ARIZONA SUPREME COURT

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Appellant, v. DANA LEWIS, in her official capacity as Pinal County Recorder; JEFF SERDY, in his official capacity as Pinal County Supervisor; JEFFREY MCCLURE, in his official capacity as Pinal County Supervisor; KEVIN CAVANAUGH, in his official capacity as Pinal County Supervisor; MIKE GOODMAN, in his official capacity as Pinal County Supervisor; STEPHEN MILLER, in his official capacity as Pinal County Supervisor, Appellees.	No. CV-24-0251-T/AP Arizona Court of Appeals No. 2 CA-CV 2024-0309 Pinal County Superior Court No. S1100-CV2024-02541

ARIZONA SECRETARY OF STATE'S OPENING BRIEF

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Pursuant to Ariz. R. Civ. App. P. 19 and this Court's October 23, 2024 Order, Secretary of State Adrian Fontes hereby re-files in this Court the Opening Brief that he filed in the Court of Appeals on October 9, 2024. Save the changes to the caption and this page, the following brief is identical to the version filed in the Court of Appeals. In addition, the Secretary is filing under separate cover the Appendix and October 3, 2024 Hearing Transcript that he filed in the Court of Appeals.

RESPECTFULLY SUBMITTED this 23rd day of October, 2024.

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INTRODUCTION

The superior court correctly decided that the Defendants/Appellees/Cross-Appellants Pinal County Board of Supervisors and the Pinal County Recorder (collectively, the "County"), violated Arizona law, and will continue to violate Arizona law on election day, by "knowingly and voluntarily elected not to implement this requirement of the [2023 Elections Procedures Manual, also called the] EPM." (APP014).[1] However, the superior court abused its discretion by applying the incorrect legal standard to deny Plaintiff/Appellant/Cross-Appellee Arizona Secretary of State Adrian Fontes' request for an injunction. The superior court committed an error of law when it declined to order mandamus relief as provided in the factually indistinguishable *Arizona Public Integrity Alliance v. Fontes* ("*AzPIA*"), 250 Ariz. 58 (2020).

When *AzPIA* is correctly applied, mandamus relief must be granted in this case, "[b]ecause Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority." *Id.* at 64, ¶ 26. Under *AzPIA*, that is the end of the analysis, and the mandamus relief requested by the Secretary should issue. Alternatively, when correctly applied, the Secretary is entitled to injunctive relief under

[1] Because this matter is proceeding on a highly expedited basis, the trial court record has not yet been included in the Court's electronic record on appeal. The Secretary has contemporaneously filed a Motion to Docket and File Appendix. Citations in this Brief to APP___ are to that appendix.

a proper application of the four-factor sliding scale injunctive test pursuant to *Shoen v. Shoen*, 167 Ariz. 58 (App. 1990). And finally, the alternative reasons that the County provides to excuse its failure to comply with its non-discretionary duties are unavailing. This Court should issue mandamus and/or injunctive relief against the County to ensure the County complies with its non-discretionary duty under Arizona law.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Secretary brought this case to ensure the County follows the rules in the EPM. The EPM's purpose is to "achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" of election procedures across the state. A.R.S. § 16-452(A).[2] The requirement at issue in this matter, from page 190 of the EPM, provides that:

> An election official shall [p]ermit 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.

[2] An excerpt of the 2023 EPM is included in the trial court record as Trial Exhibit 1 (*See* APP157-161). The Secretary publishes the EPM on his website in fully-searchable format. As such, in this Brief, the Secretary provides links to the EPM on the official Secretary of State website.

(EPM, at 190 (emphasis added) (the "Requirement")). The County refuses to comply with this Requirement, despite the fact that it has the ability to do so.

The law governing the issuance of the EPM sets forth specific procedures for how it must be issued. In particular, A.R.S. § 16-452(A) first directs the Secretary to consult with the county election officials, who do the bulk of the day-to-day work of maintaining voter registration rolls and carrying out elections, in developing the EPM. The statute requires that the Secretary obtain the approval of the Governor and Attorney General before issuing the final EPM, which carries the force of law. A.R.S. § 16-452(B). On September 30, 2023, the Secretary provided the draft EPM to the Governor and Attorney General. On December 30, 2023, the Governor and Attorney General approved the 2023 EPM, and the Secretary issued it. (APP158-160).

