

# IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

Date: 10/4/2024

**THE HON DELIA R. NEAL,**

By Judicial Administrative Assistant: Angie Newendyke

**ADRIAN FONTES,**

**Petitioner(s),**

**vs.**

**KEVIN CAVANAUGH, et al.,**

**Respondent(s).**

)  
) **S1100CV202402541**  
)  
) **SPECIAL ACTION**  
)  
) **ELECTION CASE**

The matter came before the Court on a *Complaint for Special Action Relief* (“Petitioner’s Complaint”) filed by Petitioner Arizona Secretary of State Adrian Fontes, in his official capacity (“Petitioner,” “the Secretary”).

The Court also received a *Response* filed by Respondents<sup>1</sup> (collectively, “Respondents,” “the County”), as well as Respondents’ *Motion to Dismiss*. Finally, the Court received Petitioner’s *Response to Defendant’s Motion to Dismiss and Reply in Support of the Secretary’s Application for an Order to Show Cause (“Reply”)*. Oral argument was held on October 3, 2024.

Petitioner has requested emergency relief due to imminent deadlines prescribed in ARS §16-449 that require logic and accuracy testing (“L&A testing”) of electronic ballot tabulating systems within seven days of use for early balloting. ARS §16-449(B). Early balloting in Arizona begins on

<sup>1</sup> The named Respondents in this matter are Kevin Cavanaugh, Mike Goodman, Stephen Miller, Jeffrey McClure, and Jeff Serdy, all in their official capacities as Pinal County Supervisors, as well as Dana Lewis in her official capacity as Pinal County Recorder.

October 9, 2024. *See Elections Calendar and Upcoming Events, October 9, 2024, Early voting begins*[/] <https://azsos.gov/elections>.

To that end, Petitioner filed this action on September 27, 2024, seeking emergency orders from this Court requiring Respondents to:

- 1) Comply with the current EPM<sup>2</sup>, including the EPM provisions in Chapter 9 at page 190 regarding voters who arrive at the incorrect precinct<sup>3</sup>.
- 2) Equip all accessible voting devices in Pinal County with correct ballot styles from all precincts in the county.
- 3) Allow any eligible Pinal County voters to cast ballots on an accessible machine equipped with the correct ballot style for each precinct, even if they arrive to vote in the incorrect precinct.

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<sup>2</sup> The Court takes judicial notice of the Arizona Secretary of State website, at which the EPM can be located in its entirety. Ariz.R.Evid. 201(b), (b)(2). For convenience, Petitioner provided a link to the full EPM at <https://tinyurl.com/yhhxvh4z>.

<sup>3</sup> Regarding out-of-precinct voters, the 2023 Elections Procedures Manual states at Chapter 9, p. 190: *If the voter's name does not appear on that precinct's signature roster because the voter resides in another precinct (in counties that conduct assigned polling place elections), an election official shall:*

- *Permit the voter to vote a provisional ballot (in the correct ballot style for the voter's assigned precinct) using an accessible voting device that is programmed to contain all ballot styles, and inform the voter that their provisional ballot will be counted after it is processed and if it is confirmed the voter is otherwise eligible to vote and did not vote early or at another voting location and had that other ballot counted.*

*o Alternatively, upon a specific resolution of the Board of Supervisors issued pursuant to A.R.S. § 16-411(B)(4) authorizing the use of accessible voting equipment within an assigned polling place to be used as a vote center, a voter shall be entitled to vote a regular ballot using the accessible voting device if:*

- *The election board has access to real time information and can confirm the qualified voter has not cast a ballot at another voting location;*
- *The accessible voting device is pre-programmed and certified to allow voters to mark or vote any ballot style for that county; and*
- *The accessible voting device enables the voter to vote/mark a ballot for the correct precinct in which the voter is entitled to vote.*

- *If the voter refuses the option to vote on the accessible voting device as described above, the election official shall direct the voter to the correct polling location or, if applicable, to a vote center.*

- *If the voter refuses the option to vote on the accessible voting device and refuses to go to the correct polling location (i.e., the voter insists on voting a paper ballot in the wrong ballot style for the voter's assigned precinct), the election official must inform the voter that the voter must vote the correct ballot style, either using the accessible voting machine or in the correct polling place, in order for their votes to be counted.*

*The out-of-precinct procedures described above apply to voters who are in the right county, but the wrong precinct. Voters who attempt to cast a ballot in the wrong county (i.e., outside their county of registration) should be informed that ballots cast in the wrong county will not be counted.*

- 4) Inform Pinal County voters who attempt to vote in the incorrect precinct and refuse to use the accessible machine with the correct ballot style that their vote will not be counted.
- 5) Notify any Pinal County voter who arrives at the incorrect precinct, and refuses to use the accessible voting device, of the address for their assigned precinct polling place.
- 6) Notify any voter who is not a Pinal County voter, but who attempts to vote at a Pinal County precinct polling place that their vote will not be counted if it is not cast in their county of residence.

