IN THE COURT OF APPEAL
OF THE STATE OF ARIZONA
DIVISION ONE

ARIZONA PUBLIC INTEGRITY ALLIANCE,
an Arizona non-profit corporation; **TYLER MONTAGUE**, an individual

Plaintiffs and Appellants,

v.

ADRIAN FONTES, in his official capacity as Maricopa County Recorder; **FRAN McCARROL**, in her official capacity as Clerk of the Maricopa County Board of Supervisors; **CLINT HICKMAN**, **JACK SELLERS**, **STEVE CHUCRI**, **BILL GATES AND STEVE GALLARDO**, in their official capacities as members of the Maricopa County Board of Supervisors; **MARICOPA COUNTY**, a political subdivision of the State of Arizona,

Defendants and Appellees.

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY COUNTY
(LC2020-000252-001)
HONORABLE JAMES D. SMITH, JUDGE

APPELLANTS' OPENING BRIEF
EXPEDITED REVIEW REQUESTED

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INTRODUCTION

Arizonans have a right to a "free and equal" election. Ariz. Const. art II, § 21. This right "is implicated when votes are not properly counted" *Chavez v. Brewer*, 222 Ariz. 309, 320 (App. 2009) (citing A.R.S. Const. Art. II, § 21 and A.R.S. § 16-646). Arizona's election-law statutory scheme seeks to ensure election integrity by maximizing the proportion of cleanly marked ballots received in vote counting centers that can be automatically tabulated by vote-counting machines in compliance with the letter and spirit of governing statues. At the same time, the statutory scheme creates a mechanism for fair determination of voter intent if a ballot is incorrectly marked or contains an "**overvote**," or the selection of more candidates than are allowed in a particular race.

State law envisages that if a voter overvotes, the voter must discard the overvoted ballot and contact the County and request a new ballot ("**Overvote Instruction**"). The county of Maricopa ("**County**") Recorder's own website issues that very instruction. However, the County seeks to include an alternate, unapproved instruction with its general election early ballots that allows voters who wish to correct a mistaken vote simply to cross out the erroneous vote and fill in the oval next to the chosen candidate ("**New Instruction**") – thus creating an overvote – instead of discarding their ballot and requesting a new one, as set forth in the "**Overvote Instruction**" found in the state Elections Procedure Manual

("**EPM**"), which all parties agree has the force of law, as well as on the County Recorders website.

The Recorder's intentional disregard for the EPM's required Overvote Instruction undermines public confidence in Arizona's election processes and is a recipe for planned chaos. Ballots corrected according to the New Instruction cannot be automatically read and tabulated. Instead they are rejected by the automatic vote tabulating equipment and manually reviewed in a subjective, human, process. This opens the door to error and makes it less likely that the public will know the winner of the most important election in American history the night the polls close.

Appellants Arizona Public Integrity Alliance and Tyler Montague, who is on the County's permanent early voter list ("**PEVL**") and votes via early ballot (collectively, "**Appellants**"), sought to enjoin the County's use of the New Instruction because it contradicts state law. The trial court agreed with Appellants that they are likely to succeed on the merits of their claim that the county's use of the New Instruction is unlawful, but it ruled that the other three preliminary injunction factors – irreparable harm, balance of the hardships and public policy considerations – favored the County. Thus, this appeal focuses mostly on those three factors.

The trial court erred in ruling that three of the four injunction factors favor the County. First, where, as here, a movant seeks to enjoin an unlawful act, the movant need not show irreparable harm or a balance of hardships in its favor. However, even if the Court does review those factors, the trial court appears to have disregarded the relevant statutory requirements governing the issue of ballot instructions, as well as the constitutional right of voters to have votes properly counted in an election in which they participate, when finding an insufficient showing of irreparable harm. The trial court's finding that the balance of hardships favors the County also is erroneous, because the County created its own "hardship" by not proactively challenging the EPM if it felt its instructions were improper and not investigating alternate vendors to see if revised instructions could be printed in a timely fashion after being notified by the Attorney General that the New Instruction was illegal. It is important to note that ballot instructions need not be printed on special ballot paper and may be printed on ordinary printer paper.[1]

In the alternative, Appellants meet a sliding-scale test for balancing hardships by showing probably success on the merits and a possibility of irreparable harm. Finally, the trial court again appears to have erred by

[1] The lack of need to print ballot instructions on special paper was raised at oral argument during the trial court's September 3, 2020 hearing. Appellants have ordered the audio of that hearing for purposes of preparing a transcript but have not received the audio recording as of date of filing of this brief.

disregarding the appropriate legal standard when finding that public policy favors the County's position.

Request for expedited briefing and review: This is an election case, and time is of the essence. *Harris v. Purcell*, 293 Ariz. 409, 412, ¶ 15 (1998); see Appellant's Appendix ("**Appx**.") 52:3-53:6. The early-ballot printing deadline for the general election is October 1, 2020. *See* A.R.S. §§ 16-503; -545. However, according to Attorney General Mark Brnovich, the first round of early ballot packets for the general election must be sent out to armed forces members and citizens living abroad (and referred to as "**UOCAVA**" ballots) is September 19, 2020. UOCAVA[2] ballots must be **printed and ready to** go by then. Appx. 122:14-20, 165, ¶¶ 20-22. However, there are likely only a few thousand ballots that must be printed by that deadline. *See infra*, note 11. Otherwise, the generally-applicable ballot-printing deadline for early ballots is October 1, 2020. *See* A.R.S. §§ 16-503; -545.

Therefore, Appellants respectfully request expedited briefing schedule and review as follows: Appellees shall have 48 hours from service of Appellants' opening brief to file their responsive brief, and Appellants shall have 24 hours from service of the Appellees' brief to file a reply, if any. The court would then make a decision as expeditiously as possible, ideally within three business days.

[2] "UOCAVA" is an acronym for the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 et seq. Appx. 122:14-16.