The provision at issue here was added to the EPM in December 2023, and the Secretary provided the updated, but not yet final version of the EPM, and highlighted certain changes, to the County via email on December 21, 2023. (APP176 at ¶ 34). The changes included the Requirement, which provides that counties allow voters who arrive at the incorrect precinct to use an accessible voting device ("AVD") that is programmed with all precincts in the county, to select their preferred candidates from the ballot style for their precinct. (APP170). The AVD then prints out the selections the voter made from the correct ballot style for that voter's residential precinct, which allows the voter to check his or her selections and then cast that as a provisional ballot.

To cast this correct ballot style, despite being in the incorrect precinct, the ballot is cast as a provisional ballot. (APP170). The process the County and the voters would follow under the Requirement are as follows: sign the signature roster for provisional ballots, complete the provisional ballot envelope, vote the ballot, deposit the ballot in the provisional ballot box, and take the provisional ballot receipt. (APP198-99 at ¶¶ 12-18). Notably, this is the same procedure which that voter would undertake to cast their ballot out of precinct if the EPM Requirement did not exist. (APP198 at ¶¶ 12-13) (explaining that an out of precinct voter has the right to cast a provisional ballot). The only difference is whether the provisional ballot that voter casts is one that can be legally tabulated. If the County does not follow the EPM procedure, the ballot style given to the voter will be the wrong type, and despite the fact that the County must still spend additional time to process the provisional ballot and the voter must spend additional time to complete the provisional ballot and associated paperwork, that ballot will be rejected. If Defendants follow the EPM procedure, the ballot style will be the correct type, and will include only those races for which the voter is eligible to vote, and the ballot can legally be tabulated after that extra time and effort. (APP161).

The Maricopa County superior court has already upheld the Requirement as legal. (APP167). Several weeks after the Secretary issued the 2023 EPM, the Republican National Committee, the Republican Party of Arizona, LLC, and the Yavapai County Republican Party (collectively, the "RNC plaintiffs") challenged the

Requirement and other EPM provisions. Plaintiffs in that case argued, *inter alia*: (1) that the entire EPM is void because it should have been promulgated pursuant to the Administrative Procedure Act ("APA"); and (2) that the Requirement conflicted with Arizona law. (APP162).

The superior court rejected all of plaintiffs' claims, concluding that the EPM was properly promulgated under Arizona law and none of the challenged specific provisions conflict with governing law, including the Requirement the County refuses to follow here. (APP162). Accordingly, the superior court dismissed the Complaint in its entirety. (APP168). The RNC plaintiffs appealed and sought expedited relief, which this Court denied. (APP023 at ¶ 17). Because this Court denied expedited relief, there is no question that the 2023 EPM, including the Requirement that the County does not want to follow, is and will be the law governing voting on election day in the 2024 General Election. (APP023 at ¶ 18).

On appeal, the Secretary asks only for reversal of the superior court's denial of mandamus, or alternatively, injunctive relief. (APP002-03, APP024-27). The Defendants seek a reversal of the trial court's determination that the Defendants are violating state law. (APP006-07). As explained below, this Court should affirm the superior court's determination of the first two *AzPIA* factors, but reverse its denial of mandamus and, alternatively, injunctive relief.

STATEMENT OF THE ISSUES

1. Whether the superior court correctly applied *AzPIA* when it denied mandamus relief.

2. Whether the Secretary would not have prevailed on all factors of the four-factor *Shoen* test for injunctive relief, if the test for mandamus relief is inappropriate.

3. Whether the County's other defenses, including standing, exhaustion of administrative remedies, and *Purcell* provide a defense or excuse that would preclude this Court from issuing an order for mandamus or injunctive relief.

