whether he acted "without substantial justification." The closeness of the election also bears on the issue. Hamadeh needed only to prevail to a small extent for the outcome to change. That he did not prevail does not mean he made claims without substantial justification. Indeed, the superior court agreed with some of Hamadeh's arguments, including some at issue on appeal, such as by recognizing the timeframe in A.R.S. § 16-677 was not mandatory and allowed the court to continue the trial for four days if it chose to do so.

And though Mayes and the Secretary of State argue all Hamadeh's claims were groundless, Hamadeh identified at least some ballots subject to dispute at the December 23, 2022 evidentiary hearing. Though Hamadeh's arguments thinned through his Motion for a New Trial, we cannot say the superior court erred by finding they were not groundless.

Agreement between Hamadeh, the superior court, and one of the defendant counties perhaps highlights why we cannot say the superior court clearly erred by finding Hamadeh acted in good faith. Though Mayes and the Secretary of State disagreed, Maricopa County agreed with Hamadeh, saying the CVR was a public record but subject to redaction. And Maricopa County ultimately produced the redacted provisional ballot lists Hamadeh sought.

Under these circumstances, the superior court did not clearly err when it concluded Hamadeh's claims did not lack substantial justification. We thus decline to reverse the superior court's denial of an award of attorney fees.

VI. The superior court's exercise of its discretion to deny Hamadeh's discovery requests and Motion for a New Trial did not violate his due process rights.

Hamadeh argues the superior court's denial of his continuance and discovery requests denied him "due process to a fair trial and the right to a new trial." In particular, he argues the superior court violated his right to due process because the superior court did not adhere to procedural rules permitting Hamadeh's sought-after trial continuance and further discovery.

Hamadeh did not assert whether the appealed rulings violate his procedural or substantive due process rights until his reply brief, after the answering briefs pointed out the omission. Even then Hamadeh makes no argument explaining how the superior court's specific rulings affect his right to due process, relying

only on assertions it is so. And he does not cite authority to support those assertions. Hamadeh's argument is unavailing.

VII. In the exercise of our discretion, we decline to award attorney fees on appeal.

Mayes prevailed against Hamadeh in his appeal. Hamadeh prevailed against Mayes and the Secretary of State in their cross-appeal. We thus exercise our discretion and decline to award any party attorney fees or costs.

IT THEREFORE IS ORDERED affirming the superior court's denial of Hamadeh's Motion for a New Trial and the relief he requested in the Statement.

IT FURTHER IS ORDERED affirming the superior court's order denying cross-appellants' request for attorney fees.

-/s/

DAVID B. GASS, Chief Judge

-/s/

KENT E. CATTANI, Judge

M O R S E, J., dissenting:

I respectfully disagree with the majority. The superior court abused its discretion by relying on timing to deny Hamadeh's discovery request for the Cast Vote Record ("CVR"). While the superior court has broad discretion to rule on discovery matters, it cannot base its decision on "irrational bases." *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 57, ¶ 12 (2000) (quoting *Brown v. Superior Court*, 137 Ariz. 327, 332 (1983)). In the context of this case, it was irrational to fault Hamadeh's timing in requesting the CVR.

As compelled by A.R.S. §§ 16-672 through -677, the superior court and the parties operated on a condensed timeframe. On December 9, 2022, Hamadeh filed the election contest. On December 13, 2022, Hamadeh filed a request to inspect ballots, a request for production, and a request for expedited discovery. On December 14, 2022, the court held a return hearing to discuss the scheduling of briefing, discovery, and oral arguments. During the hearing, the court asked Hamadeh if he wanted to address his

petition to inspect ballots and motion for expedited discovery, but Maricopa County requested time to file a response, and Hamadeh wanted time to reply. Hamadeh further indicated he "might be able to perhaps suggest a smaller sample, a smaller universe of documents" in his reply.

On December 15, 2022, Maricopa County responded to the discovery request. In its response, the county asserted that discovery was not available in an election contest and objected to the "extensive" discovery requested by Hamadeh. Hamadeh filed his reply on December 16, 2022. In the reply, he indicated that Maricopa County's concerns "about the breadth of the discovery are no longer valid" because he reduced his discovery request to a list of "[a]ll persons who cast a provisional ballot," the "reasons why their provisional ballot was not counted," and the "unredacted CVR."

On December 19, 2022, the court held a hearing on the pending motions. During the hearing, Hamadeh informed the superior court that it wanted to focus on the request to inspect ballots because the parties anticipated resolving the other discovery disputes via cooperation or public-records requests:

[Hamadeh]: I'll just start with the petition for inspection. The -- the other discovery we're asking for is actually -- is actually quite limited, and it -- you know, it should be expedited, but as I put in our pleadings, that, you know, look, there's another basis to require that and it's under the Public Records Act.