*Emergency Verified Complaint for Special Action Relief*, pp. 7:12-8:3.

Respondents argue first that relief should be denied because Petitioner has waited too long to bring this action. Respondents cite to the *Purcell Doctrine* as well as laches. *Response*, p. 8:12-15. Respondents next argue that Petitioners cannot bring a civil lawsuit against them to enforce the EPM as a violation of the EPM is a class 2 misdemeanor and only the Attorney General or “the appropriate county, city, or town attorney” may enforce criminal provisions in Title 16. *Id.*, p. 13:6-9. Respondents also argue that Petitioner must exhaust administrative remedies pursuant to the Arizona Administrative Procedure Act (“APA”). *Id.*, p. 2:13-14. Finally, Respondents argue that the EPM violates A.R.S. 16-411§§(B)(4), 16-122, and 16-584(E) as it requires that Pinal County operate “voting centers,” as well as count out-of-precinct provisional ballots. *Id.*, p. 2:15-22.

### **SPECIAL ACTION REVIEW**

This Court has Special Action jurisdiction pursuant to Art. IV, Sec. 18 of the Arizona Constitution and by Rule 4 of the Rules of Procedure for Special Actions.

The Court’s review of this matter is guided by Ariz. R. P. Spec. Actions 3:

“The only questions that may be raised in a special action are:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority[.]”

Ariz. R. P. Spec. Actions 3(a), (b).

As a preliminary matter, the Court FINDS, first, and most importantly, that both sides of this dispute share responsibility for this last-minute controversy. As this ruling will detail, both the State of Arizona and Pinal County had a legal obligation to address these issues long before this case was filed, and their failure to do so now threatens to create confusion in the upcoming general election, immediately before Early Voting begins, no matter whether the Court grants or denies the relief requested by the Secretary of State.

## FINDINGS & ANALYSIS

**The 2023 Elections Procedure Manual is Binding on Pinal County and has the force of law in this State.**

“Once adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.” *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, 475 P.3d 303, 308 (2020), *citing* ARS §16-452(C). In this ruling, Justice Gould cited the non-discretionary mandate found in ARS §16-452(C). This is the law of this State.

Chapter 9 of the EPM expressly mandates that all counties, including Pinal County, take required actions to allow out-of-precinct voters, commonly known as “OOP” voters, to access accessible voting equipment, which can accept ballot styles for all precincts in the county. *EPM*, p.190.

### **Respondents are Obligated to Follow the Law.**

Here, Respondents were made aware of proposed changes to the 2023 EPM as far back as December 2023 but no later than January 2024, when it was published and, pursuant to A.R.S. §16-452, had the force of law.

Every county in Arizona has complied with this mandate, except Pinal County, which has knowingly and voluntarily elected not to implement this requirement of the EPM. *Ex. 3, Decl. of Lisa Marra*, p. 5.

Respondents argue that provisions in the 2023 EPM conflict with other provisions in A.R.S. Title 16 regarding the management and administration of elections. This argument may have merit, but Pinal County has not tested or litigated this argument in an appropriate forum, such that Pinal County has no legal authority to be excused from its duty of following this provision of the EPM.

The Court is aware that a challenge to the 2023 EPM is before Division 2 of the Arizona Court of Appeals<sup>4</sup>, however no decision has been reached in this matter and the 2023 EPM remains binding with the force of law. A.R.S. §16-452.

Respondents already conducted both the March 2024 Presidential Preference Election (“PPE”) and the July 2024 Primary Election in noncompliance with the EPM and, with the upcoming general election, will be in noncompliance for the entirety of 2024.