LEGAL ARGUMENT

I. Standard of Review.

The superior court accepted special action jurisdiction, but denied mandamus and injunctive relief. (APP017-18). A trial court's order denying a preliminary injunction is reviewed for abuse of discretion, such as a mistake of law or clearly erring when finding facts and applying them to the law. *Shoen*, 167 Ariz. at 62-63.

II. The Superior Court Abused Its Discretion When It Denied Relief.

The superior court correctly determined that the County exceeded the scope of its authority by ignoring the EPM's Requirement. Further, "since [the County has] neither sought nor obtained relief from their duty to follow the EPM," the EPM has the force of law and "is binding upon them." (APP015). The superior court additionally held that the Secretary proved irreparable harm due to the significant equal

protection concerns and the potential for voter confusion created by one county deciding to shirk its duty to its constituents. (APP015). That alone is sufficient to grant the relief the Secretary seeks, because allowing Defendants to choose *a la carte* which provisions of Title 16 and the EPM they adhere to was an abuse of discretion.

A. This Case Is Governed by *AzPIA*, and Mandamus Relief is Required.

This case is factually indistinguishable from *AzPIA*, and therefore the law requires the same mandamus relief to issue here. The superior court's failure to follow *AzPIA* was error. The misapplication of the law, or the application of the incorrect standard, is an abuse of discretion and merits reversal of the superior court's denial of relief. *McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.*, 169 Ariz. 520, 523 (App. 1991) ("An abuse of discretion exists if the trial court 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.") (citation omitted).

In *AzPIA*, as in this case, county election officials failed to follow the EPM for the March Presidential Preference Election and Primary Election. 250 Ariz. at 60, ¶ 1. In *AzPIA*, as in this case, a demand letter was sent to the county election officials before filing a special action. *Id.* at 61, ¶¶ 5-6. In *AzPIA*, as here, the trial court found that the plaintiffs were likely to succeed on the merits, but failed to meet the other

requirements for injunctive relief. *Id.* In *AzPIA*, as here, the offending county election officials argued that Arizona law conflicted with the governing EPM provision, which should provide the county the ability to decline to follow the EPM. *Id.* at 64, ¶¶ 22-23. The *AzPIA* court rejected that contention, finding that "[t]he Recorder is mistaken." *Id.* So too, here.

In *AzPIA*, once "Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority," that ends the analysis. *Id.* at 64, ¶ 26. The court explained that because a county official is "not empowered to promulgate rules . . . nor does he have the authority to change or supplant the EPM's prescribed instructions," mandamus was appropriate *Id.* at 63, ¶ 17. The "legislature has expressly delegated to the Secretary the authority to promulgate rules" governing the process to cast a ballot, both regular and provisional. *Id.* at 62, ¶ 15. On the other hand, the authority of county officials "is limited to those powers expressly or impliedly delegated to him by the state constitution or statutes," and therefore a county election official can "be 'enjoined from acts' that are beyond his power." *Id.* at 62, ¶ 14. Moreover, this "contradicts the purpose of the EPM, which is to 'prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency.'" *Id.* at 64, ¶ 26.

Simply put, the Defendants have no discretion to ignore the Requirement in the EPM. *Id.* at 63, ¶ 16. Defendants were aware of the Requirement, but "knowingly and

voluntarily elected not to implement [it]," making it the only county to refuse to follow this provision of the EPM. (APP014). The EPM has "the force and effect of law." A.R.S. § 16-452. Among other things, the EPM includes the Requirement, which allows a voter who arrives at the incorrect precinct to vote the proper ballot style, and "Pinal County has no legal authority to be excused from its duty of following this provision of the EPM." (APP014). Based on these facts, the superior court correctly decided that the Secretary had proven the factors that the Court in *AzPIA* found sufficient to warrant mandamus relief. (APP015). The same result should have followed in the superior court.

The superior court correctly decided the illegality of the County's actions, which should have been sufficient to order mandamus relief. (APP015). Applying the "incorrect . . . preliminary injunction standard", instead of the *AzPIA* standard in this mandamus special action, is a "clear abuse of discretion." *City of Flagstaff v. Dep't of Admin.*, 255 Ariz. 7, 11-12, ¶ 12 (App. 2023). Accordingly, this Court should reverse the superior court's decision to deny mandamus relief, and enter an order of mandamus against the County, directing them to follow the Requirement.

