

ARIZONA SUPREME COURT

ARIZONA ALLIANCE FOR
RETIRED AMERICANS, INC. and
STEPHANI STEPHENSON,

Appellees,

v.

TOM CROSBY, ANN ENGLISH, and
PEGGY JUDD, in their official
capacities as the Cochise County
Board of Supervisors; DAVID
STEVENS, in his official capacity as
the Cochise County Recorder; and
LISA MARA, in her official capacity as
the Cochise County Elections Director,

Appellants.

No.

Court of Appeals
Division 2
No. 2CA-CV2022-0136

Cochise County Superior Court
No. CV2022-00518

MOTION TO TRANSFER

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Appellants

Pursuant to Ariz. R. Civ. App. P. 19(a)(3) (“Rule 19(a)(3)”), Appellants Cochise County Board of Supervisors and Cochise County Recorder David Stevens¹ (“Appellants”) hereby move this Court to permit the transfer of Case No. CV-2022-2020-00518 from the Arizona Court of Appeals, Division Two, to the Arizona Supreme Court.

BACKGROUND

Every general election, each county in Arizona that uses tabulation machines must count some ballots twice—once by machine and once by hand. Counties must meet certain minimums as to the number of ballots recounted but have the discretion to count more if they wish. Prior to election day, the elected Cochise County Board of Supervisors (“Board”) and the elected County Recorder chose to exercise this discretion to conduct an expanded hand count of all the ballots cast in the 2022 General Election. Petition 5:16-18. By law this expanded hand count must be completed prior to the canvas of election results. A.R.S. 16-602(I). The afternoon before the

¹ Defendant/Appellant Lisa Marra is a nominal defendant in her capacity as the appointed Elections Director for Cochise County. She agrees that Plaintiffs/Appellees are entitled to the relief they seek and has already started the process of tabulating early ballots and sequestering ballots for the statutorily required audit. (Ruling at 3).

election, the trial court entered an order prohibiting Cochise County from conducting its expanded hand count of 100% of ballots cast.

Especially in light of the recent and well publicized election-day issues with Maricopa County's electronic voting system,² voter confidence in the accuracy of electronic tabulation is at an all-time low. The County can still finish the labor intensive 100% hand count and reassure voters that their election has been free and fair but, by law, it must do so before the canvas in late November.³ Accordingly, though this controversy is certainly the type of matter that could easily repeat in such a way as to evade review, the matter is in urgent need of rectification for **this** cycle.⁴

ARGUMENT

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<https://www.azcentral.com/story/news/politics/elections/2022/11/08/arizona-election-problems-maricopa-county-tabulator-issues/8302133001/>

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<https://www.12news.com/article/news/politics/elections/decision/tabulators-down-people-can-still-vote-maricopa-county-officials-say/75-9de41949-f2d2-4314-9a37-2724ae1d1150>

³ The County has already commenced the hand count process as required by law in conformity with the scope of the trial court's order.

⁴ This appeal could not have been filed earlier because, by law, the Board of Supervisors was required to give 24 hours notice before meeting to authorize this appeal.

Rule 19(a)(3) provides that the Supreme Court may permit transfer of an appeal pending in the Court of Appeals to the Supreme Court if extraordinary circumstances justify transfer. The extraordinary circumstances justifying transfer of this appeal are threefold: (1) the statewide importance of the novel issue of pure law this case presents, (2) the fact that the statutory hand-count deadline will preclude review by this Court for this election if the Court does not accept transfer, and (3) that judicial economy favors transfer.

I. This matter concerns a novel issue of pure law that is of statewide importance.

This Court accepts transfers concerning matters of general or widespread importance. For example, in a case addressing the funding of public pensions, this Court accepted transfer because it raised issues of statewide importance. *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 38 ¶ 13 (2016). Similarly, the constitutionality of municipal code provisions for the removal of magistrates constituted an appropriate issue for transfer to this Court because many other municipal codes included similar provisions and thus a decision would have broad effect statewide. *Winter v. Coor*, 144 Ariz. 56, 57 (1985). See also *Deer Valley Unified Sch. Dist. V. Superior Court*, 157 Ariz.