STATEMENT OF THE CASE

This appeal arises from an application for preliminary injunction filed by Appellants on August 25, 2020 in Maricopa County Superior Court. Appx. 20-42. The County moved on September 2, 2020 to dismiss Appellants' related Complaint and opposed Appellants' application for preliminary injunction. Appx. 98-168. However, Arizona Attorney General Mark Brnovich submitted an amicus brief on September 2, 2020 in support of Plaintiff's application, Appx. 43-78, as did the Public Interest Legal Foundation, headquartered in Indianapolis, Indiana. Appx. 79-97.

The superior court held a return hearing on September 3, 2020. Appx. 267. The trial court ruled that although Appellants had shown likelihood of success on the merits, "the lack of irreparable harm, balance of hardships and public policy countenance against preliminary judgment." Appx. 274. The court entered an order on September 4, 2020 "denying [Appellant's] application for a preliminary injunction and denying the [County's] motion to dismiss" ("**Order**"). *Id*. The same day, Appellants filed their Notice of Appeal from the trial court's Order, seeking expedited relief in relation to this election-related matter. Appx. 275-276.

Appellants' Notice of Appeal was filed timely. ARCAP[3] 9(a). This Court has jurisdiction over the within appeal. A.R.S. § 12-1201(A)(5)(b) (court of

[3] "ARCAP" stands herein for "Arizona Rules of Civil Appellate Procedure."

appeals has jurisdiction to review order "refusing to grant or dissolve an injunction"); *AES Fed. Credit Union v. Yuma Finding, Inc*., 237 Ariz. 105, 109, ¶ 12 (App. 2015) (citing same); *see* Appx. 274 (trial court signed its Order "to ensure that all involved know it is the order resolving [Appellants]] request for preliminary injunction," acknowledging that an order "refusing to grant or dissolve an injunction [is an order] from which a party may appeal").

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In Maricopa County, early balloting by mail has become increasingly popular, rising from approximately 80 percent of the county's voters in the 2016 general election to 94 percent of the voters in the August 4, 2020 primary election, held during the present COVID-19 pandemic. Appx. 164-65, ¶¶ 12-15. To guide elections, Arizona's secretary of state ("**Secretary**") promulgates the EPM, which is updated periodically, and the parties agree that said manual "carries the force of law." Appx. 44:4-7 (citing A.R.S. § 16-452(B), (C)), 124 n.2, 273.[4] The Secretary is legally required to promulgate a new EPM by December 31 of each odd-numbered year immediately preceding a general election. A.R.S. § 16-452(A) &

[4] The 2019 EPM, which was approved by Attorney General Brnovich and Governor Ducey and released on December, 19, 2019 and applies to the November 2020 general election, is available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (last visited Sept. 5, 2020). *See* Appx. 8 ¶ 17, 44 n.1, 100 n.1.

(B). However, the EPM preceding the present version, issued in 2019, was released in 2014. Appx. 100:25-101:2 & n.2.

The County mails out early ballots to PEVL voters, such as appellant Tyler Montague. Appx. 7 ¶ 2; *see* id. 165 ¶¶ 16-18. The County sends instructions with early ballots to guide voters in their marking of the ballots. Appx. 165, ¶ 16. The present dispute centers on the nature of those instructions; Appellants seek to enjoin the County's use of the New Instruction,[5] which directs PEVL voters who mark a vote in error simply to cross out the erroneous vote and fill in the circle of the desired candidate. *See* Appx. 9, 31 (reproductions of challenged instruction, entitled "MADE A MISTAKE?").

State law requires that where a county, such as Maricopa County, uses an "electronic voting system," in which voters mark paper ballots that must be automatically counted and tabulated, the tabulation machines must, when properly operated, "record correctly and count accurately every vote cast." Appx. 10 ¶¶ 24-25 (citing A.R.S. § 16-444(A)(4) & (7), 16-446(B)(6)). State law further requires that the County's automated vote-tabulating machines identify and reject ballots

[5] Appellants in the proceedings below refer to this instruction as the "New Instruction." *E.g.* Appx. 9 ¶ 21. The Attorney General, in his amicus brief refers to the same instruction as the "Mistake Instruction." *E.g.* Appx. 45:1. The County refers to the instruction as the "Early Ballot Instructions." *E.g.* Appx. 65-69, 100:6. The trial court, following Appellants, used the term "New Instruction." Appx. 268. For the sake of consistency, Appellants continue to refer herein to the ballot instruction it challenges as the "New Instruction."

that include an overvote or other defect. Appx. 10 ¶ 28 (citing A.R.S. §§ 16-446(B)(2)). Automated vote-tabulating machines cannot read ballots that are damaged; marked improperly – e.g. voter circles candidate's name instead of filling in the oval – or contain ink blots, pen rests, smudges, bleed-through marks or other defects; or constitute "overvotes," which occur when a voter marks more candidates for an office than allowed or marks the proper number of candidates and also writes in a candidate's name for the same office. Appx. 51:19-22, 101:12-14 & n.3; EPM at 201-02.

The 2014 EPM set forth a system to adjudicate damaged or improperly marked ballots (e.g. candidate name circled) in which election workers would hand-duplicate the ballot in proper form to reflect the intended vote – if the voter's intent could be discerned[6] – then feed it into the tabulation machine so that the previously improperly marked ballot would be counted via the automated tabulation system, as required by statute. Appx. 101:12-102:3 (citing 2014 EPM, at 177-78); A.R.S. §§ 16-446(B)(6), 16-621(A)). However, the 2014 EPM **prohibited** counties from adjudicating and counting overvotes. Appx. 102:4-7 (citing 2014 EPM, at 59, 177).