B. Alternatively, the Plaintiff Has Demonstrated All Traditional Injunctive Factors Weigh in Favor of the Secretary.

Because this is a mandamus special action, the Secretary seeks an order to ensure that the County adheres to its non-discretionary duty and follow the law. "A trial court abuses its discretion if it applies the incorrect substantive law or preliminary injunction

standard, bases its decision on an erroneous material finding of fact, or misapplies an appropriate preliminary injunction standard." *Flagstaff*, 255 Ariz. at 11-12, ¶ 12. The superior court correctly found that the Secretary had a likelihood of success on the merits and had shown irreparable harm. (APP015). However, had *Shoen* been properly applied by the superior court, the Secretary would still be entitled to an injunction because the balance of hardships and public interest favor the Secretary.

As an initial matter, the *Shoen* test is "not absolute, but sliding," which is sufficient to provide injunctive relief here, based on the findings of the superior court. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, ¶ 10 (2006). A party can establish injunctive relief is appropriate by either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply in favor of the moving party. *Flagstaff*, 251 at 432, ¶ 16. The superior court already determined that the Secretary had demonstrated a likelihood of success on the merits and possible irreparable injury on the basis that "Pinal County voters will be placed in a position different from the rest of the voters in the state," which would cause "significant confusion on election day, and it may result in the disenfranchisement of voters who mistakenly arrive at the wrong precinct to vote." (APP015).

The superior court's determination that the Secretary failed to satisfy the two remaining prongs of the *Shoen* test to establish entitlement to injunctive relief was error.

The superior court here found that the County is not following the law and is acting in excess of its authority. (APP014). Because the superior court correctly concluded that the County exceeded its authority by refusing to follow the Requirement, applying *AzPIA* confirms that the Secretary has met his obligation and made the requisite showing to obtain injunctive relief as well. In *AzPIA*, the court held that "because the Recorder's action does not comply with Arizona law, public policy and public interest are served by enjoining his unlawful action." *AzPIA*, 250 Ariz. at 64, ¶ 27. Moreover, to the extent the superior court was concerned about the potential to create uncertainty and confusion, *AzPIA* was very clear: "Plaintiffs' delay does not excuse the County from its duty to comply with the law." *Id.* at 65, ¶ 30. Indeed, unlike the situation in *AzPIA* where entirely new instructions needed to be printed and stuffed into almost two million early voting envelopes, in this case the burden on the County is only doing what must be done anyway—loading ballot styles onto an AVD, and processing some number of provisional ballots.

III. The State of Arizona and Pinal County Voters Should Not Be Punished Because Their County Refuses to Comply with the Law.

The County admits that there will be some voters who arrive at the wrong voting location to cast their ballot on election day. (APP198 at ¶ 11). In Pinal County—and only Pinal County—this discrete group of in-person voters who arrive at the incorrect voting location on election day will be disenfranchised even though the county has the ability to provide that voter the correct ballot style. (APP014). Voters should not suffer

because the County refuses to do its duty and follow the law. Ariz. Const. art. XII, § 4. The burden on the County is minimal and self-inflicted, and this Court may draw its own legal conclusions from undisputed facts. *Zellerbach Paper Co. v. Valley Nat'l Bank*, 13 Ariz. App. 431, 433 (1970). While the burden on the County is light, the burdens on the State and this group of voters are substantial, irreparable, and could subject the state to significant equal protection concerns, which is a problem that the EPM is supposed to prevent. A.R.S. § 16-452(A). This Court should reverse the superior court's denial of mandamus and injunctive relief, and issue an order requiring the County to comply with its non-discretionary duties and follow the law.