. . . The -- the county has -- has generally worked very hard to -- to accommodate requests on a short timetable and I am thankful for that, but I think that it's - it's just some of these things that the other discovery I think is -- is fairly easy that ought to be able to be worked out in short order by the parties.

But I know the petition -- excuse me, the ballots are the big ones, and I think the Court sort of identified the -- the issue

After Hamadeh presented his arguments on his request to inspect ballots, Maricopa County asked the court to clarify whether Hamadeh was still pursuing his requests for production and expedited discovery:

[Maricopa County]: Well, so I'm not entirely clear. . . . Is the other request for additional discovery being continuing to be pursued?

In response, the superior court suggested that it would address discovery matters later, if needed, and stated it would just address the petition to inspect ballots in a separate order:

The Court: Sounded like [Hamadeh] is optimistic you can work those things out based on your history. If there is some issue, he can address it in the response, and I'll let you address it if there []is. But go ahead and just address the inspection of ballots issue.

[Maricopa County]: Okay. Well, I would remind the Court, Your Honor, that the Rules of Civil Procedure don't apply in this. They're making a request for production essentially. I guess they are a public records request. The county has responded to numerous requests. There's been other litigation related to that, but in this action the only discovery that's available is a ballot request.

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[The Court:] I'll address it either way, by 2:00 tomorrow whether I'm gonna grant the petition to inspect. So it is ordered taking under advisement both -- all these motions that are pending.

The following day, the superior court ordered a limited inspection of ballots under A.R.S. § 16-677. The superior court's order did not address the motion for expedited discovery. As to ballot inspection, the superior court concluded "[i]f the parties fail[ed] to reach an agreement" about the inspection, the issues should be addressed in writing by December 21st. The superior court also directed the parties "to continue to cooperate with each other in exchanging" any information that would expedite the case.

On December 21st, and only one day after the court's invitation, Hamadeh filed a document entitled "Response to Court's Order Requiring Written Submissions Regarding Issues on Which No Agreement Has Been Reached." In that document, Hamadeh raised "five issues" upon which the parties had been unable to agree. Two of those issues related to discovery matters. First, Hamadeh requested "an unredacted electronic copy of the" CVR to allow "Plaintiffs to efficiently identify which ballots should be inspected." Hamadeh argued that the CVR was either a public record or, alternatively, "part of the 'ballots' for purposes of inspection under A.R.S. § 16-677." Second, Hamadeh asked the court "to compel Maricopa County to provide [a] list of all voters whose

provisional ballot was rejected along with the reason[s] why the ballot was rejected."

The superior court held a hearing the next day, December 22nd. At the hearing, Hamadeh argued the CVR was "critically necessary to inspect the ballots." Hamadeh also said the other parties were not cooperating as "the court's order kind of assumed would happen." During argument, the superior court asked Hamadeh if he agreed that his original petition for inspection of ballots did not contain a specific request for the CVR: "Do you agree that when I read your original petition for inspection of ballots, there's no -- the CVR is not even in it?" In response, Hamadeh's counsel responded that they "put the CVR in a subsequent briefing . . . in order to really make heads or tails of the ballots." Counsel further argued that the CVR "is just sort of part of the ballot inspection process . . . -- as [our expert] says, it's sort of the tally of the ballots. So I mean, I think it is sort of -- it's part and parcel of that."

"The courts must be alert to preserving the purity of elections and its doors must not be closed to hearing charges of deception and fraud that in any way impede the exercise of a free elective franchise." *Griffin v. Buzard*, 86 Ariz. 166, 173 (1959). Our supreme court has also stated that the "short time period allotted" in election litigation may not deny a party an opportunity to present a case because "[d]ue process requires that a party have an opportunity to be heard at a meaningful time and in a meaningful manner." *McClung v. Bennett*, 225 Ariz. 154, 156, ¶ 8 (2010) (quoting *Mandraes v. Hungerford*, 127 Ariz. 585, 587-88 (1981)).⁷

But in its minute entry, the superior court only provided one reason for denying the CVR discovery request, i.e., "the CVR was not requested in the original Petition for Inspection of Ballots and [the court] shall not allow it at his time." The superior court did not acknowledge that Hamadeh had included his request for the CVR in his December 16, 2022 reply in support of the petition to inspect ballots and motion to expedite discovery.

⁷ In *Mandraes*, a case involving challenges to nominating petitions and candidates under A.R.S. § 16-351, which also provides a ten-day timeframe, our supreme court has stated that "comply[ing] with the time schedule . . . may not deprive a party of their opportunity to present their evidence." 127 Ariz. at 588.