The 2019 EPM, which was approved and took effect on December 19, 2019, changed that rule, so that overvoted ballots now "shall" be duplicated and counted,

[6] The vote for an office "shall be rejected" only "if for any reason it is impossible to positively determine the voter's choice." A.R.S. § 16-610; Appx. 145 ¶ 10.

if voter intent can be determined. EPM, at 4-5, 201-202; Appx. 269 (requirement that overvote in ballot be duplicated and counted if voter intent can be determined applies to "*any* error in the ballot – smudges, crayon, erasing, tears – that prevent automated equipment from reading the ballot"). Moreover, Senate Bill 1135, Fifty-Fourth Legislature, 2nd Regular Session, enacted in February 2020 ("**2020 Addendum**"), modified the EPM to permit counties to use an electronic system to **adjudicate** ballots with overvotes or defects, such as smudges or stray marks, that the tabulation machines reject. Appx. 138 ¶¶ 6, 9. With this electronic system adjudication panels can view and correct an improperly marked vote or overvote, if they can determine the voter's intent, electronically. Appx. 138 ¶¶ 9-10. The Maricopa County Board of Supervisors authorized use of this electronic system for adjudicating defective ballots or overvotes, and the County used it in the March 17, 2020 presidential preference election and the August 4, 2020 primary election, among others, and contends that the electronic system saves time and allows the County to report election results to the public more promptly. Appx. 138 ¶ 7, 149 ¶ 19.

Even though the EPM now allows adjudication of overvotes and, via the 2020 Addendum, allows the use of a digital system to speed the process of adjudication of such votes, it **still requires** county recorders, in the printed ballot instructions they supply voters, to "[i]nform voters that no votes will be counted

for a particular office if they overvote (vote for more candidates than permitted) and therefore the voter should contact the County Recorder to request a new ballot in the event of an overvote." ("**Overvote Instruction**") EPM, Ch. 2, I (C)(3), at 56 (parenthetical in the original); *see* Appx. 45:5-10, 91. The County Recorder's own website contains the same instruction. Appx. 54:21-26 & n.7;[7] *see* Appx. 105:10-16 (County concedes that the current EPM retains the Overvote Instruction).

Nonetheless, the County – which unilaterally adopted the New Instruction that allows voters to cross out erroneous vote and write in "corrected" votes after the state adopted the 2020 Addendum – not only continues to utilize the New Instruction even though said instruction does not find support in any statutory provision, but it refused to abandon the instruction after Appellants informed the County Recorder that it "provides an alternative, unapproved, method of curing overvotes" that "deviat[e] from the instructions provided for in the [EPM]." Appx. 33-34, 37-42.

The County argues that the EPM and the 2020 Addendum obligate it to count overvotes where voter intent can be determined and do not specify that corrected votes are not to be counted, and, therefore, it is (or should be) allowed to instruct voters to **create new overvotes** rather than follow the EPM requirement

[7] *See* Frequently Asked Questions 15, https://recorder.maricopa.gov/site/faq.aspx (last visited Sept. 5, 2020) (emphasis added) ("If you make a mistake on your ballot, **do not try to correct it**. [¶] Call us at 602-506-1511" to obtain a new ballot).

(and the County Recorder's own website response to Frequently Asked Question no. 15) that the voter contact the county to receive a fresh ballot to fill in correctly, because the the County repeatedly insists that the New Instruction allowing the creation of overvotes "provide[s]" guidance to voters concerning how "best to correct any mistaken votes." *See generally* Appx. 102-105, 110, 129:13-14; *see also* Appx. 131:10-12 (New Instruction "tell[s] voters how best to correct any mistaken votes so that their ballots can be counted"), 132:14-15 ("informing voters of the best way to correct mistaken votes"), 133:23-24 (same), 140:11-12 (same). The county further contends that its New Instruction is a new "rule" that should take precedence over an earlier statute; that the New Instruction complies with A.R.S. § 16-502; and that Appellants waited too long to bring their case. Appx. 105:20-106:20, 108:7-110:3, 111:7-112:6.

Appellants argue, *inter alia*, that in utilizing the New Instruction, the County Recorder is unlawfully acting outside his power; the New Instruction does not comply with or causes violation of A.R.S. § 16-502; and use of the New Instruction causes the county's vote tabulation system to violate state law because it causes votes to be counted manually instead of automatically, which also defeats the statutory objectives of ensuring the maximum degree of correctness, impartiality and uniformity of early vote-counting procedures via the use of automated tabulation machines. *See generally* Appx. 10 ¶28-11 ¶33, 13-14, 23-27.

Arizona Attorney General Brnovich, in an amicus brief, noted that his office "received several complaints from Arizona voters surrounding the [County] Recorder's [use of the New Instructions] in the Primary Election on August 4, 2020," and agreed with Appellants that the County Recorder overstepped his bounds and further argued that the County lacks authority to contravene the Overvote Instruction in the EPM; that the Overvote Instruction is consistent with Arizona law, while the New Instruction is not; and that the County waited too long to challenge the Overvote Instruction. Appx. 44:21-23; *see generally* Appx. 47-52.

The trial court agreed with Plaintiffs that county boards of supervisors "must prepare voter instructions that follow the Secretary of State's Election Procedures Manual," which the governor and attorney general approved "as the law requires." Appx. 268-69 (citing A.R.S. § 16-513) (quoting EPM at 56). The court added, "Nothing in the EPM refers to the New Instruction." Appx. 269.

However, while the trial court found Appellants likely to succeed on the merits, it ruled that Appellants did not meet the other three preliminary injunction factors. Appx. 271, 274. For example, the court found that Appellants did not allege irreparable harm because the injury allege was not "particular to" Appellants. Appx. 272. The hardship to the County cited by the Court includes an extra expenditure of $125,000 (out of a multi-billion-dollar budget) to conform the County's conduct to the law and allegations that because its one printing vendor

may not be able to handle the job of printing new 2.5 million copies of replacement ballot instructions, such a job cannot be performed at all. Appx. 273. As to the final prong, public policy, the court expressed discomfort in altering an instruction that had been used in elections earlier this year and concern with a risk perceived by the court that granting relief may cause delay in delivery of early ballot instructions to voters. Appx. 273-74. However, Appellants believe that due to the importance of the upcoming general election, it is imperative that the County vindicate Arizona voters' constitutional right to a free and equal election by complying with the law when issuing ballot instructions.