A. The Burden on the County Is Minimal.

The County's claims of an insurmountable burden are impossible to square with the undisputed facts. The burden on the County must begin from the premise that public officials are presumed to know and perform their duties according to law. *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917). Public officials should not have to be compelled to follow the law, and the superior court erred when it found that the Secretary failed in his "legal obligation" to enforce the 2023 EPM. (APP012). There is good cause for this presumption. All people must follow the law, even if they disagree with it. And government bodies are limited to the authority granted to them by the law. Ariz. Const. art. XII, § 4.

First, the County knew about the Requirement "as far back as December 2023 and January 2024," but it did not seek an exemption from the Requirement. (APP013). Instead, the County "knowingly and voluntarily elected not to" follow the EPM's Requirement. (APP014). Furthermore, the County was on notice by mid-September that the Secretary would take the necessary steps to bring the County into compliance with the Requirement, including, if necessary, seeking court-ordered relief. (APP178-79). To the extent there is any burden on the County that is in excess of the regular burdens of administering an election, they are burdens that the County caused by refusing to comply with the EPM, and is compounding by refusing to comply with the law despite the superior court's finding that the County is in inexcusable violation of the law. (APP013).

Second, each and every accessible voting device ("AVD") must be programmed with at least one ballot style before election day, whether the County follows the Requirement or not. Both precinct-based voting locations and vote center locations must have at least one AVD, and for that AVD to work, a County employee must have loaded it with ballot style(s). (APP172 at ¶ 13). Ballot styles are loaded onto the AVD by plugging a secure USB drive into the AVD. (APP173 at ¶ 17). All ballot styles have already been created by the County, so the issue is only whether one or a few ballot styles are transferred from the USB drive to the AVD, or all ballot styles for the county are transferred from the USB to the AVD. (APP173 at ¶¶ 17-19). The steps of packing,

unpacking, and downloading the ballot styles from the USB to the AVD must occur regardless of the number of ballot styles. (APP173 at ¶¶ 18-19). Indeed, it is indisputable that the County is familiar with loading all ballot styles onto its AVDs, and selecting the correct ballot style for voters from different precinct, as all early voting locations in the County use the vote center model, where any Pinal County voter from any precinct can cast a valid ballot at any early voting location in the county, regardless of their residential precinct. (APP172 at ¶ 13).

Third, Recorder Lewis detailed ten steps that voters and poll workers must follow to process ballots pursuant to the Requirement, but those steps must occur *regardless* of whether the Defendants do or do not comply with the Requirement because those are the same steps that the County follows to process a provisional ballot of any type. The Recorder explained in her declaration that despite the County's best efforts to ensure that voters go to their correct polling location, "voters still occasionally attempt to cast a ballot at a polling place in precincts where their name does not appear in the signature roster." (APP198 at ¶ 11). "If a voter wishes to cast his or her ballot in a polling place to which that voter is not assigned, that voter has a right to cast a provisional ballot. A.R.S. § 16-513.01; A.R.S. § 16-563(1)." (APP198 at ¶ 12). In other words, that voter who arrives at the incorrect polling place but can not or will not go to the correct polling place *must* be given a provisional ballot and allowed to vote it. 52 U.S.C. § 21082; A.R.S. § 16-584. Accordingly, there is minimal, if any, extra work

required, as the County must follow the provisional ballot process, even if the County is not ordered to follow the Requirement. A.R.S. § 16-584 (mandating any voter not on the precinct list be allowed to cast a provisional ballot, and providing the process the County must follow to process all provisional ballots). In other words, the voter is provided a provisional ballot, and works with the provisional clerk to complete the additional provisional ballot paperwork. The only difference is whether that ballot is counted or not.

Fourth, following the Requirement will not require the Defendants to do significantly more processing, as the County already trains provisional clerks, and stations a provisional clerk at each polling place. (APP231). And the County must process all provisional ballots it receives, so a marginal increase in the total number of provisional ballots will not result in an intolerable or uniquely onerous burden. A.R.S. § 16-584.