### **Petitioner had a Duty to Seek Enforcement of the 2023 EPM.**

The Secretary of State knew, or should have known, about the noncompliance of Pinal County during the of *Logic & Accuracy testing* (“L&A testing”) on

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<sup>4</sup> *Republican National Committee v. Fontes*, Maricopa County Superior Court cause no. CV2024-050553, is pending in Division 2 of the Arizona Court of Appeals in *Republican National Committee, et. al. v. Adrian Fontes et al.* 2 CS-CV 2024-0241. A briefing schedule has been ordered but no decision has been published as of this date.



Pinal County elections equipment on February 13, 2024, and June 25, 2024, and through communications between the parties during 2024.

The Secretary now comes just days before the start of voting, seeking enforcement of the 2023 EPM for the 2024 General Election.

### INJUNCTIVE RELIEF

In order to grant injunctive relief, the Court reviews this case in light of the criteria set forth in *Shoen*: (1) A strong likelihood that petitioner will succeed at trial on the merits; 2) The possibility of irreparable injury to petitioner not remediable by damages if the requested relief is not granted; 3) A balance of hardships favors petitioner; and, 4) Public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ct. App. 1990).

Petitioner may well be able to establish the first two prongs of *Shoen*. First, as discussed above, the EPM carries the force of law and is binding on Respondents, since they have neither sought nor obtained relief from their duty to follow the EPM. For the same reason, with the limited facts before the Court today, it seems probable that Petitioners would prevail at trial on the merits.

Secondly, if Pinal County is not required to abide by the law as stated in the EPM, Petitioner persuasively argues that Pinal County voters will be placed in a position different from the rest of the voters in the state, there could be significant confusion on election day, and it may result in the disenfranchisement of voters who mistakenly arrive at the wrong precinct to vote.

Although Petitioner meets the first two criteria of *Schoen*, the Court does not find that the last two criteria are satisfied.

Assessing the third prong of *Schoen*, the balance of hardship does not weigh in favor of Petitioner. State Election Director Lisa Marra stated in her declaration that the process to configure the accessible voting devices for use with all ballot styles is merely the matter of a few tweaks to the software. *Ex. 3, Decl. of Lisa Marra*, p.3-5.

The Court is not persuaded by this assessment. The Court notes that Recorder Dana Lewis' description of the steps required to bring all the 124 accessible voting devices into compliance with the EPM raises a valid question as to the practicability of this effort so close in time to the General Election. *Ex. B, Decl. of Dana Lewis*, pp. 9-12.

Beyond the programming aspect, which Recorder Lewis indicates will take approximately 30-45 minutes per device, the Court finds compelling her explanation of the multitude of other logistical complications involved in a wholesale modification of the impacted devices. Moreover, all polling place staff would require additional training in an excessively compressed period. *Id.* at 9, 10.

The Court FINDS that there is unacceptable risk to undertake this change at this very late date.

Finally, for the same reasons, the Court cannot find that public policy favors this injunction. At this late date, the requested remedy for non-compliance with the EPM is impracticable, if not imprudent, since it creates unacceptable risk of chaos, uncertainty, and confusion in this election, at a time when the Court takes notice that public confidence in elections is at a low point. The requested relief, at this late date, also creates some risk for disabled voters for whom this equipment is presently configured.

## CONCLUSION

Based upon these findings and analyses, and for other good cause, the Court FINDS that Respondents, who were responsible for the elections during 2024, had a legal duty to fully comply with the EPM and have not fully complied with that duty. As to the specific relief requested by Petitioner, as more fully stated above, that relief is denied, since the balance of hardship does not favor Petitioner and public policy is likely frustrated by the requested relief so near the election.

**IT IS ORDERED** granting the Petition for Special Action as to Respondents failing to comply with certain legal duties; denying the injunctive relief requested by Petitioner.

It should be noted that the Court invited the parties to suggest alternative remedies to ensure that the County's current procedures do not negatively impact the 2024 General Election voting process. None were proposed and, therefore, none are ordered.

As and for the *Motion to Dismiss*, the Court FINDS that it is not yet fully briefed or submitted to the Court for ruling, and it is therefore **ORDERED** that the motion is summarily denied, since this ruling on the merits is due before the *Motion to Dismiss* may be heard.

To the extent applicable, the Court further FINDS that there is no prevailing party for purposes of awarding fees or costs.

**IT IS FURTHER ORDERED** pursuant to Ariz.R.Civ.P. 54(c), that no further matters are pending, all future hearings shall be vacated, and the file administratively closed.



eSigned by HONORABLE ELIA R NEAL, 10/04/2024 14:42:28 5y9pfV6x



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