STATEMENT OF THE ISSUE

Whether the trial court erred in denying Appellants' Motion for Preliminary Injunction that challenged whether the County may, unilaterally and without lawful authority, instruct early-ballot voters to correct mistakes pursuant to the New Instruction.

ARGUMENT

I. THE STANDARD OF REVIEW.

A court reviews denial of preliminary injunction for abuse of discretion. *Apache Produce Imports, LLC v. Malena Produce, Inc*., 247 Ariz. 160, 164, ¶ 9 (App. 2019) (citing *Shoen v. Shoen*, 167 Ariz. 58, 62 (App. 1990)). "When an order denies a preliminary injunction, '[a]n abuse of discretion exists if the

superior court applied the incorrect substantive law or preliminary injunction standard, based its decision on an erroneous material finding of fact, or applied the appropriate preliminary injunction standard in a manner resulting in an abuse of discretion.'" *Id*. (citing *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 ¶ 8 (App. 2013)) (alteration in the original). However, to the extent that interpretation of any statute – including interpretation of the language of the EPM, which carries the force of law – is necessary to the resolution of this appeal, review should be de novo. *E.g. Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 615, ¶ 9 (App. 2017) (appeal de novo where court construes or interprets a statute); *see also IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, 64, ¶ 5 (App. 2011) (in injunction proceedings, appellate court will "review [the trial court's] legal conclusions de novo").

To attain a grant of preliminary injunction an applicant must show "(1) a strong likelihood of success at trial on the merits, (2) the possibility of irreparable injury not remediable by damages, (3) a balance of hardships in its favor, and (4) public policy favoring the injunction." *Apache Produce*, 247 Ariz. at 164, ¶ 10 (citing *Shoen*, 167 Ariz. at 63). As explained below, the trial court abused its discretion in its ruling that although they are likely to succeed on the merits, Appellants did not meet the final three elements of the preliminary injunction test, this Court should reverse the trial court's Order denying preliminary injunction.

II. THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS DID NOT MEET THE FOUR-FACTOR TEST FOR AN INJUNCTION.

Our Supreme Court recently referenced "the state's compelling interest in protecting the integrity of … elections." *Arizonans for Second Chances, Rehabilitation and Public Safety v. Hobbs*, CV-20-0098-SA, --- P.3d ---, 2020 WL 5265545, at 1, ¶5 (Ariz. Sept. 4, 2020) ("***Hobbs***"); *see id*. at 2, ¶ 9 ("The people of this state look to us to uphold the law, and we must act consistently with that imperative"). Appellants asked nothing of the trial court but to uphold the law and protect the integrity of the upcoming general election.

A. The County offers no legal support for its use of the New Instruction and, therefore, the trial court correctly concluded that Appellants are likely to succeed on the merits.

Maricopa County utilizes an "electronic voting system" in which "votes are recorded on a paper ballot by means of marking, and such votes are subsequently counted and tabulated by vote tabulating equipment at one or more counting centers." A.R.S. § 16-444(A)(4) (internal quotation marks omitted). "Vote tabulating equipment" means "apparatus necessary to **automatically** examine and count votes as designated on ballots and tabulate the results." A.R.S. § 16-444(A)(7) (emphasis added) (internal quotation marks omitted). By statute, the county's electronic voting system must, "[w]hen properly operated, record correctly and count accurately every vote cast." A.R.S. § 16-446(B)(6).As

Appellants pointed out below, courts may enjoin public officials from acting beyond their power. Appx. 22:2-5; *see Boruch*, 242 Ariz. at 617, ¶ 18; *Crane Co. v. Ariz. State Tax Comm'n*, 63 Ariz. 425, 445 (1945) (*overruled on another ground in Valencia Energy Co. v. Ariz. Dept. of Rev.*, 191 Ariz. 565, 576, ¶ 34 (1998)) ("if public officers exceed their authority and resulting injury cannot be adequately provided by proceedings at law, equity will enjoin the commission of such illegal act"). Appellants further argued below that with regard to replacing mistaken early ballots, a county recorder's authority is limited to (1) "issu[ing] replacement ballots-by-mail to a voter upon request and limit[ing] the total number of ballots-by-mail to three per voter per election." EPM 2(I)(E), at 59; Appx. 23:12-15.

Additionally, state election law limits "instructions to the voter on marking the ballot."[8] *See* Appx. 23:16-24. The County contended below that these statutory limits apply to ballots and not separately ballot instructions, and, in any case, no

[8] The allowable instructions are:
"1. Put a mark according to the instructions next to the name of each candidate for each office for whom you wish to vote.
"2. If you wish to vote for a person whose name is not printed on the ballot, write such name in the blank space provided on the ballot and put a mark according to the instructions next to the name so written.
"3. Put a mark according to the instructions next to the word "yes" or "for" for each proposition or question you wish to be adopted. Put a mark according to the instructions next to the word 'no' or 'against' for each proposition or question you wish not to be adopted."
A.R.S. § 502(A).

violation of A.R.S. § 16-502(A)(1) occurs if a voter follows the New Instruction and changes her or his vote. *See* Appx. 108:7-23.

These arguments are unavailing, because nowhere does the County cite authority that the County Recorder may ignore the directives of the EPM and conjure up the New Instruction, and the trial court correctly acknowledged that no such authority exists. *See* Appx. 271, 274. Moreover, the County provides no authority for the proposition that ballot instructions not contemplated by Arizona's election-related statutory scheme or the EPM that direct voters to correct errors by creating an overvote rather than requesting a replacement ballot comports with A.R.S. § 16-502(A), because a voter creating the overvote merely would be following the New Instruction. Nor does the County demonstrate that issuance of the New Instruction was not outside the power of the County Recorder and thus subject to an injunction. *Boruch*, 242 Ariz. at 617, ¶ 18.