As discussed in the superior court, the number of ballots cast on AVDs in Maricopa County (the only county which provides data of this granularity) is sparse. Indeed, from 2020 to 2022 , use of AVDs increased from 454 ballots to 1503 ballots, in a county with more ballots cast on election day than there are registered voters in Pinal County. The increase occurred because Maricopa County was actively encouraging voters to use AVDs due to an issue with Maricopa County's ballot on demand printers at that time. (APP150). In other words, when Maricopa County was

actively encouraging voters to use AVDs, there was an average of just one vote cast every two hours at each of Maricopa County's 223 voting locations. Pinal County is not required to encourage voters to use AVDs, and may even encourage voters to go to the correct precinct to cast their ballot. What the County cannot do is ignore the Requirement and prohibit their voters from using an AVD to cast a provisional ballot that can be counted because the AVD can provide the correct ballot style for that voter. (APP161). The marginal increase in use of AVDs experienced in Maricopa County belies the argument that the County will face a dramatic increase in provisional ballots, as well as refuting allegations that such a requirement will harm disabled voters who use AVDs. (APP150).

The fact that the County must process provisional ballots, whether the County follows the Requirement or not, coupled with the County's outright refusal to follow the law that could improperly disenfranchise a group of in-person Pinal County voters who cast ballots on election day, demonstrates that the alleged burden on the County is at best minimal. This Court should order the County to comply with the Requirement.

B. The Burdens on the State and the Voters Are Severe.

The County's refusal to comply with the law places a severe and intolerable burden on the State and voters. The Arizona Constitution is very protective of a citizen's right to vote. Ariz. Const. art. II, § 21 ("All elections shall be free and equal,

and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."); *see also* *id.* at art. VII, § 2 (allowing any citizen who meets age, residency, and citizenship requirements to cast a ballot). The Arizona Constitution, like the U.S. Constitution, also forbids the state from "granting to any citizen, class of citizens, . . . which, upon the same terms, shall not equally belong to all citizens or corporations. *Id.* at art. II, § 13.

The County's refusal to follow the Requirement renders the treatment of Pinal County voters, who choose to vote on election day but arrive at the wrong precinct, different from every other voter in Arizona. This contradicts both the clear directive of the Arizona constitution, Ariz. Const. art. II, § 13, and the purpose of A.R.S. § 16-452. Arizona voters have a right to be treated consistently when they go to vote. Additionally, if a statutory automatic recount or election challenge is filed, the fact that Pinal county voters are treated less favorably than similarly situated voters in the rest of the state could create significant litigation risks and questions regarding the validity of the election. No individual county should be allowed to undermine confidence in the entire electoral process because that county believes its method—which does not comply with the law—is nonetheless a better policy choice.

Equal protection violations such as the one at issue here impinge on the right to vote because "the right to vote is 'the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters.'"

Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n ("*AzIRC*"), 211 Ariz. 337, 346, ¶ 23 (App. 2005). Strict scrutiny applies when there is "the denial of the right to vote on an equal basis with others." *Id.* at 347, ¶ 28. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The County's behavior will situate Arizona like Florida in *Bush*, because the County will "value one person's vote over that of another," by rejecting in-person ballots cast outside the voter's assigned precinct on election day, contrary to the rules every other Arizona county will follow. The County's wrongful actions mean that an Apache Junction voter who lives in Maricopa County can cast a ballot that will be counted, regardless of where it is cast, but the same voter who lives in the part of Apache Junction in Pinal County will not be provided with the correct ballot and will be entirely disenfranchised. This Court should not let the County create an equal protection violation by willfully ignoring the law. Mandamus or injunctive relief is appropriate and the only relief that will prevent the severe harm to the State and in-person voters who live in Pinal County but go to the wrong precinct on election day. This Court should issue an order directing the County to comply with the Requirement.

C. Delay Is an Insufficient and Improper Reason to Deny Relief.

Furthermore, allowing the County to flout the Requirement without seeking any kind of legal relief would create a perverse incentive for counties that do not wish to comply with the EPM to simply ignore whatever provision or chapter it disagrees with. The County's refusal to follow the law in this case undermines a basic tenet of Arizona election law that seeks to protect the right of every Arizona citizen to cast a valid ballot. The County should not be permitted to ignore the Requirement, disenfranchise an identifiable class of in-person election day voters, and sow further confusion about Arizona's election system. *AzPIA*, 250 Ariz. at 61, ¶ 4 ("[W]hen public officials, in the middle of an election, change the law based on their own perceptions of what they think it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.").