Thus, Hamadeh urged the superior court to order Maricopa County to provide the unredacted CVR only eight days after filing the initial petition to inspect ballots and request for discovery, three days after specifically requesting the CVR in a reply, two days after the superior court asked whether the parties could limit the scope of inspection to focus on necessary ballots, and only one day after the superior court invited parties to raise further disputes and Maricopa County formally denied the public-records request for the CVR. In essence, the superior court delayed ruling and invited the parties to work out such issues. But the court then faulted Hamadeh for the resulting delay. Under these facts, timing cannot provide a rational reason to deny Hamadeh's request for the CVR. See *McClung*, 225 Ariz. at 156, ¶ 8; *State Farm Mut. Auto. Ins. Co.*, 199 Ariz. at 57, ¶ 12.

However, such error is reversible only if it was prejudicial. *Johnson v. Provoyeur*, 245 Ariz. 239, 241-42, ¶¶ 8-12 (App. 2018) (citing *Marquez v. Ortega*, 231 Ariz. 437, 441, ¶ 14 (App. 2013); *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506 (1996)). Here, the prejudice shown is not necessarily whether the additional production would have led to a different result but whether Hamadeh was afforded an opportunity to conduct a meaningful inspection of the requested ballots and properly prepare for trial. See *Johnson*, 245 Ariz. at 242, ¶ 11 (noting an untimely disclosure deprived the father of a fair opportunity to obtain evidence and prepare for trial).

Denying access to the CVR deprived Hamadeh of an opportunity for a meaningful way in which to conduct the ballot inspection in the condensed timeline allotted for election contests. From the beginning, Hamadeh raised concerns about undervotes, i.e., ballots cast without a counted vote in the race for Attorney General. On December 16, 2022, when he first requested the superior court's assistance in obtaining the CVR, Hamadeh indicated that it would "greatly aid in review of the ballots because it can be used to quickly identify the universe of ballots that is sought, including where that physical ballot can be located if resort must be made to that actual ballot." On December 21, 2022, Hamadeh argued the following:

Access to the CVR is important because it allows Plaintiffs to quickly identify what specific ballots are implicated by the concerns raised in the Complaint. There were over 1.5 million votes cast in Maricopa County in the 2022 General Election. Not all of them are implicated by the issues raised in the Complaint, nor is it feasible for a 3-person panel to inspect all of them

before Friday's hearing. With access to the CVR, Plaintiffs' expert can run a computer program that flags which ballots are potentially impacted by the issues raised in the complaint . . . and use the ballot number to expedite direct inspection of the ballots at issue.

. . . .

. . . As described above, access to the unredacted CVR will allow the parties to implement a more targeted ballot inspection process that focuses on the ballots that are actually implicated by the concerns raised in this context, rather than shooting in the dark through 1.5 million ballots.

Although our supreme court has not directly addressed the extent to which discovery is available in election contests, the supreme court has addressed discovery disputes under A.R.S. § 19-122, the statute providing for challenges to initiative or referendum petitions. See *Harris v. Purcell*, 193 Ariz. 409 (1998). Like the election contest statutes, A.R.S. § 19-122 does not specifically provide for discovery. But, in rejecting a plaintiff's claim that he was denied the opportunity to depose witnesses, our supreme court affirmed because the depositions were "neither germane nor probative . . ." *Harris*, 193 Ariz. at 413, ¶ 20. I read the specific permission to inspect ballots under A.R.S. § 16-677 as a grant of authority, rather than a prohibition on other types of disclosure. Because an election contest is a superior court proceeding, the superior court has authority to facilitate the inspection of ballots, whether or not there is a general right to discovery. See *Arpaio v. Baca*, 217 Ariz. 570, 576, ¶ 19 (App. 2008) (stating that "a superior court judge has inherent authority to conduct such proceedings and issue such orders as are necessary to the complete administration of justice" (citing *Schavey v. Royston*, 8 Ariz. App. 574, 575 (1968))). Ordering disclosure of the CVR would be probative and germane to facilitating that ballot-inspection effort in the short statutory timeframe. See A.R.S. § 16-676(B) ("The court shall continue in session to hear and determine all issues arising in contested elections."); cf. also *Owen v. City Ct. of Tucson*, 123 Ariz. 267, 268 (1979) (discussing a court's "inherent powers" that are "indispensable if a court is to perform the duties specifically assigned to it"); *McClung*, 225 Ariz. at 156, ¶ 8 (stating that the "short time period allotted" may not deny a party "an opportunity to be heard at a meaningful time and in a meaningful manner").

By rejecting Hamadeh's request for the CVR as untimely, the superior court abused its discretion and denied Hamadeh a fair opportunity to inspect the ballots and prepare for the evidentiary hearing. See *Johnson*, 245 Ariz. at 242, ¶ 11. I would remand this matter to the superior court to determine whether Hamadeh can prove his claim, as alleged pursuant to A.R.S. § 16-672, and establish that a sufficient number of ballots were not properly counted such that the outcome of the election would plausibly have been different.⁸

_____/s/_____

JAMES B. MORSE JR., Judge

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⁸ Because I would remand on this basis, I would not reach the other issues addressed by the majority.