Nor does the County explain how the New Instruction, which inevitably will result in the creation of more overvotes that must be adjudicated by adjudication boards than would strict compliance with the EPM, complies with the letter and spirit of election statutes that require that county recorders maximize the correctness, impartiality and uniformity of vote-tabulation procedures by maximizing the proportion of votes counted by automated tabulation machines. A.R.S. § 16-444(A)(4) & (7), 16-446(B)(6); Appx. 24:8-26:2. In sum, the County

simply cannot point to any legal justification for its insisting on using the New Instruction. Accordingly, the trial court was correct to conclude that Appellants are likely to succeed on the merits of their claims. Appx. 271, 274.[9]

B. The trial court's finding that plaintiffs did not show irreparable harm appears to disregard the statutory requirements with which the County must comply.

1. Because the County's New Instruction clearly violates the law, the Court need consider neither irreparable harm or balance of hardships.

To the extent the County could be said to offer valid irreparable harm and balance-of-the-hardships arguments, such contentions "run aground against the backdrop of a prima facie showing" by Appellants that the County – as the trial court acknowledged – is violating governing statutes by insisting on issuing the New Instruction to PEVL voters. Appx. 271, 274. *Burton v. Celetano*, 134 Ariz. 594, 596 (App. 1982). Thus, "When the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show

[9] The County makes several further arguments, all of which are without merit. First, the County contends, in effect, that the change in the 2019 EPM that allows the counting of overvotes allows county recorders to contravene the 2019 EPM provision that voters who need to change their votes request a new ballot, on the principle that a later statute prevails over an earlier, conflicting statute. Appx. 105:10-106:20. However, permission to count overvotes does not constitute permission to change an early ballot instruction. The County additionally argues – without relying on any evidence – that requiring it to issue the Overvote Instruction would "create massive voter confusion" and violate the fundamental right to vote protected by the U.S. Constitution. See generally Appx. 105:14-107:16. However, arguably, utilizing the same instruction that has been used in past elections, by all other counties in the state and in compliance with the EPM be more likely to diminish potential voter confusion and ensure a fair election. The Court should disregard these baseless contentions.

neither irreparable injury nor a balance of hardship in his favor." *Id*. (quoting 11 Wright & Miller, *Federal Practice & Proc*. ¶ 2948, at 461-62) (internal quotation marks omitted).

Here, the trial court ruled that Appellants' position that the New Instruction violates existing statutes is likely to succeed on the merits – i.e., is correct. Appx. 271. Because the County persists with unlawful conduct, Appellants need not show irreparable harm or that the balance of the hardships tip in their favor. See Appx. 272 (citing *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F.Supp. 421, 427 (E.D. Mo. 1985)) (irreparable harm presumed though rebuttable where moving party shows "a statutory violation is happening").

2. The County's inclusion of the New Instruction in early-ballot packets irreparably harms PEVL voters like Plaintiff Montague by forever depriving them of the opportunity to vote in an election in which votes are lawfully and properly counted.

Even if Appellants were required to demonstrate irreparable harm, the trial court acknowledges that under Arizona law Appellants need only demonstrate "a *possibility* of irreparable harm," so long as they have shown a probability of success on the merits. Appx. 272; see Apache Produce, 247 Ariz. at 164, ¶ 10 (showing of irreparable injury "not remediable by damages" is sufficient).

Once an election is held, courts typically will not invalidate the results because of procedural defects. *See Searles v. Strauch*, 149 Ariz. 52, 54 (App. 1985); Appx. 26:19-23. Thus, if a court does not enjoin or otherwise prohibit the

acts of which Appellants complain prior to the general election, the opportunity for PEVL voters such as Appellant Montague to participate in an election conducted according to law will be lost forever.

In a case in which the plaintiffs sought injunctive and mandamus relief against the then-Secretary to desist from using "voting machines" that did not comply with state law, a panel of this Court "conclude[d] that Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted. *Chavez v. Brewer*, 222 Ariz. 309, 311 ¶ 1, 313 ¶8, 320 ¶ 34 (citing A.R.S. § 16-446(B)(6)); *see Ortega-Malendres v. Arpaio*, 836 F.Supp.2d 959, 989 (D. Ariz. 2011) (emphasis added) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)) ("**The loss of constitutional rights 'unquestionably constitutes irreparable injury**.'"). The *Chavez* Court "further conclude[d] that [movants] may be entitled to injunctive and/or namdamus relief if they can establish that a significant number of votes cast on the [voting machines that did not comply with state law] will not be properly recorded or counted." *Chavez*, 222 Ariz. at 320, ¶ 34. The Court reversed the trial court and ruled that the movants' case could proceed in trial court. *Id*.

Here, as noted above the relevant statutes require that PEVL votes be automatically counted and tabulated, the tabulation machines must, when properly operated, "record correctly and count accurately every vote cast" – i.e. PEVL

voters have a right to have their votes counted on perfectly accurate vote-tabulatoin equipment. *See* A.R.S. § 16-444(A)(4) & (7), 16-446(B)(6)). The County's New Instruction is harmful because it encourages the creation of overvotes by PEVL voters correctly following that instruction that must be hand-counted, where exactly the same types of votes or ballots would not produce overvotes and would be counted and recorded automatically were voters given the Overvote Instruction.

Appellants thus contend that success on the merits is not only likely, but probable, because even the County concedes that the EPM retains the Overvote Instruction, and the EPM carries the force of law. Appx. 105:10-13, 124 n.2. The County's principal argument that Appellants do not suffer irreparable harm is that "the law now *commands*" that it count overvotes, and the New Instruction "tell[s] voters how best to correct any mistaken votes so that their ballots can be counted." Appx. 131:8-12. However, the fact that the law commands the tabulation of overvotes does not authorize the County to deviate from the requirements of the EPM and conjure up its New Instruction.

Moreover, the County offers no statutory support for the proposition that it may determine "how best" to correct ballots, then so instruct voters. Further, consistent with its apparent willingness to deviate from governing statutes, the County also dismisses Appellants' argument that early ballot instructions should not lead voters to create overvotes that only diminish the proportion of votes

automatically tabulated without human intervention, which is the objective of the election statutes. Appx. 131:18-132:3; *see* Appx. 10 ¶¶ 24-25 (citing A.R.S. § 16-444(A)(4) & (7), 16-446(B)(6)).