The County relied upon *Purcell v. Gonzalez*, 549 U.S 1 (2006), to avoid compliance with the law, but this reliance is misplaced. The County "knowingly and voluntarily" broke the law, but argues that it should be excused from complying with the law because coming into compliance now would require additional time and resources. *Purcell* is distinguishable from this case, and does not provide a reason to excuse the County's failure to comply with the Requirement. In *Purcell*, the plaintiffs sought to *block* a law that had been: 1) approved by Arizona voters; 2) precleared by the United States Department of Justice; and 3) not enjoined by the District Court, which heard evidence

and issued a decision, without providing factual findings or reasoning when it issued its order denying injunctive relief. *Id.* 2-3. In contrast, the Secretary here seeks to ensure that a Requirement that was: 1) promulgated as required by Legislature; 2) included input from county election officials; 3) submitted and approved by the Attorney General and Governor; and 4) upheld by the Arizona Superior Court, is followed consistently across the state. The case which cautions federal courts not to *change* state election law on the eve of an election because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," should not be used as a tool to allow election officials who disagree with an election procedure to obtain their policy preference by simply ignoring the law. *Id.* at 4.

Moreover, the superior court's order, which found that the County is acting illegally but declined to provide any relief, creates perverse incentives in at least two distinct ways. First, the order foists a duty upon the Secretary to investigate and inquire whether all fifteen counties are complying with their obligations, rather than relying on the presumption that government officials are following the law. (APP012) (noting that the court finds "most importantly . . . the State of Arizona and Pinal County had a legal obligation to address these issues long before this case was filed . . . "). If the Secretary learns that election officials will not follow the law, the Secretary then has a duty to rush to court to force compliance, rather than attempt to work out those disagreements and provide whatever assistances may be necessary to ensure those election officials can

comply, which creates an adversarial relationship rather than a cooperative one. Second, the superior court's directive provides an incentive for any county official who disagrees with any direction in the EPM to just quietly ignore that provision, rather than work to come into compliance or seek a declaratory judgment if that official has a good faith belief that the provision is incorrect as a matter of law. (APP017) (denying relief "at this late date"). Secrecy is poisonous to trust in elections, where transparency should be the rule.

In sum, the County knew about the Requirement, and chose to ignore it. It does not matter that the County purports to have a good faith disagreement with the Requirement. Indeed, that makes the current situation more frustrating, because the County could have challenged the Requirement in court before this, but they did not. The County has no discretion to ignore the Requirement, but that is exactly what they are doing here. *AzPIA*, 250 Ariz. at 63, ¶ 16. To the extent the County could be burdened by complying with the EPM, it is a mess entirely of the County's own making. The Secretary, and Pinal County voters, have the right to rely on the County and its elected officials, to follow the law. *See* Ariz. Const. art. XII, § 4 ("The duties, powers, and qualifications of [county] officers shall be as prescribed by law."). They did not. (APP014). If the superior court's order denying the injunction on the basis of delay is allowed to stand, then any county that disagrees with any portion of the EPM could escape enforcement and treat its voters in whatever way it deemed "best" by running

out the clock. That is not the precedent that Arizona should set. Quite simply, "Plaintiffs' delay does not excuse the County from its duty to comply with the law." *AzPIA*, 250 Ariz. at 65, ¶ 30.

IV. This Special Action Is a Valid Vehicle to Decide a Narrow Legal Question, Not the Opportunity to Challenge the Legality of the Requirement.

Finally, the County tried to deflect from the narrow legal issue here to challenge the Secretary's standing, arguing that the Secretary was required to pursue administrative remedies before going to court, and finally that the Requirement conflicts with Arizona statutes. None of the County's post hoc rationalizations are sufficient to excuse its failure to follow the law.