537, 537 (1988) (disposition of state school trust lands, a matter of first impression, addressed a sufficiently important question for transfer).

No appellate court in Arizona has determined whether counties are precluded by law from conducting a full hand count of the results of an election race for comparison with electronically tabulated results. Thus, the issues of pure law this case presents is novel. And although only one county has elected to conduct a full hand count for this election cycle, whatever decision this Court or the Court of Appeals renders here ultimately affects every county in Arizona.

Moreover, Appellants have elected to conduct a full hand count in this election to “enhance voter confidence.” Nov. 7, 2022, Ruling (“Ruling”) at 2. As public officials, Appellants plainly have a role “in preserving and protecting our democratic system,” and “[e]lection laws play an important role in protecting the integrity of the electoral process. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 4 (2020).

There is scarcely a matter of greater statewide importance than “protecting the integrity of the electoral process” and the public’s perception of whether their elected officials are upholding their duty preserve and protect “our democratic system,” as Appellants are attempting to do for their

constituents in Cochise County. Because the issue at bar is novel, purely legal, and greatly important to the state, it behooves this Court to speak first on the issue.

II. The hand-count deadline warrants a rapid, final resolution of this matter.

The need for a timely determination also carries weight when considering a petition for transfer. This Court accepted a petition for transfer due to the need for the parties to “obtain a timely determination whether [a] proposed initiative [would] be on the ballot for the next city election,” and because the issue was one of general importance as at least one other city provided for a similar measure. *Fleischman v. Protect Our City*, 214 Ariz. 406, 409 ¶ 14 (2007). In this case, as in *Fleischman*, the parties need a timely determination of whether Arizona law prohibits Appellants from conducting a full hand count.

Hand counts “shall ... be completed before the canvassing of the election for that county.” A.R.S. § 16-602(I). In other words, if the Court determines that A.R.S. § 16-602(F) precludes Appellants from conducting a full hand count, then they must **finish** the count in the next few weeks, which means that they will need to know very soon whether they can expand the count to include 100% of ballots cast. If this Court does not accept

transfer, then the decision rendered by the Court of Appeals will govern whether Appellants must conduct a partial hand count rather than a full hand count, and that decision will stand for this election cycle because this Court will not have time to review the case before the hand count must begin. Because there is no conclusive precedent to guide the Court of Appeals, however, Appellants and Appellees alike will be deprived of receiving a final disposition by this Court—the ultimate arbiter of what the law means—before the hand count for this election becomes moot.

III. Judicial economy favors transfer.

While ordinarily, judicial economy is promoted by requiring parties to go through the normal appeals process, this is an extraordinary case. Because Plaintiffs waited till the last minute to file their action and the trial court waited till late into the afternoon before the election to grant their requested relief, there is likely to be time for only one stage of appellate review. But as noted in briefing, a central issue in this case is likely to be the proper interpretation of this Court's recent decision in *McKenna v. Soto*, 250 Ariz. 469 (2021) regarding precisely when the EPM has the force of law and how it interacts with statutory law. This interpretation will no doubt guide the new secretary of state, attorney general, and governor when next they sit

down to draft a new EPM. It will also guide the next legislature as it decides which election law issues it can continue to delegate to the secretary. Since only one appellate court will likely be able to weigh in on these weighty issues in time to guide Arizona's new lawmakers, it should be this Court.

WHEREFORE, Petitioners/Appellants respectfully request that this Court grant their Petition for Transfer and hear this appeal directly.

RESPECTFULLY SUBMITTED this 10th day of November 2022

Davillier Law Group, LLC

By: /s/ Veronica Lucero

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the Motion for Transfer is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 1,317 words according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 10th day of November, 2022.

Davillier Law Group, LLC

By: /s/ Alexander Kolodin

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