In summary, none of the foregoing points argued by the County demonstrates a lack of irreparable harm that Appellants suffer when the County conducts an election using instructions that do not comply with the requirements set forth in the EPM – i.e. that the opportunity to participate in a lawfully conducted election "will be lost forever" if the court does not enjoin the County from using the New Instruction, because courts generally do not invalidate election results due to procedural defects. See *Searles*, 149 Ariz. at 54; Appx. 26:19-23. Perhaps recognizing this shortcoming, the trial court centered its irreparable harm argument on its position that the alleged harm is "generalized" and "not a harm particular to [Appellants] that is irreparable" – which appears as more of a standing argument, which Appellants address below. Appx. 272; *see infra*, part III.

The trial court then points out that even if it does not enjoin the New Instruction, voters, including Appellants, will still be able to vote by mail for the candidates of choice. As such, it appears to gloss over the fact that the election, if the County's use of the New Instruction is not enjoined, will not comply with the law. However, the trial court's "no harm no foul approach" conflicts with the Supreme Court's recent reference to "the state's compelling interest in protecting

the integrity of … elections" and the courts' obligation "to uphold the law, and [to] act consistently with that imperative." *Hobbs*, 2020 WL 5265545, at *1, ¶5, *2, ¶ 9. By taking this approach, the trial court abused its discretion. *Apache Produce*, 247 Ariz. at 164, ¶ 9.

C. The trial court erred in ruling that the balance of hardships tips in the County's favor.

1. The County created its own "hardship" by not correcting the New Instruction when it first was put on Notice of its illegality and by relying on only one vendor.

As discussed above, Appellants did not need to demonstrate the balance-of-hardships factor in light of the superior court's correct finding that Appellants are likely to succeed on the merits of their claim challenging the County's authority to issue the unapproved and unlawful New Instruction. Nonetheless, the superior court appears to have implicitly concluded that this factor supports the County.

The trial court points to the two above-described inconveniences the County faces if injunction is granted – the expenditure of $125,000 and the need to find a printer that can print 2.5 million slips of paper containing ballot instructions that include the Overvote Instruction – as justifying its finding that the balance of hardships favors the County. Appx. 273; *see supra*, part II.A.2. The trial court appears to consider such inconveniences to be overly burdensome. Appx. 272-73.

To demonstrate relative hardships, a movant "**may** establish" either (1) probable success on the merits and a possibility of relative harm or (2) serious

questions going to the merits and that the balance of hardships "tips sharply" in movant's favor. *Shoen*, 167 Ariz. at 63;[10] Appx. 22. The trial court acknowledges that the "balance of hardships favors a party seeking preliminary injunction" if it meets the first of the two sliding-scale tests set forth in *Shoen*. Appellants explained above that success on the merits of this case is probable, and they certainly have shown at least a possibility of irreparable harm. *See supra*, part II.B. Thus, Appellants meet the first of the two sliding-scale tests, and the trial court erred in not finding that the balance of the hardships favors Appellants on that basis. *Cf. Kellogg Co. v. Mattox*, 763 F.Supp. 1369, 1385 (N.D. Tex. 1991), ¶ 74 ("balancing of hardships need not come into the analysis at all" where prohibitory action by state "merely require" the non-movant "to comply with state and federal laws that have been on the books for years").

Moreover, the County created its own "hardship." It was on at least inquiry notice as far back as March 2020 that its New Instruction was out of compliance with the EPM, yet it did nothing to correct the New Instruction or bring it in

[10] In a more recent case, a panel of this Court, citing *Shoen*, held that a movant "must" make a showing under one of these two "sliding scale" approaches, but *Shoen* uses the permissive term "may," not the mandatory "must." *TP Racing*, 232 Ariz. at 495, ¶ 21; *see Ariz. Assoc. of Providers for Persons With Disabilities v. State*, 223 Ariz. 6, 12, ¶ 12 (App. 2009) (identifying *Shoen* test as "sliding scale" test). Appellants therefore take the position that the *TP Racing* Court's opinion that the sliding-scale test is mandatory is incorrect and that the sliding-scale test is permissive

.

compliance with the EPM. Appx. 111:8-10; *see infra*, part II.C.2. Moreover, there is no evidence in the record that the County, which was notified by the Attorney General that the New Instruction was unlawful on August 11, 2020, Appx. 63, began searching for new or additional vendors to handle the reprinting of early-ballot instructions that include the correct Overvote Instruction. The record does show, to the contrary, that the County did not look beyond the very same vendor that purports to be unable to do the job. Appx. 166-67, ¶¶ 25-28, 32, 35. In any case, Appellants, in a matter of days, were to find a vendor that could print 2.5 million ballot instructions pages – **which need not be printed on any form of special paper and may be printed on ordinary copier paper** – within a week. Appx. 273.

The Court should not allow the County to hide behind its own intransigence in order to claim that the lateness of the hour creates a hardship. The County has been on notice at least for a number of months that the New Instruction is out of compliance with the EPM, and its ongoing refusal to utilize the authorized Overvote Instruction should not be "rewarded" with a finding that the balance of harms favors the County.

Furthermore, given that election challenges frequently arise close in time to election dates, the County would always be able to claim "hardship" by asserting that its one vendor cannot handle the change. For example, had Appellant

Montague challenged the New Instruction being used in the August primary upon receiving an early ballot just prior to that election, the County could have made the same "hardship" argument with equal force. Such begs the question: If not now, when?