The Secretary is charged with promulgating the EPM to "achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). The Requirement ensures that voters who arrive at the incorrect polling place are treated uniformly, as required by state law and the Arizona constitution. Accordingly, the Secretary has standing to bring these claims to enforce the EPM requirements, when he learns that a county rejects its responsibility to follow the law. A.R.S. § 12-2021. In this case, whether the County approves of the Requirement or not, the Requirement is the law, and the County is bound to follow it. A.R.S. § 16-452.

Further, there is no administrative remedy to pursue here, nor a forum in which to hear it. The Secretary filed a claim under the declaratory judgment act, A.R.S. § 12-1831, mandamus, A.R.S. § 12-2021, and sought an injunction, A.R.S. § 12-1801. These separate statutory bases for relief preclude any requirement to exhaust (non-existent) administrative remedies. Proceedings in the Office of Administrative Hearings ("OAH") are not used to require a public official to perform a non-discretionary duty. A.R.S. § 12-2021. For that, the Secretary has to seek relief in superior court, as he did here.

Moreover, the County's argument turns administrative procedure upside-down. In this case, the Secretary would be the agency head a case would be brought to under the Arizona Administrative Procedures Act ("APA"), because he plays the primary role in promulgating the EPM. A.R.S. § 16-452. However, under the APA, after promulgating rules, the agency head does not initiate the contested case, as the agency is not an aggrieved party under the APA. *See* A.R.S. § 41-1001 at (1)-(2), (6) (providing definitions for "agency," "appealable agency action," and "contested case"). This is significant because after the agency creates the rules, the burden is on the party contesting the rule, or the application of the rule to the aggrieved party, to bring the claim. The County did not challenge the rule, under the APA or otherwise, so there are no administrative remedies to exhaust. The sample documents that the County provided as hearing exhibits are orders from proceedings brought before OAH

(APP209-26), by an aggrieved party against the Secretary pursuant specific statutory authority that requires administrative remedies be provided. *See, e.g.* 52 U.S.C. § 21112 (requiring a state accepting federal dollars to have an administrative body hear complaints regarding certain election access claims). None of these specific statutes authorizing an administrative hearing apply to this disagreement between the Secretary and the County.

Finally, as a special action seeking mandamus and injunctive relief, the legal question before this Court is a narrow one: whether the County has the authority to ignore the Requirement. A.R.S. § 12-2021; *see also* Ariz. R. P. Spec. Actions 3 (providing that special actions are appropriate to determine whether the defendant failed to act as required by law when that official has no discretion, or when the official is threatening to act outside the bounds of his non-discretionary authority). If the Defendants do not have the authority to act, they are exceeding their authority and "may be 'enjoined from acts' that are beyond [its] power." *AzPIA*, 250 Ariz. at 62, ¶ 14. A special action is not the time nor the place to litigate the validity of a specific EPM provision, because it is solely about whether the public official is failing to act consistent with his or her non-discretionary duty. Because the superior court correctly found that County did not have an excuse for failing to implement the Requirement, the County had no discretion to ignore the Requirement. (APP012-13). The Defendants cannot challenge the validity

of the Requirement in a special action now, nearly ten months after they first received notice of the Requirement.

CONCLUSION

This Court should affirm the superior court's decision to accept special action jurisdiction and its findings as to the application of *AzPIA*, and enter a writ of mandamus requiring the County to comply with its non-discretionary duty to follow the Requirement. Alternatively, this Court should enter an injunction requiring the County to follow the Requirement, as the Secretary has made the showing required for injunctive relief.

RESPECTFULLY SUBMITTED this 9th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Arizona Secretary of State's Opening Brief uses type of at least 14 points, is double-spaced, and averages no more than 280 words per page. Pursuant to Ariz. R. Civ. App. P. 14(a)(1), and according to the word count of the word processing system used to prepare this Brief, it contains 6,216 words.

RESPECTFULLY SUBMITTED this 9th day of October, 2024.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on October 9, 2024, Plaintiff-Appellant/Cross-Appellee Arizona Secretary of State Adrian Fontes filed the foregoing Motion with the Court of Appeals, Division Two, and pursuant to ARCAP 4(f), copies of the same were e-served via AZTurboCourt, and emailed, to the following:

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