2. If any party should be barred for laches, it should be the County.

The County took the position in the proceedings below that the court should deny relief to Appellants under the doctrine of laches. Appx. 111:7-112:6, 129:27-130:27. The trial court acknowledged that the laches issue "affected the analysis." Appx. 268. This doctrine is available in elections cases. *Harris*, 193 Ariz. at 412, ¶ 15. A defendant in such cases "must not only prove that a plaintiff's delay prejudiced the defendant, the court, or the public, but also that the plaintiff acted unreasonably." *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435, ¶ 13 (App. 2013) (*as amended* Feb. 26, 2013). Mere delay is insufficient to give rise to the doctrine in an election matter. *Id*.; *accord*, *Harris*, 193 Ariz. at 412. Moreover, "the doctrine may not be invoked to defeat justice but only to prevent injustice." *Prutch*, 231 Ariz. at 435, ¶ 13 (internal quotation marks omitted).

When evaluating a laches defense, a court should evaluate not only the length of the delay, but also the magnitude of the problem at issue." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 560, ¶ 13 (2009). The definition of "reasonable" delay "recognizes that plaintiffs are 'entitled to take time for an

investigation,' and 'protests, complaints and negotiations looking toward a settlement of the controversy, go far to explain the reasonableness of the delay.'" *McComb v. Superior Court In & For County of Maricopa*, 189 Ariz. 518, 525 (App. 1997) (quoting Restatement (Second) of Torts § 939 cmt. b (1977)) (action **after** election not barred by latches); *cf. Mathieu v. Mahoney*, 174 Ariz. 456, 459, (1993) (challenge may be held "to be timely when brought more than a month and a half before absentee voting began").

Here, Appellants filed their challenge on August 25, 2020, and the state's early ballot mailing deadline is October 7, 2020.[11] Appx. 6, 165 ¶ 24. Thus, under Supreme Court precedent, Appellants acted reasonably. In any case, the County was on notice as early as August 11, 2020, when the Attorney General's Office notified the County by letter sent via email that the New Instructions "d[o] not satisfy State requirements." Appx. 63. The letter asked for a response no later than August 21, 2020, but according to the record, the County did nothing. *Id*.

[11] It is true that the deadline for the County to send out UOCAVA early ballots for the general election is September 19, 2020. Appx. 165 ¶ 20. However, the EPM does provide for alternate UOCAVA ballot procedures. EPM, at 58. In any case, the most recent years for which Appellants could locate relevant data, 2004-2010, the number of UOCAVA ballots sent out by the County ranged from approximately 3,500 to 7,000. Appx. 169-170, 181-185. As Appellants informed the trial court, "this strongly indicates that the requisite number of UOCAVA instructions" – which can be printed on any sort of paper stock and not necessarily special ballot paper – "could be printed on an office copier over the course of a weekend.

The County avers that Appellants should have known by March 17, 2020, the date of the Democrat-only presidential preference election, that the County had been issuing the New Instruction. In the alternative, the County asserts that Appellants, if they did not vote in Democrat-only elections, should have known by sometime in July, after the County mailed out primary election PEVL ballots, and concludes that Appellants waited "too long" to file their request for an injunction. *E.g*. Appx. 111:7-15.

However, Plaintiffs should be accorded reasonable time to investigate the nature of the New Instructions contained in the primary-election ballot instructions, find counsel to represent them and attempt to persuade the County to refrain from including the New Instruction in the general-election ballot packet. Plaintiffs did all those things, assuming they found out sometime in July 2020, within approximately one month. *See* Appx. 30 (Plaintiffs' Cease and Desist letter to County, dated Aug. 17, 2020). Even in an election case, such cannot be seen as an unreasonable delay.

Moreover, the County may demonstrate that an injunction could **inconvenience** it, but the County **does not demonstrate prejudice**. The first inconvenience cited by the County is that it would have to spend $125,000 – out of

an annual budget of more than $2.5 billion[12] – to print new ballot instructions containing the lawful Overvote Instruction. Appx. 166, ¶¶ 32, 33. The second inconvenience is that the County claims that its vendor cannot print 2.5 million ballot instructions on short notice, due to an alleged "depletion of paper stock reserves," due to the unprecedented national demand for vote by mail ballots this year due to COVID, concluding that "it is too late for the vender to obtain sufficient paper to print Early Ballot Instructions" that contain the Overvote Instruction. *Id*. ¶ 35, Appx. 121:25-122:2; *see also Hobbs*, 2020 WL 5265545 at *2, ¶ 9 (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944)) ("Indeed, if COVID-19 justifies setting aside Section 1(9) today, then perhaps tomorrow it will be used to set aside other constitutional protections. In short, our decision would lie 'about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.'")

Appellants, on the other hand, found a vendor who could do the job in a week and so informed the trial court, as it acknowledged. Appx. 273 & n.6. In summary, the County may be able to show inconvenience as a result of grant of the

[12] Appellants respectfully request that the Court take judicial notice of the County budget materials found at the following link (spending, p 23 of the resulting PDF document, at https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/4731 (last visited Sept. 6, 2020). Ariz. R. Evid. 201; *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 325, ¶ 33 (App. 2012).

relief Appellants see, but it cannot show prejudice. Therefore, its laches argument is unavailing.

Moreover, the attorney general argued that, if anything, the County should be barred from opposing Appellants' application for preliminary injunction under the doctrine of laches for "deviat[ing] from the EPM's Overvote Instruction just weeks before printing deadlines …." Appx. 52:3-53:2. Appellants hereby adopt the attorney general's argument that if the County "perceived a legal error in the EPM or a conflict between the EPM and Arizona law, it was incumbent on [the County] and the Secretary to identify any such error or conflict and take corrective action." Appx. 52:9-12.

Moreover, given that the County demonstrated neither unreasonableness on the part of Appellants nor prejudice to the County or voters, it appears the trial court erred in allowing laches to affect its analysis and not concluding outright that the County's own delay protects it from court intervention to halt its unabashed violation of governing statutes. *Decker v. Hendricks*, 97 Ariz. 36, 41-42 (1964) ("equitable remedies … should not be used to protect an intentional wrongdoer"); Appx. 268.

D. Public policy favors the lawful conduct of elections.

As a matter of public policy, the trial court, sua sponte, expressed "uneasy[ness]" with requiring the County to replace the New Instruction that had

been used in primary elections with the lawfully required Overvote Instruction – even though "[t]he EPM has the force of law and requires [use of the Overvote Instruction, i.e.] instructing voters to request new ballots if they over vote." Appx. 273, 274. The trial court appears to dismiss the lawful force of the EPM's Overvote Instruction requirement because a different instruction in the EPM "is incomplete and perhaps incorrect." Appx. 273. The trial court additionally acknowledges that election officials should not "encourage over voting or ignore the EPM" but appears to dismiss this concern because it believes the County's use of the New Instruction is "understandable, and nothing suggests improper motives behind it." *Id*. However, these considerations are of no import. *See Hobbs*, 2020 WL 5265545, at *2 (necessity not to be considered where government act represents a violation of the law).

However, understandability or lack of impropriety of the County's motive is not the standard with which the County must comply when preparing early-ballot instructions. It remains undisputed that the County's use of the New Instruction (1) fails to comply with law as set forth in the EPM and governing statutes, and (2) promotes or at least facilitates the creation of overvotes that voters given the Overvote Instruction would not create. Furthermore, use of the New Instruction undermines the statutory and policy objectives of ensuring the maximum degree of correctness, impartiality and uniformity of early vote-counting procedures via the

use of automated tabulation machines. *See generally* Appx. 10 ¶28-11 ¶33, 13-14, 23-27; A.R.S. §§ 16-444(A)(4) & (7), 16-446(B)(6); *cf*. A.R.S. § 16-621(B)(2) (ballot rejected by tabulation machine must be reviewed by adjudication panels to determine voter intent). In short, the fact remains that the EPM compels (and the County corder's website contains) the Overvote Instructions compelling voters request a replacement ballot rather than correct a ballot.

Finally, the County appears to take the position that the New Instruction "inform[s] voters how best to correct mistaken votes…." Appx. 133:23-24. However, the County does not cite any legal authority to show "how best" to correct mistaken votes, or what the legal standard for "best" is. In short, the County, as discussed herein, does not provide any legal authority for its use of the New Instruction notwithstanding the EPM's requirement that is use the Overvote Instruction. In sum, neither the County nor the trial court show that public policy favors denial of the requested relief. As such, the trial court abused its discretion.

III. The Court should deny any challenge to Appellants' standing.

The County may attempt to argue that Appellants do not have standing to challenge the New Instruction. As an initial matter, appellate courts decline to address standing in special actions involving constitutional issues of statewide importance where the parties failed to raise the issue. *Hobbs*, 2020 WL 5265545, at

*21 (citing *Rios v. Symington*, 172 Ariz. 3, 5 n.2 (1992)). Any standing challenge should be rejected for that reason alone.

Furthermore, while the Arizona Constitution does not require the showing of a specific case or controversy as does the U.S. Constitution, Arizona courts follow federal case authority when determining standing. *See generally Hobbs*, 2020 WL 5265545, at *4-*5, ¶¶ 21-23. Arizona plaintiffs "must establish a causal nexus between the defendant's conduct and [their] injury," i.e. that the plaintiff's injury is traceable to the defendant's acts, and that "the injury be redressable." *Id*. at *5, ¶¶ 23-25. Redressability "is a relaxed burden," such that while the plaintiff must show the relief sought "would alleviate [its] alleged injury … the remedy need not completely cure the alleged harm." *Id*. at *5, ¶ 25.

Here, Appellants seek an injunction to preclude the County from including the New Instruction in the early ballot packets it sends to voters. The alleged legal injury is that the New Instruction deprives PEVL voters such as Appellant Montague from participating in a fair election that follows the letter of the law, as is his right. *See* Appx. 272 (trial court "agrees" that the County should follow the EPM and that public officials should "follow the law" and conduct "procedurally correct elections"). This injury is unequivocally traceable to an act of the County, which elected to issue the New Instruction in the absence of statutory support for its doing so and refused to desist from using such instruction despite having been

on at least inquiry notice since March 2020 and actual notice since August 11, 2020. Appx. 63. Appellants disagree with the trial court that the injury is not particularized. The New Instruction is being given to PEVL voters so PEVL voter Montague, a plaintiff/appellant herein, is a member of the particular class of voters being injured.

The injury Appellant Montague and other PEVL voters suffer because of the County's conduct is redressable: A court simply can enjoin the use of the New Instruction, as Appellants respectfully requested that the trial court do. Even if such injunction may not cure all potential or actual unlawful election conduct by the County, it would fully cure the conduct at issue here, i.e. the County's continued use of the New Instruction. *Hobbs*, 2020 WL 5265545, at 5, ¶¶ 25. In short, if the County challenges Appellant's standing, the Court should deny any such challenge.

NOTICE OF REQUEST FOR ATTORNEY FEES UNDER RULE 21(a)

Appellants requested that the trial court grant them an award of attorney fees pursuant to A.R.S. § 12-348, 12-2030 and common law doctrine. Appx 14, prayer for relief E. They hereby provide notice pursuant to ARCAP Rule 21(a) that they will seek an award of attorney fees if they prevail in this appeal.

CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court reverse the Order of the trial court; direct such court immediately to grant a preliminary injunction enjoining the County (and/or the County Recorder) from including the New Instruction in any early ballot packets it provides to voters for the November 3, 2020 general election; and remand to said court for any needed further proceedings in accord with this Court's ruling.

DATED: This 8th day of September, 2020
RESPECTFULLY SUBMITTED,

By /s/ Chris Ford

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Ariz. R. Civ. App. P., the undersigned counsel certifies that Appellant's Opening Brief uses a proportionately spaced typeface of 14 points or more, and is double-spaced using a Times New Roman font. According to the Microsoft Word count function, Appellants' Opening Brief contains 8,536 words.

DATED: This 8th day of September, 2020
RESPECTFULLY SUBMITTED,

By /s/ Chris Ford

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the forgoing will be served upon Defendants in conformity with the applicable rules of procedure. Due to the expedited nature of the proceedings courtesy copies have also been sent via email to:

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